BUUK Infrastructure
Energy House
Woolpit Business Park, Woolpit,
Suffolk, IP30 9UP

Tel: +44 (0)1359 240 363
Fax: +44(0)1359 243 377
www.bu-uk.co.uk

Competition Policy
Ofwat
21 Bloomsbury Street
London
WC1B 3HF

19th January 2017

To the Case Management Office

Re: Guidance on Owat's approach to competition law in the water and waste water sector.

This response is provided for and on behalf of Independent Water Networks Ltd (IWNL) a member of the BUUK Utilities (BUUK) group. IWNL operates as a New Appointment and Variation undertaker (NAV), owning and operating the 'last mile' of water and sewerage networks.

IWNL welcomes Ofwat's consultation setting out its draft guidance on its approach to the application of competition law to water and waste water. Operating as a NAV we experience a number of practices which we believe unduly distort competition. These include:

- the charging practices and methodologies that incumbents impose, both in determining the charges for connection to NAVs, and in the tariffs that incumbents apply to NAVs; and
- the processes and delays imposed on NAVs seeking connection.

We agree with Ofwat's statement that *"…even if a company is compliant with a relevant obligation within the code and/or rule for a market, it may still be in breach of competition law".* We see this is as one of the most important messages in the guidance consultation. We believe that some (if not all) incumbents use regulatory obligations as an excuse to procrastinate and hold back the development of arrangements that are consistent with competition law.

We recognise that previously Ofwat, informally and through consultations, has reminded incumbents of their duties under competition law, and that in parallel with this consultation Ofwat is undertaking work on charging rules and on the adoption process to address some of the competition concerns we have raised. However, we are extremely concerned at the apparent lack of urgency that incumbents are giving to developing arrangements to create a level playing field for competition, with progress being punctuated by procrastination and delays.

Incumbents should be in no doubt as to the actions that Ofwat will take if incumbents fail to put practices in place that create a level playing field and which facilitate competition. We recognise that accepting binding commitments may be an appropriate solution in respect of some investigations into alleged breaches, particularly where Ofwat are resource constrained. However, our experience in this and other utility markets is that such measures do not always provide the appropriate incentives or act as a sufficient deterrent to infringement by other

incumbents, particularly in a market where we see many of the practices that distort competition being applied widely by multiple different incumbents. As such, we think Ofwat's approach to applying competition law and the action taken to address compliance failings needs to be robust.

Our experience in opening markets to competition in other utility sectors is that it is only by robust action and enforcement by the regulator that the market opens up. In the absence of such regulatory engagement the opening of such markets to competition is often a drawn out and frustrating process, only driven forwards by the market entrants at the pace of the slowest incumbent. We now witness similar behaviours in water and waste water.
We believe that the actions taken to address competition law infringements must be at a level that incentivises compliance and provides a deterrent to other incumbent undertakers. We think that binding commitments can appear a 'soft' remedy and as a consequence not provide the urgency needed to drive a step change in behaviour, as is now required.

We have few comments on the detailed text of your draft guidance but would like to make the following brief points:

- We note that the draft guidance provides a brief description of the Fairfield investigation and also later refers to it in the context of talking about how Ofwat will consider any bundling of services. We are concerned that incumbents may draw comfort from the fact, noted in the draft guidance, that no finding of infringement was ultimately found in the Fairfield case. From our perspective, it is important for incumbents to realise that Fairfield was exceptional because it represented a situation where combining water and wastewater revenues provided a margin for a NAV (on Ofwat's analsysis, at least) and, both critically and unusually, the customer was only interested in purchasing both from the same one supplier. [redacted]
- We agree with much of what the draft guidance says about margin squeeze on page 32. It is, of course, correct that the purpose of competition enforcement is to deliver benefits to consumers and not to protect *inefficient* competitors or drive *inefficient* new entry. Crucially, though, where new entrants are more efficient than the incumbent, it will almost invariably be in consumers' best interests to promote competition by the new entrant. There is often, therefore, a close alignment between the interests of consumers and new entrants. We would like this point to be drawn out more explicitly in the final guidance.

Should you wish to discuss any of the points raised in this letter please do not hesitate to contact me.

Yours faithfully

Mike Harding
Regulation Director, BUUK Infrastructure

BUUK Infrastructure No 2 Limited. VAT Number: GB688 8971 40. Registered No: 08246443
Registered Address: Energy House, Woolpit Business Park, Woolpit, Bury St Edmunds, Suffolk, IP30 9UP