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cc. All Interested Parties

9 February 2005

Dear colleague,

**Decision in relation to the request of British Energy Plc 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**

On 6 August 2004, British Energy (BE) informed Ofgem<sup>1</sup> of a formal request to the Gas and Electricity Markets Authority<sup>2</sup> (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.

On 19 November 2004, Ofgem issued a consultation concerning BE's request that the provisions of paragraphs 5 to 7 of SLC 14 be given effect in the electricity generation licence of BEGL, inviting views from interested parties on the Authority's preliminary view to consent to BE's request.

Having carefully considered respondents' views, the Authority has decided to direct that paragraphs 5 to 7 of SLC 14 have effect in the electricity generation licence of BEGL for five years from 9 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 direction issued by the Authority providing that the provisions of paragraphs 5 to 7 of SLC 14 shall be in effect in the electricity generation licence of BEGL.

In addition to consulting on BE's request, Ofgem also sought views from interested parties in relation to whether Ofgem should conduct a broad review of the powers, rights and obligations conferred on licensees in the electricity generation licence. Ofgem's views in relation to this issue are also set out in this letter.

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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.

<sup>2</sup> 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.

## Background

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

- (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
  - (ii) a distribution system.

Paragraphs 1 and 2 of SLC 14 specify how paragraphs 5 to 7 may be given effect. Paragraph 1 of SLC 14 provides that prior to 1 October 2001<sup>3</sup>, the Secretary of State could, by a scheme made under Schedule 7 to the Utilities Act 2000, provide for SLC 14 to have effect within an electricity generation licence. In addition, paragraph 1 provides 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. The Authority may direct to extend the date specified in the scheme.

Paragraph 2 of SLC 14 sets out that the Authority may issue a direction providing that the provisions of paragraphs 5 to 7 of SLC 14 shall have effect in a licence. When the Authority issues such a direction, paragraph 2 of SLC 14 states that paragraph 5 to 7 of SLC 14 shall have effect for a period specified in the direction, which may be extended by a further direction by the Authority.

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

## BE's request

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 in relation to the compulsory 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. In addition, BE made

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

a number of other arguments<sup>4</sup> in support of its application relating to the nature of nuclear generation as compared with other forms of generation.

### **Ofgem's preliminary view**

As set out in its November consultation on BE's request, Ofgem recognised BE's view that the powers and rights conferred in relation to the compulsory purchase of land may not have been applied consistently to all generation licensees. Ofgem also considered that this issue of consistency may extend to a number of other licence conditions (in which powers, rights and obligations can be conferred to licence holders by the Secretary of State or the Authority (see, for instance, SLC 15, 17, 17A and 18)). Ofgem considered 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 was of the view that there were two issues which needed to be resolved in relation to these conditions. First, whether it is appropriate for such conditions to exist, and second, if it was determined that such conditions should exist, whether the powers, rights and obligations conferred under the condition are applied consistently or, where there is difference in application, whether that difference is justified. Therefore, in its November consultation letter, Ofgem indicated that it may be appropriate for it to conduct a broader review of the powers, rights and obligations conferred on licensees in the electricity generation licence, focussing specifically on those two issues.

In relation to BE's request, and in light of the issues identified by Ofgem above, Ofgem was of the view that there was 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 was therefore that a direction should be issued providing that the provisions of paragraphs 5 to 7 of SLC 14 should be given effect in the electricity generation licence of BEGL. However, Ofgem considered that, at that time and subject to the outcome of any review Ofgem conducted in relation to the application of certain 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 was issued.

In its November consultation letter Ofgem invited respondents' views in regards to the issues raised in that 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; and
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.

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<sup>4</sup> See Ofgem's November consultation letter for more information.

## Respondents' views

Ofgem received four responses to its consultation. The following summarises the substantive comments made:

### *1. Whether generators as a class should have the powers and rights to compulsorily purchase land*

The majority of the respondents considered that electricity generators as a class should have the powers and rights conferred under SLC 14. These respondents considered that the provisions of SLC 14 enabled electricity generators to fully comply with the obligations set out within their licence. Some of these respondents considered that it was important that there are appropriate checks and balances in place in relation to how the powers and rights conferred under SLC 14 are used such that they are only used when it is essential to do so. However, these respondents considered that there were sufficient checks and balances in place under the current arrangements given that all SLC 14 applications are received from licensed generators and are assessed by both the regulator and the government.

One respondent did not consider that generators as a class should have the powers and rights conferred under SLC 14. This respondent considered that as Parliament had given powers for different approaches to be taken for different licensees it should be a matter for the Secretary of State to consider.

### *2. Whether the current application of the powers and rights conferred in relation to the compulsory purchase of land is consistent*

Given BE's SLC 14 application request, the majority of respondents considered there to be some degree of inconsistency in the application of SLC 14 in electricity generation licences. However, a number of these respondents highlighted that they did not consider that any difference in the application of the SLC 14 powers was anti-competitive; given that any licensed generator can make an application to the Authority to give effect to the relevant paragraphs in SLC 14.

### *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*

The majority of respondents were of the view that Ofgem should not conduct a broad review of the powers, rights and obligations conferred on licensees in the electricity generation licence. Most of these respondents considered that an established and recognised process existed where licensees could apply to the Authority to have certain licence conditions given effect in their licence.

A number of respondents considered that BE's SLC 14 application request was not contentious and therefore expressed concern that BE's application had prompted Ofgem to consider conducting a broader electricity generation licence review. Other respondents considered that Ofgem should have conducted a licence review as part of the suite of changes made through the Energy Act 2004, if it had prior concerns regarding the application of the licence conditions.

Only one respondent was in support of Ofgem conducting an electricity generation licence review. This respondent considered that BE's SLC 14 application highlighted inconsistencies in

the application of the condition, which could indicate a wider problem. The respondent therefore considered that a broader licence review would be timely and extremely valuable.

#### *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*

All respondents supported BE's application to the Authority that the provisions of paragraphs 5 to 7 of SLC 14 should be given effect in the electricity generation licence of BEGL. Several of these respondents indicated that the expiry period associated with the application should be consistent with other expiry periods agreed by Ofgem in equivalent circumstances.

#### **Ofgem's final view**

In relation to BE's request, having carefully considered respondents' views, and in light of the issues identified by Ofgem in relation to how the powers and rights conferred in relation to the compulsory purchase of land are applied across generation licensees, Ofgem remains of the view that 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. The Authority has therefore decided to direct that paragraphs 5 to 7 of SLC 14 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 the powers, rights and obligations conferred on licensees in the electricity generation licence, it would be appropriate to limit the duration for which paragraphs 5 to 7 of SLC 14 are given effect in the electricity generation licence of BEGL to five years from 9 February 2005.

In relation to whether Ofgem should conduct a broad review of the powers, rights and obligations conferred on licensees in the electricity generation licence, Ofgem considers that the views of respondents have raised a number of important issues that should be addressed. For instance, Ofgem notes the view of a majority of respondents that electricity generators as a class should have the powers and rights conferred under SLC 14. Ofgem considers that, in order for it to determine whether such a change would further the achievement of its principal objective to protect the interests of consumers and whether it would be consistent with its general duties, it would be necessary for it to conduct a review as to whether, in general, this change would be appropriate and, if so, whether the current condition as drafted in the electricity generation licence was suitable.

Ofgem acknowledges, however, that a majority of respondents to its November consultation expressed the view that such a review is not necessary. Ofgem therefore considers that, although a broad review of the powers, rights and obligations conferred on licensees in the electricity generation licence may not be priority at this time, such a review would be desirable and Ofgem proposes to undertake this review when its priorities and resources allow.

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

In accordance with the terms of SLC 14, the Authority has decided to direct that paragraphs 5 to 7 of SLC 14 be given effect in the electricity generation licence of BEGL for a duration of five years from 9 February 2005.

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 Ndid Njoku on 020 79017157 or Liz Chester on 0207 901 7403.

Yours sincerely

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

**Steve Smith**

**Managing Director, Markets**

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