

19th March 2003

Dr Eileen Marshall CBE
Managing Director - Competition & Trading Arrangements
Office of Gas and Electricity Markets
9 Millbank
London
SW1P 3GE

Dear Eileen

ELECTRICITY GENERATION STANDARD LICENCE - CONDITION 18: GENERATING UNIT AVAILABILITY

We welcome the opportunity to comment on the issues set out in the Ofgem consultation paper on the above as published in February 2003.

British Energy has consistently advocated the need for greater use within the energy sector of the principles of good regulation as developed by the Better Regulation Task Force (BRTF) and used in its review of economic regulators¹. One such principle which is applicable to the issue under consideration is the principle of 'targeting' and the need to withdraw from directly regulating competitive markets and focus primarily on the natural monopolies. Specifically, we fully support the BRTF's recommendation that Regulators should conduct annual reviews of licence conditions with a view to removing any outdated obligations. Companies should then be given the ability to challenge the Regulator's performance against this requirement. Furthermore, we suggest that the burden should fall on the Regulator to justify retention of sector specific regulations affecting fundamentally competitive activities, especially if these activities are already adequately covered by general competition law. We are disappointed that Ofgem has yet to adopt this recommendation.

In response to Powergen's disapplication request we note that Ofgem is consulting on five options. For the following reasons **British Energy supports Option 5 - the removal of SLC18 as a standard condition in all generation licences:**

- Ofgem state that the licence condition was introduced in late 1991 at a time when there were serious concerns regarding the ability of generators with large market shares to exert undue influence on wholesale electricity prices through availability declarations. The generation market at this time was dominated by three companies. It was argued that this together with the Pool based trading arrangements (and in particular the existence of capacity payments) were the main drivers behind the introduction and continued application of the licence condition throughout the 90's.

However, since then the generation market has significantly evolved. There are now a large number of companies generating wholesale electricity which has led to a significant fall in generator concentration. Furthermore, the market arrangements have been reformed leading to the ending of the Pool arrangements and the associated capacity payment mechanism and the introduction of greater contractual freedom and price transparency. Consequently, we consider the concerns that led to the introduction of the licence condition no longer apply.

¹ BRTF - Economic Regulators July 2001



- Notwithstanding the above, we also consider that removing the standard generation licence condition will still leave the Authority with sufficient regulatory tools to monitor the market and address any legitimate concerns regarding the conduct of all generation licence holders. For example, the Authority under SLC 13 has the power to request from any licensee information it requires to fulfil its duties under the Electricity Act. This condition together with the fact that much more market information and generation data is now routinely published should allow Ofgem to monitor the market appropriately.

Moreover, if Ofgem believes that a licensee is seeking to act in an anti-competitive manner, including actions in relation to the availability of generating plant, it has the ability to use its concurrent powers under the Competition Act 1998. In a fully competitive generation market we consider these regulatory tools to be far more appropriate than a distinct licence obligation that is placed on a limited number of generators in an undefined manner.

- We recognise that Option 1 (disapplication of paragraphs 7-17 inclusive of SLC18 in Powergen's licence only) together with Ofgem's statement that it would be minded to apply the same decision to a future disapplication request from other affected licensees would have almost the same effect as Option 5. However, for a number of reasons we consider Option 5 to be more appropriate than Option 1. Firstly, the adoption of Option 1 would allow Ofgem, following a period of 12 months, to reapply the condition if in its opinion circumstances have changed in a material respect. This reapplication of the condition would not need to be consulted upon or require the consent of the licensee(s). Whilst noting that Ofgem has these powers, we regard such arrangements to be unacceptable, and represent a deficiency in the governance arrangements that exist within the electricity market.

Secondly, the existence of a standard licence condition that did not apply to any licensee would appear contrary to the principles of standard licensing. If a licence condition is deemed no longer relevant for any licensee it should be removed altogether.

In summary, for the reasons stated above we do not support the adoption of options 2,3 or 4. We propose that the specific generating unit availability licence obligations are removed from all generation licences and consider that Option 5 is the most appropriate method to achieve this.

If you would like to discuss any of the points raised, please do not hesitate to contact me.

Your sincerely

David Love
Head of Regulation

Direct Line: 01452 653325
Fax: 01452 653246
E-Mail: david.love@british-energy.com