

CITIZENS FOR A BETTER ENVIRONMENT (CBE)
(A REGISTERED NON-GOVERNMENTAL ORGANISATION)
Reg. No. ORS/102/26/480

OECD COMPLAINT AGAINST NATIONAL GRID TRANSCO

FURTHER DETAILS

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25th July 2003

FULL OECD COMPLAINT AGAINST NATIONAL GRID TRANSCO- UK
(As amended on 25/07/03)

A. DESCRIPTION OF PARTIES TO THE COMPLAINT LODGED

1. Citizens for a Better Environment (“CBE”) is a non-governmental organisation dedicated to developing, promoting and implementing sustainable environmental and economic policies. CBE utilises research, public education, community organisation, legislation and litigation in achieving goals of socio-economic and environmental justice. CBE was formed in 1998 and registered under the Society Act of the Laws of Zambia. Its registration. No. is ORS/102/26/480. Particulars of the registered office, mailing address and contact person are as below:

67 AFCOM House
Obote Avenue,
P.O. Box 23202
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Tel.: 260-97-797514
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E-mail: cbezambia@hotmail.com
Contact: Person: Peter Sinkamba- Executive Director

2. National Grid Transco (“NGT”) is a limited liability company registered under the laws of England and acts as shareholder /manager and or operator of the Copperbelt Energy Corporation plc (“CEC”), a company which is owned collectively by NGT, a US energy company called Cinergy, each holding a 38.5% interest, and the remaining shares held by Zambia Consolidated Copper Mines Investments Holdings (“ZCCM-IH”) and a local Zambian management team. CEC owns and operates a 500-mile transmission network to supply electricity to the mining operations within Zambian Copperbelt, and the 220Kv interconnector with the Democratic Republic of Congo. Particulars of the registered office, mailing address and contact persons at NGT in respect of this matter are as below:

The Chief Executive Officer
National Grid UK
National Grid House
Kirby Corner Road
ENGLAND
Tel: +44-(0)-2476 537777
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B. DESCRIPTION OF THE COMPLAINT IS LODGED

The basis of the complaint is as follows:

- 1) NGT is a multinational corporation domiciled and operating in the UK and also in Zambia through CEC. The UK is an adhering government for the Organisation for Economic Co-operation and Development (“the OECD”) Act (“the Act”). Adhering Governments in Declaration I (Guidelines for Multinational Enterprises “the Guidelines”) as amended on 27th June 2000- C/M(2000)17, it was declared, “That they (adhering

governments) jointly recommend to multinational enterprises operating in or from their territories the observance of the Guidelines...”.

In this vain, we therefore allege that the said Declaration require NGT to observe the Act and the Guidelines for its operations in the UK including the on going operations in Zambia at CEC although Zambia is not an adhering country for the Act.

NGT, in its letter to CBE dated 21st July, 2003, signed by one NGT Director on CEC Board of Directors, Mr. Paul Johnson states that NGT “...works to high standards of corporate social responsibility” and that “NGT’s conduct throughout the CEC sales process was entirely in line with the guidelines for OECD Act”.

- 2) To the contrary, we believe that conduct and acquisition of CEC, and the incentives which were solicited and were subsequently granted, as contained in the Development Agreement, Bulk Supply Agreements, Power Supply Agreements, all being documents of 21st November 1997 (the “Agreements”), made between the Government of the Republic of Zambia acting through the Ministry of Finance (“GRZ”) and NGT through CEC, for the on-going operations at CEC, conflict with the spirit the Guidelines of 21st June 1976- C (76) 99/Final as amended on 13th June 1979- C79) 102/Final and 17th May 1984-C/M (84) 7 Part ii(Final), Items 99 and 100, 4th June 1991-C/M(91)12/Final, item 11.11c) and on 27th June 2002-C/M(2000) 17 as set out below:

a) SEEKING OR ACCEPTING EXEMPTIONS

- i) According to the OECD Act, at Part II (General Policies), Regulation 5, it is a requirement that enterprises “refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues”.

We allege that contrary to the requirements of Regulation 5 stated above, NGT negotiated, , obtained and accepted exemptions in the aforesaid Agreements and we submit the following grounds in support as follows:

□ Environmental and Safety-

Clause 11.1 and 11.3 of Part C of the Development Agreement mentioned in 2 above it is stated that the Company (i.e. CEC), will (subject to provisions of and save to the extent provided otherwise in Clause 11) comply with (a) environmental and safety laws and regulations enacted or promulgated within Zambia from time to time which are of general application; and (b) the environmental plan applicable from time to time subject to compliance by the Company with the Environmental Plan and Environmental Remediation Obligations applicable from time to time save as provided and GRZ will not for a period of fifteen years from Effective date (21st November 1997), take any action and will procure no action is taken by any GRZ Instrumentality (e.g. Environmental Council of Zambia) under, or in enforcing, any applicable Environmental Laws.

We submit that the said Clauses 11.1, 11.3 as well as 11.6, which were negotiated, obtained and accepted by CEC, exclusively exempt CEC from complying with environmental and safety laws and regulations enacted in Zambia from 1997 up to 2013 conflict with the spirit of the said Regulation 5.

Further, we submit that the said Clauses 11.1, 11.3 and 11.6, conflict with the spirit Regulation 5 because they make environmental regulatory officers harmless to CEC. The officers have no

authority to enforce general environmental laws on CEC up to 2013 except for the Minister who has powers to make interventions (although this is also only possible with too much derogation).

Such kind of exemptions or enforcement mechanism solicited did not exist in the Environmental Protection and Pollution Control Act No.12, 1990. Neither were they contemplated in any of its subsidiary environmental legislation of November 1997.

□ Taxation/Financial Incentives.

Clause 10.2 of the said agreement states that in the event foreign exchange controls are introduced in Zambia or any laws relating to foreign exchange or use of foreign exchange are amended, enacted or repealed within fifteen (15) years from 21st November 1997, the Company shall be exempt from those changes in the laws and shall have the right to retain both outside and within Zambia its foreign exchange and GRZ is under obligation to make sure that counterparties to the Power Supply Agreements are compelled to continue making payment for the purchase of electricity pursuant to the Company's accounts outside Zambia in foreign currency and free and clear of withholdings.

Clause 13.1 (a) of Part D of the said Development Agreement in 2 above compels GRZ not to for fifteen years (15) commencing on the 21st November 1997, (i) increase corporate tax rates applicable to the Company (CEC) or decrease its allowances available to the Company in computing its liability to such taxes from prevailing as at 21st November 1997 or (ii) otherwise amend the VAT and corporate tax regimes applicable to the Company (CEC) for those prevailing as at 21st November 1997; or (iii) impose new taxes, duties, levies or fiscal imports on business, so as to have in each case, a material adverse effect on the company distributable profits or dividends received by its shareholders. The issue of whether or not such effect is materially adverse shall be determined by a sole expert and is not a matter for the Zambia Revenue Authority.

Furthermore, Clause 13.3 of the said Agreement compels GRZ to pay the Company (CEC) or at GRZ's option, make changes in any law, statute, regulation or enactment exclusively applicable to the Company (CEC) to ensure the Company is fully and fairly compensated for any costs incurred, losses suffered or revenue lost by it by reason of a failure by GRZ to honour its obligation of comply with the provisions of Clauses 13.1 and 13.2 i.e if changes to the tax regimes within 15 years from 21st November 1997 or thereafter affect CEC. The Company (CEC) acknowledged this arrangement as its sole remedy for such failure to comply with clauses 13.1 and 13.2, which bar GRZ to increase tax rates, levies, duties, etc.

Clause 10.1 of Part C of the said Development Agreement in 2 above, makes CEC free to (a) remit any amounts of foreign currency out of Zambia (b) receive and retain outside Zambia foreign currency accruing to or earned by it (c) maintain foreign currency accruing to or earned by it whether outside or within Zambia into Zambia free and clear of any withholdings or exchange controls.

We submit that these financial and tax incentives granted to CEC have increased the tax burden on the poor, over taxation of other tax payers and have introduced non-uniform, discriminatory treatment to the maximum extent possible and massive externalisation of funds (in most instances up to 100%). Ultimately, these incentives have brought about an unstable macroeconomic environment. This distortion has been ongoing since 1997. Such revenue management measures and changes introduced have stifled effective domestic revenue-

generating and sustainable mechanisms that are readily administered and satisfy the budget revenue requirements for the development of the country.

The afore stated incentives have prompted the new Minister of Finance Mr. Ng'andu Magande to complain that Zambia is not benefiting from the policy of allowing investors to externalise 100% of their profits and the need for immediate review of such policies as quoted on the front page of Zambia Daily Mail published on the 12th of July 2003. CEC is one of the enterprises involved in excessive externalisation of its revenue by causing payments due to it for services rendered in Zambia to be paid in its offshore accounts (one of them being held at London Citi Bank). Externalisation of proceeds like CEC is doing is harming the economy of Zambia. At Average Energy Sales Forecasts (2003-2018) at over 4,500, 000 GWh and monthly profits averaging US \$600,000, Zambia has lost and will continue to significantly lose revenue through externalisation of funds.

In view of the foregoing, we submit that since the incentives or exemptions granted to CEC were not and are not contemplated in the tax and other financial legislation applicable to electricity supply companies operating in Zambia to date, and we find the conduct of NGT to negotiate and obtain such incentives as contained in Parts C and D of the afore said Development Agreement to be inconsistent with the spirit of Part II (General Policies), Regulation 1 and 5 and Part X (Taxation) of the OECD Act. Enterprises should comply with tax laws and regulations and should exert every effort to operate in accordance with both letter and spirit of these laws.

Further, we find the conduct of NGT, through CEC to negotiate, accept and enjoy considerable non-uniform, discriminatory, undue or improper advantages through waivers or powers or immunity, which entail that any changes made to laws, statutes, regulations or any enactment from 27th November 1997 up to 27th November 2013 so as to have no effect on CEC, to be inconsistent with spirit of Part VI of the OECD act (Combating Bribery). Enterprises should not directly or indirectly demand a bribe or advantage to obtain or retain a business or other improper advantage.

□ Consumer Interests on Tariffs

By virtue of the Agreements aforesaid, CEC is the biggest customer of Zambia Electricity Supply Corporation plc (ZESCO) and using its muscle extracted tremendous advantage in the tariff structure, which most observers think was too generous (Sunday Times, Features, June 29, 2003). The Agreements bar ZESCO from directly supplying electricity to the mines and ZESCO cannot adjust tariffs applicable to CEC from 21st November 1997 up to 21st November 2013.

Between 1998 and 2002, the monopoly of CEC created serious operational problems resulting in mine flooding at RAMCOZ mine in Luanshya. While the tariffs for ZESCO were fixed, CEC made tariffs applicable to RAMCOZ to be higher than those applicable to other mine operators such as Konkola Copper Mines (KCM). This discriminatory approach made RAMCOZ operational costs on power to be higher than its other mines. Despite this discrimination, RAMCOZ could not procure power from an alternative source, ZESCO, because of afore said Agreements. Thus electricity bills for RAMCOZ were higher due to the monopolistic Agreements. This arrangement caused serious financial problems for RAMCOZ. We believe that to a great extent, the CEC monopoly is one of the reasons that contributed to the premature mine closure at RAMCOZ, which closure has adversely affected the socio-

economic environment of Luanshya town and put in jeopardy the lives of 4,000 plus employees and their 30,000 dependants and closure of other companies.

Further, the CEC monopoly has contributed to revenue base for ZESCO is stifled since ZESCO cannot adjust the tariffs for its biggest client CEC yet CEC is free to adjust its tariffs for its client. This arrangement has worked to the detriment of other consumers in that ZESCO has focused on repeatedly increasing tariffs for its other consumers (industrial, townships and social) to make up for its increasing operational costs. At any rate, CEC is operating as monopoly contrary to the Competition and Fair Trading Act of the Laws of Zambia (Sunday Times, Features, June 29, 2003).

To make matters worse, Part B of the Development Agreement (Operational and Employment Issues), Section 2.1 inhibits GRZ or its instrumentalities such as the Zambia Competition Commission to exercise or take action or supervise or regulate CEC or to properly and fairly conduct its business as is provided for under the laws of the Zambia (Competition and Fair Trading Act). This has consolidated the CEC monopoly.

We submit that this conduct by CEC to engage in unfair practices is contrary to the spirit of the OECD Act, particularly Part VII (Consumer Interests), Regulation 4. Further, the conduct of CEC to enter into or carry out anti-competitive agreements as aforesaid, (i.e. fix tariffs, inhibit ZESCO to supply electricity to the mines), is contrary to the spirit of the Act, in particular Part IX (Competition), Regulations 1 (a), (d). Furthermore, for conducting their business in a manner that is inconsistent with applicable competition laws and for being immune to government instrumentalities like Zambia Competition Commission as stated above, CEC is in breach of Regulations 2 and 3 of Part IX (Competition) of the Act

□ Industrial Relations

In Clause 6.11(Training and Human Resources Management) of Part B (Operational and Employment Issues) of the aforesaid Development Agreement, CEC committed itself to adopt the Redundancy Terms of Zambia Consolidated Copper Mines (ZCCM) to Transferring Employees, supported by letters from ZCCM Chief Executive Ref. CE/ZCCM/191/97 dated 2nd September 1997 and Ref. CEC/CE 001/97/ISB/len dated 2nd December 1997 from the CEC Chief Executive. The failure by CEC to pay retrenched their full CEC separation/retrenchment packages and money held in trust as agreed with ZCCM, which has resulted in several litigations e.g. ZCCM/CEC v Lucian Chitalu & Others (Appeal No. 183A/2000), ZCCM/CEC v John Mutamfu & Others (1998/HK/207) and several other cases still on-going five years after the retrenchments.

Part IV of the OECD Act (Employment and Industrial Relations), Regulation 6, require enterprises in considering in their operations that would have major effects upon the livelihood of employees, in particular collective lay-offs (retrenchments), to provide meaningful co-operation to mitigate the effects of such decisions. These litigation cases are evidence that CEC has not provided meaningful co-operation to the well over 350 retrenched employees to mitigate the effects of the lay-offs five years after the retrenchment despite huge profits and colossal dividends (US\$0.60/share) publicly declared in the last five years.

□ Conflict of Interest

NGT partnered with a Zambian Management Team of public officials employed by ZCCM comprising Mr. Charles Milupi (was ZCCM Group Consultant- Mechanical & Electrical), Mr.

Hansen Sindowe (was ZCCM Group Consulting Engineer- Special Duties), Mr. Rodney Sisala (was General Manager, Power Division), Mr. Aaron Botha (was Acting Superintendent-Electrotechnical, Power Division), Mr. Humphrey Mulela (was Superintendent- Operations & Maintenance, Power Division). These officials were a core team of professionals privy to information of the ZCCM Power Division assets now CEC, by nature of positions they held in ZCCM and Power Division before and during the time of privatisation, and further their association with the Government Negotiating Team that handled the privatisation negotiations. They are now Directors of CEC.

We verily believe that NGT had prior knowledge of the conflicting interest these people had and that they never declared interest as ethics require. Thus we believe that by partnering with these members who did not declare interest, National Grid ought to have directly or indirectly offered or promised or gave or obtained other undue advantage to obtain or win the CEC bid, which action we find to be contrary to the spirit of the OECD Act particularly, Part V(Combating bribery), Regulation 1 and Part IX(Competition), Regulation 1 (b).

C. CONCLUSIONS

By failing or neglecting to carry out or adhere to the Guidelines as aforesaid in details referred to in paragraphs 1, and 2 of Part B of this complaint, NGT is in violation of the OECD Act as elaborated hereinabove. By allowing CEC to carry out operations and benefiting in manner complained of, the parties referred to in paragraphs 2 of Part A of this complaint, in particular NGT and Cinergy, are in violation of the OECD Act.

Further, our members and country have been and will likely continue to be affected by the social, economic and environmental impacts of the above stated acts in the following ways:

Poverty on the Copperbelt and Zambia generally will continue to rise if National Grid is not stopped from conducting its activities at CEC plc in a manner that does not contribute to the wider goal of the Guidelines on promoting sustainable development. This is so because the concessions or so-called “incentives” obtained as stated above disadvantage local consumer interests on tariffs, inhibit competition, unduly stifle the national taxation base and sustainable revenue management and inhibit sound employment and industrial relations as complained of and demonstrated in Part B above.

The so-called “incentives” granted to NGT and consequently to CEC plc are suspect in the sense they were obtained from a government that has since been disgraced locally and abroad for its repugnant reputation of plunder of national resources and corruption. The national crusade against corruption and the campaign to combat bribery will be inhibited if “incentives” and partnerships at are left un-investigated for corruption and bribery.

D. JURISDICTION OF THE UK NATIONAL CONTACT POINT

In terms of Decisions of the Council of the OECD Guidelines for Multinational Enterprises as amended on 27th June 2000-C (2000)96/FINAL; in particular Decision I (1) and (2) of the OECD Act, and further the OECD Guidelines for Multinational Enterprises Declaration as amended on 27th June 2000-C/M(2000)17, in particular Declarations I, II, III and IV, since NGT is domiciled in the UK, the UK National Contact Point, the Department of Trade and Industry (DTI) is possessed of full jurisdiction to receive and facilitate the investigation of this complaint in accordance with the Procedural Guidance so as to contribute to the solution of the problems outlined above

E. RELIEFS REQUESTED

The complainants respectfully urge the UK National Contact Point, the DTI to investigate this complaint in accordance with the Act by opening an inquiry, instituting proceedings by holding hearings in terms of Procedural of the Act. Having investigated the complaint as aforesaid, the complainants respectfully urge the National Contact Point to make the following findings of fact and recommendations:

1. To make a finding of fact that the OECD Act as stated in Grounds 2 (a) all bullet points of Part B of the complaint were abrogated by the parties referred to in Part A (2) of the complaint.
2. To make a finding of fact that the conclusions made in preceding paragraphs of Part C of the complaint are correct and a reflection of the details in Ground 2 of Part B of the complaint.
3. To recommend to the NGT/CEC Board to suspend or cancel the said agreements granted to CEC until such a time as the issues raised in this complaint that are in violations of the OECD Act are collectively reviewed by GRZ, NGT, CEC and ourselves in order to make them conform with the spirit of the OECD Act, and as elaborated in Parts B and C any injury or losses caused as a result of the said violations has been remedied in accordance with the Act.
4. To recommend to the NGT Board to review the Agreement between GRZ and CEC in respect of the payment of royalties, taxes, tariffs and other charges with a view to level the playing field so that the rates that CEC ought to pay are not discriminatory and become more beneficial to the government, the complainants, other stakeholders and the people of Zambia in general.
5. To recommend to NGT Board to review and to cause to be amended or repealed Clauses of the Agreements that make CEC to be precluded from jurisdiction of laws on environment and any effect of any new enactment of other law, which indemnity CEC is now enjoying up to 2013 as elaborated in Part B of this complaint
6. To recommend to NGT Board to review and to cause to be amended or repealed the provisions of the agreements that allows or guarantees CEC to externalize 100% of all revenues and profits generated as elaborated in Part B of the complaint.
7. To recommend to an appropriate instrumentality of the UK Government to investigate the submitted bids and the partnership between NGT and the Zambian Management Team from the outset including the sources of funds or mode of payment used by the Zambian Management Team to procure shares (which were not floated to Power Division employees or all management and or the public) in CEC during privatization of CEC
8. To recommend to the NGT Board to exercise its powers to review or to cause to be amended or repealed clauses in the agreements that inhibit government or its instrumentalities to perform their legal duties which they fail to do due the restriction in the agreements as elaborated in Parts B of the complaint.
9. To recommend to the NGT Board to exercise its powers to review and get finally settled all outstanding cases in respect of full payments of retrenchment packages of former employees which money is still held in trust

10. To make any other recommendations or advice or to take any steps that the National Contact Point shall deem fit, proper and just in order to secure the remedying of the violations of the OECD Act in Part B of the complaint.

Dated this 25th day of July 2003

SIGNED:

Peter Sinkamba
Executive Director