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Date: 30 May 2012

Dear Mr Vidal,

**Decision in relation to NuGeneration Limited's (NuGen) request for Authority consent under Standard Licence Condition 15 (SLC 15) of the electricity generation licence**

On 4 April 2012, NuGen submitted to the Gas and Electricity Markets Authority ("the Authority"<sup>1</sup>) its application to obtain the Authority's consent under SLC 15 of the electricity generation licence to exercise rights of entry on land including subsoil. This right of entry "for the purposes of establishing whether or not the land is suitable for the construction or extension of a generating station" is given by paragraph 10 of Schedule 4 of the Electricity Act 1989 (the Act).

After taking account of all relevant material, including the application and evidence provided in support, the responses to the consultation and statutory objectives and duties the Authority is satisfied that the application for consent should be granted. This letter sets out our decision in full in respect of NuGen's application. A copy of the Consent is attached to this letter.

Background

Schedule 4, paragraph 10(1) of the Act gives a power to the holder of a generation licence to access land in order to survey the land for the purpose of ascertaining whether the land would be suitable for the use for any purpose connected with the carrying on of the activities which the licence holder is authorised by their licence to carry out. Schedule 4, paragraphs 10(2) to 10(5) of the Act set out the conditions which apply to this right of entry.

Section 10 of the Act provides that Schedule 4 shall have effect subject to such conditions or restrictions as may be provided in a licence. In this regard SLC 15(4) provides that the rights of entry provided in the Act may be exercised if they are for the purpose of establishing whether the land is suitable for the construction or extension of a generating station and the licensee has obtained the consent of the Authority before exercising those rights.

SLC 15(4) states:

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<sup>1</sup> Ofgem, the Office for Gas and Electricity Markets, was created by the Authority to support it discharge its duties. Everything undertaken by Ofgem is done in the name of the Authority, and the two terms are used interchangeably in this letter.

*"Paragraph 10 of Schedule 4 to the Act shall apply to the licensee if:*

- (a) it wishes to exercise its rights of entry on land for the purpose of establishing whether or not the land is suitable for the construction or extension of a generating station; and*
- (b) it obtains the consent of the Authority before exercising those rights."*

Accordingly SLC 15 of the generation licence restricts the powers available under paragraph 10 of Schedule 4 in two ways:

- by limiting the purpose for which the licensee may enter land; and
- by requiring prior Authority consent before rights of entry are exercised.

On 3 April 2012 Ofgem published a revised procedure for any requests made for consent under SLC 15. This procedure includes holding a four week consultation following any application and subject to having the necessary information making a final decision within 10 working days of the closure of the consultation.

### Assessment criteria

In assessing NuGen's application we have applied the following criteria:

- Does the applicant hold a generation licence?
- Is access to land required for the purpose of establishing whether the land would be suitable for the construction or extension of a generating station?
- Does the licensee intend to bore/search the sub-soil and if so, is the occupier of the land a statutory undertaker?
- Is the licensee aware of the conditions placed upon the right of entry as provided for in paragraph 10 of Schedule 4 of the Act?

When making a final decision Ofgem is obliged to act in accordance with its objectives and statutory duties. In this regard our principal objective is to:

*"protect the interests of existing and future consumers in relation to gas conveyed through pipes and electricity conveyed by distribution or transmission systems. The interests of such consumers are their interests taken as a whole, including their interests in the reduction of greenhouse gases and in the security of the supply of gas and electricity to them."*<sup>2</sup>

### Feedback from the Consultation

Although not a statutory requirement, in order to allow stakeholders to comment on NuGen's application, we held a four week public consultation which ran from 17 April to 16 May 2012. On the day of launching the consultation Ofgem specifically contacted the representatives of the parties likely to be affected by the application, by e-mail to notify them of the consultation and NuGen's application.

The consultation exercise was an opportunity for those interested to put forward their views in respect of the application.

We received two formal responses to the consultation and these raised a number of concerns. The substantive concerns can be summarised as follows;

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<sup>2</sup> See <http://www.ofgem.gov.uk/ABOUT%20US/AUTHORITY/Pages/TheAuthority.aspx>

1. There is insufficient information or evidence for the Authority to reach a decision on the application, in particular whether access is solely for the purposes of establishing the suitability of the land for the construction of a generating station.
2. There is insufficient information about the full extent of the surveys or their timing.
3. NuGen have not carried out proper or timely negotiations with the third parties and a decision by Ofgem should be delayed to allow the negotiations to be concluded.
4. NuGen have not yet asked for access to the subsoil owned by the third parties along the lines outlined in their application to the Authority.
5. The consultation period is too short to allow for current negotiations to be completed.

### Responding to the concerns of stakeholders

#### **1. Insufficient evidence for the Authority to reach a decision.**

In light of the framework within which Ofgem must consider the application, we must in effect consider two substantive matters, namely:

- does the applicant hold an electricity generation licence?
- does the applicant wish to exercise the rights of entry on land provided in the Act for the purposes of establishing whether or not the land in question is suitable for construction or extension of a generating station?

The applicant is the holder of a generation licence as the same was granted by Ofgem on 16 March 2012. Further, from our assessment of the application there is nothing to suggest that NuGen is attempting to gain access to the site for any other purpose, other than to assess whether or not the land is suitable for the building of a generating station. In this regard the land in question has been designated in the Nuclear National Policy Statement as potentially suitable for a nuclear power station and further, the applicant was granted planning permission on 1 November 2011 for the purpose of carrying out site investigation works on the land the subject of the application.

#### **2. Insufficient information about the full extent of surveys or their timing.**

From the information provided there is nothing to suggest that the details about surveys to be carried out is inconsistent with the purpose for which the request is made. Any consent granted to the applicant would be as provided for in paragraph 4(a) of SLC 15, in that the rights of entry must be exercised for the purposes of establishing whether or not the land is suitable for the construction of a generating station. Accordingly, the rights must be exercised purely for this purpose and this limit governs the extent of works the applicant can undertake and their timing.

#### **3. Process should be delayed to allow for the completion of negotiations between NuGen and the affected parties.**

While the parties can reach an agreement for entry to the land without the application and we understand that some contact has been made which has not resulted in an agreement, these are largely matters for the applicant and the third parties. This is because neither the licence nor the Act provides any restriction on exercising rights of entry or seeking the consent only in circumstances where alternative means of gaining access have failed.

#### **4. NuGen have not yet made the same access request as that outlined in their request for consent from the Authority.**

Neither the Act nor SLC15 suggest that the licensee must inform the occupier of the land of their intentions before approaching the Authority for consent to exercise the powers outlined in the Act. However, if approval is granted the licensee must provide the occupier with 14 days notice of their intentions to access the land.

If NuGeneration Limited require rights in addition to those referred to in paragraph 10 Schedule 4 of the Act it will need to negotiate these with those in whom the rights rest. The grant of the consent does not prevent such negotiations.

#### **5. The consultation period is too short to allow for current negotiations to be completed.**

The consultation period in this matter was set at a period which was considered to be adequate in respect of the likely issues that arise with applications made under SLC 15 and thereby allow those interested to consider the issues and to provide a response. There has been no suggestion that the period is insufficient to allow proper consideration of the issues raised by the application. Accordingly we do not accept that the period is too short.

#### The Authority's decision

After taking account of all relevant material, including the application and evidence provided in support, the responses to the consultation and statutory objectives and duties we are satisfied that the application for consent should be granted. A copy of the Consent is attached to this letter.

We are satisfied that the criteria referred to above have been met as follows;

- NuGeneration Limited currently holds an Electricity Generation Licence and thereby paragraph 10 of Schedule 4 of the Act applies.
- NuGeneration Limited intends to exercise rights of entry on the land for the purposes of establishing whether the land would be suitable for the construction of a generating station. According to the information provided, the surveys are all intended to ascertain whether or not the land in question could be used for the construction of a generating station. We have not seen any evidence that suggests that the access to land is required for some other purpose.
- NuGeneration Limited is intending to bore the sub-soil; however, the affected parties are not statutory undertakers. As such, the matter does not need to be referred to the Secretary of State under paragraph 10(4)(b) of Schedule 4 of the Act.
- NuGeneration have made clear in their application that they are aware of the obligations upon them under the Act should consent be granted and they wished to exercise rights of entry.

This consent is given subject to NuGen complying with its statutory obligations under Paragraph 10 of Schedule 4 of the Act. These obligations (such as the requirement to make good any damage done to the land) are outlined in full in the Act.

#### Next Steps

Before entering any land for the purposes of exploration NuGen is required under Paragraph 10 of Schedule 4 of the Act to give 14 days' notice of the intended entry to the occupier.

Please contact Wil Barber at [wil.barber@ofgem.gov.uk](mailto:wil.barber@ofgem.gov.uk) or on 020 7901 7436 if you have any queries in relation to the issues raised in this letter.

Yours sincerely,

Emma Kelso,

**Associate Partner, Wholesale Markets**

Signed on behalf of the Gas and Electricity Markets Authority