

Your Ref:  
Our Ref: nn29-ccgenltr  
Direct Dial: 020 7901 7149  
Email: Nicola.Northway@ofgem.gov.uk

8 November 2001

Dear,

### **Competition Commission Costs in the case of AES and British Energy - Licence Fees**

The Competition Commission's costs for the references made under section 12 of the Electricity Act 1989 in the case of AES and British Energy are recoverable as part of licence fees due under Section 7(1)(b) of the Electricity Act 1989. The Competition Commission's costs total £887,106.

The Generation Licence at Standard Licence Condition 4 ("SLC 4") deals with the mechanism for recovery of such payments from Licensees. Under SLC 4 only licensed generators can be asked to contribute.

The decision about who should bear the costs is a matter reserved to the Gas and Electricity Markets Authority ("the Authority"). On this occasion the Authority is seeking views from those potentially affected by the decision on the decision that it is minded to make.

#### **The Options**

The Authority has considered four options as follows:

Option 1 – that AES and BE,\* i.e. the referred licensees, bear the costs;

Option 2 – that the other licensees who were asked by the Authority to accept the Market Abuse Licence Condition ("MALC") and consented to it, i.e. were not part of the reference, should bear the costs;

Option 3 – that all holders of generation licenses who were asked to accept MALC bear the costs;

Option 4 – that the costs are borne by all holders of a generation licence.

The Authority considered it appropriate to adopt a preliminary decision before consultation and that the preliminary decision should be in favour of Option 1 above. The Authority also adopted a preliminary decision that the costs should, in principle, be apportioned 50/50 between the groups.

In taking its preliminary decision the Authority was influenced by the following factors:

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\* AES and BE refers to those licence holders within each group which were asked to accept the MALC.

- The Competition Commission only considered the issues relating to AES and BE and not to any other licensees. It was expressly stated in the Competition Commission's report that it was only concerned with AES/BE and not with the general policy issue;
- The costs were directly attributable to the actions of AES and BE, namely that they refused to accept MALC, whereas the other holders of generation licences who had been asked to accept MALC had agreed;
- In previous references in the sector the costs of the Commission were borne by those referred;
- Option 1 was equitable, as although Ofgem had released the other generators from an obligation as a result of the MALC reference i.e. had removed the MALC from their licences, that release was not conferred directly by the Competition Commission;
- The Authority considered that, were this case to set a precedent, in future those who may wish to refuse to accept a licence condition with which the majority of other licensees are content may be able to force them to contribute to the Commission's costs;
- The argument that those who had caused the referral had already borne their own costs was not persuasive; all involved knew the terms of the relevant condition on fees.

Comments are invited on the preliminary decision from licensed generators and other interested parties.

In the light of the comments received the Authority would expect to take its final decision. It is possible that the merits of the representations received might lead the Authority to prefer one of the other Options set out above and respondents may wish to comment on the relative merits of those as well.

Responses should be made by 5 p m on 22 November 2001 and addressed to Nicola Northway, General Counsel, Ofgem by post, fax or e-mail on [nicola.northway@Ofgem.gov.uk](mailto:nicola.northway@Ofgem.gov.uk).

Yours sincerely,

**Nicola Northway**  
**General Counsel**