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Miss Elaine Flannagan
All-island Energy Branch
Department of Enterprise, Trade and Investment
Netherleigh HQ
Massey Avenue
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5th January, 2007

Dear Elaine

CONSULTATION ON SINGLE ELECTRICITY MARKET LEGISLATION

Please find attached herewith AES Kilroot Power Limited's response to the above consultation.

Yours sincerely



Jon Poley
Project Director

1. This is the response of AES Kilroot Power Limited (**Kilroot**) whose postal address is AES Kilroot Power Station, Larne Road, Carrickfergus, Co. Antrim BT38 7LX, to the Consultation on "Single Electricity Market Legislation" issued by the Department of Enterprise, Trade and Investment, dated November 2006.
2. Kilroot would support the introduction of a truly competitive single electricity market for Northern Ireland and the Republic of Ireland. The current SEM project is a positive step toward that goal. It is an important project being executed against a challenging timetable. Kilroot notes, however, the importance of ensuring that adherence to the timetable does not interfere with the requirements of proper consultation, fairness and due process. In that context, it is unfortunate that the Memorandum of Understanding between the Governments of the United Kingdom of Great Britain and Northern Ireland and of Ireland (**MOU**) was not made available until 7 December 2006 and that its final publication was not brought to consultees' notice. The MOU is critical because the draft Order in Council (**draft Order**) that is the subject of the consultation exists solely to give the MOU legal effect. To commence a consultation without this key document was a surprising approach. Furthermore, a defined plan describing the steps for the exercise of the powers under the proposed legislation would have provided consultees with some method for establishing whether the powers being created were justified and proportionate. In this sense the consultation is lacking.
3. The proper approach to matters of this kind is first to define with precision the objective to be met, second to describe the steps needed to meet the objective and third to draft the powers that are sufficient, but not excessive, to implement the steps required.
4. Perhaps because of the shortness of time and because the Department has yet to provide a coherent explanation of what precisely it seeks to achieve and by what steps, it appears to Kilroot that this approach has not been taken. Instead, the draft Order has been prepared so as to grant the Department and the Authority the widest possible powers, without the most basic safeguards for licensees. As the Consultation stands, any and all of a licensee's contractual arrangements are subject to amendment and, indeed, termination without the right of appeal or compensation. Kilroot has been informed by the Department that it is not the intention of the Department (or, presumably, the Authority) to use the proposed powers in a manner which would affect the termination rights of the Authority originally established in 1992 under Kilroot's Generating Licence and power purchase agreements with Northern Ireland Electricity plc. However, Kilroot submits that explicit safeguards should be included or the scope of the proposed powers curtailed.
5. Kilroot is also concerned that the breadth of the powers proposed to be granted to the Department and Authority will increase uncertainty and discourage investment other than by government owned entities. Such powers, even if of limited duration, will necessarily undermine private investor

confidence in Northern Ireland as a stable and reliable commercial environment in which to conduct business, and this will be felt beyond just the electricity sector. The only purported qualification to these powers from which Kilroot, its investors and its counterparties may be expected to take comfort, is that the Department or Authority "considers it necessary or expedient" for (a) "the purpose of implementing, or facilitating the operation of, the new arrangements" or (b) "in consequence of, or for giving full effect to, those arrangements". Kilroot believes that this is subjective and too broad to give investors or counterparties any real comfort.

6. Kilroot's principal concern is clause 3(3) of the draft Order. On its face this clause gives the Department and the Authority powers fundamentally to alter a licensee's contractual position by requiring the licensee to amend or terminate existing agreements or to enter into new agreements, subject only to an obligation on the Department and the Authority to consult. That is a provision that is without precedent in United Kingdom practice and is unnecessary to achieve the SEM.
7. Powers of that sort were not thought necessary or appropriate when the New Electricity Trading Arrangements (**NETA**) and British Electricity Trading and Transmission Arrangements (**BETTA**) were introduced in Great Britain and, indeed, were not subsequently required. Kilroot can see no reason why they are necessary in Northern Ireland and the Department has not made the case to explain or justify the need. Indeed, Kilroot suggests that NETA and BETTA provide a model for the form of legislation that is needed in circumstances of this sort. For example, the Energy Act 2004 imposes a requirement to have regard to (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and (b) any other principles appearing to the relevant regulator to represent best regulatory practice. Provisions of this sort are notably absent from the draft Order.
8. However, Kilroot's objection to these proposed powers is more basic. Kilroot considers that there are fundamental legal objections to their introduction. Freedom to contract is recognised as a core fundamental right. As such, the approach of the Courts is that there can be no interference with that right except where there are clear words in the relevant primary legislation or in secondary legislation where the empowering primary legislation specifically confers that power. In such cases it is well recognised that general words will not suffice, and will not be construed by the Courts as authorising interference with contractual rights.
9. Kilroot understands that it is proposed that the draft Order would be made under the Northern Ireland (Miscellaneous Provisions) Act 2006 (**2006 Act**) and Northern Ireland Act 2000 (**2000 Act**). Neither the 2006 Act nor the 2000 Act confer on the Secretary of State any specific power to make an Order that interferes with contractual rights. As secondary legislation, the draft Order would, if made, be subject to review by the Court. Since it purports to create powers that interfere with

contractual rights the draft Order would be outside the scope of the powers granted by the 2000 Act and 2006 Act. Accordingly, it would be ultra vires and void.

10. Further, Kilroot considers that the proposed powers would contravene the rights of licensees under Article 1 of the First Protocol to the European Convention on Human Rights as enacted by the Human Rights Act 1998. The right to peaceful enjoyment of possessions under Article 1 extends to corporations and to contractual rights. If the draft Order were brought into force, the extreme breadth of the proposed powers would constitute an interference with the peaceful enjoyment of possessions. That in turn would entitle the Court to strike down the Order, or at the very least, to order the payment of compensation.
11. In addition, investors in Kilroot had a legitimate expectation when they made the investment, and as they maintained that investment through time, that Kilroot's contractual rights would not be undermined. Kilroot has also entered into many agreements with counterparties who also have legitimate expectations that those rights would not be undermined. These expectations, which are protected under both UK law and international treaty obligations, would clearly be breached if the powers under the draft Order are exercised in a manner that negatively impacts Kilroot's or its counterparties' rights under its various commercial agreements.
12. Kilroot has reasoned objections to the draft Order that are fundamental but that can be remedied to a substantial extent by the deletion of one sub-clause, clause 3(3), and the introduction of the concept of best regulatory practice. If those steps are not taken then Kilroot must reserve its right to take the matter further.