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Dear John

CONSULTATION ON FUEL MIX DISCLOSURE

EDF Energy welcomes this opportunity to comment on the initial draft of the new supply licence condition by which the DTI proposes to give effect to the UK's obligations under article 3(6) of the Liberalisation Directive. We also appreciated Ofgem's seminar held on 5 August, at which it was clear that industry, regulator, and government were keen to work together to implement the requirements of article 3(6) in a workable and effective manner.

We note that although this consultation is sponsored by Ofgem, the proposed new licence condition would be introduced by means of regulations to be made by the Secretary of State under section 2(2) of the European Communities Act 1972. In these circumstances, it is clearly appropriate that the Secretary of State should be aware of our comments, and we are therefore sending a copy of this response (including our detailed drafting comments) to her officials.

It is clear from our own considerations and also from what was said at the seminar that considerable amendment and clarification of the proposed licence condition will be required – and, in this context, that some process will be needed to give the industry continuing sight of the government's proposals as they develop. Moving straight to section 2(2) regulations without further sight of the condition in draft carries the risk that something unworkable could be legislated, particularly as the making of such regulations is subject only to the negative resolution procedure.

We amplify our concerns in the attached commentary, first in general terms and then by suggesting some specific changes to the draft of the licence condition itself, where we feel that this could be helpful.

Yours sincerely

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EDF ENERGY: COMMENTS ON OFGEM'S CONSULTATION ON FUEL MIX DISCLOSURE

Some general comments

Regarding the basis of green power, from data year two onwards it is proposed that REGOs form this basis. We welcome this. We also welcome the statement at the seminar that REGOs will be tradeable on a "separable" basis with regard to the underlying power, and that the actual means for registering and trading REGOs simply will very shortly be confirmed.

We believe that it is important that the references to "guarantees of origin" in the draft licence condition definitions should not be limited to UK certificates. It is a clear intent of the Guarantees of Origin Directive that the guarantees of origin should be portable as between Member States. We expand on this point in our detailed commentary below on the wording of the draft licence condition and its definitions, where we propose alternative wording.

The licence condition seeks to define "promotional materials" as "including, but not limited to, materials handed out or sent directly to customers." This is too open-ended and would be impossible to comply with. In our detailed comments below, we recommend, and explain, alternative wording.

We have particular concerns over those parts of the draft condition that relate to searches of premises as part of a verification exercise**:** we do not believe that these powers are either necessary or proportionate. Again, we offer alternative wording below for this part of the condition.

We are concerned that the compliance cycle may not work. Suppliers will need at least two months from receipt of the relevant information to complete their print runs and begin dissemination of the new information. In the case of promotional material, a further three months should be permitted to use up old stocks where necessary. We offer alternative wording below for the condition and its definitions that would create a realistic workable timeline in these respects – it specifies the dependencies more clearly.

As regards the provision of information by the DTI, we hope that the generic emissions factors given will be reasonably consistent with those used in emissions trading design work, even though those ETS data are calculated in relation to a different 12-month time period and so will not be identical.

To avoid any publication delay and keep the process simple and workable, the adjustment made by the DTI to the national fuel mix data that it publishes should be limited to removing all green power and adjusting the remaining four components to achieve summation to 100%. We noted the assurance at the seminar that this is the intent**:** but it is not the meaning of the words in the consultation's explanatory portion.

We are concerned, as regards the intended issuing by Ofgem of guidance on best practice, that an unduly rigid approach could stifle innovation and force the publication of information not in a format consistent with suppliers' brands. It is therefore important that guidance should not be prescriptive.

Commentary on the draft licence condition

Definitions (paragraph 1)

general: some definitions are introduced by "refers to" others by "means". Is any difference intended? If so, please explain**:** if not, please conform.

first disclosure period: we suggest that this new definition (meaning "the disclosure period immediately following the first date") should be added.

fuel mix disclosure data table: the references to the DTI should be spelt out in full.

generator declaration: it is highly unlikely that it will be possible to obtain generator declarations for a high proportion of the renewable energy in year 1. This is because of the highly fragmented nature of the renewable generating industry and the fact that a contract trail already exists for 2004/05 without any provision for generator declarations. In order to get more meaningful green data, we suggest that the holding of a ROC in year 1 may be counted as holding a generator declaration, provided that the supplier takes reasonable efforts to avoid double counting. We suggest this alternative wording**:**

> "generator declaration" means a document compiled by the generator containing the details specified in paragraph 8 in relation to the preceding year, but so that in relation to the first disclosure period, and subject to taking reasonable endeavours to avoid double counting with any such documents held by it, the licensee may treat as generator declarations any ROCs relating to that period which are held by it at close of business on the record date.
>
> "record date" means**:**
>
> (a) in relation to the first disclosure period, one week after the final issue of ROCs by the Authority for that period, and
>
> (b) in relation to any other disclosure period, 1 June next following the end of that period.
>
> "ROC" means a certificate issued by the Authority under section 32B of the Act and not revoked.

guarantees of origin: this definition needs to include guarantees issued by other Member States of the EU, in accordance with article 5(4) of Directive 2001/77/EC, which requires mutual recognition of REGOs. We suggest**:**

> "guarantee of origin" means a certificate issued **…** renewable energy sources, or, where a corresponding quantity of electricity has been imported into the United Kingdom from elsewhere in the European Union, a guarantee issued by the relevant Member State or competent body under article 5 of Directive 2001/77/EC.

preceding year: we do not think that this definition works between January and July each year, and we think that the 1 July date will have to be flexible to allow for any delays in the provision of information by the DTI and/or Ofgem. We think that it is best to introduce a date called the "disclosure date" when disclosure of the new information is to begin, and to define the "preceding year" in relation to this, as follows**:**

> "disclosure date", in relation to a disclosure period, means the date two months after the later of the record date for that period and the date on which the fuel mix disclosure table corresponding to that period is published.
>
> "preceding year", in relation to any disclosure date, means the most recent disclosure period completed prior to that date.

promotional materials: as mentioned at the recent seminar, this definition is too open-ended to be meaningful. Obligations on the industry cannot use the word "including" since there is no way the industry can know if it has complied.

It would also be sensible to take advantage of the clarifications given by the Commission about the modes of communication intended to be included, and to consider precisely what material is intended to be covered. Moreover, it is noteworthy that the directive does not say "all" promotional material**:** we take that as meaning that prospective consumers need to see, but should not be bombarded with, the labelling information.

Taking account of all these points, we therefore suggest this approach**:**

> "promotional materials" means written materials handed out or sent directly to prospective final customers which specifically solicit the purchase of electricity from the supplier's undertaking, but**:**
>
> (a) where several such items are so handed out or sent together, or where the process of agreeing with a customer for the supply of electricity requires additional confirmatory communications, the complete package of communication shall be considered to be a single item of promotional material, and
>
> (b) promotional materials do not include newspaper, magazine, bill-board, and television or radio advertisements.

reference sources: we think that it is probably best to omit this definition and deal with the matter in the text, as it is unclear whether the formulation "including but not limited to" is a further open-ended obligation or else is intended to give the industry additional compliance options. In any event, it would be better to track the wording in the directive ("such as web pages"), which implies that the reference sources must be of a similar nature to web pages.

relevant person: this definition should be expanded to deal with a situation where the generator is not a company limited by shares.

total amount of electricity supplied by the licensee: the reference to the Renewables Obligation (Scotland) Order 2002 is incorrect, as that order was repealed by the 2004 version which replaced it. However, the reference to 2002 is correct for England and Wales, as the England and Wales 2004 order amended rather than replaced the 2002 order.

Paragraph 2

As a consequence of our suggestions in relation to paragraph 5 (see below), it will be necessary**:**

- to replace "Subject to paragraph 5" with "Once the licensee has supplied electricity for a full disclosure period", and

- to clarify the 12-month period for bills, by replacing "in a 12-month period" in sub-paragraph (a) with "in the 12-month period immediately following each disclosure date".

Paragraph 2(b)

We believe that an instantaneous switch-over of promotional material is neither feasible nor cost-effective. We therefore suggest adding the following words to the end of this sub-paragraph**:**

> "which were printed or made after the disclosure date (or earlier if the supplier so wishes)".

Paragraph 3(b)

This does not accurately track the terms of the directive because it asks suppliers to identify the environmental impact of CO_2 and radioactive waste, rather than simply quantify the amounts of these things produced – which the Commission guidance indicates is all that is mandatory. It also needs to be clearer that web pages are an option for suppliers, who could (if they wish) just state the data.

As a separate point, we think that the label will need to identify the year to which it relates.

We therefore suggest the following form of words**:**

(b) either information on emissions of CO_2 and radioactive waste resulting from each kilowatt hour of electricity produced according to that overall mix, or else a reference to existing reference sources, such as web pages, where such information is publicly available, and

(c) a statement identifying the preceding year.

Paragraph 4

It would be helpful to add at the end**:** "and it shall be a sufficient compliance to quote each percentage to the nearest whole per cent, unless the category represents less than 1 per cent, in which case one decimal place is required".

Paragraph 5

Much of the existing substance of this paragraph is covered by the more specific amendments that we have suggested for paragraph 2 (see above). In particular, those amendments secure that the disclosure date is when disclosure starts using the new data, rather than when it must be completed. However, we think that it will be necessary to set a cut-off for old promotional material.

On the basis that three months is a reasonable time to use up stocks, we would therefore redraft paragraph 5 as follows**:**

5. The licensee shall not use promotional material**:**

(a) bearing information of the type described in paragraph 3, relating to any year before the previous year, at any time more than three months after the disclosure date, or

(b) bearing no information of that type, at any time three months after the disclosure date following the first full disclosure period for which the licensee has supplied electricity.

Paragraph 6

This needs tightening up to say when declarations must be held and also to deal with the fact that guarantees of origin may be held from other EU countries which may not be on Ofgem's register.

We therefore suggest that the sub-paragraphs should read**:**

(a) renewable when the licensee has redeemed a guarantee of origin or, if such a process is not available in relation to any guarantee held by the licensee, when the licensee holds a guarantee of origin (or, in relation to the first disclosure period, a generator declaration) at close of business on the record date;

(b) coal, natural gas, nuclear, or other, when the licensee holds a generator declaration at close of business on the record date; or

(c) in the case of electricity obtained via an electricity exchange or imported from an undertaking situated outside the Community, attributable to an energy source where the licensee holds a generator declaration at close of business on the record date or, in the case of **…**

Paragraphs 11–13

These "dawn raid" powers are not necessary and are disproportionate to the policy objective, given that paragraph 10 already provides sufficient access to information. If it is still considered that more is required, we suggest**:**

11. The licensee shall, if so required by the Authority**:**

(a) engage a verifier accredited by the Authority, or by an accreditation body designated for this purpose by the Authority, to report to the Authority on whether it appears to the verifier that the information described in paragraph 3 has been prepared, in all material respects, in accordance with this condition, and

(b) provide a copy of the verifier's report to the Authority.

We suggest that it should not be necessary for each supplier to provide such a report every year. However, it may be useful, to ensure reliability, for suppliers to undergo verification from time to time.

EDF Energy

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