John Costyn
Ofgem
9 Millbank
London
SW1P 3GE

FL/LIC

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Euan C. Norris
0141 568 3259

Dear John

Fuel Mix Disclosure – Proposed Supply Licence Amendment

ScottishPower welcome the opportunity to comment on the above consultation document. Since June 2003 we have proactively engaged in discussions with DTI, Ofgem and suppliers on how implementation of EU Directive 2003/54 should be taken forward in the United Kingdom (UK). The DTI have maintained the view that fuel labelling should be implemented in the UK making use of existing available data and that the minimal requirements of the directive should be delivered to ensure compliance. Throughout this process suppliers have been supportive of the DTI's pragmatic approach and taken debate forward on that basis. Discussions held with Ofgem have always indicated that they were also supportive of the DTI's position on implementation and that they would facilitate fuel labelling in a way that would minimise the impact and costs on consumers and suppliers whilst also ensuring that the UK complied with the directive.

It was therefore with great disappointment that we read the detail of the recent consultation in that we strongly believe that the proposed licence amendment completely fails to implement fuel labelling in the manner advocated by the DTI and thus far supported by suppliers. We are concerned that Ofgem have misinterpreted the preferred approach of the DTI and in turn have produced a licence condition which if implemented would do nothing more than increase the regulatory burden placed upon suppliers. We believe that the proposals put forward by Ofgem create an over-prescriptive and onerous obligation on suppliers. In particular, we believe that the powers of entry, together with the information gathering provisions set out in the proposed licence condition are completely disproportionate in relation to the overall impact that the implementation of fuel labelling will have on the operation of the competitive supply market. We believe that Ofgem have in effect attempted to extend their existing powers in relation to obtaining information from suppliers in a manner that is wholly excessive and unnecessary.

In addition we have significant reservations on the legality of the proposed licence amendment particularly due to the fact that suppliers are having this licence condition effectively forced upon them. If the proposed licence condition were being implemented via the collective licence modification route, we would exercise our right to register a formal objection to the implementation of the proposed modification. We have detailed our concerns in relation to the imposition of the licence condition in Appendix A of this letter.

We have addressed the further questions raised within the consultation in Appendix B. In addition I have copied this letter to Sue Harrison at DTI as I believe that DTI need to

seriously reassess what appears to be a significant change in approach on their delivery of compliance with the European Directive and the precedent set by introducing a licence modification by this previously unforeseen, and unwelcome route.

Should you wish to discuss any of the information included within our response please contact me using the above telephone number, alternatively I can be contacted via email at euan.norris@scottishpower.com.

Yours sincerely

Euan Norris
Regulation, Legal & Commercial

Appendix A

ScottishPower's Legal Concerns

We note that according to the DTI in its "Conclusions from the Responses to the Consultation on the Electricity Directive" (the "Conclusions") its proposed method of implementation is the "most straightforward and effective way of implementing these new Community obligations". In addition, the DTI claim that:

"In order to satisfy the obligation in the Directive that the Member State must take necessary steps to ensure that the information provided by suppliers to their customers is reliable, the Department considers that these matters must be dealt with in the licence condition rather than as separate rules."

However the basis on which this claim is made is not explained further in the Conclusions document. It is therefore unclear why the DTI/Ofgem believe that stand-alone regulations under Section 2(2) would not be sufficient to ensure the provision of reliable information to customers.

ScottishPower believes that there are legal issues which arise from the DTI/Ofgem's decision to proceed by way of amendment to the Standard Conditions.

It is ScottishPower's view that while the DTI/Ofgem proposal seeks to amend the Standard Conditions by Regulations, there is no provision within the Electricity Act (or indeed the Utilities Act) which expressly permits modification by such means. Accordingly, since the Regulations would not be enacted in terms of the Electricity Act, they could be ultra vires.

Although the Electricity Act permits modification of the Standard Conditions in certain situations, e.g. Section 11A, the only power currently given to the Secretary of State to amend the Standard Conditions is a limited power relating to the implementation of Electricity Trading Arrangements. Thus, it is considered that in this case the Secretary of State has no general power to amend the Standard Conditions under the Electricity Act and we believe this cannot be remedied by attempting to use the European Communities Act to take such a power.

In addition, we consider that if the DTI/Ofgem were to be able to introduce regulation in such a manner, then it could set a precedent whereby the Standard Conditions may be amended in future without due consultation with the industry as provided for in Section 11A of the Electricity Act.

This would place licence holders in a position where a particular provision of the Standard Conditions may be removed, amended or inserted without them having any degree of input. This was a concern noted by Parliament when it considered the proposed introduction of Section 134 of the 2004 Energy Bill. On coming into force, this provision will give the Secretary of State the power to amend the Standard Conditions for the purpose of implementing BETTA (albeit with some form of consultation with licence holders). The following excerpt from Hansard

shows that Parliament recognises the danger of giving power to the Secretary of State to make such amendments:

“We are also conscious of the need to avoid uncertainty among licence holders, and we do not intend to take an ongoing power to make modifications. The power is exercisable only within 18 months of commencement of the section.”

It can be argued that there is at least an equivalent risk of uncertainty involved if the Secretary of State is able to override the provisions of the Electricity Act in this case.

It is also noted that the DTI/Ofgem have elected to pursue their proposal contrary to the responses of the majority of respondees to the Consultation Paper.

Appendix B

Environmental Information

We would support the view that standardised factors reflecting average GB factors for CO_2 emissions and radioactive waste generation should be used. Information based on verified station-specific emission factors should not be substituted for part of the total at this stage. It is important to gain consumer confidence in the fuel labelling system by ensuring consistency between suppliers. All suppliers therefore should base their information on the same set of data to ensure that customers can make true comparisons when comparing different suppliers.

REGOs

We would comment that the introduction of the REGOs system was based upon the assumption that they would be voluntary and have no monetary value – requiring them to be the sole scheme to be used for fuel labelling effectively makes them compulsory and implies that they will have a financial value. In addition, Ofgem has also appeared to indicate that REGOs can be separated from the physical power. We would like clarification of this from Ofgem.

In keeping with the minimalist approach a simple solution to dealing with this issue would be for suppliers who were in possession of a ROC to be automatically issued with a REGO leaving only large Hydro to be dealt with separately. This would represent a straightforward solution to issuing REGOs for the purposes of fuel labelling going forward and reduce the requirement for an extension of existing systems. This would also follow the preferred approach of both the DTI and European Commission by making best use of existing 'green' certification systems where possible to verify green supply. By developing such a system Ofgem's administrative burden would not be increased unnecessarily.

We would like to see Ofgem/DTI produce detailed plans in relation to the implementation of the REGOs certification scheme. Suppliers would therefore be able to fully understand the requirements of the scheme and would be able to conduct a comprehensive review of IT systems ensuring that they were sufficient to support any new scheme. We also need to understand how Ofgem is going to process REGOs and therefore Ofgem requires setting up a REGOs system as a matter of urgency and engage industry participants on how this would be developed.

Compliance Cycle

The timing of when disclosure labels should be presented by suppliers to customers raises a concern. Any delay in the availability of the data that the DTI have agreed to produce could result in suppliers being unable to fulfil their obligations of the licence condition. Also, the period prescribed for reporting information to consumers is too short. Green certificates are issued three months in arrears therefore a period of three months will be required following the end of the reporting period. Thereafter appropriate time must be given for verification. This coupled with the time suppliers require to produce and print the data going to consumers would mean realistically the first labels would be sent towards the October of each year.

Evidence For Fuel Sources
The proposed licence condition in respect of evidence for fuel sources conflicts with the 'Minimalist Approach' favoured by industry. Previous guidance notes produced by the European Commission advised that in relation to the tracking of information "member states ensure that the best available information is used". The administrative burden that would be imposed upon suppliers in respect of generator declarations is unreasonable, unnecessary and does not make best use of available data. Ofgem are imposing a licence condition on suppliers that requires them to obtain information from generators who have no equivalent licence condition and therefore are not compelled to provide such information. We see no requirement to impose such an obligation on any industry participants in respect of fuel labelling.

A more appropriate solution would be to make use of existing generation contracts in place between suppliers and generators. The power associated with such contracts can be easily verified and would provide an acceptable standard of proof that information included within a suppliers fuel label was reliable.

Verification, Compliance and Audit
The proposals set out within the licence condition do not provide an acceptable balance between the requirements to provide accurate data and the desire to minimise the regulatory burden on suppliers. Ofgem does not require 'dawn raid' powers to verify the labelling information and to include them within this licence condition is an unwarranted extension of Ofgem's powers. ScottishPower already disclose environmental information which includes our energy mix at the moment. We do not need a further requirement in addition to our current regime where we are regarded by the Environment Agency as a company that demonstrates best practice in this area.

Guidance on Best Practice
Information has already been produced by the European Commission in respect of best practice for the production of a fuel label. Additional information would only serve to duplicate work already produced therefore we see no requirement for best practice guidance to be produced by Ofgem.

General Comments
Promotional Material – The definition provided within the proposed licence condition is not sufficient. The definition as it currently stands leaves suppliers in a position where they would be unable to demonstrate compliance. Promotional material should simply be defined as: materials handed out or sent directly to consumers who are not already supplied by the relevant supply company, but do not include newspapers, magazines, bill board and television adverts. We would also expect items such as pen, hats, umbrellas etc to be excluded from this definition.

Reference Sources – The definition included within the licence condition is inadequate. The best practice guidance provided by the European Commission clearly provided member states with three options to choose from on where to store information in relation to environmental impacts namely:

- Website
- Include the information on the bill
- Include the information on a separate insert with the bill.

The current definition provided by Ofgem implies that suppliers would be required to present environmental impact information via the three communication channels listed above. This again imposes obligations on suppliers beyond the requirements of the directive. Suppliers should be able to choose which method they employ to convey this information to consumer.