



Direct Dial: 020-7901-7412  
3 February 2004

Mr Roger Barnard  
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EDF Energy plc  
Templar House  
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London  
WC1V 6NU

Cc. All Interested Parties

Our Ref: SLC 18

Dear Mr Barnard

**Consent to the disapplication of paragraphs 7 to 17 inclusive of Electricity Generation Standard Licence Condition 18 ('SLC 18') : Generating unit availability in respect of the Electricity Generation Licence of Jade Power Generation Ltd ("Jade")**

Ofgem<sup>1</sup> has carefully considered the issues raised by the disapplication request in respect of SLC 18 submitted on 8 August 2003 in respect of the Electricity Generation Licence held by Jade. On 6 November 2003, Ofgem issued a consultation letter that invited interested parties' comments on Ofgem's provisional view concerning the disapplication request. Ofgem received no responses to this consultation letter.

For the reasons set out in this letter, the Gas and Electricity Markets Authority (the "Authority") has decided to consent to the request to disapply paragraphs 7 to 17 inclusive of SLC 18 in the Electricity Generation Licence of Jade in accordance with paragraph 13 of SLC 18. In accordance with the terms of SLC 18 (13), the disapplication will become effective from 8 February 2005.

This letter explains the background to this issue and sets out the Authority's reasons for its decision. This letter constitutes the notice required from the Authority under Section 49A of the Electricity Act 1989 in relation to the consent to disapply the relevant parts of SLC 18 in the Electricity Generation Licence of Jade.

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<sup>1</sup> Ofgem is the Office of the Gas and Electricity Market Authority. The terms "Ofgem" and "the Authority" are used interchangeably in this letter.

## Background

### ***Background to SLC 18***

A licence condition similar in scope to SLC 18 was introduced following an investigation into Pool prices<sup>2</sup> carried out by the Office of Electricity Regulation (“OFFER”)<sup>3</sup> in 1991. The investigation concluded that certain generators with a large market share were able to exert undue influence on wholesale electricity prices, to the detriment of customers, through their generating unit availability declarations and decisions either to mothball or to close plant. Market participants also complained to OFFER that some generators were failing to offer for sale plant that they were proposing to mothball or close. A generating unit availability licence condition was, therefore, introduced into the licences of National Power,<sup>4</sup> Powergen and Nuclear Electric<sup>5</sup> explicitly to prohibit monopolistic or anti-competitive behaviour in relation to such matters as the availability, closure and mothballing of plant. The condition also incorporated an obligation to publish information on plant availability, to provide transparency and assist OFFER in assessing licensees’ compliance with the condition. Additionally, the licence condition enabled OFFER to appoint an Independent Assessor to determine whether a decision to close a station, in part or whole, was reasonable.

### ***Standard licence condition 18***

On the designation of the standard licence conditions on 27 September 2001, SLC 18 replaced the previous licence condition. Following an extensive consultation process with licensees and other interested parties, SLC 18 was included as a standard licence condition in all generation licences, but only “switched on” for those licensees that had been subject to the previous licence condition.<sup>6</sup> SLC 18 provides for the condition to be “switched on” (become operative) or “switched off” (to be disappplied) in each of the individual generation licences. SLC 18 also specifies the procedures for considering a disapplication request. While Ofgem can accept a disapplication request, it does not have the power to reject one without further action. If, following consultation, Ofgem considers that the request should be rejected, then the matter must be referred to the Competition Commission.<sup>7</sup>

SLC 18 requires those licensees in whose licence it is applied, including Jade, to provide information to Ofgem comparing the actual availability of their plants to the information that they provide on planned availability to NGC under the terms of the Grid Code. In addition, it

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<sup>2</sup> “Report on Pool Price Inquiry” December 1991.

<sup>3</sup> OFFER merged with Ofgas (the gas regulator) in 1999 to form Ofgem.

<sup>4</sup> The precursor of Innogy and International Power.

<sup>5</sup> The precursor of British Energy and Magnox Electric.

<sup>6</sup> As a result of various company changes these licensees are: British Energy Generation Limited, Magnox Electric Plc, (both previously part of Nuclear Electric), Deeside Power Development Company Limited, Innogy Plc and International Power Plc (all previously part of National Power), Powergen UK Plc, Diamond Power Generation Limited (licence since revoked), Emerald Power Generation Limited (licence since revoked) and Jade Power Generation Plc (all previously part of Powergen).

<sup>7</sup> Under paragraph 15 of SLC 18, if Ofgem does not make a reference to the Competition Commission in respect of the disapplication request before the beginning of a period of twelve months which ends on or before the disapplication date, the licensee may serve a termination notice on Ofgem specifying that the provisions shall cease to have effect on either the disapplication date or such date as is specified in the notice.

requires these licensees to use reasonable endeavours to provide six months' notice of proposals to reduce materially (whether temporarily or permanently) the capacity of a generating unit. Additionally, as part of the condition, Ofgem, with the agreement of the licensee, can appoint an Independent Assessor to determine whether a decision to close a station, in part or in whole, is reasonable.

### ***Request for disapplication***

On 8 August 2003, a formal request under SLC 18 was made to the Authority seeking the disapplication of certain provisions of SLC 18 from the Electricity Generation Licence of Jade. A disapplication date of 8 February 2005<sup>8</sup> was specified in the submission, together with the request for the disapplication of paragraphs 7 to 17 inclusive of SLC 18 within the Electricity Generation Licence of Jade.

### ***Previous requests for disapplication***

On 26 September 2002, 3 April 2003 and 10 April 2003, Powergen UK plc ("Powergen"), British Energy plc ("BE") and Innogy plc ("Innogy") respectively submitted formal requests<sup>9</sup> under SLC 18 to the Authority seeking disapplication of SLC 18 from their generation licences. In its application, Powergen argued that it was inequitable for this condition to be switched on in its licence when it is switched off in the licences of other generators of an equivalent size. Powergen contended that SLC 18 unfairly limits its commercial freedom in a very competitive generation market and requires it to provide advance notice of its commercial decisions to its competitors who do not have to make the same information available, which it believes is inappropriate. BE, in its application cited that its disapplication request did not raise any unique issues since Powergen's disapplication request to warrant further consultation. In its application, Innogy, made reference to its response to the Powergen consultation in which Innogy contended that SLC 18 "should be removed on the basis that competition is established within the generation market and, Ofgem has a number of other routes for enforcing compliance".

On 26 March 2003, the Authority decided to consent to the request by Powergen to disapply paragraphs 7 to 17 inclusive of SLC 18 in Powergen's Electricity Generation Licence in accordance with paragraph 13 of SLC 18. In reaching that decision, Ofgem considered carefully the other options it would have available if there were concerns that a company was seeking to manipulate the market to the detriment of consumers through changes in the availability of its generating plant. These include its powers under the Competition Act 1998. Ofgem additionally considered its requirements for information to conduct market surveillance activities. Ofgem has the ability, when performing its statutory functions, to require the provision of information to it from generation licensees under Standard Licence Condition 13 and, under Section 28 of the Electricity Act 1989 if it considers that a relevant obligation is being, or is likely to be, contravened. In addition, Ofgem noted the Grid Code requirement on market participants to submit accurate information to NGC regarding the availability of generating plant.

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<sup>8</sup> The date when this condition would be switched off in its licence, in accordance with Paragraph 12 of the condition.

<sup>9</sup> Powergen put forward two alternative disapplication requests in its submission:

- (i) To disapply paragraphs 7 to 17 inclusive of SLC 18.
- (ii) To disapply paragraphs 7 to 8 and 10 to 16 of SLC 18 but to continue to have paragraphs 9 and 17 operative.

Innogy formally requested the disapplication of paragraphs 7 to 17 inclusive of SLC 18 from its generation licence.

In the Powergen consultation document, Ofgem recognised Powergen's concerns surrounding the current application of SLC 18. It also stated that in the absence of compelling reasons to switch on SLC 18 in all generation licences, Ofgem was minded to accept one of Powergen's disapplication requests. Further, Ofgem indicated that it would be minded to accept disapplication requests from other licensees that have SLC 18 "switched on" in their Electricity Generation Licence, if such requests were presented to Ofgem, unless there was evidence of a material change in circumstances or the request had unique issues that warranted further consultation.

Following receipt of BE's and Innogy's request for disapplication of SLC 18 on 3 April 2003 and 10 April 2003 respectively, Ofgem considered that there had not been a material change in circumstances since the Authority's decision to accept Powergen's disapplication request. Therefore, in its subsequent consultation letter to interested parties seeking views on BE's and Innogy's disapplication requests<sup>10</sup>, issued on 10 July 2003<sup>11</sup> and 22 May 2003<sup>12</sup> respectively, the Authority indicated that it was minded to consent to the disapplication of paragraphs 7 to 17 inclusive of SLC 18 in BE's and Innogy's Electricity Generation Licences<sup>13</sup>. Following consideration of respondents' views, the Authority decided on 2 October 2003 and 3 July 2003 respectively to consent to the request by BE and Innogy to disapply paragraphs 7 to 17 inclusive of SLC 18 in BE's and Innogy's Electricity Generation licences<sup>14</sup>.

### **Consultation on disapplication request in respect of Jade**

Following receipt of the disapplication request in respect of the licence held by Jade, Ofgem considered there to be no material change in circumstances since the Authority's decision to accept Powergen's, Innogy's and BE's disapplication requests. Ofgem also considered that the request did not raise any unique issues. Therefore, in its consultation letter to interested parties, issued on 6 November 2003, the Authority indicated that it was minded to consent to the request to the disapplication of paragraphs 7 to 17 inclusive of SLC 18 in the Electricity Generation Licence of Jade<sup>15</sup>.

### **Respondents' views**

Ofgem received no responses to its consultation letter in regard to the disapplication request in respect of the licence held by Jade.

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<sup>10</sup> Ofgem considered Innogy's request for disapplication of Electricity Generation Standard Licence Condition 18 ('SLC 18'): Generating unit availability, before BE's disapplication request of Electricity Generation Standard Licence Condition 18 due to an administration error.

<sup>11</sup> "The request of British Energy plc ("BE") for disapplication of Electricity Generation Standard Licence Condition 18 ('SLC 18'): Generating unit availability in respect of the licence held by British Energy Generation Ltd."

<sup>12</sup> "The request of Innogy plc ("Innogy") for disapplication of Electricity Generation Standard Licence Condition 18 ('SLC 18'): Generating unit availability".

<sup>13</sup> In accordance with paragraph 13 of SLC 18.

<sup>14</sup> In accordance with paragraph 13 of SLC 18.

<sup>15</sup> In accordance with paragraph 13 of SLC 18.

## Ofgem's views

Having had regard to its statutory duties, Ofgem has decided, for the reasons set out below, to consent to the request for disapplication of paragraphs 7 to 17 inclusive of SLC 18 in the Electricity Generation Licence of Jade.

As it did when considering Powergen's, Innogy's and BE's requests for disapplication, in reaching this decision, Ofgem has considered carefully the other options it would have available if there were concerns that a company was seeking to manipulate the market to the detriment of consumers through changes in the availability of its generating plant. These include its powers under the Competition Act 1998. Ofgem has additionally considered its requirements for information to conduct market surveillance activities. Ofgem has the ability to require the provision of information to it from generation licensees under Standard Licence Condition 13, when performing its statutory functions, and also under Section 28 of the Electricity Act 1989 if it is of the opinion that a relevant obligation is being, or is likely to be, contravened. There is also the Grid Code requirement on market participants to submit accurate information to NGC<sup>16</sup>.

Given some previous respondents' concerns, Ofgem's concerns not to discriminate between companies and because the wholesale electricity market is continuing to evolve, Ofgem is of the view that disapplication rather than complete removal is likely to have a beneficial effect. Disapplication will reduce the regulatory burden on Jade, particularly due to the inconsistent application of this condition at present and, subject to there being no material changes or unique circumstances as outlined above, on any other generators who apply for SLC 18 to be disapplied. This is because requests for information on plant availability and mothballing/closure decisions are likely only to be made when required by Ofgem to discharge its statutory functions, although other circumstances might arise where companies are requested to co-operate with Ofgem on a more informal basis, and we trust that companies will be willing to do so. At the same time, Ofgem's ability to "switch on" the condition, following its disapplication as a result of this direction, should give smaller market participants and suppliers confidence that appropriate regulatory action can be taken with regard to plant availability, should this prove necessary.

Ofgem considers there to be no change in circumstances that sufficiently warrant Ofgem to reconsider its earlier stance, and "switch on" SLC 18 in those licences that it had previously been "switched off". Ofgem considers that the wholesale gas and electricity trading arrangements continue to provide strong price incentives that encourage and maintain both the short and long term security of supply. Ofgem's work on security of supply is firmly underpinned by regular monitoring and market surveillance which helps to provide important early warning of barriers which may prevent a timely response to market signals. Information used to monitor the markets include credit ratings, market reports, planning information and information from system operators.

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<sup>16</sup> Further information with respect to the powers of the Authority under standard licence condition 13, Section 28 of the Electricity Act 1989, and the Grid Code is included in Ofgem's decision document on Powergen's request for disapplication of SLC 18; 'The requests of Powergen UK plc's ('Powergen') for disapplication of all or part of Electricity Generation Standard Licence Condition 18 ('SLC 18'): Generating unit availability', issued 26 March 2003.

Given that Ofgem wishes to ensure that there is no discrimination between companies in the regulatory burden that they must bear, Ofgem considers it appropriate to disapply paragraphs 7 to 17 of SLC 18 in Jade's Electricity Generation Licence. Furthermore, Ofgem is still minded to accept any further disapplication requests from other licensees that have SLC 18 "switched on" in their Electricity Generation licence, if such requests were presented to Ofgem, unless there was evidence of a material change in circumstances or the request had unique issues that warranted further consultation.

### **Requirement for the Authority to undertake impact assessments**

The Authority considers that the requirements of Section 5A of the Utilities Act 2000 ("the UA"), which relates to the duty of the Authority to carry out impact assessments, do not apply to its proposal to consent to the disapplication request in respect of paragraphs 7 to 17 inclusive of SLC 18 of the Electricity Generation Licence held by Jade. The particular circumstances of this request are that:

(i) On 6 November 2003, prior to the coming into force of Section 5A of the UA,<sup>17</sup> Ofgem published its consultation letter on this SLC 18 disapplication request. The Authority stated in that consultation letter that it was minded to consent to the request in respect of Jade's licence. It had previously indicated in the decision letters regarding the disapplication requests of Powergen,<sup>18</sup> Innogy<sup>19</sup> and BE<sup>20</sup> that it would be minded to consent to SLC 18 disapplication requests by other electricity generation licence holders, provided they did not raise any unique issues.

(ii) Under paragraph 15 of SLC 18, the Authority should consent to this application for disapplication within six months of receiving it. Accordingly, the consent should be given by 8 February 2004.

The Authority considers that, in these particular circumstances, the application of Section 5A of the UA would be both inappropriate and impracticable within the time now available.

### **The Authority's decision**

In accordance with the terms of SLC 18, the Authority has therefore decided to consent to the request for the disapplication of paragraphs 7 to 17 inclusive of SLC 18 in the Electricity Generation Licence of Jade in accordance with paragraph 13 of SLC 18. In accordance with the terms of SLC 18 and the request, the disapplication will become effective from 8 February 2005.

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<sup>17</sup> Which came into force on 30 December 2003.

<sup>18</sup> The requests of Powergen UK plc's ('Powergen') for disapplication of all or part of Electricity Generation Standard Licence Condition 18 ('SLC 18'): Generating unit availability: 26 March 2003

<sup>19</sup> The request of Innogy plc ('Innogy') for disapplication of all of Electricity Generation Standard Licence Condition 18 ('SLC 18'): Generating unit availability: 3 July 2003

<sup>20</sup> The request of British Energy plc ("BE") for disapplication of Electricity Generation Standard Licence Condition 18 ('SLC 18'): Generating unit availability in respect of the licence held by British Energy Generation Ltd: 2 October 2003

If you have any queries in relation to the issues raised in this letter, please feel free to contact me on the above number or alternatively contact Jo Witters on 020 7901 7159.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Sonia Brown'.

**Sonia Brown**

**Director, Electricity Trading Arrangements**

Signed on behalf of the Authority and authorised for that purpose by the Authority

A handwritten signature in black ink, appearing to read 'Sonia Brown'.