

SLR Industry Codes Workgroup

Meeting 5, 05 April 2006

Minutes

Attendees:

Ian Anthony (Chair)	Ofgem	IA
Roger Barnard	EDF Energy	RB
Dorcas Batstone	Elexon	DB
David Edward	Ofgem	DE
Steven Eyre	British Energy	SE
Paul Finch	nPower	PF
Emily Hamilton	Ofgem	EH
Michael Knowles	Ofgem	MK
John Lang	Centrica	JL
Clover Powell	energywatch	CP
Nicholas Rubin (Secretary)	Ofgem	NR
Nick Simpson (PART)	Ofgem	NS
John Sykes	SSE	JS

Apologies:

Jill Ashby	Gemserv	JA
Emma Carr	National Grid	EC
Alex Mackinnon	Scottish Power	AM
Abid Sheikh	energywatch	AS
Alex Travell	E.ON	AT
Mark Watson	ERA	MW

Introduction, Minutes and Outstanding Actions

1. IA welcomed the Industry Codes Workgroup (the Group) to its fifth meeting. Apologies were received from JA, EC, AM, AS, AT and MW.
2. All outstanding actions were closed.
3. NR summarised comments received in relation to the minutes of the previous meeting. RB and PF proposed that additional changes be made to the formatting in paragraph 9 and the wording in paragraphs 12 and 17

ACTION – Ofgem to update and circulate the minutes from the meeting held on 23 March 2006.

4. The Group provisionally agreed the previous meeting's minutes.

Amalgamated Standard Licence Condition (SLC)

5. At the last Group meeting RB agreed to draft an amalgamated SLC. RB summarised the content of his draft. He explained that whilst drafting SLCs as part of the Supply Licence Review (SLR), he had applied two principles – that i) SLCs should have a statement of purpose and ii) individual themes within a SLC should be captured under different subject headings.

Harmonisation of obligations

6. The draft amalgamated SLC intends to pull together all existing SLCs and obligations within the Group's remit into a single SLC. As a consequence of consolidating SLCs, the draft has applied obligations consistently in relation to all supplier related industry codes. IA pointed out that the draft would have the effect of applying obligations in respect of some codes where an obligation at present does not exist. He also reminded the Group that as part of their final report and recommendations, they must give reasons for removing, retaining or modifying SLCs and obligations. RB said that applying obligations consistently across codes where possible would be a desirable outcome.

7. DE expressed concerns in relation to the consistent application of an obligation to facilitate consequential changes to industry codes. For example, the existing supply licence obliges licensees to facilitate consequential changes only in relation to the BSC, CUSC and SPAA. He argued that these obligations were introduced specifically for these codes because of a perceived hierarchy of codes. He explained that the obligation exists to facilitate changes to subsidiary codes as a consequence of changes to codes higher in rank, but not the other way round. In relation to the MRA, JS said that having a licence obligation to facilitate consequential change would not change things significantly because the MRA already has its own code obligation to facilitate consequential change. EH said that Ofgem would consider this issue further.

ACTION – Ofgem to consider the implications of consistently applying an obligation to facilitate consequential changes to all supplier related industry codes.

Part G, Paragraph 11

8. The Group broadly considered that guidance on how Ofgem takes enforcement action would ease perceived regulatory uncertainty. Paragraph 11 of the draft amalgamated SLC is intended to define 'comply' in accordance with any enforcement guidance published by Ofgem.

9. Some members of the Group recognised the difficulty of defining 'comply'. For example, Ofgem could conclude that a collection of minor code non-compliances constitute a licence breach. On the other hand an industry panel might conclude that one of those perceived minor non-compliances was, in their view, a licence breach. RB argued that if the licence referred to published guidance and therefore a definition of 'comply', then that guidance would have an overall legal standing within the regulatory regime and that this would provide greater clarity to industry participants.

10. Ofgem expressed concern at the licence referring to published guidance for a definition of 'comply'. MK reminded the Group that Ofgem's statutory duties require it to consider a variety of different issues. Consequently, it must adopt a proportional and flexible approach when considering enforcement action. RB responded by saying that Ofgem would have the final decision over the definition of 'comply' in any published guidance. MK also said that the draft SLC could prescribe how licensees must comply. EH said that guidance could either be binding or not. She expressed reservations about guidance being made binding through the licence. Instead she suggested developing an alternative means of referring to published guidance.

ACTION – RB to reword paragraph 11 of the draft SLC to take account of concerns raised.

When does a licensee's obligation to comply begin?

11. SE pointed out that the obligation to sign and comply with different industry codes varies. For example, SLC 10 requires that the licensee shall become a party and comply with the BSC insofar as they supply or offer to supply electricity to any premises in GB. On the other hand SLC 20 requires that a licensee should become a party and thereafter comply with the MRA once the licence is granted to them. JS explained that the MRA allows 'interested industry participants'. These are not parties to the agreement and therefore have no obligation to comply. DB added that a new party to the BSC can be given 6 months before the obligation to comply begins. She also said that a party's 6 month period can be extended if the BSC Panel agrees. RB said it would be sensible to standardise the wording describing licensees' obligation to sign and comply with industry codes. It was also suggested that guidance could consider this issue further in its consideration of what constitutes a material non-compliance. However, as a principle, suppliers being in breach of these obligations as soon as they are granted a licence would be undesirable.

Derogations and directions

12. Paragraph 8b of the draft SLC would give the Authority the ability to issue directions relieving licensees of their obligations in respect of aspects of industry codes. DE expressed the view that issuing directions, particularly to elements of the more commercial codes (eg the BSC), could adversely affect the incentives on licensees to comply with industry codes and competition in general. He also suggested that further consideration should be given to those circumstances where a Panel and the Authority may have different views as to whether a direction or derogation could be issued. PF said that allowing the Authority to issue directions would be consistent with the principles of Better Regulation and was an enabling provision.

Draft Ofgem Enforcement Guidance

13. At the last Group meeting, Ofgem noted that the Group's discussions had raised several complex issues in relation to compliance arrangements with industry codes. Consequently it was proposed that Ofgem would initiate an Industry Codes Compliance Review (ICCR). As an interim measure it was also proposed that guidance notes would be drafted to ease perceived regulatory uncertainty to do with Ofgem's enforcement of licence obligations to comply with industry codes. Consequently Ofgem took an action to draft a set of guidance notes in time for the next meeting.

14. MK explained that in 2003 Ofgem consulted the industry on a couple of issues (priorities for compliance activity and the publication of formal investigations), but not specifically Ofgem's enforcement practice¹. He also said that policy guidance was not formally published following the receipt of respondent's views.

15. Ofgem's draft guidance note (paper 05/02) outlined the high-level principles Ofgem considers when taking compliance action. DE acknowledged that the draft was based heavily on the 2003 consultation document. Some members of the Group said that they had expected the draft to only contain high level principles. They also expressed the view that greater clarity in relation to the terms of reference for the ICCR was needed. JS suggested that more detailed consideration of the contents of any guidance notes could pre-empt future discussion as part of the ICCR. DB also noted that the development of guidance notes could overlap with the work and potential recommendations of the ICCR.

¹ The consultation is entitled "Making markets work for consumers: Ofgem's approach to securing compliance with supply licence obligations and consumer protection legislation". It can be found on the Ofgem website at www.ofgem.gov.uk.

16. On the other hand, other members of the Group considered that the draft was in need of considerable development, and in particular that the draft should be tailored toward Industry Codes. RB said that i) without clear guidance, the five principles contained within the draft (proportionate, consistent, accountable, targeted and transparent) could be interpreted differently by industry participants, ii) the 2003 consultation could be used as a basis for developing guidance notes and iii) the current drafting of an amalgamated SLC would give any guidance a legal position within the licensing regime. JL said that he had expected more detailed guidance notes that considered distinct issues. He also explained that because of individual suppliers varying circumstances, not defining 'triviality', for example, would mean the draft guidance provided no more certainty than prevailing conditions.

17. DE and MK reminded the group that providing too much detail on the circumstances for enforcement action could be contrary to some of Ofgem's statutory duties. In particular, they referred to the need for Ofgem to maintain flexibility and proportionality toward individual cases where enforcement action may be necessary. MK pointed out that although Ofgem endeavours to take enforcement action whenever necessary, it may not always be feasible to do so. However, RB referred the Group to a recent legal case (Postwatch v Postcom and Royal Mail) where the precedent suggests that in the absence of guidance, Ofgem is duty bound to enforce any licence breach.

18. To assist Ofgem's development of guidance notes, IA invited the Group to circulate views on the potential contents of enforcement guidance.

ACTION – Ofgem to send Group members a copy of the 2003 consultation.

ACTION – Group members to circulate views in relation to the contents of enforcement guidance notes by 13 April. POST-COMMITTEE - This date was changed to 21 April.

ACTION – Ofgem to revise draft guidance note.

Any other business

19. In relation to the ICCR, DB asked what involvement would be expected of Elexon. DE responded by saying that Ofgem intended to circulate a public notice explaining the project's scope in about 6 weeks time (ie mid May).

20. The Group's next meeting will be on 3 May at 1030.