

February 2001

**Separation of PES Businesses:
Review of C12 Licence Obligations
Consultation Paper**

Executive Summary

This document reviews Condition 12 of the current public electricity supply licence in the light of recent industry developments.

In April 2000 final amendments were made to the licences of Public Electricity Suppliers (PESs) requiring the separation of their distribution and supply businesses. This involved modifications to licence condition 12 and introduced a new condition 12A to require full managerial and operational independence of the distribution business, to restrict the use of certain distribution business information and to appoint a compliance officer to monitor the activities of the distribution business. Ofgem subsequently granted derogations to PESs to allow time for the implementation of separation and allow some shared services.

Since the introduction of the revised Condition 12 the structure of the industry and the way in which some companies' distribution activities are managed and operated have changed. It therefore seems appropriate to review Condition 12. This document does this and requests views on whether and to what extent the present condition should be modified.

Ofgem has identified a range of possible actions. At one end of that range the Condition could be left unchanged and the derogations not replaced once they expire in March 2005. At the other end of the range the Condition could be removed completely. Ofgem is now seeking views on what restrictions, if any, should continue to be included in Condition 12.

As part of this consultation process Ofgem is also seeking views on the future role of compliance officers. Ofgem recognises that the scope of their activities will be reduced once the implementation of the PESs' separation plans has been completed.

Should further work on Condition 12 be required, a timetable for this is set out.

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1. Introduction

- 1.1 Following changes in industry structure and in anticipation of further changes resulting from the Utilities Act, Ofgem invites views on changes to the public electricity supply licence Condition 12¹ and 12A.

Background

- 1.2 By 1999 competition in electricity supply had been extended to all customers. As competition extended there was growing concern that the in-area supply business of a public electricity supplier (PES) was in a position to benefit from its relationship with the PES distribution business. The main concerns were as follows:

- the potential for an integrated business to make distribution decisions that favoured its supply business,
- potential supply business access to information about competitors;
- potential scope for cross subsidy; and
- customer perception that if they switched supplier they might receive an inferior service from the distribution company.

- 1.3 In April 2000 amendments were therefore made to the licences of PESs requiring managerial and operational independence of the distribution business. This is one of Ofgem's key policy objectives. The amendments were intended to reduce the scope to create cross subsidies, promote competition and prevent discrimination in the provision of distribution business activities to competing suppliers.

- 1.4 The modification to PES licences revised Condition 12 so that it tightly ring-fenced the PESs' distribution activity. A copy of the Condition may be found in Appendix 1. The present Condition requires complete managerial and operational separation of the distribution business from all other PES businesses

¹ Reference to Condition 12 also denotes reference to Condition 14 and part VI, Condition 9 of the Scottish licences. The Standard Licence Conditions to be introduced under the Utilities Act will replace these Conditions with a new Condition 39.

and the confidentiality of information relating to the distribution business, except in circumstances listed in the Condition. Ofgem recognised that PESs would need to be given a reasonable period of time to achieve separation. PESs' existing structures meant that some had to make more changes to achieve separation than did others. Ofgem therefore agreed individual separation plans for each PES and granted derogations to PESs, insofar as they followed their separation plans, which allowed them time to comply with the Condition. The plans showed that implementation of changes would be achieved by 31 March 2002. It was envisaged that by this date the only continuing derogations would relate to shared services which complied with the requirements that they should:

- not involve a cross subsidy being either given to or received from the distribution business;
- obtain the services in the most efficient and economical manner possible; and
- not restrict, distort or prevent competition in electricity generation or supply.

1.5 The Utilities Act 2000 made provision for separate supply and distribution electricity licences each with a set of standard conditions. It introduces a new requirement for distributors of electricity to be authorised by licence or exemption. Under the new arrangements the same Companies Act company cannot hold both supply and distribution licences. This requirement enhances the separation required under Condition 12.

Rationale

1.6 Since Condition 12 was revised in April 2000 there have been further developments within the industry. The way in which some companies' distribution activities are managed and operated has changed rapidly. Some PESs have now combined the operation of their distribution businesses, whilst others have combined the management and operation of their distribution activities with that of other utility networks such as water. PESs have argued that the present Condition, without derogations, prevents them from making the most efficient use of their resources in carrying out their day-to-day work.

- 1.7 Some representations requesting the amendment of this Condition were made as part of the review of proposed Standard Licence Conditions² to be introduced under the Utilities Act. In response to these comments Ofgem agreed to undertake a separate consultation on Condition 12.
- 1.8 Whilst reviewing Condition 12 it seemed appropriate to reconsider the scope of Condition 12A³, which relates to the role of the compliance officer. The compliance officer has been responsible for monitoring how the distribution business complies with the separation licence condition. A large part of the officer's role has been to ensure that the PES implements its agreed separation plan. Since PESs will have completed the implementation of changes by 31 March 2002, the future role of the compliance officer may need to be reconsidered. Therefore this document also asks for views on the future role of the compliance officer. A full list of the compliance officer duties may be found in Appendix 2.

References

- 1.9 The following documents are referred to in this consultation paper:
- "Reviews of Public Electricity Suppliers 1998 to 2000: separation of businesses: consultation paper" OFFER May 1998
 - "Reviews of Public Electricity Suppliers 1998 to 2000: separation of businesses: second consultation paper" OFFER November 1998
 - "Separation of businesses: proposals and consultation" OFFER May 1999
 - "Reviews of Public Electricity Suppliers 1998 to 2000: Distribution price control review: update" OFFER October 1999
 - "Utilities Act Standard Licence Conditions – Final proposals" Ofgem October 2000.

² Responses are summarised in the consultation paper: "Utilities Act Standard Licence Conditions - Final proposals" Ofgem October 2000

³ Reference to Condition 12A also denotes reference to Condition 14A and part VI, Condition 5 of the Scottish licences. The Standard Licence Conditions to be introduced under the Utilities Act will replace these Conditions with a new Condition 40.

Structure of Document

- 1.10 Chapter 2 discusses the extent of separation and confidentiality requirements on the distribution business necessary to protect competition in supply. Chapter 3 discusses the role of the compliance officer. Chapter 4 invites views on specific issues and outlines the next steps.

Timetable

- 1.11 Comments are invited on the proposals discussed in this document. The deadline for responses to this consultation is 27 April 2001. A further paper outlining and responding to views received and identifying Ofgem's preferred approach will be published in July 2001.

Ofgem contact

- 1.12 All responses or queries relating to this document should be sent to :

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9 Millbank
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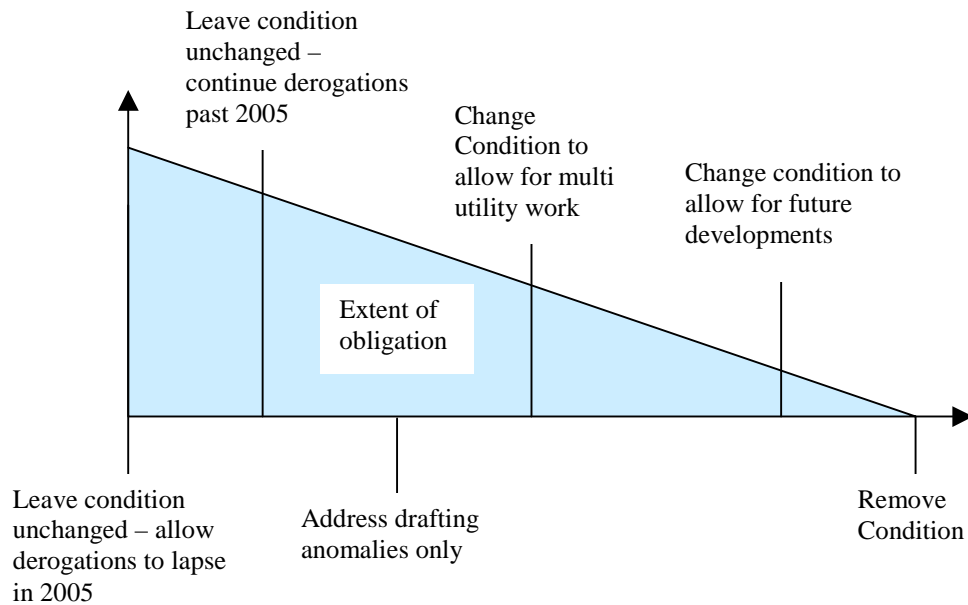
Confidentiality

- 1.13 It is open to respondents to mark all or part of their responses as confidential. However, we would prefer it if, as far as possible, responses were provided in a form that can be placed in the Ofgem library.

2. Options for change

- 2.1 The existing Condition 12 sets out the basis for operating the distribution business as a stand-alone business. It requires that staff, premises, systems and other assets of the business are not shared with any other business. Any information obtained by the business should be held as confidential to that business unless subject to special arrangements.
- 2.2 In addition to these restrictions the business must be operated to comply with other licence conditions which further increase the independence of the business. These include prohibitions on giving or receiving cross-subsidies; on discriminating between a PES's own supply business and other supply businesses and preventing, distorting or restricting competition in the supply or generation of electricity.
- 2.3 These Conditions provide comfort to suppliers operating in a PES area that the PES supply business is not receiving any benefit from its relationship with the distribution business. However, Ofgem does not wish such conditions to stifle the development of cost effective innovation by distribution businesses. To date such innovations, including the introduction of the joint venture company 24seven, have required a derogation from Condition 12 to enable them to proceed.
- 2.4 In reviewing Condition 12 Ofgem considered a range of possibilities for the extent of regulatory obligations. The range is shown in Figure 1 overleaf. One end of the range would require no changes, that is the condition would stay as it is with the existing derogations for shared services lapsing on 31 March 2005 at the latest. The other end of the range, representing a removal of regulation in this area, would require the removal of Condition 12 (and consequently 12 A) in their entirety. The rest of this chapter discusses the advantages and disadvantages of revising Condition 12 to reflect various levels of regulatory obligation.

Figure 1: Range of possibilities



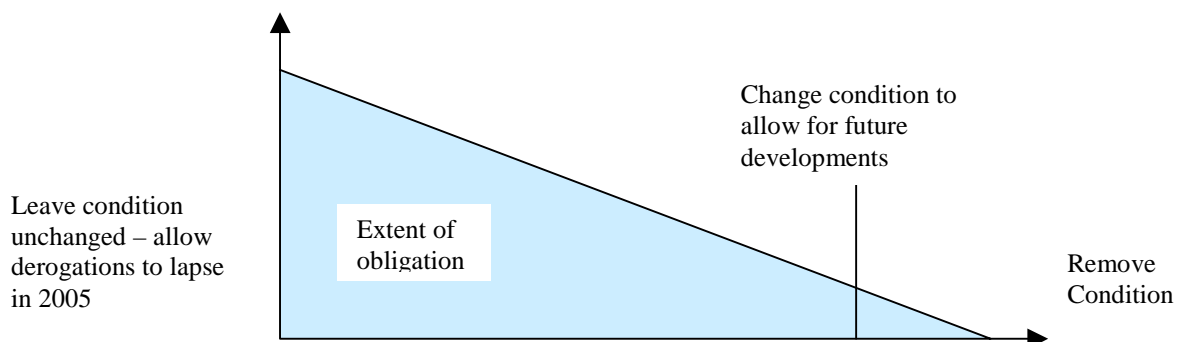
- 2.5 It would be possible to leave the Condition unchanged, removing all derogations for shared services by 31 March 2005. This would provide for the absolute independence of the management and operation of the distribution business, the confidentiality of all information relating to the business and give maximum comfort to suppliers. However, while there are some distribution businesses which would be able to achieve complete separation with relatively little effort, others are more dependent on continuing to share those services allowed by their present derogations.
- 2.6 It has been argued by some PESs that compliance with the existing Condition is unachievable without derogations. They argue that if the Condition is not changed there would be a continuing need for derogations to allow PESs to operate shared services that have already been agreed as appropriate. These include corporate HR and legal services, transport fleet management and facilities management. They further believe the confidentiality aspects of the condition to be too restrictive. For example, they argue that the Condition without derogation prohibits the distribution business from hiring the same firm of consultants as are being employed, or may be employed within an unspecified time limit, by any business owned by the same parent company. Some PESs argue that this is unworkable in practice.

- 2.7 It would be possible to retain the Condition and continue to issue derogations. In doing this, Ofgem could address those areas of Condition 12 presently identified as having a limiting effect on the way the business is run, for example constraining the way PESs can investigate those customer complaints that potentially involve both distribution and supply. The fundamental principle of the existing Condition, that the distribution business should be ring-fenced as tightly as is consistent with good business practice, would remain unaltered. Existing concerns would be met, but there would be no provision for addressing future changes, other than via altered derogations. This would therefore require Ofgem to continue to issue and amend derogations against Condition 12.
- 2.8 The initial licence Condition had been devised at a time when most PESs were primarily involved in running the distribution and supply businesses. However, even at that time there were two companies who ran water businesses alongside the distribution business. This meant that some companies wanted to use a common pool of staff to carry out work on both water and electricity distribution networks. Over the past few years PESs have changed from being suppliers and distributors of electricity to being involved in many commercial activities. To accommodate these changes Ofgem could alter the Condition to allow all multi-utility work to be operated in conjunction with the distribution business, except for the supply of electricity and gas.
- 2.9 Some PESs have argued that if the licence were to be modified to allow multi-utility working many of their concerns would be alleviated. They would be able to use core teams of staff more flexibly across the different businesses. Equipment and systems could also be shared to reduce costs. It is recognised however that special rules would still be needed to regulate the relationship between the distribution and supply businesses. These would include provisions covering confidentiality of information, discrimination in the provision of services and use of cross subsidies.
- 2.10 Simply allowing multi-utility working would only be a short term solution. The distribution companies have changed considerably over a short period. It is possible that they may wish in the future to develop further interests consistent with other licence obligations and it would be better to create a Condition which

could accommodate these, rather than revisit the Condition every time the business changes. This would require a more radical rewrite of the Condition.

- 2.11 Some companies have suggested that the Condition should allow the licence holder to manage and operate its distribution business in whatever way it wishes, subject to any specific prohibitions that are clearly set out in the licence. Such prohibitions would mainly address the distribution business's relationship with supply businesses. However further restrictions may be needed to fully protect the distribution business from the financial risks of other businesses so that it will not, for instance, be required by the parent company to act as credit guarantor for another business owned by the parent company.
- 2.12 Finally there is the option to remove Conditions 12 and 12A from the licences. This would mean that suppliers competing with a PES supply business would not be protected from potential abuse of the special relationship between supply and distribution. Distribution businesses would have no disincentive to prevent them from sharing sensitive information about other supply businesses with their associated supply business. For these reasons Ofgem believe that there will always be a need for confidentiality provisions in the distribution licences.
- 2.13 Ofgem's initial view is that Condition 12 should be flexible enough to provide for future developments without derogations whilst being strong enough to give sufficient protection to other suppliers. This would be a significant move from the current position .

Figure 2: Ofgem's preferred position



Views invited

2.14 Views are invited on:

- ◆ What specific provisions would be necessary to protect the interests of suppliers?
- ◆ What extent of regulatory obligation provides sufficient flexibility to the distribution businesses to allow for future developments without impinging on protection for suppliers?
- ◆ Should the use of derogations be continued and if so, until when?

3. Compliance officers

- 3.1 The compliance officer has played a very important role in the separation of the distribution business. The compliance officer is principally responsible for monitoring the licensee's compliance with the separation licence Condition and providing advice where appropriate. A list of duties and tasks assigned to the compliance officer may be found in Appendix 2.
- 3.2 Once the implementation of the PESs' separation plans has been completed, the workload of the compliance officer is likely to be reduced. All plans are expected to be fully implemented by March 2002, with derogations for shared services continuing to March 2005. The compliance officer will still be required to produce annual reports monitoring the effectiveness of the practices, procedures and systems adopted by the licensee and to investigate complaints or representations made on separation issues. However it seems advisable to revisit the duties and tasks of the compliance officer.
- 3.3 In its response to the consultation on the draft Standard Licence Conditions, one PES suggested that the distribution business licensee should be required to ensure that its group holding company engages a compliance officer, where the group holding company is located in the United Kingdom. This could introduce additional flexibility into the appointment of the compliance officer and may allow the compliance officer to look at the distribution business's relationship with other group companies more easily.
- 3.4 A supplier, responding to the consultation on Standard Licence Conditions, observed that there is no obligation on the licensee to make its statement of practices, procedures and systems publicly available, while there is an obligation to make the compliance report available. This supplier suggested that it was important that all suppliers could monitor compliance regimes to ensure they are effective, that this could only be achieved by full disclosure of the initial statement, and concluded that the statement should be published.

Views invited

- 3.5 Views are invited on whether it is appropriate to amend the Compliance Officer condition, and if so, in what way.

4. Next Steps

- 4.1 This document sets out Ofgem's proposals to reconsider and if necessary amend Conditions 12 and 12A. It invites views from interested parties on the options listed below:

Condition 12

- ◆ What specific provisions would be necessary to protect the interests of suppliers?
- ◆ What extent of regulatory obligation provides sufficient flexibility to the distribution businesses to allow for future developments without impinging on protection for suppliers?
- ◆ Should the use of derogations be continued and if so, till when?

Condition 12A

- ◆ The future role of the Compliance Officer;
- ◆ The responsibility for appointing the Compliance Officer.

- 4.2 Views are also invited as to the necessity of the distribution business making its statement of practices, procedures and systems publicly available.

Handling of Responses

- 4.3 In accordance with our normal practice, we intend to make responses to this consultation available through the Ofgem Library. However, if asked to do so, we shall respect the confidentiality of any response. Respondents wishing their responses to remain confidential should clearly mark the documents to that effect.

Timetable for Consultation

- 4.4 The deadline for responses is 27 April 2001.
- 4.5 All responses and queries relating to this consultation should be sent to:

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- 4.6 A second consultation document outlining and responding to views raised is due to be published in July 2001. Final proposals will be published in December 2001, with the aim of implementing any amendments in April 2002.

Appendix 1

Condition 12. Restriction on use of certain information and independence of the Distribution Business

1. Any information relating to or deriving from the management or operation of the Distribution Business shall, for the purposes of this Condition, be treated as confidential information.
2. The Licensee shall not (and shall procure that its affiliates and related undertakings shall not) disclose or authorise access to confidential information:
 - a) save to the extent provided by sub-paragraphs 3(b) to (d), to such of its (or its affiliates' or related undertakings') employees, agents, advisers, consultants or contractors as are engaged in, or in respect of, the management or operation of the Supply Business; or
 - b) save to the extent permitted by paragraph 3, to any other person.
3. The Licensee shall (and shall procure that its affiliates and related undertakings shall) disclose or authorise access to confidential information only:
 - a) In the following circumstances, namely:
 - i) to such of its (or its affiliates' or related undertakings') employees, agents, advisers, consultants or contractors as are engaged in, or in respect of, the management or operation of the Distribution Business or any external distribution activities and require access to the information for that purpose; and
 - ii) to personnel of any other holder of a public electricity supply licence (a PES licence holder) engaged in the external distribution activities of that PES licence holder to the extent necessary for the performance by such personnel of those external distribution activities, and the use by such personnel of that information for that purpose;

provided that effective arrangements are maintained in place at all times for ensuring that no further disclosure of any information supplied or obtained pursuant to this paragraph is made and that such information is used only for the purpose of the Distribution Business or any external distribution activities of the Licensee.
 - b) where the Licensee (or any affiliate or related undertaking of the Licensee) is required or permitted to disclose such information by virtue of:

- i) any requirement of a Competent Authority;
 - ii) the conditions of any licence granted under the Act or any document referred to in such a licence with which it is required by virtue of the Act or that licence to comply;
 - iii) any other requirement of law; or
 - iv) the rules of the Electricity Arbitration Association or of any judicial or other arbitral process or tribunal of competent jurisdiction;
- c) where such information was provided by or relates to any person who has notified (or otherwise agreed with) the Licensee that it need not be treated as confidential; or
- d) where such information, not being information provided by or relating to any person other than the Licensee, is placed by the Licensee in the public domain;

and in each case the Licensee shall disclose or authorise access to the confidential information only insofar as is necessary or appropriate in all the circumstances.

4. The Licensee shall use all reasonable endeavours to ensure that any person who is in possession of or has access to confidential information in accordance with subparagraph 3(a) shall use such information only for the purposes of the Distribution Business or any external distribution activities.
5. For the purpose of facilitating its compliance with paragraphs 1 to 4, the Licensee shall establish and shall thereafter maintain the full managerial and operational independence of the Distribution Business and any external distribution activities from each other business (whether or not a Separate Business) of the Licensee and of its affiliates and related undertakings.
6. In order to facilitate its compliance with paragraphs 1 to 5, the Licensee shall ensure that:
- a) the Distribution Business is provided with such premises, systems, equipment, facilities, property, personnel, data and management resources as are necessary for the efficient and effective management and operation of the Business;
 - b) no business of the Licensee (or of any affiliate or related undertaking of the Licensee), other than the Distribution Business or any external distribution activities, may use or have access to:

- i) premises or parts of premises occupied by persons engaged in, or in respect of, the management or operation of the Distribution Business or any external distribution activities;
 - ii) systems for the recording, processing or storage of data to which persons engaged in, or in respect of, the management or operation of the Distribution Business or any external distribution activities also have access;
 - iii) equipment, facilities or property employed for the management or operation of the Distribution Business or any external distribution activities; or
 - iv) the services of persons who are (whether or not as their principal occupation) engaged in, or in respect of, the management or operation of the Distribution Business or any external distribution activities; and
- c) it can and does, insofar as is legally possible, prevent any person who has ceased to be engaged in, or in respect of, the management or operation of the Distribution Business from being engaged in, or in respect of, the activities of any other business of the Licensee (or of any affiliate or related undertaking of the Licensee) until the expiry of an appropriate time from the date on which he ceased to be engaged by the Distribution Business.
7. The Director may, upon the written request of the Licensee, issue a direction relieving the Licensee of its obligations under paragraphs 1 to 6 - to such extent and subject to such terms and conditions as he may specify in that direction - where:
- a) it is not reasonably practicable for the Licensee to comply with any aspect of those obligations;
 - b) in the case of paragraphs 2 to 4, a failure to comply with any aspect of those obligations would be of a trivial nature; or
 - c) in the case of paragraph 5 and sub-paragraph 6(b), any arrangements for the use of or access to premises, systems, equipment, facilities, property or personnel by both the Distribution Business and any other business of the Licensee (or of any affiliate or related undertaking of the Licensee):
 - i) do not involve a cross-subsidy being either given to the Distribution Business by such other business or received from the Distribution Business by such other business;
 - ii) obtain for the Distribution Business, in the most efficient and economical manner possible, the use of the relevant premises, systems, equipment, facilities, property or personnel; and

- iii) do not restrict, distort or prevent competition in the generation or supply of electricity.
8. Where, subsequent to the issue of a direction pursuant to paragraph 7, the criteria set out at sub-paragraph 7(a), (b) or (c) cease to be satisfied, the Director may withdraw the direction or modify any terms and conditions which may be specified in it.
9. For the purposes of paragraphs 7 and 8 the Director shall, following consultation with the Licensee, determine any question as to whether the criteria set out at sub-paragraph 7(a), (b) or (c) are or continue to be satisfied.
10. (a) This paragraph applies only in circumstances in which the Licensee does not itself carry out any Metering and Data Services as part of the Distribution Business but those services are provided for it by an agent acting independently of the Licensee which is not an affiliate of the Licensee and in which the Licensee holds no shares or other financial interest ('a metering agent')
- (b) Where paragraph (a) applies, the Licensee may disclose confidential information to its metering agent notwithstanding that the metering agent provides Metering and Data Services to the Supply Business of the Licensee or to others, provided that the Licensee maintains, and procures that the metering agent also maintains, in place at all times effective arrangements so that the metering agent does not disclose information relating to the Distribution Business to the Licensee in its capacity as electricity supplier except to the extent necessary for the metering agent to provide Metering and Data Services as part of the Distribution Business to the Supply Business of the Licensee.

11. In this Condition:

"appropriate time" means 3 months, or such shorter period as the Director may approve in respect of any person or class of persons.

"Competent Authority" means the Secretary of State, the Director, the Compliance Officer, the Stock Exchange, the Panel on Take-overs and Mergers, or any local or national agency, regulatory body, authority, department, inspectorate, minister, ministry, official or public or statutory person (whether autonomous or not) of, or of the government of, the United Kingdom, the United States of America or the European Community.

"confidential information" bears the meaning given at paragraph 1.

“external distribution activities”

means any business of the Licensee or any affiliate or related undertaking of the Licensee comprising or ancillary to the maintenance, repair or operation of, or other activities in connection with any electricity distribution system other than the Licensee’s Distribution System (‘an external distribution system’)

“Electricity Arbitration Association”

means the unincorporated members’ club of that name formed inter alia to promote the efficient and economic operation of the procedure for the resolution of disputes within the electricity supply industry by means of arbitration or otherwise in accordance with its arbitration rules.

Appendix 2

Condition 12A. Appointment of Compliance Officer

- 2.1 The duties and tasks assigned to the Compliance Officer shall include:
- (a) providing relevant advice and information to the Licensee for the purpose of ensuring its compliance with the Relevant Duties;
 - (b) monitoring the effectiveness of the practices, procedures and systems adopted by the Licensee in accordance with the statement referred to at paragraph 1 of PES licence condition 12A;
 - (c) investigating any complaint or representation made available to him in accordance with paragraph 7 of the licence condition;
 - (d) recommending and advising upon the remedial action which any such investigation has demonstrated to be necessary or desirable;
 - (e) providing relevant advice and information to the Licensee for the purpose of ensuring its effective implementation of:
 - (i) the practices, procedures and systems adopted in accordance with the statement referred to at paragraph 1 of the licence condition; and
 - (ii) any remedial action recommended in accordance with sub-paragraph (d); and
 - (f) reporting annually to the directors of the Licensee - in respect of the year ending 31 December 2000 and of each subsequent year - as to his activities during the period covered by the report, including the fulfillment of the other duties and tasks assigned to him by the Licensee.
- 2.2 As soon as is reasonably practicable following each annual report of the Compliance Officer, the Licensee shall produce a report:
- (a) as to its compliance during the relevant year with the Relevant Duties; and

- (b) as to its implementation of the practices, procedures and systems adopted in accordance with the statement referred to at paragraph 1 of the licence condition.

2.3 The report produced in accordance with paragraph 2.1 shall in particular:

- (a) detail the activities of the Compliance Officer during the relevant year;
- (b) refer to such other matters as are or may be appropriate in relation to the implementation of the practices, procedures and systems adopted in accordance with the statement referred to at paragraph 1 of licence condition 12A; and
- (c) set out the details of any investigations conducted by the Compliance Officer, including:
 - (i) the number, type and source of the complaints or representations on which such investigations were based;
 - (ii) the outcome of such investigations; and
 - (iii) any remedial action taken by the Licensee following such investigations.

Appendix 3

List of Recipients

3.1 Below is a list of recipients of this report.

Distribution Businesses

East Midlands Electricity
GPU Power UK
LPN
NEDL
NORWEB
SEEBOARD
Scottish Power
Scottish and Southern Energy
TXU Europe Distribution
Western Power Distribution
Yorkshire Electricity

Supply Businesses

Atlantic Electric and Gas plc
British Gas Trading
Eastern Energy
Enron Direct Ltd
London Electricity
Northern Electricity
npower
PowerGen
Scottish and Southern Energy
Scottish Power
SEEBOARD
Utility Link Ltd
Yorkshire Electricity

Others

Compliance Officers
Department of Trade and Industry
energywatch
Ofwat