

Your Ref:
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Cc. All Interested Parties

28 October 2005

Dear Colleague,

Decision in relation to the request from Thanet Offshore Wind Limited for a Direction under Standard Condition 14 ("Compulsory Acquisition of Land etc") of the Electricity Generation Licence

The Gas and Electricity Markets Authority ("the Authority")¹ has considered an application for an electricity generation licence made by Thanet Offshore Wind Limited ("TOW") on 29 March 2005.

On 18 May 2005, TOW submitted a request for the Authority to make a direction providing for the provisions of paragraphs 5 to 7 of Standard Licence Condition 14 ("Compulsory Acquisition of Land etc") ("SLC 14") to have effect in that generation licence.

On 23 August 2005, Ofgem issued a consultation² concerning TOW's request that the provisions of paragraphs 5 to 7 of SLC14 be given effect in the electricity generation licence of TOW, inviting views from interested parties on the Authority's preliminary view to consent to TOW's request.

No responses were received to that consultation.

The Authority has decided to implement its preliminary view and direct that paragraphs 5 to 7 of SLC 14 have effect in the electricity generation licence of TOW for five years from 28 October 2005.

This letter explains the background to TOW's request 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

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. The terms "Ofgem" and "the Authority" are used interchangeably in this letter.

² 'Request from Thanet Offshore Wind Limited for a Direction under Standard Condition 14 ("Compulsory Acquisition of Land etc.") of the Electricity Generation Licence', Ofgem, August 2005.

provisions of paragraphs 5 to 7 of SLC 14 shall be in effect in the electricity generation licence of TOW.

Background to SLC 14

Paragraphs 5 to 7 of SLC 14 refer to and set out the purposes for which the powers and rights conferred under Schedule 3³ of the Electricity Act 1989 shall have effect. Schedule 3 provides for the Secretary of State to authorise a licence holder to compulsorily purchase any land for any purpose connected with the carrying on of the activities which he is authorised by his licence to carry on. Where the land in question belongs to another licence holder, the Authority must give its consent to the Secretary of State's authorisation.

The purposes referred to in SLC 14 (in paragraph 6 specifically) are:

- (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.

Therefore, under SLC 14 licensees can make a request of the Secretary of State for the compulsory purchase of land in connection with the activities listed above (detailed in paragraph 6 of SLC 14). For the purpose of clarification, the Authority can give effect to the powers and requirements of SLC 14 in specific electricity generation licences; i.e. it can switch the condition on or off, but it does not have the vires to take a decision in respect of whether the land in question can be compulsorily purchased. Any such decisions fall entirely to the Secretary of State, except where the land in question belongs to another licence holder. In the latter case, under Schedule 3 (2) (1) the Authority must give its consent to the Secretary of State's authorisation.

Paragraphs 1 and 2 of SLC 14 specify how paragraphs 5 to 7 can be given effect. Paragraph 1 of SLC 14 relates to the provisions of paragraphs 5 to 7 of SLC 14 being brought into effect by the Secretary of State.⁴ Paragraph 2 of SLC 14 sets out that when the Authority issues a direction that the provisions of paragraphs 5 to 7 of SLC 14 shall have effect, it shall specify a period during which such paragraphs shall have effect. Therefore those licences where paragraphs 5 to 7 of SLC 14 were brought into effect by the Secretary of State may or may not include an expiry

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

⁴ Paragraph 1 of SLC 14 sets out that where the Secretary of State provides by a scheme made under Schedule 7 to the Utilities Act 2000 for SLC 14 to have effect within a generation licence, the provisions contained in paragraphs 5 to 7 will apply to the licensee from the date the scheme takes effect until such date as may be specified in the scheme. The last day for the Secretary of State to exercise the scheme-making power was the day before section 30 of the Utilities Act 2000 came into force i.e. 30th September 2001.

date, whereas those licences where paragraphs 5 to 7 of SLC 14 have been brought into effect by the Authority will necessarily include an expiry date.

Details of those licences in which paragraphs 5 to 7 of SLC 14 have been given effect without an expiry date being specified, those licences in which paragraphs 5 to 7 of SLC 14 have been given effect including an expiry date and those licences where these paragraphs are not in effect are available on the electronic public register⁵ on the Ofgem website.⁶

TOW's request

In support of its application, TOW considered that the area of land which it seeks to purchase is small, the current plan being to lay 2.5-3.0 km of 132kV underground cabling consisting of two circuits terminating at the existing substation at Richborough power station. TOW confirmed its intention to attempt to acquire the land by negotiation with the relevant landowner(s) rather than by seeking authorisation for compulsory acquisition from the Secretary of State. However, TOW considered that it would be helpful to prepare for the possibility of it seeking a compulsory purchase order.

Therefore, TOW requested the Authority give effect to paragraphs 5 to 7 of SLC 14 in its electricity generation licence. For the purpose of clarification, TOW did not request the Authority's views or permission in respect of any actual compulsory acquisition of land. As discussed previously, any such permission would be a question for the Secretary of State.

Ofgem's preliminary view

The Authority's preliminary view was that it should make a direction to give effect to paragraphs 5 to 7 of SLC 14 of the electricity generation licence to be granted to TOW. It proposed that such direction should be for a period of five years.

Ofgem considered that this preliminary view was consistent with its decision in respect of the request from British Energy for the provisions of paragraphs 5 to 7 of SLC 14 to be given effect in the electricity generation licence of British Energy Generation Ltd.⁷ In that decision, Ofgem considered that it was appropriate, "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, to limit the duration for which paragraphs 5 to 7 of SLC 14 are given effect in the electricity generation licence of British Energy Generation Ltd to five years from 9 February 2005".

Ofgem has yet to undertake the wider electricity generation licence review referred to in the British Energy decision letter and therefore considered that at this time, for the benefit of consistency, it would also be appropriate for TOW to be granted access to the powers that it has requested under SLC 14.

⁵ <http://62.173.69.60/index.php?pk=folder97241>

⁶ www.ofgem.gov.uk

⁷ 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, Ofgem, 9 February 2005.

Respondents' views

No responses were received to this consultation.

Ofgem's final view

Following this period of consultation, and having noted that no consultation responses have been received, Ofgem has further considered this request and is of the view that its preliminary view remains appropriate. Therefore Ofgem considers that the Authority should make a direction to give effect to paragraphs 5 to 7 of SLC14 of the electricity generation licence to be granted to TOW for a period of five years.

Ofgem considers that this view remains consistent with its previous decision in respect of the request from British Energy.

Electricity Generation Licence Review

In its consultation with respect to the request from British Energy, Ofgem recognised that the powers and rights conferred in relation to the compulsory purchase of land may not be applied consistently to all generation licensees. Further that this issue of consistency may extend to a number of standard licence conditions in which powers, rights and obligations can be conferred to licence holders by the Secretary of State or the Authority via the licence (including for example electricity generation standard licence conditions 15, 17, 17A and 18). Ofgem therefore 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 of competition. Ofgem therefore considered that it was appropriate to conduct a broad review of the powers, rights and obligations conferred on licensees under the electricity generation licence.

However, due to Ofgem resources being diverted to take forward other more urgent workstrands, Ofgem has not yet been able to take forward a review of the electricity generation licence. Further, having considered the potential nature of this review, Ofgem notes that whilst it would be more desirable to take forward a wider review at this time, such a review is unlikely to be able to be undertaken over the coming winter months given that other, more urgent, workstrands require additional support over this period.

However, Ofgem considers that it remains important to address the application of SLC14 and SLC15 as a matter of some urgency. Ofgem has therefore decided to take forward a review of these two standard licence conditions, separate to a wider electricity generation licence review, as soon as possible.

Until such time as this review is completed, Ofgem considers that, in relation to TOW's request, there is no objective justification for TOW to be denied similar powers as compared with other companies that currently have SLC14 in effect in their electricity generation licence. Therefore, Ofgem considers that, at this time and subject to the outcome of any review conducted by Ofgem in respect of SLC 14 and SLC 15, it would be appropriate to agree to TOW's application

and to bring the relevant provisions of the licence into effect for a period of five years from the date that the direction is issued.

The Authority's decision

In accordance with the terms of SLC14, the Authority has decided to direct that paragraphs 5 to 7 of SLC14 be given effect in the electricity generation licence of TOW for a duration of five years from 28 October 2005.

If you have any queries in relation to the issues raised in this letter, please feel free to contact Ben Woodside on 020 7901 7471.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'S. Brown'.

Sonia Brown
Director, Wholesale Markets