

THE TAKEOVER PANEL

TRAFALGAR HOUSE PUBLIC LIMITED COMPANY ("TRAFALGAR HOUSE")/ NORTHERN ELECTRIC PLC ("NORTHERN")

As has already been announced, the Panel met this morning to hear an appeal by Trafalgar House against a Panel Executive decision that Trafalgar House should not be permitted to make an immediate new offer for Northern. The Panel dismissed the appeal.

On 9 January, 1995, Swiss Bank Corporation ("SBC"), on behalf of Trafalgar House, posted the original offer document to shareholders in Northern. On 24 February, an increased offer was posted which included a cash alternative of £11.00 per Northern share. Trafalgar House allowed this offer to lapse on 10 March (day 60, the final day of the offer) with acceptances of 76.5%. The decision to lapse followed a substantial fall in the market value of the regional electricity companies as a result of the statement on 7 March by Professor Littlechild, Director General of the Office of Electricity Regulation.

Trafalgar House stated that it wished to make a new offer for Northern which would include a cash alternative at £9.50 per share. It applied to the Executive for permission to do so under Rule 35.1.

Rule 35.1 provides that: -

"Except with the consent of the Panel, where an offer has been announced or posted but has not become or been declared wholly unconditional and has been withdrawn or has lapsed, neither the offeror, nor any person who acted

in concert with the offeror in the course of the original offer, may within 12 months from the date on which such offer is withdrawn or lapses. . . make an offer for the offeree company. . . ."

Having heard representations from both parties, the Executive refused permission for Trafalgar House to launch a new hostile offer. Trafalgar House appealed against that decision to the Panel.

Trafalgar House in its appeal submitted that the circumstances of Trafalgar House's recently lapsed £11 per share offer for Northern were so exceptional as to justify the Panel permitting a new offer. Trafalgar House rested its submission both on the General Principles of the Takeover Code and on the general discretion conferred on the Panel by Rule 35.1. It contended that shareholder interests would be best served by a new offer.

Rule 35.1 is designed to create a reasonable balance between giving shareholders an opportunity to consider offers for their shares and enabling the business of the company in which they have invested to be carried on without continuous uncertainty and dislocation. Inevitably the effect of this Rule may be to prevent for a period of time a new offer by a failed offeror, at whatever price, being made to shareholders in the offeree company.

As provided by the Note to Rule 35.1, there are certain grounds for granting dispensations from this Rule, including when a new offer is recommended by the board of an offeree company. The board of Northern has not agreed to a new offer being made immediately. It has said, however, that it would agree to the Panel giving its consent to a new offer from Trafalgar House within the relevant twelve months period after the present uncertainty has been removed by the resolution of the regulatory position currently under review, irrespective

of whether acceptance by shareholders of such an offer was to be recommended by the board.

The Panel acknowledges that Professor Littlechild's intervention on Day 57 created a significant uncertainty for all parties. However, the Panel decided that, although unusual, the circumstances were not such as to justify the granting of a dispensation under Rule 35.1 without the consent of the Northern board. As with any hostile offeror, Trafalgar House chose to make an offer for Northern at a price and time and on terms and conditions of its own choosing. When it did so, it knew that Northern was operating in a regulated sector and must have appreciated the possible consequences; indeed the conditions of its offer reflected this appreciation.

Trafalgar House further claimed to have significant support from shareholders of Northern for a new offer. Whilst the Panel recognises that shareholders have given some support to the principle of a new offer, the Panel considers that it is for the board of Northern to decide what weight to give to that support. Directors' fiduciary duties inevitably require that they give careful consideration to the views of shareholders. If they do not do so, the shareholders ultimately have the power to replace them. In this case, it is reasonable to assume that the board of Northern, having regard to its fiduciary duties and taking into account the views of shareholders and of its financial advisers, weighed up all its responsibilities in reaching its decision not to agree to a new offer at this time.

Conclusion

The Panel regards Rule 35 as one of the more important rules of the Code and only on rare occasions will it be prepared to grant a dispensation from its provisions. As already mentioned, the Panel does not consider that the circumstances which resulted in Trafalgar House's hostile offer for Northern lapsing on Day 60 with 76.5% acceptances are such as to

warrant the Panel granting a dispensation to enable Trafalgar House immediately to make a new offer at £9.50 per share without the consent of the board of Northern. Accordingly, the Panel dismissed Trafalgar House's appeal.

17 March 1995