The member who raised the concern about human rights in relation to P173 provided the following response to the legal advice received by BSCCo:

1.1 First, I disagree with the sentiment in 3.2 (and summarised in 7.2) which implies that Generators, acting in a free market situation, may, in some way, themselves be regarded as a 'public authority' and thus cannot be a 'victim' of a human right infringement. It seems to be somewhat of a 'red herring'. In this respect I note:-

(a) that Generators, such as Teesside Power, may not be 'privatised utilities' (that is they were not one of the 12 RECs, 2 Generators, 2 Scottish companies or NGT that were sold off circa 14-15 years ago); and

(b) it seems clear in the Joint [Parliamentary] Committee on Human Rights report published in March this year ("The meaning of Public Authority under the Human Rights Act") that the reference to 'public authority' refers to the act being undertaken. The report notes:-

"20. It was left to the courts to interpret the legislation to determine exactly where the lines between public and private functions should be drawn. It is quite clear that Parliament envisaged that the scope of section 6(3)(b) should be based primarily on the nature of the function being performed by a private body, rather than the intrinsic nature of the body itself. In a key statement the Home Secretary explained — As we are dealing with public functions and with an evolving situation, we believe that the test must relate to the substance and nature of the act, not to the form and legal personality."

The report goes onto note that:-

"25. However, the House of Lords stressed that it was the nature of the function being performed that should determine whether a body was a functional public authority. Lord Nicholls of Birkenhead considered that there should be a "generously wide" interpretation of "public function" so as to further the statutory aim of promoting human rights protection, whilst still allowing functional bodies to rely on the Convention rights themselves where they acted privately. In determining what was a "public function", there could be "no single test of universal application … given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. ....."

26. The House of Lords, therefore, favoured a relatively narrow test for "pure" public authority status[it being my contention, in this respect, that NGT as GBSO is a "hybrid", rather than a "pure" public authority], but balanced this against a correspondingly wide and flexible category of "functional" public authority. In contrast to this decision, as well as to the tenor of the debates in Parliament and the clearly expressed expectation of Ministers, the broad, functional approach to public authority responsibility under the Human Rights Act has not so far found favour in the lower courts. In the relatively few decided cases, the courts have, in their application of section 6, taken as their starting point the amenability to judicial review of a body discharging a function, and have looked to the identity of the body, and its links with the State, as well as to the nature of the function performed.

27. This is particularly the case as regards application of the definition to private sector providers of public services. The fully privatised public utilities such as the water

companies are established in the case law as "functional" public authorities, performing public functions in their delivery of services. By contrast, the application of section 6(3)(b) to smaller private or charitable organisations, often providing services under contract from local authorities, has been less clear-cut. The case law has considered the public authority status of organisations including housing associations, care homes, mental health care facilities and organisations managing public markets."

Thus NGT, when it is undertaking an act clearly performed by the GBSO (such as issuing an Emergency Instruction) then this would seem to me to be in the performance of a public function. But when NGT is performing other 'private' acts, such as buying its fleet vehicles this would not be a public function. Furthermore a privately owned and operated Generator (who might or might not be unlicensed) wouldn't, it seems to me, be performing a public function if it would merely acting in a free market. However, if such acts where performed under direction of, for example, the Fuel Security Code, then they might.

1.2 Second, in regard to 5.1, whilst the particular event that gave rise to P173 (the Damhead Creek incident) was safety related, P173 has to take account of all types of Emergency Instruction some of which are far more likely to be related to the integrity of the system than to safety (such as the direct risk to life indicated in the Damhead Creek incident). I am not denying that NGT (as GBSO) has a legitimate right to interfere in the use of property and I have ensured that this is reflected in our Report. The issue at hand is is that interference disproportionate. In this respect the Courts look to whether the interference strikes a 'fair balance' between the 'general interest' and the rights of the property owner.

1.3 Third, in regard to 6.4 and 6.5 (and also as summarised in 7.6 and 7.7), as I indicated in the Modification Group (and as reflected in the latest version of our Report) I accept that the compensation may not be at full value.

However in this respect I note:-

(a) the comments in the Holy Monasteries v Greece (at paragraphs 70 and 71) that:-

"70. An interference with peaceful enjoyment of possessions must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights [refers to Sporrong and Lonnroth v Sweden at paragraph 69]. The concern to achieve this balance is reflected in the structure of Article 1[of the First Protocol] as a whole.... In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions [refers to James v United Kingdom at paragraph 50].....

71. Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden on the applicants. In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can only be justified under Article 1[of the First Protocol] only in exceptional circumstances. Article 1[of the First Protocol] does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest" may call for less than

reimbursement of the full market value [refers to Lithgow and Others v United Kingdom at paragraph 121]."

(b) the comments in Lithgow and Others v United Kingdom (at paragraph 121) that:-

"The Court further accepts the Commission's conclusion as to the standard of compensation: the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1[of the First Protocol]. Article 1[of the First Protocol] does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value [refers to James and Others v United Kingdom at paragraph 54]."

It seems from this that (a) some form of compensation is required to be paid and (b) that if the action taken by the GBSO is not in the "public interest" (which the Court in both 'Lithgow' and 'James' limits to "measures of economic reform or measures designed to achieve greater social justice") then, indeed this could be at 'full' value (an Emergency Instruction not being an 'exceptional circumstance' of a 'public interest' of a "measures of economic reform or measures designed to achieve greater social justice").

1.4 Fourth, in regard to 6.6 the key issue is that some compensation should be made by the public authority (NGT acting as GBSO) to the Party whose property has been disproportionately interfered with. In this respect I note:-

(a) the comments of the Court of Appeal in Marcic v Thames Water Utilities Ltd (at paragraphs 117 and 118) that:-

"[117].....When a State is authorised to restrict rights or freedoms guaranteed by the Convention, the proportionality rule may well require it to ensure that these restrictions do not oblige the person concerned to bear an unreasonable burden."

118. This suggests that where an authority carries on an undertaking in the interest of the community as a whole it may have to pay compensation to individuals whose rights are infringed by that undertaking in order to achieve a fair balance between the interests of the individual and the community. "

and

(b) the comments of the European Court of Human Right in Guillemin v France (at paragraph 54) that:-

"Compensation for the loss sustained by the applicant can only constitute adequate reparation where it also takes into account the damage arising from the length of the deprivation. It must moreover be paid within a reasonable time."

I do not believe the P173 'compensation' methodology which:-

(i) restrict the items of costs that a Party may claim compensation for to a limited set, i.e. the Section G 2.1.4 claims process (this being further compounded by the fact that the Panel and the Authority have the ability to further restrict, but not expand, the costs to be recompensed); and

(ii) restricts the period for which a Party can claim cost to one acceptance term; particularly as the length of deprivation (in conforming with the public authority requirement) could, in the case for example of a nuclear power station tripped off, be circa 48 hours (not taking account of any plant damage)

can be considered to provide a fair balance between the Party and the general interest, nor can it be said to be a "genuine attempt to recompense the generator" as not all the totality of costs, or the duration that they were incurred, have been taken into account in striking such a 'fair balance'.

1.5 Fifth, I do not support the assertion in 6.7 that the "aim of the proposed rules put the generator in a neutral position as respect his costs" as all the Generator costs (or there duration) will not be included in the P173 cost calculation (see items (i) and (ii) above), so there will not be a 'cost neutral' situation.

1.6 Sixth, in regard to 7.1, the aim should be to ensure that there is no infringement of the human rights of any BSC Party who may be subject to an Emergency Instruction (under Article 1 of the First Protocol) by a proposed Modification by P173 to the BSC, not just Generators per se.

1.7 Seventh, in regard to 7.3, this too has somewhat of the appearance of a 'red herring'. All actions by a State, be they regulation or licences, or indeed Acts of Parliament (as well as a BSC Modification approved by the Authority) are subject, simplistically, to a test to see if they disproportionately interfere with someone's rights, hence the legal cases referred to in the legal note and my comments.

Anecdotally, its worth considering the comments in the 'Times' on 19th November 2004, when referring to the ban on hunting passed by Parliament a few days before, which noted that in addition to challenging this ruling in terms of the use of the Parliament Act that:-

"The second challenge will be under the Human Rights Act. This issue, first raised in the Burns Report of 2000 and then by the Joint Committee on Human Rights, covers the property rights [Article 1 of the First Protocol] of hunters, and, in particular, the absence of any compensation scheme from the legislation."

1.8 Eighth, the assertion in 7.4 appears over ambitious if consideration is not also given to the matters of 'fair balance' and 'disproportionate interference'.

1.9 Ninth; as per my comments on 7.4; 7.5 seems over ambitious if not qualified by the fair balance principle (see, for example, Holy Monasteries v Greece 1994), particularly as the interference (the Emergency Instruction) may not (and did not in the Damhead Creek incident) "appl[y] to all equally" as this paragraph states.

Indeed one might even read 7.5 to suggest that as the interference is not 'temporary' (the effect of compliance with the Emergency Instruction could incapacitate the use of the property for some time) and not applied equally to all that it therefore "can[not] be argued to be within the State's scope"(!).

1.10 Tenth, the notions combined in 7.6, 7.7 and 7.8 is that the concept of 'cost neutrality', in itself, equates to 'compensation' and is thus a fair balance between the disproportionate interference of the Generator and the general interest. I note the definition of 'compensation' in the Concise Oxford [English] Dictionary (9th Edition):-

"compensation.... 1 [a] the act of compensating. [b] the process of being compensated. 2 something, especially money, given as a recompense...."

I fail to see (even if one accepts the notion of using a curtailed list of 'cost' items - G 2.1.4) how a Generator who ends up, at the end of the process receiving £0 ('cost neutral') for the interference with the use of his property can be considered (a) to have been compensated or (b) that a fair balance has been struck between that interference and the general interest.