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Dear Sirs

Standby Charge for Embedded Electricity Generation – Call for Information

We refer to the above Call for Information document which first appeared on your website on 4 July 2018, and responses to which the Channel Islands Competition and Regulatory Authorities (“CICRA”) has confirmed it will accept until 5pm on 15 August 2018. *Please regard this letter as Guernsey Electricity Limited’s (“GEL”) formal response to the Call for Information and please also note that we are happy for it to be placed on the public record.*

Introduction and scope of the inquiry

The Call for Information anticipates a review of GEL’s current standby charge, noting that standby charges are currently being reviewed in Jersey and suggesting that increased interest in embedded generation in Guernsey warrants the same approach here. Embedded generation, or “EG”, is a form of electricity generation powered by private systems, such as photo voltaic panels (“PV”), which is utilised by individuals or companies who nonetheless remain connected to the grid. Many forms of EG are environmentally friendly, so interest in them is continually growing. However, it is clear that the most immediate catalyst for the review is a complaint¹ made to CICRA by the International Energy Group (“IEG”) that GEL’s standby charge is an abuse of GEL’s dominant position in the electricity supply market, and that by imposing the charge, GEL is “*engaging in practices or entering into arrangements which have the object or likely effect of preventing, restricting or distorting competition in breach of its licence*”,² and preventing IEG from installing Combined Heat and Power (“CHP”) systems to supply its customers. And it is also clear that whilst there may be increasing general interest in exploring CHP potential in Guernsey, currently “*..the potential number of customers that CICRA is aware of that are actively interested in availing of embedded generation is low,...*”³

There is no doubt that the issue of standby charges, and their justification, is a controversial one, and moreover, is one which, as CICRA rightly acknowledges,⁴ requires serious

¹ Paragraph 2.11. Please note that any references in this letter to paragraphs which are not otherwise described are to the corresponding paragraphs in the Call for Information.

² Paragraph 1.6.

³ Paragraph 4.9.

⁴ Paragraphs 3.7 and 4.5.

consideration. The issue affects both customers and investors alike. For the former, the question is primarily whether (and if so, to what extent) those utilising CHP systems should still have to pay for the security they enjoy by remaining grid connected and being able to call upon back up from the network when necessary. For the latter, the main issue is whether the existence of the charges unfairly discourages investment in the sector to the ultimate disadvantage of the paying public. Those questions, and others aside, are matters that any proper review of the standby charge in Guernsey, would have to address.

One thing is clear, however. This is that the standby charge is not something new. For many years now, and around the world, charging arrangements have been used as a means of ensuring those who install their own system of generation but remain grid connected, pay their proper share of the cost of maintaining the grid, given they will look to it for back up, if for whatever reason, their own system should fail. Still less is the standing charge something that GEL have imposed recently in an attempt to discourage competition. Instead, it has been an established and a familiar part of GEL's tariff for 20 years, designed to protect the public against the cost of grid connected private generation. All that said, there is a growing view that whilst some form of charging arrangement is necessary, the standby charge in its traditional form is becoming outdated, and in some jurisdictions, including Jersey, its suitability for purpose is under review. So-called private "green energy policies" are of course to be welcomed, but not at the expense of the public. The issue is therefore how best to create a level playing field for the development of those policies which does not at the same time penalise those who cannot afford them, and must therefore continue to rely on the more conventional methods for creating energy.⁵

A similar issue recently arose in the UK. On 29 July 2016, the Office for Gas and Electricity Markets ("OFGEM") announced plans⁶ to undertake a review of certain network charging arrangements for small embedded generators, by which they received so-called "embedded benefits". Those benefits were twofold; the generators received a "triad" payment for assisting

⁵ See for instance, extract from the announcement by Jersey Electricity "Commercial standby charge deferred second time to allow States review"; "JE had originally given a year's notice of its intention to extend its Standby Charge from 1 November 2017 to all new commercial customers who generated their own electricity but still required back-up services from the grid for when their facilities failed to meet their operational needs. JE believes this is only fair, reasoning that if they did not pay their fair share of the investment in and maintenance of the network, the burden would fall on others not in a position to install renewable generation, through higher tariffs.

Warning from Ofgem chief

Already in the UK, where government is encouraging renewables to cut carbon emissions from electricity generation that are 10 times higher than in Jersey, customers are calculated to be paying an extra £110 a year on energy bills to fund 'green policies'. The CEO of Ofgem, the UK's energy market regulator, recently warned that 'there was a risk that those who could afford to harvest their own energy and avoid network charges and avoid policy costs that are passed on via bills would leave a 'shrinking pool of less wealthy customers to shoulder such costs'.

He questioned whether it would be acceptable if 'many of the wealthier in society were having very, very low energy costs because they weren't paying network costs, they weren't paying policy costs and those costs were then being smeared over a smaller section of less well-off people, including potentially on the vulnerable'. He suggested those who wanted to maintain a grid connection for emergencies paid something 'akin to an insurance premium'.

⁶ Open letter; "Charging arrangements for embedded generation" .

suppliers to avoid peak time transmission charges, but also avoided paying transmission generation charges that other generators paid. OFGEM took the view that the small embedded generators were being unfairly favoured at the expense of other consumers and that the market was being distorted,⁷ and proposed a measure whereby embedded benefits would be reduced over a period of three years from April 2018, and ahead of their wider “significant code review” of electricity charges.⁸ OFGEM’s prediction was that the decision to reduce the triad payments from c£45/kW to c£2/kW would save the customer up to £7bn by 2034.⁹ In June this year, their decision was upheld in the High Court on an unsuccessful application for judicial review made by disappointed small embedded generation companies.¹⁰ OFGEM’s approach signifies the current direction of travel; to grant too great an incentive to EG (and whether by excessive embedded benefits, or, as CICRA now suggests, by removing the standby charge) risks seriously distorting the energy market, at the expense of the customer. We return to the OFGEM case further below.

Given the above, by anticipating a review of GEL’s standby charge, the Call for Information poses the following key questions;

- Would the Guernsey market welcome an increase in EG, such as PV and CHP both as an alternative means of energy supply, and as a contribution to economic growth?
- Assuming (as GEL does) that the answer will be yes, what is the most fair and efficient method of encouraging and enabling EG to enter, and remain a valuable part of the Guernsey market, and to what extent does the standby charge create an obstruction to that process?
- How (and whether or not by use of a standby charge) can we ensure fair cost reflectivity for both EG or Centralised Generation (“CG”) customers, so that both bear the costs they impose on the system, and so that all customers pick up their fair share of island infrastructure with no free-riding?

That these questions were important to the review of standby charges in Jersey is apparent from the quoted extract from the Jersey States Council of Ministers which appears at paragraph 4.2 of the Call for Information. And in paragraph 3.1, CICRA acknowledges the need to ensure that economically priced energy encourages economic growth. Also, however, to be of any real value, any review of the standby charge needs to support the Island’s energy policy¹¹ and take account of the views of the States of Guernsey, who are responsible for that policy.¹² We are bound to say that at this point in time, that will be difficult, as the Committee for Environment and Infrastructure has yet to express any clear view on how far infrastructure costs may be recovered from the market, or to publish its detailed energy policy. We return to the implications of this in the current context below.

All that said, at this stage, the Call for Information does not seek detailed comment on the merits or otherwise of the standby charge itself: that will be for the later review. Instead, it asks (and calls for respondents’ views on) two preliminary questions. The first is about how

⁷ See e.g. Open letter, n6, p 1-2.

⁸ See “Impact Assessment and decision on industry proposals (CMP264 and CMP265) to charge electricity transmission charging arrangements for Embedded Generators”, 22 June 2017.

⁹ OFGEM Press release “Ofgem proposes lower payments for embedded generators to reduce costs to consumers”, 1 March 2017.

¹⁰ *R, ex parte Peak Gen Top Co Limited & ors v The Gas and Electricity Markets Authority & anr* [2018] EWHC 1583.

¹¹ Paragraph 3.1.

¹² Paragraph 4.1.

CICRA should proceed going about reviewing the charge. In paragraph 3.4 CICRA invites views on “*how best to address the issues raised in a timely, proportionate and constructive manner*”, and sets out a series of proposed principles (in sections 3 and 4) for reviewing the charge in a way that it believes is fair, proportionate and practical, and does not distort the market. Respondents are asked (Question 1) to say whether they agree with those principles. The second (Question 2) is whether, pending any review of the charge, GEL’s current standby charge, of £6.8594 per kW for customers with embedded generation capacity exceeding 25 kW, should be set at zero. That is something CICRA says it is minded to do, because, so it says, it is only aware of a small number of potential customers actively interested in EG, and because “*The materiality of any forgone revenue to GEL is likely to be low during the duration of this review whereas retaining it at its current level may inhibit future market development.*”¹³

This letter contains GEL’s formal response to Questions 1 and 2, which appears below. However, prior to answering the two Questions, GEL wishes also to make some observations on IEG’s complaint of uncompetitive practices, especially as it is clear that the complaint is the catalyst for the review of the standby charge.

Allegation of abuse of a dominant position

In paragraph 2.11 of the Call for Information, it is said “*IEG alleges that the application of a standby charge by GEL is an abuse of its dominant position in contravention of general competition law in Guernsey and that by imposing the charge, GEL is engaging in practices or entering into arrangements which have the object or likely effect of preventing, restricting or distorting competition which it claims is a breach of condition 13 of GEL’s electricity licence*”. IEG has therefore brought two complaints, one of abuse of dominance, which falls to be dealt with under general competition law, that is, under the Competition (Guernsey) Ordinance, 2012 (as amended)¹⁴ (the “**Competition Ordinance**”), and the other alleging GEL is in breach of condition 13.1 of its licence, which says it must “*not engage in any practice or enter into any arrangement that has the object or the likely effect of preventing, restricting or distorting competition in the Generation Business, Conveyance Business and/or Supply Business*”.

The use by CICRA of a Call for Information document is a pre-statutory practice which its website suggests is available where CICRA is undertaking its regulatory functions,¹⁵ and not where it is investigating a complaint brought under the Competition Ordinance. That, and the link in paragraph 2.11 between the abuse of dominance complaint and “*general competition law*”, would mean that the Call for Information ought properly to extend only to IEG’s breach of licence complaint. However, that appears not to be the case, and GEL registers a concern that CICRA has published and invites public comment on the matters listed in paragraph 2.12 (which CICRA acknowledges go towards the abuse of dominance complaint). A decision by CICRA to suspend GEL’s current standby charge (even temporarily) is clearly a regulatory decision (on which see further below). Hence, in GEL’s view, in coming to that decision, it would be wrong for CICRA to place weight on allegations under general competition law, which have not been properly determined or proven.¹⁶

That said, whilst reserving all its rights in respect of the IEG allegations, GEL feels the need to say something in this letter by way of response. To begin with it is helpful to explain the rationale for the standby charge, which as we said above, has been in place now for over 20

¹³ Paragraph 4.9.

¹⁴ To which there is a link in paragraph 2.11.

¹⁵ Information Note “*Regulatory Consultation Process*”, Doc No. CICRA 18/29, July 2018, para 1.

¹⁶ See paragraph 3.3.

years. The background is that GEL currently applies a monthly standby charge of £6.8594 per kW of installed capacity on customers (“**decentralised customers**”) who have their own embedded generation capacity exceeding 25kW. This charge is confirmed in GEL’s published Tariff and represents the “insurance” cost to GEL of decentralised customers remaining connected to the grid for backup or additional power in the event of an outage, and ensures they pay their share of any infrastructure costs associated with the grid. The charge is applied to any “behind the meter” generation capacity regardless of whether the capacity operator is a GEL customer or a third party, such as the holder of a generation licence, as there is no difference in the cost to GEL in either case, and it is only fair that all who benefit from the grid should meet equally the cost of maintaining it. If that were not the case, then the centralised customers, who form the vast majority of Guernsey residents, would be subsidising the decentralised ones.

IEG’s allegations are that¹⁷

- The standby charge appears to bear no relation to the costs it purports to cover
- GEL is imposing a charge on customers of competitors that it does not impose on its own customers
- The charge discriminates between customers who choose to supplement their energy options with electricity and other energy sources
- The charge deters customers purchasing energy from a GEL competitor by making a switch to a competitor uneconomical

GEL strongly refutes any abusive behaviour. In particular;

- Our overall prices are not excessive and are subject to a reasonable level of shareholder return (based upon a 4% return on net assets)
- The standby charges are specifically designed to ensure there are no cross subsidies, and ensure competition takes place on a level playing field. GEL explains below how removing the standby charge would have the reverse effect.
- In seeking to set charges which discourage avoidance of charges to support centralised infrastructure we are consistent with the trend among unbundled regulated utilities across Europe.

Furthermore, and with regard to the specific allegations made by IEG, none are factually incorrect. In particular,

- The standby charge does bear a relationship directly to the costs it seeks to recover, as it seeks to recover a fair contribution to the cost of centralised infrastructure, and prevent cross-subsidies.
- The standby charge payment is based on the EG equipment physically on a customer’s site not who contracts with the customer and is charged universally ensuring a broad base. It does not seek to raise the costs of those who purchase energy from a competitor.

¹⁷ Paragraph 2.12.

Question 1: Does the respondent agree with CICRA's proposed principles for reviewing the GEL standby charge?

GEL agrees that any review should have the following objectives;

- to be conducted with fairness
- to be conducted in a proportional, practical and transparent manner
- not to create market distortions,

but beyond that, and in short, it does not agree with the principles being proposed by CICRA, and notably the idea that the review should proceed in two distinct stages, the first an interim period during which GEL's current standby charge is suspended and the second comprising the full review. It is also of the view that far from encouraging investment in the energy sector, approaching the matter as CICRA suggest, and in particular setting the charge at zero, will in fact distort the market.

It is time for a full review of all GEL's tariffs, not just the standby charge

There are various reasons for GEL's views on potential market distortion, which are explained under the various headings below. As a headline point, however, as GEL has made very clear for some time now, it has no objection to (and would in fact welcome) a review of the standby charge and its tariffs and charges generally. Indeed, in July this year, it asked CICRA to undertake a review of a 2% increase in tariff charges, but CICRA declined to do so on grounds of lack of resources. As CICRA acknowledges, there has been no proper review of GEL's tariffs since 2012,¹⁸ and since that time, the States of Guernsey has determined it will remove GEL from regulation by CICRA. That process has not yet been finalised.¹⁹ However, it has meant that since 2015 GEL has paid no regulatory fees to CICRA and in turn, CICRA has not exercised any significant regulatory function in respect of GEL. CICRA's position on this issue appears in paragraph 3.3 of the Call for Information, as follows;

"The last review by CICRA of GEL's tariffs was in 2012. That review – and indeed earlier reviews – did not focus on structure of every tariff, as such an approach, at that time, would not have been proportionate. CICRA is conscious that a wholesale review of every GEL tariff will require significant resources to be deployed by both GEL and CICRA. CICRA is mindful of the decision by the States of Guernsey to amend the regulatory regime in Guernsey for the regulation of GEL. While this has not been finalised – and for now GEL remains subject to all of its regulatory obligations – the complaint raised by IEG would still fall to be considered by CICRA under general competition law".

Lack of regulatory oversight is as damaging to GEL's actual and potential competitors and the Guernsey public, as it is to GEL, because it creates a vacuum within which potential investors are unlikely to commit and GEL is unable to plan strategically. The standby charge forms part of GEL's tariffs and charges (such as connection charges and use of system charges) and is part of its overall financial planning. What is needed here is a review of those tariffs and charges, not one aspect of them. As CICRA acknowledges, GEL is currently planning to review the structure of all its tariffs and charges.²⁰ However, it goes on "No timeline has been

¹⁸ Paragraph 4.4.

¹⁹ Ibid.

²⁰ Paragraph 3.1.

provided for this review, nor is it clear what approach GEL intends to adopt towards such a review".²¹ The answer to that is that (assuming it has shareholder approval) GEL is working towards February 2019 as a date for having our new tariffs available for review by CICRA. The plan is to move to a new tariff structure with a much higher proportion of fixed charges, reflecting the direction of travel in the UK and much of Europe, and consequently the need for a standby charge will go away.

Under condition 20 of GEL's licence, any change to its tariffs would require CICRA's approval. And yet, if the situation in July is anything to go on, CICRA may not have the available resources to undertake a proper assessment to approve them, something hinted at paragraph 3.3 of the Call for Information as above. GEL is prepared to commit resources to a full tariff review and to confirm a timeline for the review, but it will expect CICRA to do likewise. CICRA seems to regard the high cost of a full review of GEL's tariffs as one factor pointing to the proportionality of reviewing the standby charge in isolation. GEL fundamentally disagrees; a full review of its tariffs is overdue, and should now go ahead. Reviewing the standby charge in isolation, and even then, without any clear commitment from CICRA as to when the full (as opposed to suspensory) stage will begin, is a very poor second best.

If the standby charge is to be reviewed, it should be reviewed in full, not in two stages

That said, GEL recognises that IEG's complaint is about the standby charge specifically. Hence, and without prejudice to its primary contention that a full review of its tariffs should now go ahead, GEL will answer Question 1. In summary, GEL's position is that it would regard a decision by CICRA to conduct a two-stage review of the standby charge as unjustifiable on the current facts, unhelpful to the energy market, and contrary to the interests of the Bailiwick's residents. If a review of the charge is to be undertaken at all, it should be an immediate full review. There are a number of reasons for this as follows:

- the prompt for CICRA's decision to act on an interim basis is surely limited to IEG's perception of market imbalance, and their estimate of GEL's loss of revenue, which the Call for Information says is what has prompted the preference to set the standby charge at zero (or rather direct that GEL waive it).²² So far as GEL is aware, there is no wider concern within the market.
- moreover, a move to suspend the charge on an interim basis is surely a very draconian measure. GEL notes that under the Competition Ordinance, CICRA's power to take interim measures applies where there is an urgent need to prevent serious damage, protect the public interest or to protect and enhance the Bailiwick's economic development and well-being.²³ By analogy, nothing nearly so pressing or serious exists here. In fact, it is almost the reverse; it is because CICRA sees suspension as having limited financial impact on GEL and there are only a small handful of IEG customers with an interest in it, that the charge should be suspended.
- if CICRA agrees a market imbalance does now exist (or it is being suggested by IEG that it now exists) why not undertake an immediate full review? Surely that is the obvious course of action. What is it that is so urgent that it justifies CICRA considering an immediate (albeit interim) suspension of the charge to address the imbalance rather than undertaking a full investigation of the matter?

²¹ Ibid.

²² Paragraph 1.9.

²³ S. 35 (2).

- that point is all the more pertinent given the recent review of the standby charge which has taken place in Jersey. The results of that review, which was not undertaken by CICRA²⁴ (because it does not regulate Jersey Electricity), are expected very shortly. Surely it would seem prudent and sensible to wait for its release and study the findings therein.
- it is correct that GEL has not submitted its regulatory accounts for some time, but it has prepared them up to primary statement level for tax computation purposes. Given GEL's current regulatory status, CICRA has not insisted that it submit the accounts. However, GEL is not suggesting a price control, but rather a tariff review. A review of tariffs and charges may not necessitate preparation of full historic accounts. So, it would take GEL nowhere near the length of time that CICRA anticipates,²⁵ and a commitment by GEL to a timeframe for the review will necessarily include a commitment to updating as required, the necessary regulatory accounts.

CICRA's suggested approach will distort the market

CICRA is over optimistic to suppose that setting the charge at zero will lead to a competitive and undistorted market. The OFGEM experience in the UK (now upheld by the High Court) demonstrates the dangers of over benefitting EG at the expense of others, and endorses an approach (even on an interim basis) that removes or reduces the excess benefits. Suspending the standby charge will have the same effect. Indeed, removing the standby charge will create an explicit cross-subsidy. Customers unable to install EG (including vulnerable customers) will cross-subsidise those who can. Whatever the merits of the standby charge, setting the charge at zero will mean that EG benefits from avoiding the cost of centralised infrastructure. That cannot be right.

Furthermore, there are an additional three reasons why suspending the charge will create market distortion;

- First, as CICRA acknowledges,²⁶ GEL has committed to a wholesale review of its tariffs and charges. The timeline on this project is to have a set of tariff proposals for consultation by February 2019. Rather than 'jumping the gun' to 'cherry pick' a particular tariff in isolation, when a fundamental review of all tariffs is imminent, we suggest waiting for our draft proposals to be completed at which time a review can be performed of the complete tariff and charging proposal given the heavy inter-linkage between them all.
- Secondly, if the charge is suspended, some customers, but not IEG, will make investment decisions based on this decision when in the future any benefits may disappear under a future tariff structure.
- Thirdly, CICRA may believe that a warning contained in the Call for Information²⁷ that tariffs may change in the future would temper any artificial boost in EG could be viewed as being over optimistic in the sense that customers would pick up this signal. Therefore, the consequences could be;

²⁴ But instead by NERA Economic Consulting (which also acted in the OFGEM judicial review case).

²⁵ Paragraph 4.8.

²⁶ Paragraph 3.2.

²⁷ Paragraph 4.10

- The EG market is artificially stimulated
- A powerful minority lobby group with vested interests may oppose for their own benefit, future comprehensive tariff reform
- Customers who may have made investment decisions based on zero standby charges may feel misled when they see future tariffs which re-introduce costs in a different form
- GEL's lost income on standby charges will necessarily need to be recovered from other customer groups including vulnerable customers.

S. 16 contracts offer a sensible alternative to CICRA's approach in the interim

There is another very compelling reason why a short-term suspension of the standby charge is both disproportionate and misguided. This is that s. 16 of the Electricity (Guernsey) Law, 2001 offers the perfect means for the small number of IEG customers wishing to install CHP to do so with the assistance of GEL. S. 16 permits customers to enter into a special agreement for the supply of electricity with a "public electricity supply licensee" (such as GEL). There would therefore be nothing to prevent IEG customers from contracting jointly with IEG, but also with GEL for the installation of a CHP system, and on commercial terms such that the standby charge could be absorbed within the overall price, in effect, anticipating the kind of fixed price structure underlying GEL's new tariff proposals. Discussions between GEL and IEG on this issue have commenced, but stalled when no agreement could be reached on the extent to which GEL's rights to protect its confidential information should be respected. As GEL has already publicly stated, it is very happy to resume these talks, and believes that s. 16 contracts are a very suitable alternative to suspending the standby charge in the period before a full review.

Benchmarking

Benchmarking has been suggested as a way to assess fairness. However, the inferred comparison with those set by Jersey Electricity is not helpful as a headline comparison and wrongly implies GEL's tariff is above what would be reasonable. It is too simplistic to compare islands at a high level as it depends, for one thing, on what technology is being used by the customers. The Jersey standby charge is based on PV customers whereas Guernsey supports CHP and may necessarily be different as more infrastructure capacity will necessarily be required as a back-up.

The principles behind our standby charge are that it also allows for the passing on of GEL security costs. Our security costs reflect our mandated energy security standard, that is, purely the costs of maintaining on island generation capacity as opposed to sunk costs which are not passed on via the standby charge.

Therefore, there are considerable differences in resilience and security standards between the islands with Guernsey being set at a level of N-2 (that is the level of generational capacity to support island MD minus the largest 2 generational assets) as opposed to Jersey only being required to meet 75% of island MD. Thus, to properly benchmark, a more comprehensive and granular review would be needed, maybe scoping along the lines of the Jersey review or at least leveraging its results as a starting point.

For cost recovery it is important to note that GEL does not charge for back-up/emergency solutions e.g., standby generators or uninterruptible power supplies ("UPS") and instead only seek to make fair recovery of the costs imposed on our system by operational systems such as CHP, when the CHPs remain grid connected.

Question 2: Does the respondent agree with CICRA's proposal to set the standby charge applied by GEL to zero pending review of the charge?

Again, the short answer is that GEL does not agree. And again, the reasons can be grouped under various sub-headings.

Factual inaccuracy

CICRA's decision temporarily to suspend the charge is based upon three very basic false premises. The first is that there is limited financial materiality²⁸ to GEL if the charge is set at zero, the second is that "allowing a charge which is also not cost justified remain at its current level may result in a dampening down of demand",²⁹ and the third is that suspension mirrors the approach recently taken in Jersey.

As to the first, it is clear from paragraphs 1.9 and 4.9 of the Call for Information that CICRA has formed the view, based upon confidential information that IEG (not GEL) has provided, that the financial impact on GEL of suspending the standby charge will be minimal. That is not the case.

As to the second, GEL repeats the points it made in relation to Question 1 (sub-heading *CICRA's suggested approach will distort the market*) as they apply equally to explain why suspending the charge is likely to have the same effect.

Finally, as to Jersey, there has been a fundamental misunderstanding of the deferment of JEC's standby charge. The offer of JEC to suspend the tariff charge was applicable only to those new customers brought into scope by the extension of the standby charging scope NOT existing EG customers already subject to a standby charge. And it was not done on an interim basis, pending the full review. It occurred during the full review itself.

No indication how long interim stage will last

Another important consideration is that there is currently no indication from CICRA for how long the temporary suspension of the charge will remain in place. The fear must be that given CICRA's concerns as to resources, a full review is unlikely to take place in the near future. This is unsatisfactory as it will create uncertainty, result in prolonged market distortion and prevent future investment in the sector.

Procedural unfairness

The first point under this heading is that GEL does not believe that CICRA has power or authority temporarily to suspend the standby charge. CICRA says it "*is considering, given the limited materially [sic] to GEL of this potential lost revenue, whether to **direct** that the standby charge be waived by GEL pending resolution of the issue*" (with our emphasis added).³⁰ This approach, it says "*mirrors the approach adopted voluntarily by JEC in Jersey*".³¹ CICRA has power to issue directions to GEL if permitted to do so under either the Electricity Law or GEL's

²⁸ The Call for Information contains a typographical error, referring to "*materially*".

²⁹ Paragraph 4.8.

³⁰ Paragraph 1.9.

³¹ Ibid.

licence.³² The power to issue directions under the Electricity Law arises only if CICRA is satisfied that a licensee is in breach of its licence or the law.³³ And GEL's licence permits CICRA to issue directions as to price control under condition 20.4 only after a consultation has taken place, not at some prior stage. Hence, to issue any form of direction suspending the charge would be to put the cart before the horse; thus far, CICRA cannot have determined that GEL is in breach and no consultation has occurred so that any direction would surely be *ultra vires*.

An associated point is that if CICRA has no power to suspend the standby charge, there can be no right of appeal of a decision to suspend it.

Alternatively, if GEL is wrong and CICRA does have power to suspend the charge, that is a power which it must still exercise having regard to promoting or balancing the objectives listed in s. 2 of the Regulation of Utilities (Bailiwick of Guernsey) Law, 2001 (the "**Utilities Law**"). Those objectives are, without exception, directed at ensuring the fair and competitive and environmentally friendly supply of utility services for residents across the Bailiwick. A full review of the standby charge and indeed of GEL's tariffs in general would unquestionably promote or balance the s. 2 objectives. By contrast, a decision by CICRA to temporarily suspend the charge would be geared towards none of those objectives, as it is instead, as CICRA concedes,³⁴ an interim response to resolve or diffuse supposed *immediate tensions* deriving from a competition law complaint made by one commercial entity. Moreover, given the scale of the current issue, to exercise a power of suspension would be disproportionate to the Bailiwick's circumstances.³⁵

Conclusion

The approach taken by CICRA to this matter is of considerable concern to GEL, as it appears to have been prompted largely (if not exclusively) by pressure in the form of a complaint brought by a GEL competitor. Equally, however, GEL appreciates the difficult position in which CICRA now finds itself given the uncertainty surrounding GEL's regulated status; in short, it is a regulator, but one without funds properly to regulate. That situation is as unsatisfactory for IEG and for Guernsey, as it is for GEL. So doubtless CICRA felt the need to do something, but was limited what. The result is an unsatisfactory "halfway house", which unfairly penalises GEL and risks stymying rather than encouraging the investment in the energy sector it aims to promote. There can be no doubt that Guernsey will benefit from a thorough review of the standby charge, within a wider consideration of EG and CHP, and of GEL's tariffs and charges in general, and GEL would welcome such a review. But that review can surely only be completed when the States have confirmed their future energy policy, and when CICRA is sufficiently resourced to undertake it, or another person can be found to carry out the task. However, as things stand, the energy market is stagnant. The current regulatory vacuum in which GEL finds itself leaves it unable to make any significant decisions as to future investment and infrastructure. Other investors are similarly affected. This is a situation which cannot persist.

Whilst perhaps inevitable, given the current situation as described above, the Call for Information advances a temporary approach, but one which is still flawed. Rather than undertaking a full and informed review of the matter, CICRA has instead reacted to what it

³² S. 5 (1)(e) of the Regulation of Utilities (Bailiwick of Guernsey) law, 2001.

³³ S. 29(1).

³⁴ Paragraph 1.9.

³⁵ S. 4 (2) (b) (ii) of the Utilities Law.

perceives as pressure by deciding it will take an immediate suspensory measure of indeterminate length in circumstances where there is no justification to do so. Moreover, that step ignores GEL's commitment to a full tariff review, as well as the fact that the results of the Jersey review are soon expected. It also ignores the fact that IEG could, if they were so minded, make use of s. 16 contracts to address any problem in the interim. And finally, CICRA has suggested itself that there may be doubts whether it has the resources to undertake any meaningful full review in any event.

GEL has committed to a future review of its tariffs and charges. The proposed tariff review is based on our future tariffs being able to:

- Reflect and recover costs;
- Ensure a fair contribution to the island's centralised infrastructure;
- Recognise the introduction by customers of self-generation and energy storage;
- Be consistent with overall energy policy;
- Allow the introduction of macro renewable generation by third party generators;
- Be seen as fair, and in particular protect vulnerable customers and avoid damaging the island's businesses; and
- Be stable, simple and understandable to all.

GEL would welcome input from CICRA on these principles.

In conclusion, GEL's recommendation is that;

- The standby charge remains unchanged for now
- The outcome of the Jersey review is reviewed in full when available
- GEL commits to a date of February 2019 (subject to shareholder approval) for release of its tariff and charging proposals (including its proposals as to the standby charge)
- The States publishes its views on EG and CHP in Guernsey and on the recovery of infrastructure costs
- CICRA clearly articulates the principles it expects to be met by GEL's new tariffs in the near term, and agrees either to undertake a proper review of those tariffs, or if it is unable, for whatever reason, to do so, to arrange for a suitable third party to carry out the review.

We will be happy to engage with CICRA and meet CICRA (and indeed any other interested person) to discuss this letter more fully.

Yours faithfully



Alan Bates
Chief Executive