

Energy Networks Association Response to Consultation ‘Proposal to modify the Regulatory Reporting Pack (RRP), Regulatory Instructions and Guidance (RIGs) and the Price Control Financial Model (PCFM) Guidance for RIIO-ET2’

Energy Networks Association (ENA) represents the companies that operate and maintain the gas and electricity network infrastructure in the UK and Ireland. Serving over 30 million homes and businesses in every part of the country, they are responsible for the transmission and distribution network of ‘wires and pipes’ that keep our lights on, our homes warm and our businesses running.

Our members welcome the opportunity to respond to this Ofgem consultation on proposed changes to the Electricity Transmission Regulatory Reporting Pack (RRP) and Regulatory Instructions and Guidance (RIGs) that seek to clarify the existing reporting requirements.

This response is on behalf of our electricity and gas network members.

Proposed change in the definition of Totex

Ofgem propose to amend the definition of totex in the RIGs to exclude any costs or Legal fees incurred relating to an application for a Judicial Review or an appeal to the CMA in respect of a decision made by Ofgem.

Ofgem’s reason for this is that in its view legal fees incurred in challenging an Ofgem decision should not be recoverable through the price control and should not be subject to the sharing factor. Ofgem sets out a view that these costs should be borne by network company’s shareholders rather than the consumer because any legal challenge against an Ofgem decision would be in the interest of shareholders rather than the consumer and hence it believes that they should not be included in totex.

Proposed change is ‘not’ in the interests of consumers

Ofgem’s stated rationale for the proposed change is fundamentally flawed. This is because it cannot be assumed that any legal challenge against an Ofgem decision is solely in the interest of shareholders (and not consumers).

In a scenario where an appeal has succeeded, the CMA will have reached its decision whilst taking on Ofgem’s principal objective to act in the interest of consumers. There can be no argument that the challenge was not in the interests of consumers when the CMA reaches a conclusion that Ofgem’s decision was not in those interests. It cannot be in the interests of consumers for such errors by Ofgem to be left uncorrected, for example, where the correction of an error will result in investment that delivers a net benefit to consumers.

Ofgem’s proposed change would act to deter networks from appealing against Ofgem errors with potential resultant detriment to consumers.

Statutory standing and legitimacy

CMA costs are an important and integral part of the licence modification process under the Gas and Electricity Acts. Where these costs are incurred by a licensee it does so acting under the statutory regime, so there is no reason for them to be treated differently to other costs.

Any appeal to the CMA would only be undertaken by a licensee where it is deemed necessary for the network to carry out its role efficiently and economically for consumers. As is the case for all public bodies, it is important that there are ways in which Ofgem's decisions can be challenged and it is therefore not reasonable to try to discourage such challenge by imposing greater risk on networks, if they do so.

Regulatory stability and minimising costs to consumers

The current GB regulatory regime is viewed favourably by investors as one that is stable and applies the rule of law. This is critical in setting the conditions needed to attract the scale of efficient investment needed to delivery Net Zero and governments wider related policy objectives. Any perception by investors that the GB regulatory regime is changing could clearly be very damaging.

The ability to appeal to a higher authority, in this case the CMA, where a regulator has erred in its decision is a key aspect of the current regulatory regime that supports investor confidence. CMA appeals are therefore a legitimate cost.

Proper process

If Ofgem is minded to pursue this proposed change, given its far reaching implications, it should be subject to a fuller analysis and appropriate level of consultation and scrutiny by stakeholders, and not part of the wider annual consultation on the RRP and RIGs that is focused on improving the functionality of the RRP and improve the supporting RIGs.

Conclusion

This proposal has clearly not been sufficiently considered in advance of it being put forward, the underpinning rationale for it is fundamentally flawed and it seems solely to be geared at limiting challenges to Ofgem's decisions and licencees exercising their legal rights to do so.

In the event that Ofgem wish to pursue it then it should be subject to a fuller evaluation of it impacts and an appropriate level of consultation.

If you have any questions on the points raised in this response, please contact Energy Networks Association via email: regulation@energynetworks.org

Energy Networks Association

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