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By email only

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Dear Megan

Subject: Consultation on changes to Ofgem's Enforcement Guidelines and Sectoral Penalty Statement

Shell welcomes Ofgem's consultation on proposed changes to its Enforcement Guidelines and Sectoral Penalty Statement and supports updating them to ensure that they remain fit for purpose and continue to provide parties with clarity, consistency and transparency on enforcement processes.

We consider that Ofgem's current enforcement processes are working well and are concerned that some of the proposed changes may weaken either the independence or rigour of Ofgem's decision making processes.

The consultation is not always clear on the purpose or perceived benefit of the changes being proposed – which makes it difficult to make concrete proposals. Having said that, our main recommendations to Ofgem to enable them to speed up settlement processes whilst maintaining procedural and substantive protections are to make sure that they are adequately resourced and to strengthen the account management function.

Our response to the specific consultation questions are set out below. Please contact me if there is any element of our response that you would like to discuss.

Yours sincerely,

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Question 1: What is your view on the proposal to remove the middle and late settlement windows, and associated settlement discounts?

We support retaining the middle and late settlement windows. We believe that the current windows enable a more managed approach to decision making in enforcement and settlement cases. We do not believe that the windows not being used is sufficient grounds for them to be removed.

There is a risk that moving to one settlement window, and not allowing sufficient time for Ofgem and the relevant party to have meaningful discussions around settlement, could reduce the number of cases which are settled – where settlement is the right outcome for consumers. The proposal to move to one window will also remove the ability to settle once the full statement of case is provided to the party, as this is only provided under contested cases.

It is not clear from the consultation document what benefits Ofgem sees from removing the windows. If the settlement windows are rarely used, then it is not clear how they add significantly to the time or resources required for enforcement processes.

Question 2: What are your views on the option of allowing the Director responsible for Enforcement to be a decision maker in settlement cases?

It is not clear from the consultation what Ofgem's proposed amendment is to the decision-making process for settlement decisions.

Our current understanding is that settlement decisions need to be reached by a Settlement Committee which is made up of two members of Ofgem's Enforcement Decision Panel and one Ofgem Director – and that the Ofgem Director shall not be the Director responsible for Enforcement.

We strongly support the current approach, as it ensures an appropriate, and in our view fundamentally important, level of independence of the decision-makers from the team in Ofgem that is pursuing the case.

We are not clear whether the change being proposed is that:

1. It should be possible to delegate authority for settlement decisions to an Ofgem Director, including the Director responsible for Enforcement, as well as the Settlement Committee; or

2. the Settlement Committee will continue to be the sole body able to make settlement decisions, but that the Director responsible for Enforcement should also be able to join a Settlement Committee.

Shell does not support either of the possible amendments to the current approach. We expect that the current approach was adopted to ensure an appropriate level of independence between the body with delegated powers to make settlement decisions and the team in Ofgem responsible for investigating the case.

Further, we believe that rigorously maintaining such independence will be more important to the robustness of Ofgem's enforcement practice, enabling Ofgem to better protect consumers, than any perceived gain from weakening it.

Related to that, the consultation document does not provide a strong rationale for changing the current rules. We would be concerned if Ofgem felt that it has been, as suggested in the consultation, adopting a more lenient approach to enforcement cases due to having to maintain independence of decision making.

It is not clear why maintaining independence would lead to more lenient decision making. If, however, the concern is more about the resource requirements, then we consider it would be most beneficial for GB consumers to address that constraint and ensure that enforcement processes are appropriately resourced, rather than weakening the independence of settlement decisions.

Question 3: 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?

We understand that the increasing level of obligations on suppliers, for example from the supplier licensing review, may also place an additional burden on Ofgem to monitor compliance. If this requires additional resources for Ofgem to manage efficiently then we would strongly support Ofgem recruiting additional resource as opposed to seeking to amend existing compliance and enforcement processes – which, in our view work well.

We also strongly support Ofgem strengthening its relationship management function with suppliers. In our experience this has worked well, to provide Ofgem with an understanding of the main day-to-day challenges faced by suppliers, discuss with Ofgem plans to manage significant system updates and have early discussions on any areas that may be a

concern. We believe that a stronger relationship management function may reduce the likelihood of incidents escalating to enforcement issues in the first instance.

Question 7: What are your views on the changes to the Sectoral Penalty Statement?

We are concerned with the proposed change that Ofgem will only calculate detriment to consumers as a result of relevant breaches where it is proportionate, reasonable and practical to do so. Our expectation is that the calculation of consumer detriment or supplier gain should remain the default approach in almost all enforcement cases.

Enabling an alternative where Ofgem may not, by exception, calculate consumer detriment or supplier gain – may only serve to add to the complexity of enforcement processes. This is because we would expect Ofgem to have to justify, against a clear set of objective and transparent criteria, why it has decided that such calculation is not merited. This will introduce an additional step and points for consideration into enforcement processes.

We are also concerned with the way in which the factors to be taken into account in the current statement at paragraph 4 have been worked into a set of overarching principles in the updated draft statement. We consider that all the factors at each of paragraph 4.1 and 4.2 should remain as these are relevant and the decision-makers should be able to account for their approach against these specific factors. We do not consider that ensuring appropriate explanation and accountability of determination against specified factors would take more time than the equivalent as against principles. Indeed, the latter may take longer.

While we understand Ofgem's aim to try and future proof the statement, we do not think that the proposed approach at paragraph 4.2 is appropriate. This gives Ofgem too much discretion as to interpretation between specific amendments and impact on the setting of penalties, making it challenging for licensed persons fully to consider the impact of the proposed rule changes. The need for change following the supplier licensing review specifically arose due to a factor relevant to mitigation becoming an obligation, namely self-reporting. We agree with the approach taken to this specific change and value the chance to consider it. We would like to retain the ability to consider and provide views on future changes to the statement should these be necessary due to changes in licence conditions.