

Guidance Note

**Derogation From Codes And Standards In Electricity Generation, Supply,
Distribution And Transmission Licences**

October 2003

Purpose of this Guidance Note

1. This document summarises the process for applying for and considering requests for derogation from technical codes and standards within electricity generation, transmission and distribution licences. A list¹ of the technical codes and standards together with the associated licence and condition number is provided in Appendix 1 to this guidance note. This document will be updated from time to time to reflect changes in licences, primary and secondary legislation, the technical codes and standards referenced and Ofgem's processes.
2. Compliance with technical codes and standards is in the interests of electricity consumers as failure to comply can have a direct and adverse impact on the security and quality of electricity supplied and may have health and safety implications.

What is meant by derogation?

3. A derogation is a direction from the Gas and Electricity Markets Authority (the Authority) relieving a licensee from its obligation to comply with a technical standard or code in its licence in specified circumstances and to a specified extent. The derogation will normally have an expiry date so that the need for it can be systematically reviewed and performance towards compliance can be monitored. The derogation will not apply to a period before the date the direction is issued. Every derogation will be entered on Ofgem's public register after it is made.
4. A derogation is granted to an individual licensee and cannot be transferred. Thus if a non-compliant system or plant item is sold, the new licensee will need to apply for a new derogation.
5. If a licensee would gain a competitive advantage from a derogation, then a direction would not be issued without Ofgem assessing what measures might be appropriate to offset that advantage. Such measures may also include requirements to monitor the impact of the derogation on the licensee making the application and other parties who may be affected.

When would a derogation be required?

5. Continued compliance with technical codes and standards is a licence obligation and is the responsibility of each licensee. Failure to comply, unless permitted by a derogation, is a contravention, for which Ofgem may take enforcement action and consequently issue an order and/or impose a financial penalty².
6. There are a number of circumstances in which a derogation may be required, for example,
 - To prevent a breach of a licensee's obligations while a system or plant item is restored to compliance with a code or standard. Such a derogation is likely to be limited to a timescale in which the compliance could reasonably be expected to be restored.
 - To prevent a breach of a licensee's obligations while changes to a code, standard or licence condition are made. Such a derogation is likely to be limited to a timescale in which the compliance could reasonably be expected to be restored.
 - To permit a system or plant item to operate out of compliance with the standard or code either indefinitely or for the lifetime of the system or plant item.
7. Where a licensee has failed to comply with their obligations, but has remedied the matter before an application for a derogation could reasonably be made, a direction would not be issued by the Authority retrospectively. In such circumstances, Ofgem will consider the extent to which the situation warrants enforcement action being taken in respect of the breach based on the nature of that breach, its consequences and the remedial actions taken by the licensee. Ofgem will however expect a licensee to notify it of any such situations as soon as possible. If no remedial action has been taken there is an increased likelihood of enforcement action by Ofgem.

¹ List was produced in October 2003

² Section 27A of the Electricity Act 1989 (as amended) gives the Authority power to impose financial penalties where there has been a contravention of a licence condition.

Types of derogation

8. There are three main categories of derogation that arise. These are:

Definite	-	Continues for a period of time specified in the Authority's direction
Lifetime	- - - -	Specific to a system or plant item and continues for the lifetime of the equipment forming that system or plant item Would cease should the equipment or plant item be replaced or a further derogation is made or the derogation is revoked Would only be granted when there are strong grounds for not taking action to restore compliance May be made where all parties materially affected by the non-compliance agree in writing to accept the consequences or are protected from its effects
Indefinite	- - - -	Continues until a further derogation is made or the derogation is revoked. Would only be granted if there are strong grounds for omitting an expiry date May be made where all parties materially affected by the non-compliance agree in writing to accept the consequences or are held harmless against its effects May lack an explicit action to restore compliance which will need to be justified against the Authority's principal objective and statutory duties and the licence obligations of the applicant

9. It should be noted that a lifetime or indefinite derogation would only be issued in very limited circumstances. It is usual practice for derogations to be limited for a period of time that is specified in the direction.

10. The Authority may issue further directions that can vary or withdraw previous derogations. This would be done following consultation with the affected licensee (and more widely if required) and may be initiated by a request from a licensee or by the Authority

How is a derogation requested?

11. The licensee should make a written request to Ofgem’s Technical Director that should as a minimum include:

Details of the applicant (typically the Company Secretary), including the full name of the licensee concerned		
A description of the non-compliance		
	-	Type of licence and relevant condition number and technical code or standard
	-	The required performance
	-	The existing capability of the system or plant
A description of any health and safety implications and the associated risk management measures		
A description of the proposal for restoring compliance (where applicable) including details of actions to:		
	-	Mitigate risks to customers or other authorised electricity operators
	-	Restore compliance (including timetable of works)
A description of the reasonable alternative actions that have been considered		
A statement of the expected duration of the non-compliance		

The licensee is required to justify the derogation request in terms of both the specific circumstances and the expected duration. Licensees are advised to give as much notice as possible when making derogation requests since a derogation will not be granted unless the Authority is satisfied that the request is justified.

How is the derogation request assessed?

12. Each derogation request is assessed by Ofgem individually on its merits in terms of the likely effect on consumers and on the ability of other authorised electricity operators to comply with their statutory obligations and licence conditions. In its assessment, the Authority, having regard to its principal objective and its general duties including environmental guidance issued by the government will consider:

- The nature of derogations already granted by Ofgem The likelihood of similar derogation requests in the future
- The effect of dealing with future derogation requests in a consistent manner
- Any competitive advantage that may arise from granting the derogation
- Allowances that have been made in current and previous price controls (where relevant)
- Any other relevant circumstances

If health and safety implications have been identified by the applicant then in addition to consultation with interested parties, Ofgem may also seek expert advice from the relevant government bodies and other organisations, for example, the Health & Safety Executive (HSE) and the Department for Trade & Industry (DTI)

Appendix 2 details Ofgem's procedure for considering an application for derogation and the criteria that Ofgem proposes to apply when considering a derogation request.

Further information

12. Please contact:

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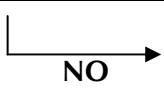
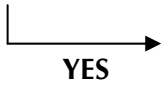
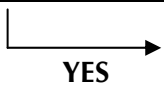
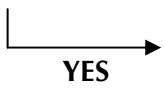
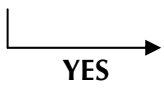
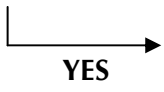
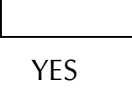
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**APPENDIX 1 – TECHNICAL CODES AND STANDARDS TO WHICH THIS GUIDANCE
NOTE APPLIES (OCTOBER 2003)**

LICENCE	STANDARD CONDITION NUMBER	TECHNICAL CODE OR STANDARD
Electricity Generation	5	Grid Code
Electricity Generation	6	Distribution Code
Electricity Transmission	7 and 7A	Grid Code
Electricity Transmission	8	Distribution Code
Electricity Distribution	5	Engineering Recommendation P2/5
Electricity Distribution	9 and 9A	Distribution Code
Electricity Distribution	15	Grid Code
Electricity Supply	5	Grid Code
Electricity Supply	6	Distribution Code
LICENCE	SPECIAL CONDITION NUMBER	TECHNICAL CODE OR STANDARD
Electricity Transmission (NGC)	AA2	Transmission System Security Standard and Quality of Service
Electricity Transmission (SHETL)	H	Transmission System Security Standard and Quality of Service
Electricity Transmission (SP)	H	Transmission System Security Standard and Quality of Service

APPENDIX 2 – OFGEM PROCEDURE FOR CONSIDERING AN APPLICATION FOR DEROGATION

- A1. Ofgem will consult with the licensee making the request initially to clarify points relating to the derogation request and satisfy itself that there is a need for a derogation.
- A2. Ofgem will consult with other parties if required in accordance with the following checklist:

<ul style="list-style-type: none"> • Have directly affected authorised electricity operators been identified? 		
	 NO	Discuss with licensee making the request
<ul style="list-style-type: none"> • Are there safety implications? 		
	 YES	Consult with the Health and Safety Executive and/or DTI
<ul style="list-style-type: none"> • Does it affect a nuclear powered generating station? 		
	 YES	Consult with the Nuclear Installations Inspectorate
<ul style="list-style-type: none"> • Does it affect other authorised electricity operators? 		
	 YES	Consult with those who are materially affected (this includes those parties who Ofgem considers would be affected technically and/or commercially)
<ul style="list-style-type: none"> • Does the request raise any wider issues? 		
	 YES	Public consultation and consideration of the wider impact in the context of the Authority's overall duties and responsibilities
<ul style="list-style-type: none"> • Is a monitoring mechanism required? 		
	 YES	Consult with licensee and materially affected parties (or more publicly where necessary) about suitable mechanism
<ul style="list-style-type: none"> • Are there other relevant factors? 		
	 YES	Seek independent external advice if required.

- A3. Ofgem is likely to consider that a derogation request is justified if:-
- An impact assessment has been provided by the applicant that demonstrates that there are NO:-
 - Significant risks associated with the non-compliance to the licensee, other relevant licensees or connected customers (who may or may not be a licenced party).
 - Avoidable adverse impacts (immediately or in the longer term) on the licensee, other relevant licensees or connected customers.
 - Additional measures that could be taken to further mitigate the impact of the non-compliance on the licensee, other relevant licensees or connected customers for its duration.
 - Outstanding objections from other parties who are materially affected by the non-compliance.
 - Competitive advantages to the licensee arising from the derogation that cannot be addressed that are not offset by a suitable mechanism.
 - Other reasonable options to address the non-compliance that have not been considered.
 - The applicant has presented a robust, economic case that supports the action that it considers necessary to address the non-compliance. (Ofgem notes that there may be cases where the impact of the non-compliance may not justify the expenditure required to restore compliance but would expect any applicant to make a strong economic case for any decision not to restore compliance.)
 - The applicant has presented a realistic and comprehensive implementation plan that defines, at the very least:
 - The works required to restore compliance.
 - The timetable for those works that show a deadline that is reasonable and is achievable (subject to highlighting any factors that may be outside the applicant's control, for example, third party consents).
 - Any measures to mitigate the risks to other parties that will be (or have been) taken until the non-compliance is restored.
 - The applicant has produced any other information that is relevant to a specific request.

Where an applicant is unable to satisfy all the above criteria, Ofgem will assess how far the applicant's ability to satisfy some of the criteria is sufficient to justify the granting of a derogation. It is noted that a justified derogation request would not necessarily need to meet all of the listed criteria. Ofgem would use its judgement in assessing any derogation requests and would advise any applicant of additional information requirements that were not included in the original request.

- A4. If Ofgem considers that the derogation request is justified then the Authority will issue a direction to the licensee granting the necessary relief from the obligations that were specified in the request. A copy will also be placed on Ofgem's public register.
- A5. If Ofgem considers that the derogation request has not been sufficiently justified then the Authority may:
- Issue a direction granting the derogation for a short duration to allow the licensee time for further investigation of solutions to the non-compliance.
 - Refuse the derogation request.
- A6. Ofgem will maintain a record of derogations that have been granted and is likely to incorporate a proactive derogation monitoring activity for fixed duration derogations in its asset risk management work area.