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Your Ref:
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Cc. All Interested Parties

19 November 2004

Dear colleague,

The request of British Energy Plc (“BE”) for paragraphs 5 to 7 of Standard Licence Condition 14: “Compulsory Acquisition of Land etc” to be given effect in the electricity generation licence of British Energy Generation Ltd (“BEGL”).

On 6 August 2004, BE informed Ofgem of a formal request to the Gas and Electricity Markets Authority¹ (“the Authority”) seeking that the provisions of paragraphs 5 to 7 of Standard Licence Condition 14 (“SLC 14”) “Compulsory Acquisition of Land etc” be given effect in the electricity generation licence of BEGL.

This letter explains the background to this request and invites views on the Authority’s preliminary view to issue a direction that the provisions of paragraphs 5 to 7 of SLC 14 be given effect in the electricity generation licence of BEGL.

Background to SLC 14

Paragraphs 5 to 7 of SLC 14 give effect to the powers and rights conferred under Schedule 3² of the Electricity Act 1989. Schedule 3 provides for the Secretary of State to authorise the licence holder to compulsorily purchase any land for the following licensed activities:

- (a) the construction or extension of a generating station;
- (b) activities connected with the construction or extension of a generating station or connected with the operation of a generating station; and
- (c) the installation, maintenance, removal or replacement of electric lines, and electrical plant associated with them, connecting a generating station with:
 - (i) a transmission system; or

¹ Ofgem is the Office of the Gas and Electricity Markets, which supports the Gas and Electricity Markets Authority, the regulator of the gas and electricity industries in Great Britain. Ofgem’s aim is to bring choice and value to all gas and electricity customers by promoting competition and regulating monopolies. The Authority’s powers are provided for under the Gas Act 1986, the Electricity Act 1989 and the Utilities Act 2000. The terms “Ofgem” and “the Authority” are used interchangeably in this letter.

² Schedule 3 of the Electricity Act 1989 is set out in full in Appendix 1.

- (ii) a distribution system.

Paragraphs 1 and 2 of SLC 14 specify how paragraphs 5 to 7 can be given effect. Paragraph 1 of SLC 14 sets out that prior to 1 October 2001³ the Secretary of State could provide by a scheme made under Schedule 7 to the Utilities Act 2000 for SLC 14 to have effect within a generation licence and for the provisions contained in paragraphs 5 to 7 to apply to the licensee from the date the scheme takes effect until such date as may be specified in the scheme. Paragraph 1 also sets out that, if an end date is specified in the scheme, the Authority may direct to extend this date. Paragraph 2 of SLC 14 sets out that the Authority may issue a direction that the provisions of paragraphs 5 to 7 of SLC 14 shall have effect for a period specified in the direction and that this period may be extended by a further direction by the Authority.

BE's request

In relation to the licence of BEGL, the Secretary of State provided by a scheme under Schedule 7 to the Utilities Act 2000 for paragraphs 5 to 7 of SLC 14 to have effect until 1 April 2002.

As set out previously, on 6 August 2004, BE informed Ofgem of a formal request to the Authority seeking that the provisions of paragraphs 5 to 7 of SLC 14 be given effect in the electricity generation licence of BEGL.

In support of its application, BE considered that major fossil generators such as RWE/Innogy and EoN/Powergen possess 'vesting' generation licences in which paragraphs 5 to 7 of SLC 14 have been given effect without an expiry date, i.e. they have been given powers and rights to compulsorily purchase land for an indefinite period. BE considered that it would be unfair for BEGL to be denied at least similar powers for assets that were subject to the licensing regime at the same time, if not before, Innogy's and Powergen's generation assets. BE made a number of other arguments in support of its application relating to the nature of nuclear generation as compared with other forms of generation.

Ofgem's preliminary view

Ofgem recognises the view of BE that the powers and rights conferred in relation to the compulsory purchase of land may not be applied consistently to all generation licensees. Currently, paragraphs 5 to 7 of SLC 14 have effect without an expiry date in the electricity generation licences of the following ten licensees: British Energy Generation (UK) Ltd, Cottam Development Centre Ltd, Deeside Power Development Co Ltd, E.ON UK PLC, International Power Plc, Magnox Electric PLC, RWE Npower PLC, Scottish Power Generation Ltd, SE Energy Ltd, and SSE Generation Ltd. Paragraphs 5 to 7 of SLC 14 have effect with an expiry date in the generation licences of the following three licensees: British Energy Generation Ltd, Edison First Power Ltd, and Shotton Combined Heat and Power Ltd. Paragraphs 5 to 7 of SLC 14 are not in effect in the remaining electricity generation licences.

³ The date on which the relevant parts of section 30 of the Utilities Act 2000 (licences authorising supply etc of electricity) came into force.

Indeed, Ofgem considers that this issue of consistency may extend to a number of licence conditions in which powers, rights and obligations can be conferred to licence holders by the Secretary of State or the Authority through the licence (see, for instance, SLC 15, 17, 17A and 18). Ofgem considers that this issue of consistency could give rise to potential concerns over whether, and if so to what degree, there is any resulting distortion to competition.

Ofgem is of the view that there are two issues which need to be resolved in relation to these conditions. First, whether it is appropriate for such conditions to exist. In this respect, BE, in support of its request for BEGL to be given powers and rights to compulsorily purchase land, cited a number of arguments in relation to the nature of nuclear generation as compared with other forms of generation. However, in contrast, an argument can be made that, as the market for electricity generation is competitive, participants in this industry should not be given any greater powers than participants in any other industry.

Second, if it is determined that such conditions should exist, there is an issue of whether the powers, rights and obligations conferred under these conditions are applied consistently or, where there is a difference in application, whether that difference is justified.

Ofgem therefore considers that it may be appropriate for it to conduct a broad review of the powers, rights and obligations conferred on licensees in the electricity generation licence, focussing specifically on these two issues.

In light of this, Ofgem considers that, in relation to BE's request, there is no objective justification for BEGL to be denied similar powers as compared with those companies that were subject to the licensing regime at the same time as BEGL. Ofgem's preliminary view is therefore to issue a direction providing that the provisions of paragraphs 5 to 7 of SLC 14 should be given effect in the electricity generation licence of BEGL. Ofgem considers that, at this time and subject to the outcome of any review Ofgem conducts in relation to the application of these and other powers, rights and obligations in electricity generation licences, it would be appropriate to limit the duration for which BEGL is given these powers to five years from the date that any direction is issued.

Views invited

Ofgem would welcome the views of interested parties on the issues raised in this letter, specifically:

1. Whether generators as a class should have the powers and rights to compulsorily purchase land;
2. Whether the current application of the powers and rights conferred in relation to the compulsory purchase of land is consistent;
3. Whether Ofgem should conduct a broad review of the powers, rights and obligations conferred on licensees in the electricity generation licence, in particular in relation to SLC 14, 15, 17, 17A and 18.
4. Ofgem's preliminary view that the provisions of paragraphs 5 to 7 of SLC 14 should be given effect in the electricity generation licence of BEGL for five years;

Interested parties are requested to submit their views by 5pm on 17 December 2004.

Responses should be addressed to:

Ndidi Njoku
Wholesale Markets
Office of Gas and Electricity Markets
9 Millbank
London
SW1P 3GE

Electronic responses may be sent to wholesale.markets@ofgem.gov.uk please mark your response 'BEG L SLC 14 application'.

Respondents are free to mark their replies as confidential although Ofgem would prefer, as far as possible, to be able to place responses to this paper in the Ofgem library. Unless clearly marked 'confidential', responses will be published by placing them in the Ofgem library and on the Ofgem website.

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 Ndidi Njoku on 0207 901 7157 or Matthew Buffey on 020 7901 7088.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Steve Smith', written in a cursive style.

Steve Smith
Managing Director, Markets

Appendix 1

SCHEDULE 3

Compulsory Acquisition of Land etc. by Licence Holders

Part I Powers of Acquisition

1.—(1) Subject to paragraph 2 below, the Secretary of State may authorise a licence holder to purchase compulsorily any land required for any purpose connected with the carrying on of the activities which he is authorised by his licence to carry on.

(2) In this paragraph and paragraph 2 below "land" includes any right over land (other than, in Scotland, a right to abstract, divert and use water); and the power of the Secretary of State under this paragraph includes power to authorise the acquisition of rights over land by creating new rights as well as acquiring existing ones.

2.—(1) No order shall be made under paragraph 1 above authorising the compulsory purchase of land belonging to another licence holder except with the consent of the Authority.

(2) The Authority shall not give his consent under this paragraph if—

(a) the land is being used by the licence holder to whom it belongs for the purposes of an installation necessary for the carrying on of the activities which he is authorised by his licence to carry on; or

(b) it appears to the Authority that the land will be so used and that the use will commence, or any necessary planning permission or consent under section 36 or 37 of this Act will be applied for, within the period of five years beginning with the date of the application for his consent.

(3) The Secretary of State may by order provide that sub-paragraph (2) above shall have effect as if for the period mentioned in paragraph (b) there were substituted such other period as may be specified in the order.

(4) A consent under this paragraph which is not acted on within the period of six months beginning with the day on which it is granted shall cease to have effect at the end of that period.

(5) In this paragraph—
"the Planning Act" means the [Town and Country Planning Act 1990]⁴ or the [Town and Country Planning (Scotland) Act 1997]⁵;
"planning permission" means a planning permission granted under Part III of the Planning Act.

⁴ Words in brackets and italics inserted by section 4, Para 83 (1) Schedule 2 Planning (Consequential Provisions) Act 1990

⁵ Words in brackets and italics inserted by section 4, Para 44 (1) Schedule 2 Planning (Consequential Provisions) (Scotland) Act 1997

3.—(1) This paragraph applies to land which—
(a) for the purposes of the Acquisition of Land Act 1981, is or forms part of a common, open space or a fuel or field garden allotment; or

(b) for the purposes of the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947, is or forms part of a common or open space.

(2) Where for any purpose a licence holder has acquired, or proposes to acquire, any land to which this paragraph applies, or any right over any such land, and other land is required for the purpose of being given in exchange for the land or right in question, the Secretary of State may authorise the licence holder to purchase that other land compulsorily, or he may acquire it by agreement.

4. Where a licence holder has acquired any land by virtue of paragraph 1 above, he shall not dispose of that land or of any interest in or right over it except with the consent of the Authority.

Part II Procedure, Compensation etc. (England and Wales)

Application of Acquisition of Land Act 1981 generally

5.—(1) Subject to sub-paragraph (2) below, the Acquisition of Land Act 1981 shall apply to a compulsory purchase by a licence holder of land or rights in England and Wales; and Schedule 3 to that Act shall apply in the case of a compulsory acquisition by a licence holder of a right by the creation of a new right.

(2) Section 16 of, and paragraph 3 of Schedule 3 to, the said Act of 1981 (statutory undertakers' land excluded from compulsory purchase) shall not apply where the land or rights in question belong to another licence holder.

New rights: general adaptation of Compulsory Purchase Act 1965

6. The Compulsory Purchase Act 1965 shall have effect with the modifications necessary to make it apply to a licence holder's compulsory acquisition of a right in England and Wales by the creation of a new right as it applies to the compulsory acquisition of land, so that, in appropriate contexts, references in that Act to land are to be read as referring, or as including references, to the right acquired or to be acquired, or to land over which the right is or is to be exercisable, according to the requirements of the particular context.

New rights: specific adaptations of Act of 1965

7. Without prejudice to the generality of paragraph 6 above, Part I of the Compulsory Purchase Act 1965 shall apply in relation to a licence holder's compulsory acquisition of a right in England and Wales by the creation of a new right with the modifications specified in paragraphs 8 to 13 below.

8. For section 7 of that Act (measure of compensation) there shall be substituted the following section—

"7. In assessing the compensation to be paid by the acquiring authority under this Act regard shall be had not only to the extent (if any) to which the value of the land over which the right is to be acquired is depreciated by the acquisition of the right but also to the damage (if any) to be sustained by the owner of the land by reason of its severance from other land of his, or injuriously affecting that other land by the exercise of the powers conferred by this or the special Act."

9. For subsection (1) of section 8 of that Act (protection for vendor against severance of house, garden, etc.) there shall be substituted the following subsections—

"(1) No person shall be required to grant any right over part only—

(a) of any house, building or manufactory; or

(b) of a park or garden belonging to a house,

if he is willing to sell the whole of the house, building, manufactory, park or garden, unless the Lands Tribunal determine that—

(i) in the case of a house, building or manufactory, the part over which the right is proposed to be acquired can be made subject to that right without material detriment to the house, building or manufactory; or

(ii) in the case of a park or garden, the part over which the right is proposed to be acquired can be made subject to that right without seriously affecting the amenity or convenience of the house;

and if the Lands Tribunal so determine, the Tribunal shall award compensation in respect of any loss due to the acquisition of the right, in addition to its value; and thereupon the party interested shall be required to grant to the acquiring authority that right over the part of the house, building, manufactory, park or garden.

(1A) In considering the extent of any material detriment to a house, building or manufactory, or any extent to which the amenity or convenience of a house is affected, the Lands Tribunal shall have regard not only to the right which is to be acquired over the land, but also to any adjoining or adjacent land belonging to the same owner and subject to compulsory purchase."

10. The following provisions of that Act (being provisions stating the effect of a deed poll executed in various circumstances where there is no conveyance by persons with interests in the land)—

section 9(4) (refusal by owners to convey);

Schedule 1, paragraph 10(3) (owners under incapacity);

Schedule 2, paragraph 2(3) (absent and untraced owners); and

Schedule 4, paragraphs 2(3) and 7(2) (common land),

shall be so modified as to secure that, as against persons with interests in the land which are expressed to be overridden by the deed, the right which is to be compulsorily acquired is vested absolutely in the acquiring authority.

11. Section 11 of that Act (powers of entry) shall be so modified as to secure that, as from the date on which the acquiring authority have served notice to treat in respect of any right, they have power, exercisable in the like circumstances and subject to the like conditions, to enter for the purpose of exercising that right (which shall be deemed for this purpose to have been created on the date of service of the notice); and sections 12 (penalty for unauthorised entry) and 13 (entry on sheriff's warrant in the event of obstruction) shall be modified correspondingly.

12. Section 20 of that Act (protection for interests of tenants at will etc.) shall apply with the modifications necessary to secure that persons with such interests as are mentioned in that section are compensated in a manner corresponding to that in which they would be compensated on a compulsory acquisition of that land, but taking into account only the extent (if any) of such interference with such an interest as is actually caused, or likely to be caused, by the exercise of the right in question.

13. Section 22 of that Act (protection of acquiring authority's possession where by inadvertence an estate, right or interest has not been got in) shall be so modified as to enable the acquiring authority, in circumstances corresponding to those referred to in that section, to continue entitled to exercise the right acquired, subject to compliance with that section as respects compensation.

New rights: compensation

14. The enactments in force in England and Wales with respect to compensation for the compulsory purchase of land shall apply with the necessary modifications as respects compensation in the case of a licence holder's compulsory acquisition of a right by the creation of a new right as they apply to compensation on the compulsory purchase of land and interests in land.

Part III Procedure, Compensation etc. (Scotland)

Application of Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 generally

15.—(1) Subject to sub-paragraph (2) below, the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 shall apply to the compulsory purchase by a licence holder of land or rights in Scotland as if the licence holder were a local authority within the meaning of that Act, and as if this Act had been in force immediately before the commencement of that Act.

(2) Paragraph 10 of the First Schedule to that Act (statutory undertakers' land excluded from compulsory purchase) shall not apply where the land or rights in question belong to another licence holder.

New rights: general application of Act of 1947 and incorporated enactments

16. The Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947, and the enactments incorporated with this Act by virtue of paragraph 15 above and paragraph 1 of the Second Schedule to that Act shall have effect with the modifications necessary to make them apply to a licence holder's compulsory acquisition of a right in Scotland by the creation of a new right (other than a right to abstract, divert and use water) as they apply to the compulsory acquisition of land, so that, in appropriate contexts, references in those enactments and that Act to land are to be read as referring, or as including references, to the right acquired or to be acquired, or to land over which the right is or is to be exercisable, according to the requirements of the particular context.

New rights: specific adaptations of Act of 1947

17. Without prejudice to the generality of paragraph 16 above, Part III of the First Schedule to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 (requirement of special parliamentary procedure, and other special provisions, in the case of acquisition of certain descriptions of land) shall apply in relation to a licence holder's compulsory acquisition of a right in Scotland by the creation of a new right with the modifications specified in paragraphs 18 to 23 below.

18. In paragraph 9 of that Schedule (compulsory purchase affecting land of the National Trust for Scotland) for references to the compulsory purchase of land there shall be substituted references to the compulsory acquisition of rights over land.

19. In paragraph 10 of that Schedule (land of statutory undertakers)—

(a) for the words "land comprised in the order" there shall be substituted the words "land over which a right is to be acquired by virtue of the order";

(b) for the words "purchase of" there shall be substituted the words "acquisition of a right over";

(c) for the words "it can be purchased and not replaced" there shall be substituted the words "the right can be acquired"; and

(d) for sub-paragraph (ii) there shall be substituted the following sub-paragraph— "(ii) that any detriment to the carrying on of the undertaking, in consequence of the acquisition of the right, can be made good by the undertakers by the use of other land belonging to, or available for acquisition by, them" .

20. In paragraph 11 of that Schedule (common or open space), for sub-paragraph (1) there shall be substituted the following sub-paragraph—

"(1) In so far as a compulsory purchase order authorises the acquisition of a right over land forming part of a common or open space, it shall be subject to special parliamentary procedure unless the Secretary of State is satisfied—

(a) that the land, when burdened with that right, will be no less advantageous to those persons in whom it is vested and other persons, if any, entitled to rights of common or other rights, and to the public, than it was before;

(b) that there has been or will be given in exchange for the right additional land which will as respects the persons in whom there is vested the land over which the right is to be acquired, the persons, if any, entitled to rights of common or other rights over that land, and the public, be adequate to compensate them for the disadvantages which result from the acquisition of the right, and that the additional land has been or will be vested in the persons in whom there is vested the land over which the right is to be acquired, and subject to the like rights, trusts and incidents as attach to that land apart from the compulsory purchase order; or

(c) that the land affected by the right to be acquired does not exceed 250 square yards in extent, and that the giving of other land in exchange for the right is unnecessary, whether in the interests of the persons, if any, entitled to rights of common or other rights or in the interests of the public,

and certifies accordingly."

21.⁶

22. Paragraph 3(1) of the Second Schedule to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 shall be so modified as to secure that, as from the date on which the licence holder has served notice to treat in respect of any right, it has power, exercisable in the like circumstances and subject to the like conditions, to enter for the purpose of exercising that right (which shall be deemed for this purpose to have been created on the date of service of the notice).

23. For paragraph 4 of that Schedule (protection for owner against severance of property) there shall be substituted the following paragraphs—

"4. No person shall be required to grant any right over part only—

(a) of any house, building or manufactory; or

(b) of a park or garden belonging to a house,

⁶ This paragraph is deleted by Schedule 8 of the Utilities Act 2000 which was brought into force by SI 2001 No. 3266 on 1st October 2001.

if he is willing to sell the whole of the house, building, manufactory, park or garden, unless the Lands Tribunal for Scotland determines that—

(i) in the case of a house, building or manufactory, the part over which the right is proposed to be acquired can be made subject to that right without material detriment to the house, building or manufactory; or

(ii) in the case of a park or garden, the part over which the right is proposed to be acquired can be made subject to that right without seriously affecting the amenity or convenience of the house;

and if it so determines, it shall award compensation in respect of any loss due to the acquisition of the right, in addition to its value; and thereupon the party interested shall be required to grant to the acquiring authority that right over the part of the house, building, manufactory, park or garden.

4A. In considering, for the purposes of paragraph 4 above, the extent of any material detriment to a house, building or manufactory, or any extent to which the amenity or convenience of a house is affected, the Lands Tribunal for Scotland shall have regard not only to the right which is to be acquired over the land, but also to any adjoining or adjacent land belonging to the same owner and subject to compulsory purchase."

New rights: specific adaptations of Lands Clauses Consolidation (Scotland) Act 1845

24. Without prejudice to the generality of paragraph 16 above, the Lands Clauses Consolidation (Scotland) Act 1845 shall apply in relation to a licence holder's compulsory acquisition of a right in Scotland by the creation of a new right with the modifications specified in paragraphs 25 to 28 below.

25. For section 61 of that Act (estimation of compensation) there shall be substituted the following section—

"61. In estimating the purchase money or compensation to be paid by the licence holder under the special Act, in any of the cases aforesaid, regard shall be had not only to the extent (if any) to which the value of the land over which the right is to be acquired is depreciated by the acquisition of the right, but also to the damage (if any) to be sustained by the owner of the land by reason of its severance from other land of his, or injuriously affecting that other land by the exercise of the powers conferred by this or the special Act."

26. The following provisions of that Act (being provisions stating the effect of a notarial instrument or of a disposition executed in various circumstances where there is no conveyance by persons with interests in the land)—

section 74 (failure by owner to convey);

section 76 (refusal to convey or show title or owner cannot be found);

section 98 (vesting of common land),

shall be so modified as to secure that, as against persons with interests in the land over which the right is to be compulsorily acquired, such right is vested absolutely in the licence holder.

27. Sections 114 (compensation to be made to tenants for a year etc.) and 115 (compensation where greater interest than tenant for a year) of that Act shall apply with the modifications necessary to secure that persons with such interests as are mentioned in those sections are compensated in a manner corresponding to that in which they would be compensated on a compulsory acquisition of that land, but taking into account only the extent (if any) of such interference with such an interest as is actually caused, or likely to be caused, by the exercise of the right in question.

28. Sections 117 (protection of promoter of undertaking where by inadvertence an interest in land has not been purchased etc.) and 118 (provisions supplementary to section 117) of that Act shall be so modified as to enable the licence holder, in circumstances corresponding to those referred to in those sections, to continue entitled to exercise the right acquired, subject to compliance with those sections as respects compensation.

New rights: compensation

29. The enactments in force in Scotland with respect to compensation for the compulsory purchase of land shall apply as respects compensation in the case of a licence holder's compulsory acquisition of a right by the creation of a new right (other than a right to abstract, divert and use water) as they apply to compensation on the compulsory purchase of land and interests in land.