

## SLR Industry Codes Workgroup

Meeting 6, 03 May 2006

### Minutes

#### Attendees:

Ian Anthony (Chair)	Ofgem	IA
Jill Ashby	Gemserv	JA
Roger Barnard	EDF Energy	RB
Dorcas Batstone	Elexon	DB
Emma Carr	National Grid	EC
Paul Finch	nPower	PF
Emily Hamilton	Ofgem	EH
Steve Mackay	Ofgem	SM
Clover Powell (PART)	energywatch	CP
Nicholas Rubin (Secretary)	Ofgem	NR
Abid Sheikh	energywatch	AS
Nick Simpson (PART)	Ofgem	NS
John Sykes	SSE	JS
Claire Walsh	Centrica	CW
Mark Watson	ERA	MW

#### Apologies:

David Edward	Ofgem	DE
Alex Mackinnon	Scottish Power	AM
Alex Travell	E.ON	AT

#### Introduction, Minutes and Outstanding Actions

1. IA welcomed the Industry Codes Workgroup (the Group) to its sixth and final meeting. Apologies were received from DE, AM and AT.
2. RB raised concerns to do with the late circulation of papers and that it was the second time in a row draft guidance notes had been tabled as a late paper. AS seconded these concerns. He added that if papers were to be usefully considered by Group members then they should be circulated at least a week before the next meeting. IA apologised for the late circulation of papers.
3. In relation to the minutes of the Group's last meeting (held on 05 April), NR told the Group that no comments had been received prior to the meeting. RB proposed a minor change to paragraph 17.

#### **ACTION – Ofgem to update and circulate the minutes of the Group's last meeting.**

4. NR explained that all outstanding actions had been completed.

#### Statement of Enforcement Guidance

5. At its last meeting, the Group considered an early draft of Ofgem's enforcement guidance. RB said that the term 'guidance' was inappropriate for the interim document being developed by the Group. This was because the term is often associated with things

that are not binding. He pointed out that other similar documents published by Ofgem and other regulators are more appropriately called 'statements of policy'. For consistency, he suggested that the document be called a Statement of Ofgem's Enforcement Policy (SOEP). EH concurred by saying that the content of the document could more accurately be called a statement of policy. Although she pointed out that the title of the document would not make it more or less binding.

6. EH apologised for the late paper on Ofgem's proposed SOEP. She explained that although the paper was not ideal it was intended to indicate to the Group the likely content of a SOEP. She added that the paper was based on three documents published by Ofgem in 2003<sup>1</sup>. JS said it was useful to see where and in what context the different elements of Ofgem's proposed SOEP had been taken.

#### *Statement of Ofgem's Enforcement Policy content*

7. There was general support for the content and level of detail proposed by Ofgem. Some members of the Group said they understood why developing a detailed SOEP could fetter Ofgem's discretion. However, PF urged Ofgem to provide as much detail as possible.

8. The Group discussed the proposed content of a SOEP according to the tabled paper. AS asked whether the policy found in the 2003 consultation had been updated following responses to the consultation. EH said that policy had not been subject to consultation except in relation to whether Ofgem should make a public notification about a formal investigation. CP said the tabled paper indicated that a SOEP would therefore not contain new Ofgem policy in relation to enforcement action. Ofgem acknowledged this point noting that the documents published in 2003 were rather broad in their context and a SOEP could be tailored more specifically toward industry codes. To achieve this, RB suggested that a SOEP could give greater consideration to the role of code panels and self-governance arrangements. JS said that a SOEP could draw out how Ofgem applies the principle of transparency when taking enforcement action. DB and RB also said that a SOEP could consider the processes that Ofgem employs when deciding not to take enforcement action.

9. In addition to the comments made above, the Group agreed to circulate further views on the potential content of a SOEP by 05 May.

#### **ACTION – Group to circulate views on the content of a SOEP by 05 May.**

#### *Further Development*

10. Ofgem expressed concerns about developing guidance by the end of the SLR. SM said it was not clear publishing guidance that re-iterated policy already in the public domain would be beneficial. He also supported the view of some Group members, expressed at previous meetings, that it could be more appropriate to let the Industry Code Compliance Review (ICCR) consider the further development of guidance. This view was expressed by some Group members because it was considered that the development of guidance could overlap with the ICCR's remit and/or pre-empt its conclusions. NS also said that re-publishing the guidance would be a matter for Ofgem's Executive. In addition, NS said that although the Group's views and suggested additions were welcome, it was unlikely that the Group would have the chance to review what would be put to the Executive for consideration.

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<sup>1</sup> The following can be found on the Ofgem website ([www.ofgem.gov.uk](http://www.ofgem.gov.uk)): "Financial Penalties - The Process", February 2003; "Making markets work for consumers: Ofgem's approach to securing compliance with supply licence obligations and consumer protection legislation", July 2003; "Utilities Act, Statement of policy with respect to financial penalties", October 2003

11. In response members of the Group recalled discussions at previous meetings. RB reminded the Group that NS had suggested that guidance, similar to those provided by the Office of the Rail Regulator, could be developed as an interim measure to the ICCR. DB referred the Group to previous minutes that described the development of guidance as a deliverable of the SLR. RB also said that because the proposed guidance intends to consolidate existing policy, its development should not be too hard and would provide a beacon toward the forthcoming ICCR.

12. It was broadly considered by the Group that the review of guidance by the Group prior to an Exec meeting would be very useful. RB and DB were of the view that well developed guidance and the Group's positive recommendation could only be of benefit to the Exec when it discussed the issue of enforcement guidance. AS also said that without allowing the Group to review guidance it would not be clear whether individual member's views had been incorporated.

13. EC reminded the Group that its remit was to ultimately provide a report to the Steering Group with a set of recommendations. Subsequently she said that the Group should concentrate on ensuring that a developed set of guidance notes, representative of their views, are drafted and attached to the report with a positive recommendation. NS said that he was comfortable for Ofgem to further develop a SOEP if it was clear that it was a product of the Group and not, at this stage, of Ofgem.

**ACTION – with consideration given to the Group's discussions and views circulated by email, Ofgem to draft and circulate to the Group a more developed version of enforcement guidance by 12 May.**

14. Ofgem was unable to indicate when enforcement guidance would be considered by its Exec.

### **Revised Amalgamated SLC**

15. One of the agreed recommendations of the Group is for the development of an amalgamated SLC. The Group's intention is to maintain the obligations contained in SLCs that are part of their terms of reference but to consolidate these into a single SLC. Last meeting, RB agreed to revise the proposed amalgamated SLC drafting to take account of the Group's discussion.

### *Derogations and directions*

16. Ofgem had previously raised concerns regarding paragraph 8b of the amalgamated SLC. Its concerns were that issuing a direction, particularly to elements of the 'commercial codes', could adversely affect the incentives on licensees to comply with codes and competition in general.

17. Having considered the issue further, EH said that Ofgem no longer had any concerns.

### *Binding vs Not Binding*

18. Paragraph 11 of the draft amalgamated SLC would have the effect of referring to published guidance for a definition of 'comply' in relation to compliance with industry codes. Previously the Group had recognised the difficulties faced by Ofgem when considering whether to refer to guidance through an SLC because it must avoid fettering its discretion.

19. Some members of the Group expressed their support for the SLC to refer to a published SOEP. RB said that the revised wording would not require Ofgem to enforce in accordance with guidance but to take it into account. AS asked for, and received assurance, that the SLC would not preclude Ofgem taking an alternative course of action, outside of the terms of the guidance. It was considered by PF that paragraph 11 was in accordance with the principles of Better Regulation; in particular, transparency and targeted. RB said that by giving guidance legal status it would provide greater assurance and ease regulatory uncertainty. PF also said that referring to guidance in the SLC would provide greater clarity of licence obligations to new entrants.

20. However, Ofgem expressed the view that guidance should not be binding through the licence. Given that the proposed SOEP is limited to explaining how Ofgem takes enforcement action rather than explaining how Ofgem assesses compliance, EH said there was little benefit in referring to guidance for a definition of 'comply'. She explained that the proposed guidance would only go as far as outlining when and how Ofgem might take enforcement action. In response, RB pointed out that the proposed guidance could contain paragraphs (eg paragraph 6.2) that went some way to defining 'comply'. SM said it was not clear why the SLC should bind Ofgem to guidance when simply publishing guidance would have a similar effect on the basis of it being a public statement made by a regulatory body. EH suggested it could be possible to provide transparency outside the SLC.

21. Members of the Group were unable to compromise on this issue. On the one hand some members of the Group agreed that their report to the Steering Group should include a positive recommendation to support the inclusion of paragraph 11. However, Ofgem maintained their position of not supporting its inclusion.

### **Consequential Changes**

22. At the Group's last meeting, Ofgem raised concerns in relation to the extension of an obligation to facilitate consequential changes to all supply related industry codes. EH explained that the obligation exists to ensure that changes made to more 'commercial codes' (eg the BSC and CUSC), if necessary, are filtered down to subsidiary/technical codes (eg the Grid Code). The obligation also ensures that changes to a subsidiary/technical code cannot dictate changes to commercial codes. These subsidiary codes are defined as Core Industry Documents (CIDs) in the supply licence and are listed in a designation made by the Secretary of State.

23. The Group broadly support the idea of consistently applying the obligation to facilitate consequential changes to all codes. RB described it as a sensible way forward given that the all codes are legally co-equal and the differences between current SLCs are an accident of history. DB added that the obligation was included in SLCs 9, 10 and 11 (to do with the BSC and CUSC) because it was considered at the time that the change co-ordination processes used by CIDs were not working effectively. Furthermore, the Group questioned whether there really was a hierarchy of codes given that a couple of the new codes (the SPAA and DCUSA) have the consequential changes obligation associated to them. JS said that although the MRA does not have an obligation to facilitate consequential change, it has a similar obligation in the Agreement itself. Furthermore, because the current SLCs require compliance with all provisions of codes, the internal obligation to facilitate change is in effect a licensed obligation. Some members of the Group commented on the concern that changes to technical codes could require changes to commercial codes. They pointed out that all codes are in some way inter-related and tend to contain a mixture of technical and commercial conditions.

24. Ofgem expressed the view that it would be undesirable to break up the existing hierarchy between the codes. In addition, EH said that because of the implicit obligation

JS described (see above) it would be unnecessary to extend the obligation formally in the licence.

25. Again the Group were unable to agree a compromise. Consequently IA suggested that the Group's report to the Steering Group reflect the view that some members of the group supported consistently applying to all codes the obligation to facilitate consequential changes. But that Ofgem supported maintaining the current hierarchy of codes. The Group agreed.

26. If the obligation to facilitate consequential changes was consistently applied to all codes, PF asked whether a licensee would still be able to appeal decisions to implement changes. EH said that a licensee should still be able to appeal modification decisions.

27. EH reminded the Group that there are CIDs outside its terms of reference, eg Data Transfer Service Agreement, Distribution Connection agreements, Ancillary Services agreements. She asked whether the Group should give consideration to these. RB said that CIDs outside the Group's terms of reference should be considered in another forum, eg the ICCR. He also pointed out that a number of these other CIDs are no longer in use or have been superseded.

### **Draft Report to the Steering Group**

28. One of the Group's deliverables is to produce a report to the Steering Group outlining its recommendations in relation to the SLCs found in its terms of reference. IA introduced an early draft of the report. The Group discussed the draft and provided feedback.

**ACTION – Ofgem to incorporate the views of the Group and circulate for further comment prior to the next Steering Group meeting (scheduled 24 May).**

### **Any other business**

29. PF offered the Group's assistance to Ofgem in relation to developing a project initiation document (PID) for the ICCR.

30. DB informed the Group of IA's forthcoming secondment to the Cabinet Office. On behalf of the Group she thanked him for his pragmatic and cheery chairmanship and wished him well in the future.