SCOTTISH STATUTORY INSTRUMENTS

2005 No. 549

ELECTRICITY

The Electricity from Non-Fossil Fuel Sources (Scotland) Saving Arrangements Order 2005

Made - - - -	*8th November 2005*
Laid before the Scottish Parliament	*8th November 2005*
Coming into force - -	*30th November 2005*

The Scottish Ministers, in exercise of the powers conferred by section 67 of the Utilities Act 2000(**a**) and all other powers enabling them in that behalf, hereby make the following Order:

Citation, commencement and extent

1.—(1) This Order may be cited as the Electricity from Non-Fossil Fuel Sources (Scotland) Saving Arrangements Order 2005 and shall come into force on 30th November 2005.

(2) This Order extends to Scotland only.

Interpretation

2.—(1) In this Order–

"adapted condition" has the meaning given in article 4(3);

"generator" means any person who, immediately before 31st December 2005, was party to any original arrangements in the capacity of an operator of a non-fossil fuel generating station described in any of SRO Orders 1, 2 & 3;

"licensed electricity suppliers" means persons falling within the definition of "electricity supplier" in section 6(9) of the Electricity Act 1989(**b**);

"new arrangements" means arrangements made by the nominated person which comply with all the requirements of article 4(1)(a), (b) and (e);

"nominated person" means the person who was nominated by the supply successor companies in compliance with article 3 and approved by the Scottish Ministers under article 5 unless approval of that person has been withdrawn by the Scottish Ministers in which case it means the person approved by the Scottish Ministers under article 5;

"order period" means the period starting on 1st April 2006 and ending on 31st March 2019;

"original arrangements" means the additional arrangements referred to in section 32 of the Electricity Act 1989 which were entered into by supply successor companies in compliance with their obligations under SRO Orders 1, 2 & 3 as applied by the Saving Arrangements Orders;

(**a**) 2000 c.27. The functions of the Secretary of State were transferred to the Scottish Ministers by virtue of the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2001 (S.I. 2001/3504), article 2 and the Schedule.
(**b**) 1989 c.29.

"owner" means any person who either directly or indirectly owns or has any interest in the nominated person; and the term "ownership" shall be construed accordingly;

"public electricity supplier" means a person who, prior to 1st October 2001, was authorised by a licence to supply electricity under section 6(1)(c) of the Electricity Act 1989 (as that provision had effect immediately before the coming into force of section 30 of the Utilities Act 2000) and whose "authorised area" (as defined in section 6(9) of the Electricity Act 1989 as that provision had effect immediately before the coming into force of section 30 of the Utilities Act 2000) was situated wholly or mainly in Scotland;

"Requirements" means the requirements listed in article 4(1);

"Saving Arrangements Orders" means the Electricity from Non-Fossil Fuel Sources (Scotland) Saving Arrangements Order 2001(**a**) and the Electricity from Non-Fossil Fuel Sources (Scotland) Saving Arrangements (Modification) Order 2002(**b**);

"SRO Orders 1, 2 & 3" means the following statutory instruments: the Electricity (Non-Fossil Fuel Sources) (Scotland) Order l994(**c**); the Electricity (Non-Fossil Fuel Sources) (Scotland) Order 1997(**d**) and the Electricity (Non-Fossil Fuel Sources) (Scotland) Order 1999(**e**);

"SRO Order 2" means the Electricity (Non-Fossil Fuel Sources) (Scotland) Order 1997; and

"supply successor company" means a person who became the holder of a supply licence under section 6(1)(d) of the Electricity Act 1989 on 1st October 2001 by virtue of a licensing scheme made in relation to a public electricity supplier under Part II of Schedule 7 to the Utilities Act 2000 or who became a supply successor company by virtue of article 8(3).

(2) Except where otherwise provided in this Order, expressions which are used both in this Order and in section 32 or 33 of the Electricity Act 1989 shall in relation to this Order have the meanings given to them in those sections.

(3) References in this Order to section 32 or 33 of the Electricity Act 1989 are references to those sections as they continue to have effect in Scotland by virtue of this Order or any Order made under section 67 of the Utilities Act 2000 (notwithstanding the substitution of section 32 by section 62 of the Utilities Act 2000 and the repeal of section 33 by section 66 of the Utilities Act 2000).

Obligations of supply successor companies

3.—(1) Each supply successor company shall ensure that before 11th March 2006 he has produced evidence to the Authority that he has made arrangements jointly with the other supply successor company to secure that the nominated person has made arrangements to secure the Requirements are complied with.

(2) Each supply successor company shall be under a duty at all times during the order period to secure that the Requirements are complied with and shall not by any act or omission of himself prevent any new arrangements from securing the result mentioned in article 4(l)(b).

(3) Each supply successor company shall supply the Authority with such information, or with information of a particular kind, requested by the Authority and which in his opinion is relevant to the question whether the supply successor company (either acting individually or jointly with the other supply successor company) is discharging, or has discharged, his obligations in this Order.

(4) Information requested by the Authority under paragraph (3) above must be given to the Authority in whatever form he requires.

(5) No person shall be required by virtue of this article to provide any information which he could not be compelled to give in evidence in civil proceedings in the Court of Session.

(**a**) S.I. 2001/3269.
(**b**) S.S.I. 2002/93.
(**c**) S.I. 1994/3275.
(**d**) S.I. 1997/799.
(**e**) S.I. 1999/439.

The Requirements - duties of the nominated person

4.—(1) The Requirements are that–

(a) the nominated person must before 11th March 2006 have made arrangements ("the new arrangements") which replace (in so far as it is necessary to comply with this Order) with effect from the commencement of the order period the original arrangements but with the nominated person replacing the relevant supply successor company as contracting party to those arrangements in each case;

(b) subject to paragraph (2) below, the new arrangements must secure that there is available to the nominated person from the non-fossil fuel generating stations described in SRO Orders 1, 2 & 3 the aggregate amount of generating capacity which, immediately before the commencement of the order period, was required by those Orders as applied by the Saving Arrangements Orders to have been available to supply successor companies during the order period;

(c) having entered into the new arrangements, the nominated person must not by any act or omission of himself prevent those arrangements made by him from securing the result mentioned in sub - paragraph (b) above;

(d) the nominated person both before and after any withdrawal of approval of the Scottish Ministers under article 5(2), and whether nominated by the supply successor companies or the Scottish Ministers must produce evidence to the Authority of having made the new arrangements before 11th March 2006 including such information, or information of a particular kind, requested by the Authority and which in his opinion is relevant to the question whether the nominated person is discharging his obligations in this Order and information requested by the Authority must be given to the Authority in whatever form he requires;

(e) the new arrangements must be on terms such that generators who are party to them are in substantially the same economic position as regards matters relating to contract price, indexation and term under those new arrangements as they had been in as party to the original arrangements;

(f) all electricity made available to the nominated person under the new arrangements must be offered for sale to persons who shall include all licensed electricity suppliers;

(g) the nominated person must use reasonable endeavours to receive the best price reasonably attainable for such electricity;

(h) the nominated person must conduct himself at all times in relation to his operations in general and in particular in relation to the selling of such electricity in a manner so as to ensure and satisfy the Authority that he does not show any undue preference or exercise any undue discrimination in relation to any licensed electricity supplier or class of licensed electricity supplier; and

(i) any owner must not gain any advantage (other than the payment of fees for the provision of services) from its ownership (save that expressly permitted under either this Order or regulations made under section 33 of the Electricity Act 1989) in relation to the purchase or sale by the nominated person of electricity which has been made available to him under the new arrangements and arrangements must be in place so as to ensure at all times that any owner does not gain such advantage.

(2) The amount of generating capacity required by article 4(1)(b) to be available to the nominated person shall be reduced in the same manner that article 4 of the SRO Order 2 reduced the amount of generating capacity required to be made available to public electricity suppliers by that Order, but the reduction in generating capacity provided for in this paragraph shall be calculated by reference to any adapted conditions instead of by reference to the conditions precedent and termination events set out in Schedules 2 and 3 to the SRO Order 2.

(3) For the purposes of this article an "adapted condition" means a condition set out in the new arrangements which has broadly equivalent effect to a provision contained in Schedule 2 or 3 to the SRO Order 2 taking into account the existence of any new or changed electricity trading

arrangements and the fact that it is the nominated person, not a public electricity supplier or supply successor company, who enters into the new arrangements.

(4) Any case of dispute as to whether a condition in the new arrangements is an "adapted condition" may be referred to and determined by the Scottish Ministers on application by either the nominated person or a generator who is party to those new arrangements.

The nominated person

5.—(1) A person may only become or continue to be a nominated person if that person is registered under the Companies Act 1985(**a**) as a company limited by shares and is approved by the Scottish Ministers.

(2) Without prejudice to article 9, if any of the Requirements are not being met at any time, the Scottish Ministers may withdraw their approval of the nominated person at any time on such notice as is reasonable in the circumstances, and where the Scottish Ministers withdraw their approval they may either nominate one or more persons to be the nominated person or they may request that the supply successor companies nominate a replacement.

(3) Where the Scottish Ministers have withdrawn their approval of the nominated person in accordance with paragraph (2) above, the supply successor companies shall jointly bear the administrative costs incurred as a result of this change in proportions to be determined by the Scottish Ministers.

(4) Where there is a change in the person who is nominated to be the nominated person (either at the instigation of the supply successor companies or the Scottish Ministers), the Authority must be provided with evidence that such nominated person has made arrangements to secure the Requirements are complied with and the Scottish Ministers' approval of the person so nominated may be conditional on new arrangements having been entered into by a specified date, and in such circumstances the dates referred to in articles 3, 4 and 6 shall be replaced with the dates specified by the Scottish Ministers and the reference in article 6(1)(b) to the "original arrangements" shall be read as a reference to arrangements which replace those original arrangements to which the generator (or his successor) was party immediately prior to 31st December 2005.

(5) Where requested in writing to approve a person nominated for the purposes of this Order, the Scottish Ministers shall decide whether to so approve or not and shall notify the supply successor companies in writing of that decision within 30 days of receipt of such request.

Deemed imposition of new arrangements

6.—(1) If, by 31st December 2005, any generator has not entered into the new arrangements with the nominated person the generator shall be deemed to–

(a) have entered into an agreement with the nominated person on 31st December 2005 and with effect from the first day of the order period on those terms last offered to it in writing by the nominated person prior to 31st December 2005, to the extent that those terms comply with all requirements of this Order in relation to new arrangements; and

(b) have terminated the original arrangements to which it was a party (without prejudice to any rights or liabilities existing prior to such termination), with termination having effect immediately before the commencement of the order period.

(2) Where paragraph (1) above applies, the nominated person shall notify the generator in writing by 14th January 2006 of the terms of the agreement which are deemed to apply to him.

(3) Any dispute as to whether the terms of the agreement referred to above comply with the requirements of this Order in relation to the new arrangements may be referred to and determined by the Scottish Ministers where application to the Scottish Ministers has been made in writing no later than 28th February 2006. In making their determination under this article the Scottish Ministers may give such directions to the nominated person or the generator as appear to them to be appropriate for varying the terms of the agreement so that they comply with the requirements of this Order in relation to the new arrangements.

(**a**) 1985 c.6.

Release from obligations under section 32

7.—(1) Within 15 days after the production of the evidence referred to either in article 3(1) by the supply successor companies or in article 4(1)(d) or article 5(4) by the nominated person (or at such later or additional dates as the Scottish Ministers may consider necessary) the Authority shall report to the Scottish Ministers the extent to which it is satisfied that the supply successor companies have complied with their obligation in article 3(1) or that the nominated person has complied with his obligation in article 4(1)(d).

(2) When the Scottish Ministers have declared that they are satisfied that a supply successor company has complied with his obligation in article 3(1) the supply successor company shall thereupon be released from his obligations under section 32 of the Electricity Act 1989(**a**) and the Saving Arrangements Orders and the Scottish Ministers shall notify the supply successor company in writing of such declaration specifying the date (which may not be earlier than the commencement of the order period) on which such release took effect.

Replacement supply successor companies

8.—(1) A supply successor company (referred to as "the Company" in this article) shall notify the Scottish Ministers in writing immediately upon the occurrence of any of the following events and such notification shall include the identity of any relevant third parties as referred to in sub-paragraphs (f) and (h):

(a) the Company passes a resolution that it be wound up;

(b) a court makes an administration order or a winding up order in relation to the Company;

(c) the Company makes a composition or arrangement with its creditors;

(d) an administrative receiver, receiver or manager is appointed to the Company by a creditor or by a court;

(e) the Company ceases to carry on business as a licensed electricity supplier;

(f) the Company makes arrangements to transfer its supply licence to a third party;

(g) the Company has, or makes arrangements to have, its supply licence revoked or modified; or

(h) the Company makes arrangements to transfer all or part of its electricity supply business to a third party.

(2) Where it appears to either the Scottish Ministers or to the Authority that in relation to the Company any of the events listed in paragraph (1) has taken or will take place the Scottish Ministers may transfer all or part of the obligations of the Company under this Order to any third party (including any other existing supply successor company) who appears to the Scottish Ministers to have taken over, continued or to have had transferred to it, all or part of the electricity supply business or the supply licence of the Company.

(3) In the circumstances described in paragraph (2) the Scottish Ministers shall notify the relevant third party and the Company in writing of the transfer of obligations under this Order and such third party shall, with effect from a date specified by the Scottish Ministers, become a supply successor company and shall take over all or part of the obligations of the Company under this Order, as specified by the Scottish Ministers.

(4) On making the written notification referred to in paragraph (3) the Scottish Ministers shall release the Company from all or the appropriate part of its obligations under this Order and shall notify the Company accordingly and specify the date on which such release is to take effect.

Enforcement of this Order

9. From the commencement of the order period the obligations on each supply successor company set out in article 3 shall be treated as relevant requirements for the purposes of Part I of the Electricity Act 1989.

(**a**) 1989 c.29.

Modification of section 33

10. From the commencement of the order period section 33 of the Electricity Act 1989(**a**) shall be modified as follows–

(a) in subsection (l)(c) for "any supply successor company" substitute "the nominated person";

(b) for subsection (5) substitute–

"(5) The amount of any payment required to be made to the nominated person by regulations under this section shall be the difference between–

(a) the total cost to the nominated person during the qualifying month of purchasing electricity which was generated in pursuance of qualifying arrangements; and

(b) the amount received during the qualifying month by the nominated person for the sale of such electricity, or rights relating thereto,

calculated (in each case) by such method as may be specified by regulations under this section and including such costs as are reasonably incurred by the nominated person in relation to the sale and purchase of such electricity and any advance payments or deferred payments.";

(c) for subsection (5A) substitute–

"(5A) Where the amount referred to in subsection (5)(b) is greater than the cost referred to in subsection (5)(a) the difference (after any deductions for the costs of the nominated person referred to in subsection (5)) shall be paid by the nominated person to the prescribed person referred to in subsection (1)(b), such sum being calculated by such method as may be specified by regulations under this section.";

(d) in subsection (6)(a) after "meters or otherwise)" insert "on the nominated person and";

(e) in subsection (6)(b) for "a supply successor company" substitute "the nominated person";

(f) after subsection (6)(c) insert–

"and;

(d) require the Authority after consultation with the Scottish Ministers and such other persons as may be specified to make provision for a debt recovery procedure to be followed by the nominated person, including provision for the consequences for the nominated person of that procedure not being followed.";

(g) in subsection (7) for "the supply successor company" substitute "the nominated person";

(h) for subsection (7A) substitute–

"(7A) In this section, references to qualifying arrangements in relation to the nominated person are to any arrangements which–

(a) are new arrangements, as defined in the Electricity from Non-Fossil Fuel Sources (Scotland) Saving Arrangements Order 2005; or

(b) would be new arrangements but for the fact that the parties to them have modified the arrangements by changing the location of the generating station which is the subject of the arrangements ("modified new arrangements"),

and which (in each case) satisfy such other requirements as may be specified in regulations made under this section.";

(i) in subsection (8) after the definition of "leviable electricity" insert–

""nominated person" has the meaning given in the Electricity from Non-Fossil Fuel Sources (Scotland) Saving Arrangements Order 2005;";

(j) in subsection (8) after the definition of "qualifying month" insert "and in relation to the nominated person the meaning shall be specified in regulations made under this section";

(**a**) 1989 c.29. Notwithstanding its repeal by section 66 of the Utilities Act 2000, section 33 continues to have effect in Scotland by virtue of article 11(1) of S.I. 2000/2727. Section 33 has been amended by S.I. 1997/1185, The Fossil Fuel Levy Act 1998 (c.5) section 1 and by S.I. 2001/3269.

(k) in subsection (8) omit the definition of "public electricity supplier";

(l) in subsection (8) in the definition of "supply successor company" for the words from and including "article 6(3)" to "2001" substitute–

"article 8(3) of the Electricity from Non-Fossil Fuel Sources (Scotland) Saving Arrangements Order 2005"; and

(m) for subsection (10) substitute–

"(10) Regulations under this section may include transitional measures making provision for payments of levy to continue to be made to supply successor companies in relation to entitlement to payments which accrued under this section before this subsection came into effect.".

Revocation

11. From the commencement of the order period the Electricity from Non-Fossil Fuel Sources (Scotland) Saving Arrangements Order 2001(**a**) and the Electricity from Non-Fossil Fuel Sources (Scotland) Saving Arrangements (Modification) Order 2002(**b**) shall be revoked, with the exception of the modification of section 33 of the Electricity Act 1989 in article 9 of the Electricity from Non-Fossil Fuel Sources (Scotland) Saving Arrangements Order 2001.

ALLAN WILSON
Authorised to sign by the Scottish Ministers

St Andrew's House,
Edinburgh
8th November 2005

(**a**) S.I. 2001/3269.
(**b**) S.S.I. 2002/93.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes provision for the saving and modification of arrangements which have been made by supply successor companies in compliance with section 32 of the Electricity Act 1989 ("the Electricity Act") and relevant Orders, namely, the Electricity (Non-Fossil Fuel Sources) (Scotland) Order 1994, the Electricity (Non-Fossil Fuel Sources) (Scotland) Order 1997 and the Electricity (Non-Fossil Fuel Sources) (Scotland) Order 1999. The Order also removes the temporary arrangements contained in the Electricity from Non-Fossil Fuel Sources (Scotland) Saving Arrangements Order 2001 (S.I. 2001/3269) and the Electricity from Non-Fossil Fuel Sources (Scotland) Saving Arrangements (Modification) Order 2002 (S.S.I. 2002/93) ("the Saving Arrangements Orders") by revoking both Orders, save for the saving arrangements in article 7 of S.I. 2001/3269.

Articles 1 and 2 provide for the citation, commencement, extent and interpretation of the Order.

Articles 3 and 4 oblige supply successor companies in Scotland to ensure that a person nominated by them makes arrangements which replace arrangements which were made in the past by them in compliance with section 32 of the Electricity Act and relevant Orders and which secure the availability of a certain amount of generating capacity from non-fossil fuel generating stations. The amount of generating capacity which is to be made available to the nominated person is the same as that which was required to be made available to the supply successor companies. The arrangements made by the supply successor companies and the nominated person must be in place from 1st April 2006. The nominated person is also obliged to offer for sale the electricity made available to him under the arrangements to all supply successor companies and licensed electricity suppliers (without any undue discrimination) and to use his reasonable endeavours to receive the best price reasonably attainable for it. The owners of the nominated person or those with an interest in it, must not gain any advantage (save as specified) from such ownership.

Article 5 provides that the nominated person must be approved by the Scottish Ministers. There is also provision for withdrawal of the approval and changes in the identity of the nominated person.

Article 6 imposes agreements on operators of non-fossil fuel generating stations who had an arrangement making electricity available to supply successor companies in compliance with certain orders under section 32 of the Electricity Act, but who have not entered into replacement arrangements with the nominated person. There is provision for the Scottish Ministers to resolve disputes as to the terms of such imposed agreements.

Article 7 provides that where Ofgem - The Office of Gas and Electricity Markets ("the Authority") considers that a supply successor company has complied with its obligations under article 3, then the Scottish Ministers may declare that it shall be released from its obligations under section 32 of the Electricity Act and the relevant Orders.

Article 8 provides the circumstance where the Scottish Ministers can appoint replacement supply successor companies.

Article 9 of the Order provides that the obligations of supply successor companies in Scotland in article 3 of the Order are relevant requirements for the purposes of Part I of the Electricity Act, thus enabling the Authority to take enforcement action.

Article 10 sets out various amendments to section 33 of the Electricity Act with effect from 1st April 2006. The amendments are largely to enable payments of fossil fuel levy to be paid to the nominated person instead of to supply successor companies together with some consequential amendments.

Article 11 revokes the Saving Arrangements Order, save for the modification of section 33 of the Electricity Act in article 9 of S.I. 2001/3269.

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