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By email only to: EGPPconsultation@ofgem.gov.uk

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Dear Heather and Megan

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

Thank you for the opportunity to respond to the above consultation. This letter should be treated as a consolidated response on behalf of UK Power Networks' three licensed distribution companies: Eastern Power Networks plc, London Power Networks plc, and South Eastern Power Networks plc. It is not confidential and may be published on Ofgem's website.

As Ofgem observes in its consultation document, the energy market and enforcement landscape have evolved since the Enforcement Guidelines and Sectoral Penalty Statement were last revised, in 2017 and 2014 respectively. We are supportive of the review of these documents and the associated processes to ensure they remain current and continue to fulfil Ofgem's strategic enforcement objectives.

Our detailed observations are set out in the appendix to this letter and we hope that you will find them helpful. If you have any questions, please contact James Hope, Head of Regulation & Regulatory Finance in the first instance.

Yours sincerely



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Director of Customer Service, Strategy, Regulation & IS
UK Power Networks

Copy: James Hope, Head of Regulation & Regulatory Finance, UK Power Networks
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Appendix

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

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

Energy companies are operating in an increasingly complex regulatory environment. Consequently, it may take longer for parties to establish their positions, which may be finely balanced. We believe that the proposed removal of the middle and late settlement windows may mean that fewer disputes are settled where the outcome of a dispute is more finely nuanced.

We agree that there is much to be gained from early settlements for all concerned. We do not believe that removal of the middle and late settlement windows will necessarily assist the parties to settle disputes. We believe that the achievement of this goal may be better served by reviewing the discount percentages; we would suggest 40% for the early window, 15% for the middle window and 10% for the late window. Alternatively, extending the duration of the early discount period may help to achieve early settlement where disputes become increasingly complex.

In addition, we would like to draw Ofgem's attention to the following points:

- According to paragraph 2.3 of the consultation document, the Authority may consider offering a discount outside of the settlement window "in exceptional circumstances". We would welcome clarification on what might constitute exceptional circumstances.
- We also note from paragraph 2.3 that the Authority may reopen the settlement window "in exceptional circumstances" but doing so provides no guarantee that a settlement discount will remain available. We would appreciate further clarity on this point as it seems counter-productive to reopen the settlement window with no guarantee that a discount will be available. In addition, it would be helpful to describe the circumstances in which the Authority might reopen the settlement window and to make it clear that the discount will remain available and for how long it would be available.
- Paragraph 2.5 of the consultation document states that, under the revised proposed process, settlement and contest "will always run separately from each other". We believe that it would be more appropriate to continue running these processes in parallel. It may be that increased understanding and greater clarity of the issues is obtained through the contest route which makes settlement more appropriate.
- We note from paragraph 3.4 of the consultation document that Ofgem has seen an increase in the amount of time taken to conclude cases through settlement. We believe that useful insight could be obtained if Ofgem conducts an analysis of the data available to it in this area to identify reasons behind the increase in time taken to conclude cases, including timescales for the parties and Ofgem to respond.

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

We consider the above to be a sensible approach and have no specific points to raise.

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 believe that it could help to expedite the settlement process if Ofgem committed to providing substantive responses to parties within defined timescales.

Question 4: Do you have any comments on the updated guidance on Provisional and Final Orders in section 7 of the Guidelines?

We have the following observations:

- Paragraph 7.1: In the final sentence, the reference to “usually” implies that there might be alternative procedures or circumstances where the process set out in section 7 does not apply. It would be beneficial to have a clearer understanding of any alternative arrangements or courses of action that Ofgem considers necessary, and the circumstances in which they would apply.
- Paragraphs 7.2 and 7.3: We would welcome further clarity from Ofgem on the circumstances in which a final or provisional order would be appropriate, including examples, if possible.

Question 5: Is there any other information on Provisional or Final Orders you would find helpful to be in the Guidelines?

As stated in our answer to question 4, it would be helpful if Ofgem could clarify the circumstances in which it would consider a provisional or final order to be appropriate.

Question 6: Do you have any comments on any areas of the revised guidelines?

We have several further comments on other aspects of the guidelines, as set out below.

- We note from paragraph 6.5 that Ofgem reserves the right to depart from the procedures set out in section 6 and may decide to resolve enforcement action “in a different manner depending on the circumstances of the case or behaviour at issue”. We would welcome further clarity on when it might be appropriate for Ofgem to adopt an alternative approach from that set out in the guidelines. Additionally, to ensure procedural fairness we would recommend that any decision to depart from the documented approach is made in conjunction with, or with the agreement of the relevant business.
- Paragraph 6.14 refers to the possibility of early settlement discussions between Ofgem and the relevant business. We presume that any such discussions envisaged under this paragraph would be “without prejudice” discussions – confirmation of this on the face of the guidelines would be appreciated.
- In relation to paragraph 6.22, we believe that the settlement window ought to be reopened or extended as a minimum to reflect the time taken for Ofgem to respond or engage with the relevant business on any settlement discussions. In addition, we would welcome further clarity from Ofgem on what might constitute exceptional circumstances (see the first and third bullets of paragraph 6.22).

- Paragraph 6.29 also refers to “exceptional circumstances” and again, we would welcome clarification on when these might apply. Further, while we understand the need for the settlement process to be concluded swiftly, it is important to acknowledge that the settlement window should be extended by any period of time Ofgem has taken to respond to points raised by the relevant business.
- In relation to paragraph 6.35 and the serving of a Statement of Case (STOC) – if the intention is to raise additional points in the STOC, the relevant business should have full visibility of the case made against it. All alleged infringements should be included in that document so that the relevant business can give proper consideration and make a fully informed decision on how to proceed. If the intention is to make material changes to the STOC, we believe that it would be appropriate to restart the settlement process.
- According to paragraph 6.36, Ofgem will usually write to the relevant business to advise it that a STOC is being drafted and to provide an updated timeline for the case. The reference to “usually” implies that this may not always be the case. We consider that it should be an obligation for Ofgem to do so, or at the very least, that Ofgem should provide greater clarity on when this will not be the case.
- We note from paragraph 6.40 that, along with the STOC, Ofgem will disclose a list of all the documents that it will rely on as evidence and that this list may include documents which have not been provided by the relevant business but which the relevant business may reasonably request from Ofgem. Resolution may be achieved more swiftly, without wasted costs, where Ofgem and the relevant business are able to consult the same evidence documents. The guidelines should make it clear that copies of all the documents that Ofgem will rely on are to be provided irrespective of their origin, as well as complete copies of all other documents in the evidence bundle anticipated under clause 6.35 to the extent that they have not already been provided to the relevant business.
- Paragraph 6.44 states that Ofgem will usually allow 28 days for a business to respond to a STOC. In our view, this should be the minimum period of time allowed and it would only be appropriate to reduce this period with the prior agreement of the relevant business.
- Similarly, with regard to paragraph 6.46, we believe that the relevant business should have a minimum of 28 days to respond to a Supplementary or Revised STOC where issued.
- We note from paragraph 6.67 that Ofgem will provide the relevant business with access to key documents on which the Authority is relying as part of the streamlined administrative process. We consider that Ofgem should provide the relevant business with copies of all documents on which the Authority is relying, not just the key ones, as there may be information contained in them that is relevant to the arguments advanced by the relevant business.
- Paragraphs 6.68 and 6.69: please see our earlier comments on paragraphs 6.22 and 6.29 with regard to extensions of the settlement window.
- In relation to paragraph 6.70, we believe that Ofgem should issue an updated Summary Statement (or Statement of Objections if already served) to the relevant business that takes account of the relevant business’ representations, and the relevant business should have a further opportunity to comment on the contents.

- Paragraph 6.71 states that Ofgem will not enter into negotiations or plea-bargaining during settlement discussions. It is our view that, in certain circumstances, these options could provide a swifter route to settlement and their removal could unnecessarily fetter the parties' ability to settle.
- We note from paragraph 6.82 that Ofgem will usually expect to provide each party with copies of the documents that are directly referred to in the Statement of Objections and any Draft Penalty Statement issued to that party. We consider that the relevant business will be better able to exercise its right of defence if it has access to copies of all documents in the case file, not just those that are directly referred to. There is no reason why this could not be done electronically.
- In relation to paragraph 6.86, it is our view that the 12 week response period should only start once all documentation is available for review, as any new evidence could impact on the wider response and this would encourage the earlier sharing of documentation. It should be clear that in responding to new evidence, the relevant business is able to revise its response more generally and sufficient time should be allowed for this.
- Paragraph 8.5 states that Ofgem will usually publish its enforcement action outcomes on its website and may also make a statement to the media or issue an update to subscribed followers of the Ofgem website. We believe that parties that are the subject of enforcement action should have an opportunity to review and comment on any such communications before they are released.

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

- In paragraph 4.1, the reference to "whether" in the second bullet makes the corresponding text somewhat binary and lacks proportionality. We believe that it would be clearer and more appropriate to replace the reference to "whether" with "the extent to which". It could be that the impact of the breach on consumers is minimal. If the impact is considerable, as currently worded the second bullet implies they must be treated in exactly the same way – which cannot be the intention.
- Paragraph 4.2: We would welcome further clarity from Ofgem on the references to conduct in this paragraph as they are unclear as drafted.

Finally, we would like to draw Ofgem's attention to the following general observations.

- It would have been helpful to review tracked versions of the Enforcement Guidelines and Sectoral Penalty Statement, providing visibility of all changes made, as this would have enabled a more efficient review of the documents.
- Paragraph 1.11 of the consultation document states that, in order to settle a case, a business under investigation must admit to the breach/es that has/have occurred, and this will lead to a formal finding of a breach by the Authority. We do not believe that this course of action is appropriate in all circumstances. For example, there may be situations where it is not clear that a breach has occurred but the relevant business is nonetheless willing to alter its conduct and settle a case.