

27 June 2001

**PROPOSAL TO AMEND DISTRIBUTION STANDARD LICENCE CONDITIONS 29  
AND 44 AND GENERAL CONSENT**

1. I refer to my letter of 25 May regarding the above and thank you for your response in which you commented on these proposals.
2. Comments were also received from, or on behalf of, each of the other PESs, and from Transco. A summary of responses is attached as Annexe A. In general, there was a wide measure of support for the approach adopted in the proposals, although a number of substantive concerns were raised on the drafting.
3. Ofgem has now considered all the comments received, and has discussed these with DTI. In the light of these considerations, revisions have been made to the draft modifications which, Ofgem believes, address the substantive issues raised. Revised drafts are attached.
4. A number of respondents commented on the interaction between SLC 29 (and the proposed general consent) and SLC44. In particular, it was considered that the proposed new paragraph 3 of SLC44 imposed a more stringent restriction than SLC29. This was argued to be inappropriate, given the scope of SLC44 which, as proposed to be amended, would apply to all resources and not only to relevant assets (as defined). It was also argued by some respondents to be inconsistent with the separation plans approved by Ofgem under LC39 of the existing PES licences, which will continue in force after the new licences come into effect.
5. These arguments appear to have some force. The purpose of SLC44 is to place on licensees a duty so to conduct their affairs as to ensure they have available all resources required for the discharge of their obligations under the licence and statute, on such terms and with such rights as ensure that these obligations can be discharged. It is not necessary for this purpose that the licensee have sole operational control over such resources; it would be satisfactory if they remain under the control of another who owes the licensee a contractual obligation to make them available on appropriate terms. The draft amendments have been revised accordingly.
6. Similarly, a number of respondents expressed concern at the proposed introduction, in SLC 29, of the concept of 'operational management' as being within or outwith the control of the licensee. It was argued that this might obscure, rather than clarify, what is meant by 'operational control', a term carried forward from the equivalent

condition of existing PES licences but not separately defined. Some also argued that this would increase the burden of the duty under SLC29.

7. The purpose of the proposed amendment is not to increase the burden of the duty, but to clarify what arrangements require consent under SLC29. In essence, Ofgem considers that SLC 29 is intended to prevent a licensee, without consent, from alienating itself, by disposal or delegation, from assets forming part of its distribution (or, as the case may be, transmission) system to the extent that it cannot itself exercise effective control over the management and operation of the system. The manner in and level at which control is exercised is secondary to this purpose. Nevertheless, there is some point at which any further withdrawal by the licensee results in it relinquishing operational control within the meaning of the condition. The proposed amendment to the condition was intended to clarify where this point lies. Ofgem accepts that the wording originally proposed did not fully achieve this aim. Revised wording is attached, which stipulates that consent is required for arrangements whereby operational control of relevant assets is not or ceases to be under the sole management of the licensee.
8. A number of points were raised in relation to the proposed general consent and the related forms of undertaking.
  - 8.1. There is a potential conflict between the requirement regarding *force majeure* and the admissibility of such a defence for certain breaches of licence conditions. This has been addressed.
  - 8.2. The requirement that an undertaking be given by the ultimate holding company of the licensee and resource provider goes further than was required in the 24Seven case. In that case, undertakings to closely similar effect were given by intermediate holding companies which in their own right are substantial. Ofgem will, on a case by case basis and on similar criteria, consider requests to substitute an appropriate intermediate holding company as covenantor, and the wording has been revised to permit this.
  - 8.3. The undertaking to ensure resource providers have adequate resources goes further than can be required in respect of the licensee itself, and should be replaced with the 'refrain from action likely to cause' formulation. The position of unregulated resource providers can be distinguished from that of licensees, which are subject to licence conditions designed to safeguard the adequacy of their financial and other resources. In the absence of equivalent regulatory safeguards in respect of resource providers, it is appropriate to place the onus on the holding company whose shareholders stand to benefit. An equivalent undertaking was given by both holding companies in the 24Seven case.
  - 8.4. The undertaking to provide information required by the Authority should be made consistent with SLC24. This has been done.
  - 8.5. In addition, there were a number of minor drafting amendments proposed.
9. Ofgem considers that the attached revised draft amendments satisfactorily address the concerns of respondents, so far as appropriate. Accordingly, Ofgem will recommend to the Secretary of State that such amendments should be made to the proposed Distribution standard licence conditions. Ofgem understands that DTI intends to publish final versions of the standard licence conditions, in the form the Secretary of State is minded to determine, in early July, to enable licensing schemes to be finalised and take effect, as planned, on 1 August 2001. Similar amendments

will be made to, and a similar general consent issued under, the equivalent special conditions of the licences to be issued to the transmission successors of Scottish Power plc and Scottish and Southern Energy plc.

Yours sincerely,

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