

Ofwat Consultation Response – "Negotiating bulk supplies" Greenberg Traurig Maher LLP

8 March 2013

OFWAT CONSULTATION RESPONSE - "NEGOTIATING BULK SUPPLIES"

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1. INTRODUCTION

On 17 December 2012, Ofwat published "*Negotiating bulk supplies – a consultation on our guidance*" (the "**Consultation**") for consultation. This note represents the response of Greenberg Traurig Maher LLP ("**GTM**") to the Consultation.

If readers have any questions in relation to GTM's Consultation response, they should feel free to contact **Stephen Tupper** (DD: +44 (0)20 3349 8729) or **Simon Harms** (DD: +44 (0)20 3349 8767) of GTM.

2. GTM'S CONSULTATION RESPONSE

Q1 Do you have any suggestions for how we could improve the draft guidance?

We appreciate the opportunity to comment on the draft of Ofwat's guidance on bulk supply negotiations (the "**Draft Guidance**") which is the subject of the Consultation.

In this context, we note that Ofwat's February 2011 publication "*Bulk supply pricing – a statement of our policy principles*" (the "**Bulk Supply Pricing Principles**") sets out, in broad terms, the principles which Ofwat uses when making determinations on bulk supply agreements under sections 40 or 40A of the Water Industry Act 1991. While the Bulk Supply Pricing Principles, on their face, provide guidance on the principles which are applied by Ofwat when making such determinations, they also provide potentially useful guidance for parties involved in bulk supply negotiations.

GTM welcomes the fact that Ofwat is now seeking to provide additional guidance in relation to the negotiation of bulk supply agreements and considers that the Draft Guidance contains some useful, if somewhat high-level, guidance for parties involved in such negotiations. As Ofwat will be aware, the existing framework in this area has generated, and continues to generate, a considerable amount of regulatory uncertainty for water companies which find themselves grappling with the interface between water sector-specific regulation and generally applicable UK competition law.

In reviewing the Draft Guidance we find it concerning that Ofwat is not currently proposing to merge the Bulk Supply Pricing Principles and its Draft Guidance. Instead, we understand that it is proposed that the Draft Guidance will sit alongside, and separately from, the Bulk Supply Pricing Principles.

Blending these two pieces of closely related guidance into a single, integrated guidance document is, in our view, essential as doing otherwise risks creating unnecessary additional uncertainties for parties involved in bulk supply negotiations.¹

¹ In this context, please also note that sections 2.2 - 2.4 and 3 - 3.3 of the current version of the Bulk Supply Pricing Principles, as displayed on Ofwat's website are, in effect, identical. This clearly inadvertent duplication could be eliminated as part of an exercise in combining the Draft Guidance with the Bulk Supply Pricing Principles.

In preparing a single guidance document in this important area, we consider that it would also be sensible for Ofwat to take the opportunity to provide some indication of the calculative approaches it considers acceptable for the purpose of bulk supply pricing. The Bulk Supply Pricing Principles recognise that the use of average costs can represent a practical and proportionate means of reflecting the costs reasonably associated with the provision of bulk water supplies. At the same time, however, the Bulk Supply Pricing Principles caution that supply-specific cost assessments are appropriate in certain circumstances. The Bulk Supply Pricing Principles do not, however, go on to indicate which approach would be broadly acceptable in which general set of circumstances. This leaves water companies in the unfortunate position of having to make a proverbial "coin toss" between two very different methodologies.

As Ofwat will be aware, this dichotomy has created considerable regulatory uncertainty for water undertakers, large users and inset appointees alike. In our experience such uncertainty also results in unnecessary delays to bulk supply negotiations. Given that the two processes identified by Ofwat will, in most circumstances, lead to very different prices with very different consequences for "new" and "existing" customers alike, Ofwat should see it as a policy imperative to provide significant assistance to all concerned. This would have the added benefit of reducing regulatory effort dealing with complaints and requests for determinations, etc.

GTM

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