

4 August 2021

National Grid ESO response to consultation on changes to Ofgem's Enforcement Guidelines and Sectoral Penalty Statement

Dear Heather and Megan,

We welcome the opportunity to respond to your consultation on changes to Ofgem's Enforcement Guidelines and Sectoral Penalty Statement.

National Grid ESO is the Electricity System Operator for Great Britain. We move electricity around the country second by second to ensure that the right amount of electricity is where it's needed, when it's needed – always keeping supply and demand in perfect balance. As Great Britain transitions towards a low-carbon future, our mission is to enable the sustainable transformation of the energy system and ensure the delivery of reliable, affordable energy for all consumers. We use our unique perspective and independent position to facilitate market-based solutions which deliver value for consumers.

In summary, we welcome and agree with Ofgem's vision of enforcement to achieve a culture whereby businesses put energy consumers first and act in line with their obligations. The enforcement process and Guidelines play an important role in protecting consumers and driving the right behaviours from licensees. We recognise that the energy market and enforcement landscape have evolved significantly since the Guidelines were last revised in 2017 and the Penalty Statement was introduced in 2014, not least because there has been increased scrutiny from energy consumers and an increased number of enforcement cases being dealt with by Ofgem and licensees on an annual basis.

We acknowledge the changes and enhancements that Ofgem are proposing to make to the Guidelines to ensure flexibility in approach, but we consider that a one size fits all approach is not appropriate, because cases can vary significantly in terms of their root cause, complexity, and impact. The approach needs to balance fairness, thoroughness, and flexibility, and always be proportionate to the specifics of each case.

Taking, for example, the case of the ESO, we would be concerned if the approach taken by Ofgem did not appropriately balance the additional measures and controls included in the regulatory frameworks against the ESO's ambitious delivery programme as agreed as part of the Price Control process. Even a prudent and efficient licensee may encounter challenging and complex factors which could impact compliance, particularly where delivery is through third parties.

On this point, we consider that implementing enforcement with little or no regard to the circumstances of the breach, particularly where it is a technical licence breach, has the potential to stifle innovation in delivering solutions and therefore ultimately negatively impact end consumers. The Enforcement Guidelines and Penalty Statement should be clearer on the treatment of

companies, who have sought to make the best decisions to the benefit of the end consumer but, who nevertheless, find themselves in a non-compliant situation, potentially as a result of the actions of a third party.

We can see that Ofgem are endeavouring to deal with the increased volume in compliance cases in the most efficient and effective way, but this way of working needs to recognise what the root causes of this increased volume might be, aside from an increase in the number of licensees. Each licensee should understand the importance of compliance, but high volumes of compliance cases may indicate more systemic issues within the energy industry which are impacting compliance, and which warrant further investigation. The focus should not necessarily be on settling a case early, but instead reaching the right outcomes, for energy consumers, Ofgem and the licensee, to avoid perverse or quick decisions being made.

We suggest that the role of the Enforcement Decision panel in contested cases continues. We acknowledge why Ofgem are proposing to assign a single director as the decision maker in settlement cases, but it is vital that this process allows for the director to have sufficient technical and industry knowledge, and be impartial, so as to avoid any bias and potential conflicts of interest. We do not agree that any case should be decided by only one director, but if they are, then these should be limited to the right cases (potentially those less complex). However, there must still remain the opportunity for the decision of this one director to be scrutinised and reviewed independently, perhaps through second- and third-line assurance reviews, including audits.

We have set out below some further thoughts in relation to the consultation questions. We welcome the opportunity to further discuss the points raised within this response. Should you require any further information or would like clarity on any of the points outlined in this paper then please contact me in the first instance at zoe.morrissey@nationalgrid.com.

Yours sincerely,

Zoe Morrissey

Legal Business Partner, ESO

Appendix 1 - National Grid ESO response to consultation questions

Middle and late settlement windows

Q1: What is your view on the proposal to remove the middle and late settlement windows, and associated settlement discounts?

We continue to believe that there is value in the middle and late settlement windows and associated settlement discounts. We note in paragraph 2.2 of the consultation that since the Guidelines were introduced in 2014, and last revised in 2017, no party has settled in the middle or late windows. However, the fact that no party has used the middle and late windows does not mean that their existence did not influence behaviours in the settlement process. The settlement windows enable the relevant organisation and Ofgem to evaluate the merits of the case at appropriate intervals. The windows enable the parties to consider all of the evidence available at each of those check points, which could be of particular importance if the Statement of Case were to introduce new findings or details not provided in the Summary Statement. Each of the settlement windows arguably therefore helps clarify and determine a party's position in a gradual, fair, and effective way.

If the middle and late settlement windows and associated settlement discounts are to be removed, we would strongly encourage Ofgem to seek to develop a process that is thorough and flexible and continues to include several check points where both Ofgem and the licensee can review their positions before moving on to the next stage of the case. In particular, should there be only one settlement window, we would strongly advocate for there then being far more flexibility on the time in which the settlement is to be accepted. In complex cases, particularly where expert opinions may need to be sought, 28 days is insufficient time to properly consider the settlement position and engage in discussions with Ofgem.

Decision making in settlement cases

Q2: What are your views on the option of allowing the Director responsible for Enforcement to be a decision maker in settlement cases?

Given the implications for impacted companies on whatever decision is made, we do not agree that one director should have full accountability and responsibility for settlement decisions. Having decision making in the hands of one director, particularly the Director responsible for Enforcement, has the potential of leading to biased decision making. This would represent a poor governance process and increase regulatory risk across all sectors. We consider it is essential that settlement decisions are independently reviewed and that there is proper separation between the enforcement case team and the decision maker.

We appreciate that the current Settlement Committee structure may impact on the speed in which a settlement can be reached. We would however encourage Ofgem to consider whether there are alternative mechanisms that may still enable speedier decisions but also avoid the risk of ineffective governance.

Q3: In your view, are there any other steps you think we could take to speed up the settlement process, without undermining the evidence-based nature of our decision making?

The settlement process in itself does not appear to necessarily create delays. In our experience, the biggest delay is the time taken to investigate a case. In some cases, Ofgem can send multiple requests for information (RFIs) to the licensee prior to a case even being opened and then, upon case opening, spend months if not years, further investigating and then settling or contesting the case. It does not feel right or appropriate that some cases take years to resolve, which naturally has a reputational impact on the licensee and may cut across multiple price control periods, with all the complexity that brings too.

We consider that the steps involved in concluding a case and determining and informing the licensee that a case has been closed could be improved. Ofgem already imposes deadlines on parties in which they have to

respond to RFIs. We would strongly support deadlines for Ofgem within which cases either need to be closed or moved to the next stage. If a case is to progress (as opposed to being closed), Ofgem should present some findings to justify its decision. This would also assist the party being investigated to better understand the case against it within a time where many of the individuals involved remain active in the relevant areas of work. The longer a case takes to work through the various stages, the more likely that individuals have moved roles or left the business which can make evidence gathering difficult.

Q4: Do you have any comments on the updated guidance on Provisional and Final Orders in section 7 of the guidelines? and

Q5: Is there any other information on Provisional or Final Orders you would find helpful to be in the Guidelines?

We do not have any further comments on the updated guidance on Provisional and Final Orders.

Q6: Do you have any comments on any areas of the revised guidelines?

In relation to industry codes, we would welcome these being acknowledged somewhere because they are established under each respective licence and have their own liability regime between parties. It is not clear how the calculated detriment takes account of these provisions, for instance the Connection and use of System Code (CUSC) includes arrangements for liability between parties. Without recognising and dovetailing these Codes within the guidelines, licensees could face double jeopardy. Alongside this, where a funding adjustment mechanism exists in the licenses, this should also clearly be factored into the enforcement arrangements as this is a de facto form of penalty.

Q7: What are your views on the changes to the Sectoral Penalty Statement?

We have no further comments on the Sectoral Penalty Statement.