

18<sup>th</sup> September 2002

Rt. Hon. Patricia Hewitt  
Secretary of State for Trade and Industry  
1 Victoria Street  
London  
SW1H 0ET

By Fax: 7215 5468

Dear Secretary of State

### **Unlawful State Aid to British Energy**

I am writing, on behalf of Greenpeace UK and Ecotricity about the aid given by the Government to British Energy. Greenpeace is advised that the aid is unlawful under the terms of the EC Treaty.

As you may know, one of Greenpeace's activities involves the promotion of renewable energy from the wind, waves and the sun (as well as energy efficiency) as an alternative to nuclear power. Greenpeace considers that renewable power is affordable, safe and clean, whereas nuclear power is expensive and dangerous.

Greenpeace has entered into a contract with a major utility jointly to market electricity to be generated by off-shore wind power. Greenpeace therefore has sufficient interest to challenge the lawfulness of any unlawful aid granted by the State that distorts or threatens to distort competition in the supply of electricity by favouring the production of electricity from nuclear power.

Ecotricity is an independent, British owned company which is both a generator and supplier of electricity. Ecotricity founded the UK's green electricity market place in 1996 at the time of de-regulation in the industry and now employs over 30 people.

Ecotricity operates in the commercial markets in the UK and supplies some 300GWhrs of electricity to around 800 sites each year. Also a leading developer of wind energy, Ecotricity has built 5MW of new capacity to date, with another 100MW planned for development in the next three years. It too has sufficient standing to challenge the grant of State Aid to British Energy and is directly affected by any unlawful subsidy to British Energy.

Our understanding of the facts in relation to Government aid to British Energy is as follows:

1. As a result of severe liquidity problems, British Energy initiated discussions with the Government on 4 September 2002 with a view both to seeking immediate financial support and to enabling discussions about a possible longer term restructuring to take place.
2. On 9 September, the Government agreed to provide British Energy with a loan for up to £410m in respect of its working capital requirements and cash collateral for trading in the UK and North America. On the same day the government announced that "Notification of this loan under EU state aid legislation is underway." (DTI press release 9 September 2002).

3. That short-term loan has been put in place in respect of the period until 27 September 2002, pending clarification of the company's full financial position. No decisions have been taken by the Government, and no commitments have been given, about support beyond this period.
4. It has been reported that the government formally asked the European Commission to approve its aid package on 11<sup>th</sup> September 2002 and that the compatibility of the aid will be considered against the admissibility criteria for rescue aid. The Commission has confirmed to Greenpeace that all state aid must be approved before being given and that this Aid has not been approved by the Commission.
5. Accordingly, the position is that the Government has granted aid to British Energy without this having been pre-notified to the Commission, and without authorisation from the Commission.

It appears to be clear law that the Government's provision of a loan to British Energy was unlawful, and that, in consequence, the aid falls to be repaid. The State is also potentially liable in damages to British Energy's affected competitors (including Ecotricity) for the loss of profits that they sustain as a result of (a) the grant of unlawful aid and/or (b) any deliberate failure to remedy the situation in the light of this complaint. This is because:

1. Article 88 (3) of the EC treaty provides:

"The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid...The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

2. Article 2(1) of Council Regulation EC No. 659/1999 ("the Procedural Regulation") laying down detailed rules for the application of Article [88] of the EC Treaty provides:

"Save as otherwise provided in regulations...any plans to grant new aid shall be notified to the Commission in sufficient time by the Member State concerned..."

3. Article 3 of the Procedural Regulation provides:

"Aid notifiable pursuant to Article 2(1) shall not be put into effect before the Commission has taken, or is deemed to have taken, a decision authorising such aid."

4. Article 88(3) EC and Article 3 of the Procedural Regulation are directly effective. They give rise to rights in favour of individuals which national courts are bound to safeguard: see Case 120/73, *Lorenz v. Germany* [1973] ECR 1471, §8.

5. *Lorenz* further holds (also at §8):

"The direct effect of the prohibition extends to all aid which has been implemented without being notified and, in the event of notification, operates during the preliminary period, and where the Commission sets in motion the contentious procedure, up to the final decision."

6. At §9, *Lorenz* holds:

"...the direct effect of the prohibition in question requires national courts to apply it without any possibility of its being excluded by rules of national law of any kind whatsoever, [although] it is for the internal legal system of every Member State to determine the legal procedure leading to this result."

7. In Case C-354/90, *Federation Nationale du Commerce Exterieur des Produits Alimentaires and Syndicat National des Negociants et Transformateurs de Saumon v. French State ("FNCE")* [1991] ECR I-5505, Advocate General Jacobs commented as follows on that aspect of the Court's ruling in *Lorenz* and similar cases:

"...that line of cases in my view establishes that, in the event of an infringement of the prohibition contained in the last sentence of Article [88(3)], whether because a new aid is implemented without having been notified, or because a notified aid is implemented prior to clearance by the Commission, the national courts, on application by any interested party, are required to give effect to that prohibition. **This means that they must hold any measures taken in defiance of the last sentence of Article [88(3)] unlawful and grant all remedies necessary to ensure the effectiveness of the prohibition contained therein.**" [emphasis added]

8. In Case C-39/94, *Syndicat Francais de l'Express International ("SFEI") v. La Poste and Others* [1996] ECR I-3547, Advocate General Jacobs pointed out:

"...the State may also – and independently of any obligation to recover the aid – be subject to **claims for damages brought in the national courts on the basis of Community law by competitors who incur loss or damage as a result of measures unlawfully implementing aid.**" [emphasis added]

Please confirm that you accept this analysis, and that you will arrange for the repayment of the unlawful aid immediately. If you are unwilling to do so, please explain, as a matter of urgency, on what possible legal basis such action can be justified. We assume that your department must have considered the matter before granting the aid.

In any event, we should be grateful if you would supply to us, as soon as practicable, a copy of any written notifications to the EC Commission (subject to the withholding of any commercially confidential information) relating to (a) the rescue aid, and (b) any current or subsequent restructuring plan submitted to the European Commission, which involves the proposed grant of further aid.

In particular, we are concerned to see how, if at all, the rescue aid granted to British Energy can be reconciled with the *Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty*. The guidelines provide, amongst other things:

- that the aid be warranted on the grounds of serious social difficulties and have no unduly adverse spillover effects on other Member States
- be restricted to the amount needed to keep the firm in business for the period during which the aid is authorised (for example, covering wage and salary costs or routine supplies)

As indicated above, Community law requires that the national courts should use all appropriate means and remedies and apply all relevant provisions of national law to implement the direct effect of the procedural obligation under Article 88. Greenpeace and Ecotricity are considering the position under domestic law and I should be very grateful, in view of the extreme urgency of the matter, for an early reply.

A copy of this letter, together with a complaint, goes to the European Commission.

Yours faithfully

Kate Harrison  
Solicitor  
Greenpeace Ltd.