

Response to consultation paper on the proposed acquisition of Viridian

John Fitz Gerald, 22 December 2006

In paragraph 38 the suggestion that carrying out what might be considered appropriate oversight would cost too much seems invalid. It is appropriate that the cost of regulation be paid for by the industry and the customers. If the structure of ownership adopted by a regulated industry is costly to oversee or investigate then it is appropriate that the beneficial owners pay for this cost.

Paragraph 40. There is growing evidence that the cost of capital for certain kinds of regulated enterprise in the UK is lower than had previously been thought. (This may reflect a global glut of savings and a changing understanding of the security of such regulated industries.) Under these circumstances it may well be the case that the NIAER at its next review of Viridian may wish to consider this issue. What is important is that the ability of the regulator to undertake such a review in the normal course of its oversight of the industry is not pre-empted by changes in the capital structure of Viridian. The regulator of British airports has issued a very trenchant statement in advance of the takeover of the BAA indicating that it would carry out its duty to regulate the industry even if it caused major financial difficulties for the future of the regulated enterprise. It would be appropriate for the NIAER to put down such a marker now for Viridian. Also It would be appropriate to ensure that the future operation of the industry by the new owners (including changes in the capital structure) does not preclude future changes in the regulated cost of capital.

In paragraph 47 there is a suggestion of a bar on disbursing funds in a manner that could affect customers in the future. It would also be appropriate that if, ex post, disbursement of funds was found to be inappropriate then the holding company would agree to pay penalties greater than the sums involved. If such penalties were, for example, twice the cost of the excess disbursement, then in the case of the holding company becoming insolvent there would be a substantial claim against the residual assets of that company.

In paragraph 48 there are provisions suggested that would lock up cash in the company in the case of a downgrading in the investment grade. This would be locking the stable door after the horse has bolted. It would be more appropriate that the holding company or beneficiaries would give very substantial guarantees in advance of changing the capital structure that they would restore the capital structure in the event of such a downgrading. In particular Arcadia or whoever the owner of Viridian is should give such guarantees in advance of putting in place a new capital structure (see paragraph 50).

Paragraph 58 – yes the NIAER should impose such a condition.

Paragraph 60 as it will become a legal requirement to separate off the transmission business under proposed EU law the accounting and disclosure conditions necessary to facilitate this should in so far as is legally possible, be imposed at this point.

Paragraph 63 If the costs identified here arise from the need to protect customers' interests as a result of a change in the financial structure of the company then this cost should be carried by the shareholders. It should certainly not be a cost to customers.

Paragraph 69. Is the use of Britain here construed to include Northern Ireland? The duty to protect security of supply should apply equally to Northern Ireland as it does elsewhere in the UK.

It would seem desirable in the long term to separate off the transmission and possibly the distribution system into a separate entity. This would facilitate regulation and would provide clarity on the appropriate cost of capital to apply to the resulting companies.