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**From:** Fitchie, Andrew  
**Sent:** 03 March 2009 13:49  
**To:** david\_mackay@ [REDACTED] Steven Bell  
**Cc:** Stewart McGarrity; Graeme Bissett; Jim McEwan; Jordan, Stuart; Fitzgerald, Sharon; Kilburn, Keith; Horsley, Chris; Allison, Garry  
**Subject:** BSC MUDFA and the ETN tie Strategy

### Legally privileged and FOISA Exempt

David

I thought it might be useful to lay out our current thoughts (as well as our immediate actual and proposed actions) at a higher level on the various pressure points.

### BSC and the extant DRP

I have discussed BSC's position paper with Stuart this morning following his advice and my initial thoughts last night. Based on our review of BSC's position paper, our view is that little, if anything, will be served by the required senior execs. meeting with K. Tie has no interest in wasting time agreeing to what BSC seeks as redress, since neither point they apparently wish agreed goes close to the real issues. BSC will know now that tie is deadly earnest about this and the less time they are given to prepare the better.

### Consequently we recommend that

1 The CEO meeting is set up as quickly as possible either to reach the position (a) where it is clear no agreement on the position papers is achieved or (b) - unlikely - where BSC change their approach, such that further discussion might be productive. If (a), you would seek to agree immediately with K that the dispute is put into adjudication (and you would go into the meeting armed with the document for signature on that point). If that agreement is not forthcoming from K, tie would immediately refer. If (b) tie remains ready to refer but is responsive until such time as there is an outcome. The DRP allows for 20 business days following February 19th to reach agreement. We would want to avoid any potential for complaint by BSC that tie has refused to engage in the senior exec process but tie is entitled to take a view on what is being said in the position papers.

2. DLAP now tunes up the adjudication panellists (on a confidential basis) as to their availability to act and estimated cost. All panellists were re-checked by personal contact at contract close in terms of their continuing interest in being nominated and they will doubtless be somewhat mentally primed by reason of the recent ETN media coverage. Following this exercise, we will recommend on choice of adjudicators. We have a contract question and a QS question in DRP, for which a lawyer and a QS would provide the best understanding of tie's points.

3. tie remains open to a one off Princes Street "protocol". Stuart is preparing this now, on the basis of my note (of what you discussed with K ) last night so that you will have this and it has been fully reviewed by Steven and Stewart, in particular. (This does have some shades of the efforts made by Dennis Murray in the autumn of last year which were ultimately defeated - I recall - by BSC UK management insisting that nothing would be progressed by BSC until actual, priced change orders had been agreed.

K is to revert and our recommendation is not to pursue him on this. There is already a forum in which you will meet again.

### Contractual Notices

We have Steven's selection from yesterday and we are preparing drafts of Notices covering the duty to procure subcontractor collateral warranties (for tie and for CEC and TEL at this point) and the Clause 61 instruction - acceleration of BSC culpable delay and selected sections on the route. These will be ready tomorrow for Steven's review. We consider that it is right, tactically and contractually, for tie to issue these without waiting longer in order to protect tie's interests and to allow the contract payment mechanism to be operated to retain money from BSC if there is a continued failure on this matter.

### Surgical DRP

We are setting a meeting tomorrow to progress this task with Steven's team.

**MUDFA - Carillion's latest letter (Feb 20th '09)**

We are acting on Jim's instructions today in terms of the production of a letter to Carillion which establishes tie's position in conjunction with a plan to secure the best outcome.

kind regards

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**Andrew Fitchie**  
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