

## **Ofgem's Supply Licence Review: A paper for the Industry Codes Working Group by npower**

1. At the last Industry Codes Working Group, npower / EDF Energy took an action to respond to concerns/issues raised by Ofgem with the compliance model set out in the joint npower / EDF Energy paper. This paper has been prepared by npower. EDF Energy has prepared a separate paper, based on the gas shipper licence, which after further consideration is now its optimal choice. However, EDF Energy continues to see merit in an 'enforcement-by-invitation' model and agrees with the response to Ofgem's 8 points as set out in paragraph 4 below.
2. The remainder of the paper therefore represents the views of npower (noting the broad support of Centrica, Scottish and Southern Energy, Scottish Power and E.ON, with regards to the original npower / EDF Energy paper). In engaging in the Supply Licence Review, npower has sought to embrace the spirit of the review, seeking outcomes that deliver a proportionate regulatory framework that is consistent with better regulation, reduces complexity and risk, whilst ensuring the interests of consumers are adequately protected and that competitive markets are preserved. Whilst npower will actively participate in discussions to explore a model based on the shipper licence condition, the model set out in the npower / EDF Energy joint paper remains our optimal choice.

### **Removal of duplication of enforcement processes**

3. The issue here is one of potential, rather than inevitable, risk of double-jeopardy and this is fundamentally undesirable in principle. We are seeking to formalise Ofgem's policy of not electing to pursue enforcement action where self-governance arrangements should more properly deal with non-compliance, whilst recognising that Ofgem should retain a compliance role in certain areas. npower would also suggest that a clear demarcation between non-compliance matters for Ofgem and those that should be dealt with by self-governance, would facilitate the exercise of Ofgem's statutory duty to enforce non-compliance.

### **Ofgem enforcement by invitation only**

4. We are pleased that Ofgem recognises the merit in the formal definition of Ofgem's enforcement powers in relation to industry code compliance and that it does not disagree with the principle behind this proposal. Dealing with the 8 concerns raised by Ofgem in turn:
  - i) We agree (as our original paper made clear) that the industry would need to consider the composition of panels responsible for compliance, to ensure that they are able to discharge their compliance duties effectively.
  - ii) We agree that self-governance arrangements should incorporate an appeal mechanism, whereby parties could take panel decisions to an appropriately specified Appeals Committee in certain limited circumstances. After further consideration, we do not consider that this would be a role for Ofgem, as hearing and determining appeals is a quasi-judicial function which is not well suited to an economic and market policy regulator.
  - iii) We agree that there may be a need for consequential changes to other types of licence and this should be solvable through drafting alignment.

- iv) We agree (as our original paper made clear) that self-governance arrangements would need to have objective triggers in assessing escalation and compliance sanctions.
- v) We agree that careful consideration should be given to non-compliances that directly affect non-code parties, particularly customers. Such non-compliances could be explicitly recognised in the Code enforcement provisions and appropriate sanctions brought to bear. As currently with certain Codes, Ofgem could direct the Panel to investigate certain matters.
- vi) We agree (as our original paper made clear) that the industry would have to review sanctions and bring forward any proposals necessary, to ensure that sanctions were both proportionate and effective.
- vii) We do not believe that the panels would face increased exposure to wider competition issues, given that Ofgem's jurisdiction over industry codes is as a regulatory rather than a competition authority. It would remain open to parties and the panels to flag any broader competition concerns to Ofgem.
- viii) We agree (as our original paper made clear) that work would be required to develop effective sanctions and believe that a recasting of Ofgem's compliance role would itself provide a strong incentive for proposals to be brought forward. (We note that the BSC Performance Assurance Framework review is ongoing).

#### Ofgem enforcement restricted to certain predetermined areas

- 5. Ofgem raises concerns about 'crystal ball' gazing in setting the predetermined areas and that more work would need to be done in defining these. npower accepts that work would be required, but are advised that this should not be insurmountable.
- 6. Ofgem is concerned that any area of industry codes may be of regulatory interest if they are sufficiently material. npower is unclear how this position sits with Ofgem's principle 3 of the review in relation to this workstream, i.e. licence conditions that relate to compliance with industry codes and agreements are only likely to be necessary if they do not themselves contain adequate sanctions for suppliers who breach them. By definition, robust sanctions that are progressive, proportionate and effective, would be sufficient to ensure significant and persistent non-compliances are dealt with adequately in areas that are considered of less relevance to the regulator.
- 7. npower also notes that there are examples of other markets where there seems to be less potential for regulatory intervention, in the context of a mature, competitive energy supply market. For example, the key 'access agreements' which allow postal operators access to Royal Mail's delivery network are commercial agreements that facilitate market inter-operability and competition. Postcomm's role is restricted to only intervening where companies are unable to agree a fair access price.

#### Implementation

- 8. We believe that the SLR timetable provides for revised industry governance arrangements to be brought forward to provide comfort to Ofgem and other stakeholders that Ofgem's compliance role should be refocused. However,

detailed work is only likely to be undertaken after SLR policy decisions have been taken and these would specify the criteria that would need to be satisfied before the licences could be modified. It would be for industry participants, along with the existing code bodies, to consider the requirements and bring forward modifications that would be triggered upon acceptance of the final proposals in the collective licence modification process. These are matters of implementation, rather than policy (if necessary, the use of 'sunset' clauses could prove useful).

9. It is for the SLR process to identify the optimal solution so that if it is not practicable within the SLR timetable, the industry can still move towards that position over time.

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