15 December 2017

Dear Mr Cooke,

**The Nuclear Decommissioning Authority – Magnox Contract**
**Public Accounts Committee (PAC) hearing on 23 November 2017**

On reviewing the transcript of the hearing of the Public Accounts Committee on 23 November 2017, I am concerned that parts of my evidence could inadvertently cause the Committee to gain an inaccurate understanding of certain events leading to the NDA’s realisation that the value of the changes to the Magnox contract required by the consolidation process were more likely than not to constitute a “material variation” for the purposes of the applicable procurement regulations (see Q83 to Q87).

To be clear, our external legal advisers, Burges Salmon, had advised of certain risks relating to material variation from 2014 onwards. In around August / September 2016, advice was provided by Burges Salmon which advised that the value of the changes resulting from the consolidation process did in fact mean that such changes posed a serious risk of constituting a material variation.

In October 2016, a second set of lawyers was instructed to provide a further opinion on the risks associated with the consolidation process. The second set of legal advisors also reached the conclusion in around December 2016 / January 2017 that the value of the changes resulting from the consolidation process meant that such changes posed a serious risk of constituting a material variation. The opinion of specialist Leading Counsel confirmed this view in January 2017.

In summary, therefore, ultimately all of the NDA’s external legal advisors agreed by January 2017 that the value of the changes resulting from the consolidation process meant that such changes posed a serious risk of constituting a material variation.

In addition to the above, I note that in response to Q71 I am quoted as saying “Whether I can say that on absolutely every occasion, we followed the legal advice to the letter, I do not know, but we certainly did not ignore it or act contrary to it at any point”. To clarify, I am unable to confirm with certainty the extent to which every piece of advice received from Burges Salmon by various people throughout the procurement, the subsequent litigation and the consolidation process, was followed, as I have not carried out the very detailed analysis needed to provide such confirmation. The NDA was receiving detailed advice on merits throughout the period of the litigation. The specific context of my remarks was our discussion of the decision to defend the claims issued by EnergySolutions, and it is fair comment that we did so with the support and not in the face of legal advice. More broadly, as we said in our evidence, matters such as this can be covered by Mr Holliday as part of the Magnox Inquiry.
I apologise if any of the comments I made at the hearing have inadvertently caused the Committee to gain an inaccurate understanding of events referred to above. This was not my intention and I hope this letter clarifies the position. I would be happy for this letter to be shared with the Committee, and published as the Committee sees fit.

Yours sincerely,

John Clarke

CC
Alex Chisholm
David Peattie
Mark Russell