

EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

**PROJECT COMPLAINT MECHANISM
ELIGIBILITY ASSESSMENT REPORT**

COMPLAINT: RIVNE KYIV HIGH VOLTAGE LINE PROJECT

REQUEST NUMBER: 2012/02

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Executive Summary

The Eligibility Assessors have reviewed the Complaint by the National Ecological Centre of Ukraine dated 10th January 2012. The Complaint has been found to satisfy the eligibility criteria for a Compliance Review as set out under the Project Complaint Mechanism (PCM) Rules of Procedure (RPs). The Complaint concerns a Project that has been approved for financing by the Bank, even though the European Investment Bank (EIB) is due to fund the two components of the Project to which the Complaint relates. It concerns actions or inactions that were the responsibility of the Bank under the EBRD's 2003 Environmental Policy, which applied at the time that Bank conducted its due diligence and approved the Project. The Complaint sets out the PCM function requested and the outcomes sought. In addition, the Complainant enjoys standing to complain, either as an individual or as a representative of The National Ecological Centre of Ukraine. Finally, though the Complaint does not identify specific material environmental harm caused or likely to be caused by the alleged non-compliance with the 2003 Environmental Policy, it does highlight the harmful effects inherent to any failure adequately to assess and disclose a proposed Project, thereby satisfying the requirements of PCM RP 19(b).

The Complaint includes two eligible grounds of alleged non-compliance with the 2003 Environmental Policy, which are to be examined in the proposed Compliance Review:

- a. The alleged failure of the Bank to ensure that a comprehensive, and therefore adequate, Environmental Impact Assessment was carried out in respect of the Project, including consideration of Parts C and D; and
- b. The alleged failure of the Bank to ensure disclosure and meaningful public consultation in respect of Parts C and D.

The Eligibility Assessors therefore find the Complaint eligible for a Compliance Review.

Factual Background

1. On 10th January 2012, the Project Complaint Mechanism (PCM) Officer of the European Bank for Reconstruction and Development (EBRD) received a Complaint regarding the Rivne Kyiv High Voltage Line Project in Ukraine, which is included as Annex 1 to the present Eligibility Report. The Complaint was submitted by Mr Yuru Urbansky, the Executive Director of the National Ecological Centre of Ukraine and, in accordance with PCM RP 10, was registered by the PCM Officer on 17th January 2012. In accordance with the requirements of PCM RP 12, the PCM Officer informed all Relevant Parties of the registration of the Complaint and subsequently designated one of the PCM Experts, Dr Walter Leal, to assist in the eligibility assessment of the Complaint. Details of the registration were posted on the online PCM Register of Complaints and can be viewed at <http://www.ebrd.com/pages/project/pcm/register.shtml>.

2. The Complaint concerns two components of a project supported by a senior EBRD loan of €150 million, and co-financed by the European Investment Bank (EIB), to reinforce the electrical connections between Ukraine's eastern and southern borders. The Project was approved by the Board of EBRD on 6th November 2007 and the loan agreement with EBRD was signed on 28th February 2008. Co-financing for the Project was approved by the European Investment Bank (EIB) on 20th October 2008. The Project is intended to help Ukraine to harmonise its electricity network with the European electricity transmission system in the medium term and to optimise the use of existing electricity generating capacity, thus resulting in reduced reliance on inefficient coal and gas-fired power plants with positive consequences in terms of decreased CO₂ emissions and increased network reliability.

3. The overall Project comprises four components:

Part A: Construction of a 750kV overhead line between Rivne NPP and the new 750/330kV Kiev substation;

Part B: Construction of a diversion of the existing Khmelnytsk to Chernobyl 750kV line into the Kiev substation;

Part C: Upgrading and modernising of the 750/330kV Kyivska substation by installing

a second 750/330kV autotransformer; and

Part D: Construction of two 60 km long 330kV lines from the 750/330kV Kyivska

substation, which will enable a secure electricity supply to Ukraine's central regions.

Tendering for Parts A and B, the two main components of the Project, has been completed by Ukrenergo and contracts for constructing these two components were signed in March and April 2011.

4. An Environmental and Social Impact Assessment (ESIA) was issued in May 2007 by the Ukrainian-based Law Firm Messrs KLC. However, Parts C and D of the Project were not assessed prior to approval of the loan by the Bank with the result that information concerning these components of the Project was not disclosed for public consultation at that time. As a Category "A" Project, the Rivne Kyiv High Voltage Line Project was required to undergo a comprehensive Environmental Impact Assessment (EIA) in accordance with Paragraph 16 and Annex 1 of the 2003 Environmental Policy.

5. As acknowledged in the Complaint¹, Part C, involving the upgrading of a substation, would not be associated with any significant environmental or social impacts. Therefore, the main concern of this Eligibility Assessment focuses on Part D of the project, *i.e.* the two 60 km long 330kV lines from the 750/330kV substation Kyivska², although Part C is referred to in the assessment below for consistency.

6. The aim of this Eligibility Assessment is to determine whether or not the Complaint is eligible for a Compliance Review to examine whether the Bank has acted in breach of the 2003 Environment Policy, which was in force when the loan was approved by the Board.

¹ See NECU Complaint, 10 January 2012, at 2, which states that:

'While the installation of an (1000kVA) auto transformer could be considered as not being subject to a environmental impact assessment, and its omission in the ESIA is not particularly alarming ...'.

² The NECU Complaint, 10 January 2012, goes on to state, *ibid.*, that:

'the complete silence regarding two 60-km long 330 kV lines clearly contradicts with the requirements of the EBRD's 2003 Environmental Policy.'

Steps Taken to Conduct Eligibility Assessment

7. On 17 January 2012 the PCM Officer notified the Relevant Parties, including the Complainant, the Client and the relevant Bank departments and teams within the EBRD, including the Environmental and Sustainability Department (ESD), that the Complaint dated had been registered.

8. Following the registration of the Complaint, on 17 January 2012 the PCM Officer, appointed one of the PCM Experts, Dr Walter Leal, as the Eligibility Assessment Expert, in accordance with PCM RP 17. Thus, Dr Leal and the PCM Officer Ms Anoush Begoyan are the Eligibility Assessors for the purposes of the Eligibility Assessment of the present Complaint.

9. In line with PCM RP 13, the Complaint has been posted on the PCM Register (<http://www.ebrd.com/pages/project/pcm/register.shtml>)

10. Pursuant to PCM RP 15, the PCM Officer requested a written response to the Complaint from Bank Management. Management's Response was received on 7th February 2012 and is included as Annex 2 to this Report. The PCM Officer also requested a response to the Complaint from the Client, whose response dated 30th January 2012 is included as Annex 3 to this Report.

11. In order to clarify certain issues with the Complainant, a telephone conference call was held between the Complainant and the Eligibility Assessors on 15th March 2012.

12. During the course of this Eligibility Assessment, the Eligibility Assessors undertook an extensive review of the Complaint, the Bank Management's Response, the Client's Response, and all of the supporting documents attached thereto. They also reviewed various Project documents produced by the Bank and by the Client and held meetings on 2nd April 2012 with relevant staff from the Bank's Operations Departments and the ESD.

13. The Eligibility Assessors have determined that they have reviewed sufficient information to consider the eligibility of the Complaint and that no additional steps, such as a Project site visit or the retention of additional expertise, are necessary at this stage.

Summary of the Positions of the Relevant Parties

14. There are three Relevant Parties whose positions were reviewed during the Eligibility Assessment process: the Complainant, the Bank and the Client.

15. The position of the **Complainant** as presented in the Complaint can be summarised as follows:

- a. The Complaint principally alleges that the Project was approved by the Bank despite the fact that Part C (involving a new 1000 kVA substation transformer) and Part D (involving two 60 km long 330kV transmission lines) were not included in the environmental and social assessment. , It additionally claims that, as a result of the alleged failure to assess Parts C and D prior to Bank approval, no disclosure or public consultation was conducted for these two components of the overall Project.
- b. Under “other issues related to the project” the Complainant further alleges that the 2007 ESIA contains a number of important deficiencies ‘which have already been communicated to the Ukrainian Environmental Department’³. According to the Complaint, these issues have been raised in order ‘to emphasise the gap in the quality assessment of the project documentation’⁴. However no further evidence has been provided by the Complainant regarding these specific deficiencies and so this part of the Complaint is not considered to be relevant to this Eligibility Assessment due to the lack of any specific information.
- c. The Complaint also expresses concern over alleged cost overruns associated with the project, which it claims will result in losses to Ukrainian tax-payers and in increased electricity tariffs⁵. However, this issue does not relate to an alleged violation of a

³ NECU Complaint, 10 January 2012, at 2.

⁴ NECU Complaint, 10 January 2012, at 2.

⁵ NECU Complaint, 10 January 2012, at 2.

Relevant EBRD Policy⁶ and need not be considered further in this Eligibility Assessment⁷.

16. The **Bank's Response** to the Complaint, dated 7th February 2012, can be summarised as follows:

- a. Of the two Project components approved by the Board and listed in the loan agreement, but not included in the ESIA, Part C (upgrading of the substation at Kyivska) is not associated with any significant environmental or social impacts and would therefore did not require to be included in an ESIA or any public consultations.
- b. The ESD accepts that Part D (Construction of two 60 km long 330kV lines from the 750/330kV substation Kyivska) was identified as part of the Project during the technical due diligence in 2007, but it was not included in the scoping for the ESIA because:
 - i. Part D was not subject to Bank financing, but is intended to be funded by EIB and Ukrenergo;
 - ii. The need for Part D was only determined after the ESIA was concluded, following completion of technical due diligence;
 - iii. The design and construction of Part D were scheduled to take place several years after the completion of technical due diligence for Parts A and B; and
 - iv. Part D was made subject to all of EBRD's and EIB's environmental and social requirements, whereby the Client is required to undertake an additional ESIA of this Project component, inclusive of public consultations, once the information available so allows.

⁶ The PCM Rules of Procedure define a "Relevant EBRD Policy" for the purposes of a Compliance Review to include

'The 1996 Environmental Policy and Procedures, the 2003 EBRD Environmental Policy or the 2008 EBRD Environmental and Social Policy and Performance Requirements as may be applicable to the Project, and/or the project specific provisions of the EBRD Public Information Policy.'

⁷ The PCM Rules of Procedure define a "Compliance Review" as

'The process to determine whether the Bank has complied with the Relevant EBRD Policy in respect of a Project'.

- c. The ESD points out that the routing and design for Part D were not known at the time of the assessment of Parts A and B and, thus, were not included in the scoping of the ESIA for Parts A and B.
- d. The ESD confirmed that by the end of 2011, i.e. some 5 years later, a land corridor has been outlined for Part D and work on the detailed design for the redesigned Part D 330kV double circuit line was expected to begin in April 2012. The ESIA for this Project component, including public consultation which the Client is required to undertake prior to finalising the detailed design, will be structured to meet both EBRD's and EIB's requirements, although it is to be financed by EIB and the Client. EIB funding will not be disbursed on this component until both lenders are satisfied that their respective environmental and social requirements have been met.
- e. Management's Response also addresses issues arising from previous correspondence with the Complainant, rather than from the Complaint, concerning a route change around the Urochische Mutvytske Reserve, and construction of two other high voltage lines of 1.6km and 55km length for Ukrenegro which, though related to the Rivne Kyiv Project, are not related to Bank funding. It also addresses extraneous issues arising under the Complaint, concerning the Internal Rate of Return (IRR) of the Project and the alleged negative impact on electricity tariffs due to costs arising from the Project and the Bank loan. These issues are all outside the remit of the PCM and are not considered further in this Report⁸.
- f. The Bank also notes in its Response that it is not aware of any material harm resulting from the development and implementation of the Project. In this regard, it addresses the issues concerning the Internal Rate of Return (IRR) of the Project and the alleged negative impact on electricity tariffs due to costs arising from the Project and the Bank loan, rather than environmental harm caused, or likely to be caused, by the Project.
- g. The Bank's Response does however acknowledge a number of issues that it accepts could have been presented more clearly in relation to Project components Part C and Part D:
- i. The information provided to the EBRD Board of Directors on Project components included Part D and clarified it would be financed by EIB. However it could have

⁸ See para. 15(c) above.

made clearer that this component was a) not yet at design stage, b) would be developed a number of years later and c) explained how its potential environmental impact would be mitigated through an ESIA performed in accordance with both EBRD's and EIB's standards, which would be required through covenants in the financing agreements

- ii. Bank staff also noted that the Board document "Environmental" section 3.3 could have been clearer and laid out all the Project components that would be directly or indirectly associated with the Project, the timing of their implementation, and their respective sources of financing, as well as how the environmental issues would be assessed in due course.
 - iii. Bank staff also believe that the EBRD Project Summary Document and ESIA webpage could have been clearer in the same manner as above.
- h. The Bank proposed the following actions in their response:
- i. Update the Project Summary Document to include the substation and the 330kV line to provide clarity on the re-route:
<http://www.ebrd.com/english/pages/project/psd/2007/37598.shtml>
 - ii. Update the ESIA page with text about the forthcoming 2012 ESIA on the 330kV dual circuit line, including the indicative timetable for the Scoping Stage⁹, and when available, the relevant Stakeholder Engagement Plan, and subsequently, provide information on where the draft ESIA for the 330kV power line and other documents will be available for public review and comment.
<http://www.ebrd.com/english/pages/project/eia/37598.shtml>
 - iii. Update the EBRD Board Of Directors with a Non Technical Summary of the 330kV line, when available, and summarise the results of public consultation and the final decision in due course.
 - iv. Continue monitoring the Project and ensuring item (ii) above meets EBRD requirements.

⁹ It can be inferred from the reference to the scoping stage as an integral part of the forthcoming ESIA to be undertaken in 2012 that scoping has not yet been undertaken but is planned as part of the 2012 ESIA.

- i. A meeting with the ESD and Project Team Group on 2nd April 2012 reiterated the above points but did not provide any significant new comments.

17. The **Client's** Response to the Complaint received on 30th January 2012, and further discussed with the Eligibility Assessors on 16th March 2012¹⁰, is reproduced as Annex 3 to the present Report and may be summarised as follows:

- i. Ukrenergo contends that, despite some divergence between the scope of the Project as identified in the ESIA and in the EBRD Loan Agreement, a sub-clause in the ESIA, referring to 'The modernization of the 750 kV Kyiv substation, which requires upgrading works in order to be able to accommodate the new transmission line', implies the existence of Parts C and D as referred to in the EBRD Loan Agreement.
- ii. Ukrenergo accepts that Parts C and D had not undergone Environmental and Social Impact Assessment prior to EBRD's approval of the Project, but points out that the Loan Agreement between Ukrenergo and EIB, who would be financing these components of the Project, expressly provides for an Environmental and Social Assessment to be carried out in respect of these components..
- iii. Ukrenergo notes that 'at the time of the preparation of the 2007 ESIA report, the long term development plan of the IPS of Ukraine did not yet contain a final decision on connecting the Kyivska substation to the 330kV network That is, at that time the site for the 330kV TL diversions was not selected, therefore public hearings could not be held.' The Client points out that the case for the inclusion of Parts C and D was only put forward by EIB in 2007. Therefore, Ukrenergo insists that 'EBRD's 2003 Environment Policy requirements were not violated'.
- iv. Ukrenergo also notes that permission of the State Administration was only granted on December 30th 2011 for Ukrenergo to develop a routing for Part D, which makes it possible to begin preparation of an ESIA relating to this component of the Project.

¹⁰ In order to clarify certain elements of Ukrenergo's response to the Complaint, a telephone conference call was held between representatives of Ukrenergo and the Eligibility Assessors on 16th March 2012. The clarifications provided by Ukrenergo are included in the present Report.

- v. Ukrenegro also points out that, during meetings with representatives of EBRD and EIB, Ukrenegro repeatedly reaffirmed its commitment to carry out an ESIA for Part D and it was agreed that Ukrenegro will engage at its own expense a consultant to assist Ukrenegro in preparing the above-mentioned ESIA in compliance with the 2003 EBRD Environment Policy. Selection of this consultant and the commencement of work on the ESIA was due to take place in late-April 2012.
- vi. Ukrenegro's response questions the Complainant's allegation that the 2007 ESIA lacks a range of data on those parts that underwent assessment and points out that this issue was addressed in a letter to EBRD dated 10 January 2010.
- vii. The Client addresses comments by the Complainant in connection with an Accounting Chamber of Ukraine Report, which Ukrenegro claims 'concerns a different facility of the 750kV Kyivska SS which is being built by Ukrenegro using its own resources' and is therefore not related to Bank-funded activities.
- viii. Ukrenegro's response further notes that the company did not receive any direct inquiries from the Complainant about the Project, despite the Complainant's considerable interest in Ukrenegro's other projects also funded by the Bank.
- ix. The Client's Response also referred to the Complainant's allegations concerning the removal of a section of the 330kV Adjalyk-Usatove/MoldRES-Usatove TL outside the villages of Nerubayske and Usatove, which are not related to the present Complaint.

Assessment

18. Following registration of the Complaint, the PCM Rules of Procedure require the Eligibility Assessors to issue their Eligibility Report within 40 Business Days. Eligibility of the Complaint is determined in accordance with PCM RPs 17-29.

19. The Complainant enjoys standing to make the present Complaint under PCM RP 2, whether in his capacity as an individual or as a representative of the National Ecological Centre of Ukraine (NECU).

20. As the Project was approved by the Board of Directors of EBRD on 6 November 2007 and the loan agreement was signed on 28 February 2008, the present Complaint satisfies PCM RP 19a, which requires that it must ‘relate to a Project that has either been approved for financing by the Board or by the Bank committee which has been delegated authority to give final approval to the Bank financing of such Project’, despite the fact that Parts C and D are to be funded by EIB as co-financers of the Project.

21. Although the Complaint describes at length the harm caused, or likely to be caused, by the Project by virtue of alleged cost overruns, including the financial burden imposed on Ukrainian tax-payers and increased electricity tariffs, such potential impacts relate to allegations of non-compliance which are beyond the remit of the PCM Compliance Review process and are thus ineligible¹¹.

22. However, the Complaint also outlines the harm caused, or likely to be caused, by approval of Part D ‘without ANY assessment or public consultations’¹², pointing out that:

‘the described gaps in the project assessment ... may lead to potential harm as to environment as well as to the local population. Predicting, preventing or mitigating such harm is rendered impossible by the missing assessment of the project components’¹³

Furthermore, the Complaint elsewhere expressly quotes Paragraph 26 of the 2003 Environmental Policy, which provides that:

‘In the case of projects which have been classified as Category A and thus require an Environmental Impact Assessment, those people potentially affected will have the opportunity to express their concerns and views about such issues as project design, including location, technological choice and timing, before a financing decision is made by EBRD’¹⁴.

This provision strongly suggests that any such decision taken in the absence of meaningful consultation must be taken improperly, as it could not have taken account of the concerns and views of those potentially affected, and is thus inherently harmful. Therefore, the Complaint

¹¹ NECU Complaint, 10 January 2012, at 2. See Para. 15(c) above.

¹² NECU Complaint, 10 January 2012, at 2.

¹³ NECU Complaint, 10 January 2012, at 3.

¹⁴ NECU Complaint, 10 January 2012, at 2.

satisfies PCM RP 19(b), which requires that ‘the Complaint must ...describe the harm caused, or likely to be caused by the Project’.

23. In addition, the Complaint alludes generally to the non-material harm that might be caused in terms of the legitimacy of the Bank’s actions by any breach of the EBRD Environmental Policy:

‘More serious is non-material harm that has being caused already by violating the bank’s Environmental Policy. The demonstrated difference in what was appraised and approved from one side and what was agreed for financing from another might undermine the public trust in [the] seriousness of EBRD fundamental commitments declared by [the] Environmental Policy’¹⁵.

This statement would appear to anticipate the position already taken elsewhere by the PCM in determining, for the purposes of the eligibility requirements set out under PCM RP 19(b), that specific material harm need not be established in respect of an alleged failure to comply with certain due diligence obligations, such as those concerning public disclosure and consultation. The recent EAR prepared by the PCM in respect of the Ombla Hydropower Project Complaint concludes that:

‘specific material harm need not be established in the case of an alleged failure to undertake meaningful consultation, as such failure would inherently impact on the integrity of the relevant decision-making process, and thus on the quality and legitimacy of the decision taken. Harm can be presumed in the case of any such instance of non-compliance’¹⁶.

Therefore, this aspect of the present Complaint would appear to satisfy the requirements of PCM RP 19(b).

24. PCM RP 20(a) establishes that the Complaint should, if possible, include ‘an indication of which PCM function the Complainant expects the PCM to use to address the issues raised in the Complaint’.The present Complaint expressly seeks a Compliance Review of the Rivne-Kyiv High Voltage Line Project¹⁷.

¹⁵ NECU Complaint, 10 January 2012, at 3.

¹⁶ Eligibility Assessment Report re the Ombla Hydropower Project, (Request No. 2011/06), para. 28. See further Ombla HPP EAR, para. 35.

¹⁷ NECU Complaint, 10 January 2012, at 3.

25. Under PCM RP 20(b), for the purposes of eligibility, a Complaint ‘should also include, if possible ... an indication of the outcome(s) sought as a result of use of the PCM process’. The Complaint expresses the Complainant’s desired outcomes as follows:

‘By seeking a compliance review of the Rivne-Kyiv High Voltage Line Project we are expecting a proper investigation of the factors that led to the deviation from the bank’s policies. The outcomes of such an investigation should help not only bringing the project into compliance with the policy as soon as possible and before it leads to any material harm, but also to prevent repeat of such flaws in the future’¹⁸.

26. The Complainant has supplied ‘copies of all correspondence, notes, or other materials related to its communications with the Bank and or other Relevant Parties’ in accordance with PCM RP 20(c).

27. In the case of a Compliance Review, PCM RP 23 requires the Eligibility Assessors to consider, *inter alia*, whether the Complaint relates to ‘actions or inactions that are the responsibility of the Bank’¹⁹. Included among the issues of alleged non-compliance listed in the present Complaint are:

- a. A failure to carry out a comprehensive, and therefore adequate, Environmental Impact Assessment, including consideration of Parts C and D²⁰; and
- b. A resulting failure to disclosure and conduct meaningful public consultation in respect of Parts C and D²¹.

28. Each of the requirements involved above constitute key elements of the EBRD’s project appraisal process, which the EBRD’s 2003 Environmental Policy regarded as falling within the Bank’s area of responsibility. For example, in relation to the requirement to carry out Environmental Impacts Assessment, the 2003 Environmental Policy provides that

¹⁸ NECU Complaint, 10 January 2012,, at 3.

¹⁹ PCM RP 23(a).

²⁰ NECU Complaint, 10 January 2012, at 1.

²¹ NECU Complaint, 10 January 2012, at 1.

*'In order to comply with its environmental mandate, policy objectives and general principles, the EBRD will pursue four strategic directions ...[including] ...integrating environmental considerations into the project cycle'*²².

Further, the Environmental Policy elaborates on the objectives of the environmental appraisal process generally, stating that:

*'EBRD-financed projects undergo environmental appraisals both to help the EBRD decide if an activity should be financed and, if so, the way in which environmental issues should be incorporated in project financing, planning and implementation'*²³

Paragraph 16 and Annex 1 of EBRD's 2003 Environmental Policy provide that, in the case of Category A projects such as the present Rivne Kyiv Project, environmental appraisal is based on an Environmental Impact Assessment (EIA). Thus, EBRD has responsibility under the 2003 Environmental Policy for ensuring that Category A projects are subjected to an adequate EIA.

29. In relation to the requirement to ensure disclosure and public consultation, the Complaint quotes Paragraph 26 of the EBRD's 2003 Environmental Policy in its entirety, which provides, *inter alia*, that:

*'The EBRD believes that meaningful public consultation is a way of improving the quality of projects. The EBRD will foster the principles of public consultation within its region of operations ... sponsors will have to follow the EBRD's own public consultation requirements, which are set out in Annex 2. The EBRD's Board of Directors will take into account the comments and opinions expressed by consultees, and the way these issues are being addressed by sponsors, when considering whether to approve investment by the EBRD in a project'*²⁴.

Therefore, EBRD undoubtedly has a role in ensuring that adequate disclosure and public consultation take place.

²² 2003 EP, para. 13 (emphasis added). Of course, EIA is one of the most well established tools for 'integrating environmental considerations into the project cycle'.

²³ 2003 EP, para. 14 (emphasis added).

²⁴ 2003 EP, para. 16 (emphasis added).

30. PCM RP 23(b) requires that, in determining eligibility, the Eligibility Assessors also consider whether ‘the Complaint relates to ... more than a minor technical violation of a Relevant EBRD Policy unless such technical violation is alleged to have caused harm’²⁵.

The present Complaint could not fall within this *de minimis* exception as it alleges serious breach of key provisions of the EBRD’s 2003 Environmental Policy²⁶ and raises the possibility of serious environmental harm resulting from the Project²⁷.

31. The Complainant details those provisions of the EBRD’s 2003 Environmental Policy which it considers to have been contravened. In relation to the alleged inadequacy of the EIA conducted for the Project, it alludes to Paragraph 21 of Annex 1 to the Policy, which includes ‘[c]onstruction of overhead electrical power lines’ among Category A projects requiring an EIA²⁸. This reference in turn implies the central relevance of Paragraph 16 of the 2003 Environmental Policy²⁹. Indeed, the express reference in the Complaint to the fact that the Rivne Kyiv Project ‘was screened as a category A project and therefore was subject to a *comprehensive* Environmental Impact Assessment’³⁰, suggests that the inadequacy alleged relates to a failure to consider the cumulative impacts of all components of the Project in the ESIA³¹. The Complaint states elsewhere that, the complete silence [in the ESIA] regarding two 60-km long 330 kV lines clearly contradicts with the requirements of the EBRD’s 2003 Environmental Policy’³². In relation to the alleged failure to disclose Parts C and D and to undertake public consultation in respect of these Project components, the Complaint reproduces Paragraph 26 of the 2003 Environmental Policy in full, the requirements of which

²⁵ In other words, it remains open to the Eligibility Assessors to decline to find a Complaint eligible where the non-compliance alleged, though relating to a Relevant EBRD Policy, involves a very minimal (*de minimis*) infraction, made in good faith (*bona fides*), which has not resulted and is unlikely to result in any appreciable harm.

²⁶ Including para. 16 and Annex 1, relating to the conduct of EIA, and para. 26, relating to information disclosure and public consultation.

²⁷ NECU Complaint, 10 January 2012, at 3. See paras. 22 and 23 above.

²⁸ NECU Complaint, 10 January 2012, at 2.

²⁹ 2003 EP, para. 16 provides, *inter alia*, that:

‘An Environmental Impact Assessment (EIA) is therefore required [*re* Category A projects] to identify and assess the future environmental impacts associated with the proposed project, identify potential environmental improvement opportunities, and recommend any measures needed to prevent, minimise and mitigate adverse impacts. An indicative list of Category A projects is presented in Annex 1.’

³⁰ NECU Complaint, 10 January 2012, at 1 (emphasis added).

³¹ Though the 2003 Environmental Policy does not expressly require that EIA conducted in respect of Category A projects should consider the cumulative impacts of such projects, according to para. 21 of the Policy:

‘The EBRD requires that projects that it finances meet good international environmental practice ... [including] ... EU environmental standards, insofar as these can be applied to a specific project.’

Since amendment of the EU EIA Directive in 1997, EU standards for the conduct of EIA require consideration of cumulative impacts (Directive 85/337/EEC, as amended by Directives 97/11/EC).

³² NECU Complaint, 10 January 2012, at 2.

it alleges have been breached³³. Therefore, the requirements of PCM RP 20(d) are deemed to have been met.

32. Pursuant to PCM RP 22, the Eligibility Assessors have established that the Complainant has made good faith efforts to address the issues raised in the Complaint, in particular, by previously raising the compliance issues involved with Bank Management.

33. PCM RP 24 sets out a list of factors, any of which if found to apply would render a Complaint ineligible. In the Complaint, there is nothing to suggest that it ‘was filed fraudulently or for a frivolous or malicious purpose’³⁴, nor that ‘its primary purpose is to seek competitive advantage through the disclosure of information or through delaying the Project’³⁵. Nowhere does the Complaint raise allegations of fraud, relate to procurement matters³⁶, relate to ‘Article 1 of the Agreement Establishing the Bank, the Portfolio Ratio Policy or any other specified policy’³⁷, or relate to ‘the adequacy or suitability of EBRD policies’³⁸. Though there is nothing to suggest that the issues of non-compliance alleged in the present Complaint have been dealt with by the accountability mechanism of any parallel co-financing institution, such a review by another accountability mechanism would not in any case disqualify a Complaint seeking a Compliance Review from being processed by the PCM³⁹. Therefore, the Complaint does not fail to be eligible on any of the grounds listed in PCM RP 24.

Conclusion

34. On the basis of the findings set out above, the present Complaint satisfies all of the relevant and applicable eligibility criteria set out under PCM RPs 17, 19, 20, 23 and 24 and is, therefore, determined by the Eligibility Assessors to be **eligible** for a **Compliance Review**.

³³ NECU Complaint, 10 January 2012, at 2.

³⁴ PCM RP 24(a).

³⁵ PCM RP 24(b).

³⁶ PCM RP 24(c).

³⁷ PCM RP 24(d).

³⁸ PCM RP 24(e).

³⁹ See PCM RP 24(f).

35. Specifically, two key issues of alleged non-compliance set out in the present Complaint are deemed to be eligible for examination in the proposed Compliance Review:

- a. The alleged failure of the Bank to ensure that a comprehensive, and therefore adequate, Environmental Impact Assessment, including consideration of Parts C and D, was carried out in respect of the Project; and
- b. The alleged failure of the Bank to ensure to ensure disclosure and meaningful public consultation in respect of Parts C and D.

COMPLAINT: Rivne Kyiv High Voltage Power Line Project, Ukraine

REQUEST NUMBER: 2012/02

Terms of Reference for the Compliance Review

1. The Compliance Review Expert shall conduct the Compliance Review in a neutral, independent and impartial manner and will be guided by principles of objectivity and fairness giving consideration to, *inter alia*, the rights and obligations of the Relevant Parties, the general circumstances surrounding the Complaint and due respect for EBRD staff.

Scope

2. These Terms of Reference apply to any inquiry, action or review process undertaken as part of the Compliance Review, with a view to determining, as per PCM RP 36 if (and if so, how and why) any EBRD action, or failure to act, in respect of the Project has resulted in non-compliance with a relevant EBRD Policy, in this case the EBRD's 2003 Environmental Policy and, if in the affirmative, to recommend remedial changes in accordance with PCM RP 40.
3. In conducting the Compliance Review, the Compliance Review Expert will examine any relevant documents and consult with the Relevant Parties. The Compliance Review Expert may also carry out site visits, and employ such other methods as the Expert may deem appropriate, as per PCM RP 37.
4. Upon completion of the Compliance Review, the Compliance Review Expert will prepare a Compliance Review Report setting out his findings. The Compliance Review Report will include a summary of the facts and allegations in the Complaint, and the steps taken to conduct the Compliance Review, as per PCM RP 38.
5. Such processes shall be conducted in accordance with these Terms of Reference subject to modifications which the Compliance Review Expert and the PCM Officer may, at any time, expressly agree upon, except modification that may prejudice the interests of any Relevant Party or is inconsistent with accepted review practice.
6. The Compliance Review shall confine itself to the Compliance Review issues raised in the present Complaint⁴⁰. It shall not go beyond the parameters of the Complaint to address other issues.

Time Frame

7. The Compliance Review will commence when the Eligibility Assessment Report containing these Terms of Reference is publicly released and posted on the PCM website.
8. Every effort shall be made to ensure that the Compliance Review is conducted as expeditiously as circumstances permit and it is intended that it shall be concluded

⁴⁰ Request No. 2012/02, Rivne Kyiv High Voltage Line Project, Ukraine. See Annex I to this report.

within sixty (60) Business Days of its commencement, within which period a draft Compliance Review Report will be prepared and sent to the Bank's Management, pursuant to PCM RP 41. However, this time period may be extended by the PCM Officer for as long as is strictly necessary to ensure full and proper implementation of the Compliance Review. Any such extension shall be promptly notified to all Relevant Parties.

Procedure: Identification of Core Compliance Issues

9. As an initial step, the Compliance Review Expert will determine the precise requirements, in the specific context of the present Project, of each of the provisions of the 2003 Environmental Policy, in respect of which non-compliance is alleged in each of the grounds of complaint deemed eligible in the this Eligibility Assessment Report. Such provisions notably include Paragraphs 16, 21 and 26 of the 2003 Environmental Policy.
10. The Compliance Review process will examine the core questions of compliance raised in the Complaint with a view to identifying the central elements of the Compliance Review, including (without limitation):
 - a. Whether EBRD has failed to ensure that an adequate Environmental Impact Assessment was carried out in respect of the Project in accordance with the requirements of the 2003 Environmental Policy?
 - b. Whether EBRD has failed to ensure meaningful disclosure and public consultation in respect of the Project in accordance with the requirements of the 2003 Environmental Policy?
11. Notwithstanding Paragraph 11 above, the Compliance Review Expert retains the authority to identify and frame the precise compliance questions to be addressed in the course of the Compliance review. However, any elements which are beyond the scope of the Complaint will be excluded.

Procedure: Conduct of the Review

12. The Compliance Review Expert may conduct the Compliance Review process in such a manner as s/he considers appropriate, taking into account the Rules of Procedure of the PCM, the concerns expressed by the Complainant as set out in the Complaint, and the general circumstances of the Complaint. Specifically, the Compliance Review Expert may:
 - a. Review the Complaint to identify the compliance issues to be included in the Compliance Review, specifically whether EBRD complied with the elements of the 2003 Environment Policy in respect of which the Complaint alleges non-compliance;
 - b. Review all documentation, including internal memos and e-mail exchanges relevant to the Complaint;
 - c. Consult extensively with EBRD staff involved in the Project including personnel from the Bank's Environment and Sustainability Department, the Project Team Group, and the relevant EBRD Resident Office;

- d. Solicit additional oral or written information from, or hold meetings with, the Complainant, any Relevant Party and any other party, such as the competent national authorities responsible for environmental protection and for the permitting of such projects;
- e. Conduct a visit to the Project site to ascertain facts accompanied by such officials of the Bank, the Complainant or his representatives or the Client, or other persons, as he may consider necessary and appropriate;
- f. Request the PCM Officer to retain additional expertise if needed;
- g. Identify any appropriate remedial changes in accordance with PCM, RP 40, subject to consideration of any restrictions or arrangements already committed to by the Bank or any other Relevant Party in existing Project-related agreements;
- h. Take any other action as may be required to complete the Compliance Review within the required time-frame.

Procedure: General

- 13. The Compliance Review Expert shall enjoy, subject to the provision of reasonable notice, full and unrestricted access to relevant Bank staff and files, and Bank Staff shall be required to cooperate fully with the Compliance Review Expert in carrying out the Compliance Review.
- 14. Access to, and use and disclosure of, any information gathered by the Compliance Review Expert during the Compliance Review process shall be subject to the Bank's Public Information Policy and any other applicable requirements to maintain the confidentiality of sensitive commercial information. The Compliance Review Expert may not release a document, or information based thereon, which has been provided on a confidential basis without the express written consent of the party who has provided such document.
- 15. The Compliance Review Expert shall take care to minimise disruption to the daily operations of all parties involved in the Compliance Review process, including relevant Bank staff.
- 16. Generally, Bank staff shall cooperate in good faith with the Compliance Review Expert to advance the Compliance Review as expeditiously as possible and, in particular, shall endeavour to comply with requests from the Compliance Review Expert relating to submission of written materials, provision of information and attendance at meetings. It is expected that all Relevant Parties will make best efforts to cooperate with the Compliance Review Expert, who will report to the PCM Officer where the actions or lack of action by any Relevant Party hinders or delays the conduct of the Compliance Review.

Compliance Review Report

17. In accordance with PCM, RP 38, the Compliance Review Report shall include a summary of the facts and of the allegations in the Complaint, and the steps taken to conduct the Compliance Review.
18. The recommendations and findings of the Compliance Review Report shall be based only on the facts relevant to the present Complaint and shall be strictly impartial.
19. Prior to submitting the Compliance Review Report to the Relevant Parties and to the Board in accordance with PCM RP 39, or sending the draft Compliance Review Report to the Bank's Management in accordance with PCM RP 41, the Compliance Review Expert shall ensure that all factual information relating to the Relevant Parties is verified with them.

Exclusion of Liability

20. Without prejudice to the privileges and immunities enjoyed by PCM Experts, the Compliance Review Expert shall not be liable to any party for any act or omission in connection with any Compliance Review activities undertaken pursuant to these Terms of Reference.

Annex 1 – Complaint



NATIONAL ECOLOGICAL CENTRE OF UKRAINE

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necu@necu.org.ua | www.necu.org.ua



№ 125-2/1

10.01.2012

Project Complaint Mechanism
Attn: Ms. Anoush Begoyan
European Bank for Reconstruction and Development
One Exchange Square
London EC2A 2JN
United Kingdom
Fax: +44 20 7338 7633
Email: pcm@ebrd.com

Subject: Complaint on Rivne Kyiv High Voltage Line Project seeking project compliance review

Country: Ukraine
Project number: 37598
Business sector: Power and energy
Public/Private: Public

3rd January, 2012

Dear Ms. Begoyan,

The public sector Rivne Kyiv High Voltage Line Project¹ was approved for financing by the EBRD in 2007; the loan agreement between the EBRD and Ukraine was signed on 28th February 2008 and ratified by the Parliament of Ukraine on 29th October 2008. The co-financing of the project was approved by the European Investment Bank (EIB) and signed on 20th October 2008 and ratified by Ukrainian Parliament on 1st April 2009.

According to the EBRD's 2003 Environmental Policy that was effective at the time of project appraisal and approval it was screened as a Category A project and therefore was subject to a comprehensive Environmental Impact Assessment, disclosure and public consultations. The full text of the ESIA² was published by the project sponsor Ukrenergo, a state-owned energy company, distributed to interested NGOs on CD and also posted on EBRD's web site where it is still accessible (except the detailed maps of the project sites).

Section 2.2 of the ESIA defines the scope of the loan application and study boundaries³:

"The scope of the present ESIA comprises the following developments:

- *The 750 kV Rivne NPP – Kyiv transmission line, of total length 353km.*
- *The 135km long diversion of 750 kV transmission line Khmelnytsk NPP – Chernobyl to Kyiv substation.*
- *Additional projects will be undertaken to achieve the project objectives, but are outside the scope of this ESIA:*
- *The modernization of the 750 kV Kyiv substation, which requires upgrading works in order to be able to accommodate the new transmission line*
- *Three maintenance stations to be built along the proposed transmission line route"*

However, the loan agreement between EBRD and Ukraine includes other significant parts of the project that were not assessed. According to the Annex 1, paragraph 2 of the Loan Agreement ("Construction of the Rivne – Kyiv 750 kV Transmission Line" Project) between Ukraine and European Bank for Reconstruction and Development⁴:

¹ <http://www.ebrd.com/pages/project/psd/2007/37598.shtml>

² "The ESIA has been prepared for meeting environmental requirements of the European Bank for Reconstruction and Development (EBRD) and European Investment Bank (EIB) that are considering the opportunity to finance the Project. The ESIA report is the main document with the help of which the EBRD and EIB will implement environmental assessment of the Project" – page 1 of the report. <http://www.ebrd.com/pages/project/eia/37598.pdf>

³ ESIA report, page 28. <http://www.ebrd.com/pages/project/eia/37598.pdf>

⁴ http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=985_014

"The project consists of the parts listed below that can be further changed according to agreements between the Bank and Borrower:

- Part A that is called "Construction of 750 kV overhead transmission line between Rivne NPP and new 750/330 kV substation Kyivska";*
- Part B that is called "Construction of diversion from the existing 750 kV overhead transmission line Khmelnytsky NPP – Chornobyl NPP to 750/330 kV substation Kyivska";*
- Part C that is called "Upgrade and modernising of 750/330 kV substation Kyivska by installing the second 750/330 kV auto transformer;*
- Part D that is called "Construction of two 60-km long 330 kV lines from the 750/330 kV substation Kyivska aimed for securing electricity supply of Borrower's central regions"⁵.*

Thus two significant parts of the project (Part C and Part D⁶) were not assessed prior to the project approval and relevant information was not disclosed to the public for consultations.

We see such an approach as a serious violation of the Bank's Environmental Policy. While the installation of an (1000 kVA) auto transformer could be considered as not being subject to environmental impact assessment, and its omission in the ESIA is not particularly alarming (although raising concerns on the overall quality of the documentation), the complete silence regarding two 60-km long 330 kV lines clearly contradicts with the requirements of the EBRD's 2003 Environmental Policy.

Paragraph 21 of Annex 1 to the 2003 Environmental Policy lists "Construction of overhead electrical power lines" as category A projects. The same policy (paragraph 26) says: *"The EBRD believes that meaningful public consultation is a way of improving the quality of projects. The EBRD will foster the principles of public consultation within its region of operations. In the case of projects which have been classified as Category A and thus require an Environmental Impact Assessment, those people potentially affected will have the opportunity to express their concerns and views about issues such as project design, including location, technological choice and timing, before a financing decision is made by the EBRD. At a minimum, sponsors must ensure that national requirements for public consultation are met. In addition, sponsors will have to follow the EBRD's own public consultation requirements, which are set out in Annex 2. The EBRD's Board of Directors will take into account the comments and opinions expressed by consultees, and the way these issues are being addressed by sponsors, when considering whether to approve investment by the EBRD in a project."*

Unfortunately this has not happened in the given case: the financing of two 60-km long 330 kV lines was approved by the EBRD without ANY assessment or public consultations.

Other issues related to the project: As it was discovered recently the ESIA even for the assessed parts of the project contains number of important deficiencies. We have already communicated our findings to the Environmental Department (Annex 1) and are waiting for measures that will address them and hopefully will solve the problem. However by mentioning these we would like to emphasise the gap in quality assessment of the project documentation that was submitted by the project sponsor.

Description of the harm caused, or likely to be caused, by the Project: Despite being projected in 2007-2008 the physical project implementation on-site has not started yet. Therefore no material harm was so far caused, however in 2011 the Accounting Chamber of Ukraine in its report "On the Results of the Audit of the Efficiency of Use of State Budget Funds Provided for the Ministry of Energy and Coal Industry of Ukraine for the Construction of Transmission Lines"⁷ indicates that the project Rivne – Kyiv TL has been poorly developed and that this has led to an almost doubling of the initial cost (from UAH 739 396 000 to UAH 1 219 370 000), the deadline has been shifted several times, but the works have not even started.

The Project is already causing direct financial harm to Ukrainian tax payers. According to the finding of Accounting Chamber in 2008-20108 the EBRD loan has **not been directly used for the construction of the project**, but only for bank charges, the fee for opening of the account and the fee for the consulting company. At the same time debt service payments already constitute EURO 1,624,500. All these expenses are included into the tariff on electricity paid by the citizens of Ukraine. The Accounting Chamber concludes that it is the unlawful actions of Ukrenergo that have led to the cost increases of the project and that they will cause the ineffective use of public funds in the future.

⁵ Unofficial translation from the Ukrainian language.

⁶ The estimated in 2007 cost of Part D was Euro 25 million, out of Euro 300 million total EBRD+EIB project cost.

⁷ www.ac-rada.gov.ua/img/files/Bulet_energet.pdf (p.18)

⁸ www.ac-rada.gov.ua/img/files/Bulet_energet.pdf (p.26)

Among Ukrenergo's unlawful actions, it has used violent attempts to resolve the conflict that it itself created with the local public during the implementation of another EBRD financed project by diverting the routing of the transmission lines in contravention of the previously approved project. In the case of the Rivne – Kyiv project the described gaps in the project assessment combined with the sponsor's far from ideal performance so far and its frivolous approach to project implementation may lead to potential harm as to environment as well as to the local population. Predicting, preventing or mitigating such harm is rendered impossible by the missing assessment of the project components.

More serious is non-material harm that has been caused already by violating the bank's Environmental Policy. The demonstrated difference in what was appraised and approved from one side and what was agreed for financing from another might undermine the public trust in seriousness of EBRD fundamental commitments declared by Environmental Policy.

Good faith efforts to resolve the issues. NECU has approached the EBRD and co-financier of the project, EIB, several times regarding the issue of the missing parts of the ESIA and other related problems:

May 2010: A meeting was held with EBRD staff at the EBRD AGM in Zagreb where NECU expressed its concerns regarding the ESIA.

September 13, 2010: A letter was sent to Mr. Alistair Clark, Corporate Director, Environmental and Sustainability Department of EBRD, regarding deficiencies of the ESIA and other project related problems. (Annex 1)

October 11, 2010: A letter regarding the problematic issues of the South Ukraine Transmission Project was sent to Mr. Thomas Mirow and the Board of Directors. Our concerns regarding this project were illustrated with examples of underperformance of Ukrenergo in previous projects financed by the EBRD - in particular we pointed to the fact that part of the Rivne - Kyiv project EIA is still missing. (Annex 2)

By seeking compliance review of the Rivne - Kyiv High Voltage Line Project we are expecting a proper investigation of the factors that led to the deviation from the bank's policies. The outcomes of such an investigation should help not only bringing the project into compliance with the policy as soon as possible and before it leads to any material harm, but also to prevent repeat of such flaws in the future.

Sincerely,



Yury Urbansky

Executive Director of the National Ecological Centre of Ukraine

Annex 2 – Bank’s response

DOCUMENT OF THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

Project	37598 Ukraine: Rivne Kyiv High Voltage Line Project
Project Team	Operation Leader: Olga Yeriomina Technical: Olivier Tricca OGC: Joel Baranowski ESD: Robert Adamczyk, Dariusz Prasek
Date of issue to ExCom	31 January 2012
Date of approval by ExCom	6 February 2012
To: PCM Officer	Anoush Begoyan
From: Director, ESD Director, PEU	Alistair Clark Nandita Parshad
Date of issue to PCM Officer	7 February 2012

A request was received on the 10 January 2012 from the National Ecological Centre of Ukraine requesting a Compliance Review of the Rivne Kyiv High Voltage Line Project under the EBRD Project Complaint Mechanism (PCM). This complaint was officially registered by the PCM Officer on 17th January 2012 and this document is the ‘Bank Management Response’ to the Complaint as outlined in *PCM: Rules of Procedure* (Clause 15), which is due under such Rules by Tuesday 7 February to the PCM Officer.

The project was approved by the EBRD Board of Directors on 6 November 2007 and is subject to the EBRD 2003 Environmental Policy. The letter of Complaint raises a number of points regarding compliance with the 2003 Environmental Policy. Section 1 of this ‘Bank Management Response’ describes the project and its related components, the setting and the subsequent sections respond to the particular points made in the Complaint.

The Complaint focuses on the lack of information in the Environmental and Social Impact Assessment (ESIA) on two project components listed in the Board document, a substation and two 60km 330kV power lines. It requests a Compliance Review to determine if the Bank’s Environmental Policy requirements were met. The upgrade of the substation, as acknowledged in the Complaint⁴¹, would not be associated with any significant environmental or social impacts and would not require an ESIA, so the main concern focuses on the 330kV lines.

⁴¹ Letter from NECU dated 10.01.2012.. “while the installation of an (1000 kVA) auto transformer could be considered as not being subject to environmental impact assessment”.

Summary of Management Response

Bank Management believes that the Project was structured to comply with the requirements of the 2003 Environmental Policy.

The Project was categorised “A” under the 2003 Environmental Policy, and an ESIA and public consultation were undertaken. The Project Part D, the original concept and now as Redesigned Part D, was identified as part of the Project during the Technical Due Diligence in 2007 but not included in the ESIA as its design was not available at that stage, but planned for some years later, nor was it to be financed directly by EBRD. Nevertheless, the Lenders required Ukrenergo to undertake a separate ESIA and public consultation in accordance with the EBRD and EIB respective requirements for Part D at the appropriate time when detailed information on the line route was available. These requirements went into the Project Implementation Plan, a document which must at all times (as updated) be to the Lenders’ satisfaction under the financing agreements. The ESIA of Part D will be undertaken in 2012 with the assistance of the EBRD, as required.

Given below is a summary of the Project, the Complaint and management response and suggested action plan.

1. The Rivne-Kyiv High Voltage Power Line Project

The Ukrainian electricity transmission system is designed around a network of High Voltage (or HV) lines operating at 750 kV. This HV network interconnects the main generating plants. It feeds the lower voltage transmission system that operates at 330 kV and supplies the whole country with electricity. The closure of the Chernobyl NPP has created an unbalanced flow in the present HV network which results in higher transmission and distribution losses in Western and Central areas of Ukraine, with potentially serious consequences for the electricity supply system in Ukraine and eventually for the quality and costs of services to the end-users. In addition, the operation and maintenance of Chernobyl substation, located in contaminated area, leads to serious health and safety issues for Ukrenergo’s staff and its subcontractors. In 2005, Ukrenergo defined a comprehensive set of investment measures for the 750 kV and the 330kV network to adapt its operation to this environment, and move towards Western European standards. These measures comprised the following items that were determined as the most urgent (the Project) during the Technical Due Diligence conducted by the EBRD in 2007:

The Project Parts –

- A.** Construction of a 750 kV overhead line between Rivne NPP and the new 750/330 kV Kiev substation,
- B.** Construction of a diversion of the existing Khmelnytsk to Chernobyl 750 kV line into the Kiev substation,
- C.** Expansion work at the Kiev 750/330 kV substation by erecting a new 1000MVA transformer,
- D.** Construction of two 60 km, 330kV lines from the Kyiv substation to feed the central regions of Ukraine and diverting the existing Chernobyl NPP-Sievernaya line towards the Kiev substation. This Project Part D has since been redesigned to be one, double circuit line, of slightly less than 70km from Kiev Substation (Redesigned D). The preliminary

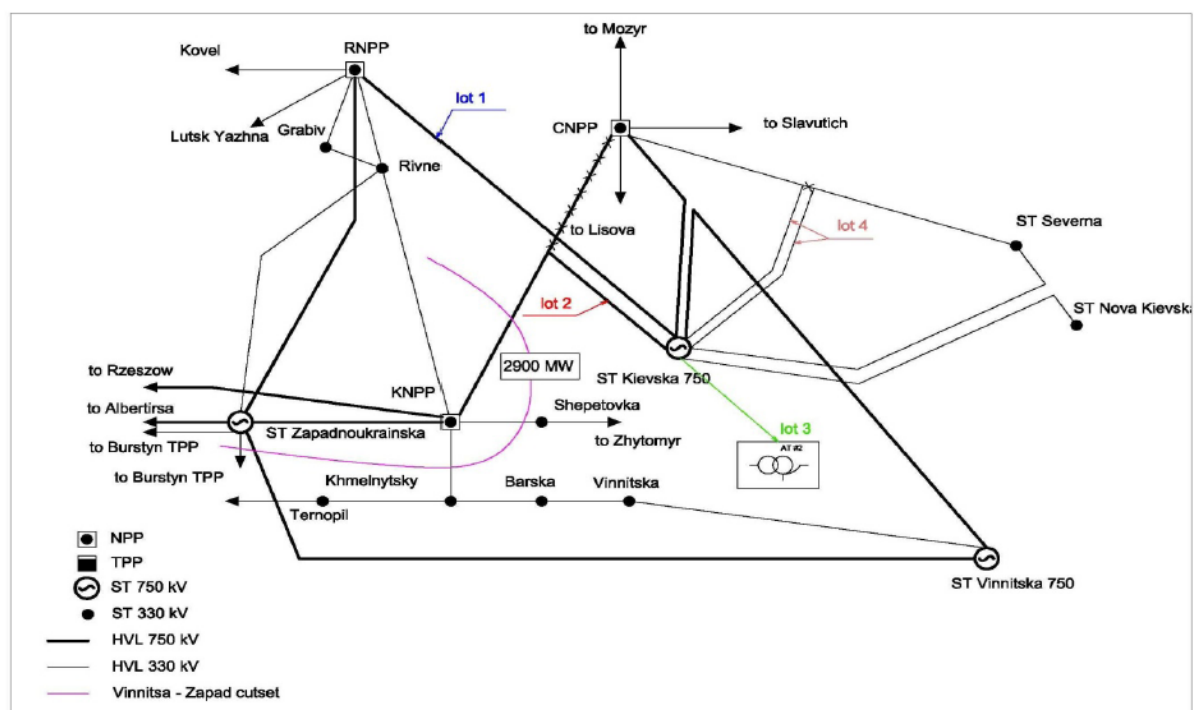
corridor for this new double circuit 330 kV was developed by Ukrenergo in Q4 2011. To reduce the overall environmental and social impact, the design has been changed to double circuit line and the proposed routing of the line will be partially constructed along an existing 750kV line. An ESIA and associated public consultation will be undertaken in 2012. An outline of the new corridor is presented in an attached map in Figure 1 and a more detailed map in Annex 1.

Ukrenergo, the European Investment Bank (EIB) and EBRD are co-financing the construction of Parts A through C above. Uses of financing for such purposes are in line with the EBRD Board document and subsequent Project Implementation Plans submitted by Ukrenergo to the Lenders.

Ukrenergo and EIB committed to finance the construction of the original Part D and will finance the Redesigned D in due course.

To understand the complaint and the responses, it is critical to clarify the various lines and the targeted sources of financing for each. Given below is a map showing the 750 kV line, the Kiev substation and the 330 kV projects. Also below is a summary of the various other lines under consideration. An additional topographical map is enclosed in the Appendix showing the 330 kV lines and their interaction with the 750 kV line.

Figure 1 Outline of 330kV High Voltage line diversions to 750 kV Kiev substation



2. Complaint Concerns (*italics*) and Bank Management Response (plain text)

I. The Loan Agreement includes significant parts of the project that were not assessed or disclosed to the public for consultations:

Part C “upgrading and modernising 750/330kV substation Kyivska by installing a second 750/330kV auto transformer” (Management note: this refers to the 1000MVA transformer in Project Part C above), and

Part D “construction of two 60-km long 330kV lines from the 750/330kV substation Kyivska to the central regions.”

Management Response

Of the two components listed in the Board document that were not covered by the ESIA, Part C, upgrading the substation is not associated with any significant environmental or social impacts and would not require an ESIA, so the main concern is with Part D, the two 60-km lines (now Redesigned D). However, we should explain that a) this component was not subject to Bank financing, b) the need for Part D was only determined after the ESIA was concluded, following completion of technical due diligence; c) design and construction were scheduled to take place several years in the future and d) in order to meet EBRD policy it was made subject to all of the EBRD’s and EIB’s environmental and social requirements in due course once the available information would be sufficient to allow for an ESIA.

At the time of the assessment of Parts A and B in 2007, the routing and design of the 330kV lines (Part D) were not known and therefore the lines were not included in the ESIA scoping. Now, at the end of 2011, some five years later, a land corridor has been outlined. And the detailed design for the Redesigned D 330kV double circuit line will begin in April 2012 and is scheduled for completion by the end of 2012. However, prior to finalizing the detailed design, Ukrenergo is required to undertake an ESIA of this project, inclusive of public consultations, which will be structured to meet the EBRD’s and EIB’s requirements,⁴² including National and EU EIA requirements and associated public consultation. An independent environmental and social consultant is to be retained by Ukrenergo in Q2 2012 to assist. The EBRD will assist in this process, as required to ensure its policies are adhered to. However, the Bank will not finance this component. The Bank’s web site will be updated as the Project is developed further.

II. Previous correspondence with National Ecological Centre of Ukraine:

The Bank and the National Ecological Centre of Ukraine have exchanged correspondence with respect to the Project over the past two years. On review, we note that our responses focused on the identified route change around the Urochische Mutvytske Reserve, which is subject to direct Bank financing. We did not address the comments on the 330 kV lines (Part D), as the Bank was not financing these, and therefore they were not part of the Project, as defined by the Environmental Policy 2003.

⁴² NB: Although the 330kV line is to be financed by EIB, it must meet both Lenders’ requirements for environmental and social impact assessment, including public consultation, and EIB funding will not be disbursed on this component until the Lenders are satisfied that the requirements are met.

We will now summarise the Bank's views on the other points mentioned in the correspondence attached to the Complaint. As before, wording in italics is from, or a summary of the Complaint and is followed by the Bank Management Response.

III. Impact on Urochische Mutvytske Reserve

[The 750kV] Project will impact the Urochische Mutvytske landscape reserve of national importance. The decision to route the line through this protected natural area, in our view, amounts to a significant change from the approved project and as such requires an additional environmental impact assessment in line with the EBRD's Environmental and Social Policy. In particular, we would like to see an alternative routing solution found for projected lines within the Makarivsky region of the Kyiv oblast in order that they be safe for the local people and for the nature of this region.

Management Response

The line has been subject to a rerouting since it was first proposed. The need for re-routing arose once detailed designs had been developed and these were presented to the local authorities for final approval. Due to local concerns on the possible impact of the 750 kV line on current and planned residential areas, Ukrenergo decided to re-route the line and developed a number of alternatives, all of which were still in the vicinity of the Urochische Mutvyske Reserve. The Bank and the independent Lender Engineer did not agree to the initial solution as suggested by Ukrenergo. Following a review of a number of options (including development of high towers to span the reserve), a final route was selected in December 2011. The Lenders' Independent Engineer provided a positive opinion on this route taking into consideration technical, environmental and social issues. Subsequently, Ukrenergo has made public disclosure of the suggested route and is currently holding public consultation. The public meeting is scheduled on the 31 January 2012 at the local Nizhylovytska village council office. The rerouting information can be found at the web-sites of NPC "Ukrenergo" (<http://www.ukrenergo.energy.gov.ua>) and Makarivska district state administration (<http://adm-makariv.gov.ua>), as well as at the premises of Nizhylovytska village council.

In the Bank's opinion, the route changes around the Urochische Mutvyske Reserve do not constitute a material change to the overall ESIA. This opinion is shared by the Lenders' Independent Engineer (letter dated 20 December 2011). Such realignments of a HV line are expected on large transmission line projects once detailed designs are made.

The ESIA, as indicated in the Board document, and discussed at scoping meetings, provided for the inclusion of local concerns into the final design, which need to be approved by the Bank as well as local authorities in accordance to National legislation. This is in accordance with the Environmental and Social Management Plan developed for the Project as part of the ESIA process. This approach is within the spirit of the EU EIA Directive and best practice, enabling stakeholder concerns to be integrated into the Project design process. For the past year the Bank has been working with Ukrenergo on the re-routing of the line. The Bank has been in communication with civil society organisations (CSOs) since 2009 on the possible rerouting.

IV. Description of Harm caused by the project: [No material harm cited. Paying of costs associated with EBRD loan and costs of project increase affecting Ukrainian taxpayer by tariff increases]

Management Response

- Although the project implementation is delayed, the Bank is not aware of any material harm resulting from the Project development and implementation. The Loan Agreement was signed in February 2008 and became effective in March 2009. At the time, the costs were deemed reasonable for the benefits that would be achieved and would not have a material effect on the tariffs. At the time of Project approval an independent consultant has concluded that the nominal pre-tax Project IRR for Ukrenergo alone was 11.6%. However, that IRR calculation was based on the evaluation of the Project net cash flows (in Euros), accruing solely to Ukrenergo. The measurable tangible benefits sector-wide of the Project were estimated at EUR 941.95m versus loan servicing of only EUR 462.90m, which if all that benefits accrued to Ukrenergo alone would make the IRR much higher. At the same time an average end user tariff increase associated with the loan servicing under the Project in 2012 does not exceed 0.5% or 0.36 kop/kWh.

Since then, the tendering of the two main items of the Project has been performed by Ukrenergo. The two largest Project contracts, for Parts A and B, were signed in April 2011. As a result of the competitive process, the aggregate contract amounts are below the initial estimates by 31%, with Ukrenergo saving approximately EUR 63 mln.

We believe that the Accounting Chamber investigation results mentioned in the letter relate to the cost of construction of the Kiev substation, which was finished using Ukrenergo's funding only and was commissioned prior to EBRD loan effectiveness. In any case, this component was included in the technical evaluation which, as already stated, was calculated in the overall Project benefits

V. 330kV Novokyivska-Severna line diversions

In addition to the Project that EBRD and EIB are financing, we note that Ukrenergo is currently commissioning two other lines that are part of their overall programme in relation to the Rivne Kyiv interconnection. The construction of these lines was ongoing at the time of the due diligence on the Project. They were not included in the definition of the Project as they were not subject to either EBRD or EIB financing. The clarification of which lines the lenders were considering was presented during the scoping meetings. The scoping document noted that:

“Two other high voltage lines – one 750 kV of 1.6 km length (plus the construction of a substation) and another 330 kV of 55 km length – that are related to the new Rivne – Kiev line are already constructed by Ukrenergo and are not related to EBRD funding”.

Under the Bank's Environmental Policy 2003, only the projects proposed for funding by the Bank are the focus of assessment. Thus, the 330kV Novokyivska-Severna line diversions would not have been covered by that policy. This has changed in the 2008 Environmental and Social Policy which includes the appraisal of other associated facilities and the Area of Influence of the project as well as the components to be funded.

3. Current and Future Status of Disclosure of Project and Information

Based on a review of the Project, Bank management recognize a number of issues that could have been presented more clearly:

- EBRD Bank staff included Project Part D in the EBRD Board of Directors' information on Project components in Section 1.7, Table 2, and Annex 2 & 4 and clarified that it would be financed by EIB. However, we recognise that it could have been made clearer that this component a) was not yet in the design stage, b) would be developed a number of years later, and c) explained how its potential environmental impact would be mitigated through ESIA's performed in accordance with both EBRD and EIB standards which would be required through covenants in the financing agreements.
- Bank staff also note that the Board document Environmental section 3.3 could have been clearer and laid out all the Project components that would be directly or indirectly associated with the Project, the timing for their implementation, and their respective sources of financing as well as how the environmental and social issues would be assessed in due course.
- Bank staff also believe that the EBRD Project Summary Document and Environmental and Social Impact Assessment webpage could have been clearer in the same manner as described above.

The Bank proposes the following actions:

1. Update Project Summary Document to include the substation and the 330kV line and to provide clarity on the re-route.
<http://www.ebrd.com/english/pages/project/psd/2007/37598.shtml>
2. Update ESIA page with text about the forthcoming 2012 ESIA on 330kV dual circuit line, including the indicative timetable for the Scoping stage, and when available, the relevant Stakeholder Engagement Plan, and subsequently, provide information on where the draft ESIA for the 330kV power line and other documents will be available for public review and comment. <http://www.ebrd.com/english/pages/project/eia/37598.shtml>
3. Update of EBRD Board of Directors with Non-Technical Summary of 330kV line, when available and summarise the results of public consultation and final decision in due course.
4. Continue monitoring the Project and ensuring the items in #2 above meet EBRD requirements.

Annex 3 – Client's response



Міністерство палива та енергетики України
Державне підприємство
«Національна енергетична компанія «УКРЕНЕРГО»

01032, м. Київ-32, Комінтерну, 25, телефон: 287-67-47,
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30.01.2012 № 04/04-12-1/048

To: Ms. Anoush Begoyan
Projects Complaints Mechanism
European Bank for Reconstruction
and Development

.....від.....

Dear Ms. Begoyan,

In response to your inquiry, dated 17th of January, 2012, NPC "Ukrenergo" considered the complaint concerning construction of the 750 kV Rivnenska NPP-Kyivska TL (hereinafter – "the Project"), submitted by Mr. Yury Urbansky on behalf of the "National Ecological Centre of Ukraine" NGO to the EBRD Complaints Mechanism, and offers the following comments on the issues raised in the complaint.

In his complaint, Mr. Urbansky argues that there exist a divergence between the project scope as identified in the ESIA (October 2007), which was designed with participation of an international group of independent consultants, and in the Loan Agreement between the EBRD and Ukraine on the project, dated February 28, 2008. However, a sub-clause in the ESIA, "The modernization of the 750 kV Kyiv substation, which requires upgrading works in order to be able to accommodate the new transmission line", in our opinion, implies Part C: "Expansion and rehabilitation works at 750/330 kV Kiev substation by an installation of the second 750/330 kV automatic transformer", and Part D: "Construction of two 60km 330 kV lines from 750/330 kV Kiev substation to feed the central regions of the Borrower", referred to in the Loan Agreement.

Indeed, parts C and D did not undergo assessment before the Project approval. However, taking into account the fact that the Project is implemented through the EBRD and EIB parity-based co-financing, each party providing EUR 150 million, and the mutually agreed plan for the Project financing, envisaging that Part D will be funded by the EIB only, the Project Agreement between the EIB and NPC "Ukrenergo", dated October 20, 2008, which is an integral part of the Financial Agreement between the EIB and Ukraine of October 20, 2008, ratified by the Law of Ukraine № 1215-VI, dated April 01, 2009, provided for the ESIA implementation for expansion of the "Kyivska" substation and construction of the 330 kV TL diversions.

It should be noted that, at the time of the ESIA report preparation, the long-term development plan of the IPS of Ukraine did not yet contain a final decision on connecting the Kyivska substation to the 330 kV network. That is, at that time, the site for the 330 kV TL diversions was not yet selected, therefore public hearings could not be held.

The requirement for inclusion of Parts C and D in the Project was put forward by the EIB in 2007, based on the report by the EIB Consultant, which carried out the feasibility study of the Project development, and was due to the need to satisfy the system requirements for stability and reliability of the IPS of Ukraine, Central Power System and Kyiv, in post-accident modes.

Therefore, in our opinion, EBRD's 2003 Environmental Policy requirements were not violated.

On December 30, 2011, we received the Order by the Kyiv State Administration № 1548 about granting permission for the NPC "Ukrenergo" to develop a land allocation design for permanent use of land for siting, construction, operation and maintenance of the 330 kV Chernobyl NPP — Severna TL diversions to the 750 kV Kyivska TL, which makes it possible to begin preparations for a comprehensive research and development of ESIA in relation to construction of the 330 kV Chernobyl — Severna TL diversions.

In the course of meetings with representatives of the EBRD and the EIB, NPC "Ukrenergo" repeatedly reaffirmed its commitment to implement an ESIA for the above 330 kV TL diversions. It was also agreed that the NPC "Ukrenergo", at their own expense, will engage a consultant to assist NPC "Ukrenergo" in preparing the above-mentioned ESIA, in compliance with the EBRD Environmental and Social Policy. The tentative time for the Consultant selection and beginning of work on the ESIA preparation is late April 2012.

We were surprised by the assertion that, **as it occurred** to Mr. Urbansky, "the ESIA lacks a range of data even on those parts of the Project that underwent the assessment". Comments and explanations to the findings referred to in the NECU's letter, dated 13th of September, 2010 and published at the CCE Bankwatch Network web site, were provided to the EBRD in a letter from NPC "Ukrenergo", dated January 10, 2010.

Mr. Urbansky's references to the report of the Accounting Chamber are inappropriate, since the conclusions in that report have no relation to the Project financed by EBRD and EIB. The report concerns a different facility of the 750 kV Kyivska SS, which is built by NPC "Ukrenergo" by its own resources.

We would like to note that the NPC "Ukrenergo" received no direct inquiries about the Project from Mr. Urbansky or the NECU. But Mr. Urbansky and his colleagues

demonstrate a considerable interest to NPC "Ukrenergo's" other projects, financed by the EBRD loan funds.

An evidence to that is Mr. Urbansky's allegations about the NPC "Ukrenergo's" unlawful actions when settling a conflict with the public during the implementation of a different EBRD-funded project. In that connection, we would like to note that, in order to reduce social tensions and resolve a crisis situation that developed in the course of construction of a double-circuit section of 330 kV Adjalyk-Usatove/MoldRES-Usatove TL, in accordance with the EBRD recommendations, on June 22, 2010, the Agreement of Intentions envisaging removal of the double-circuit section of 330 kV Adjalyk-Usatove/MoldRES-Usatove TL outside the villages of Nerubayske and Usatove, was signed by the Ministry of Fuel and Energy, NPC "Ukrenergo", Odessa Oblast State Administration, Bilyaivka District State Administration, and Usatove and Nerubayske Village Councils.

The actions of NPC "Ukrenergo" are fully consistent with the above Agreement of Intentions, the effective legislation of Ukraine, as well as the provisions of the Ukrenergo Corporate Stakeholder Engagement Framework, and Stakeholder Engagement Plan (2009, with amendments as of January 26, 2012), agreed upon with the EBRD.

After receiving the order of the Odessa Oblast State Administration № 939/A-2011, dated October 14, 2011, concerning approval of the site location for the double-circuit section of the 330 kV Adjalyk-Usatove/MoldRES-Usatove TL, in November 2011 a competitive bidding was held for drafting of the land allocation design, construction and assembly and start-up and commissioning works, and supply of equipment for the "Reconstruction of the double-circuit section of the 330 kV Adjalyk-Usatove/MoldRES-Usatove TL" facility.

On December 26, 2011, the Soyuz Corporation signed a contract to perform the above works. As of today, an advance payment was made to the Contractor, which has already started implementation of the work design.

Public hearings, aimed at information sharing about progress in implementation of the project to remove the double-circuit section of the 330 kV Adjalyk-Usatove/MoldRES-Usatove TL, are planned to be held on February 6, 2012, at the premises of the Usatove Village Council in Bilyaivka District, Odessa Oblast.

We hope that our explanations will be useful for transparent and impartial consideration of the complaint addressed to you.

Sincerely Yours,

V.V. Kovalchuk
Deputy Director

