

Pamela Taylor
Competition Policy and Pricing Manager
Office of Gas and Electricity Markets
9 Millbank
London
SW1P 3GE



3 September 2007

Dear Pamela

Proposed Enforcement Guidelines on Complaints and Investigations

Thank you for the opportunity to comment on Ofgem's Enforcement Guidelines on Complaints and Investigations. You will find EDF Energy's detailed views attached as Appendix 1. In this covering letter, we set out our wider concerns about the Authority's investigation and enforcement activities.

As you will know, in July this year the Authority closed its investigation into the alleged non-compliance by our three network licensees with standard condition 4C of the distribution licence. You will also know that this has been the third consecutive formal investigation into the activities of EDF Energy companies that has concluded without any findings of breach (the other two being a section 28 investigation relating to our compliance with the network planning and design standard under the distribution licence, and a Competition Act investigation into our withdrawal of meter-reading services from non-affiliates).

We believe that each of these, and in particular the recent SLC 4C investigation, has highlighted significant and inequitable defects in Ofgem's investigation and enforcement processes.

One of the main problems arises where a party makes specific, sometimes wide ranging, allegations of breach but requires these to be treated as confidential. This means that it is not possible for Ofgem to discuss the substance of the allegations with the subject, as this would inevitably reveal the identity of the complainant and the details of the allegations.

In the SLC 4C investigation, we must assume that the complainant requested confidentiality because at no time during the protracted investigation process did Ofgem reveal the identity of the complainant or any details of the alleged licence breaches, despite our repeated requests.

Since Ofgem could reveal neither details of the allegations nor the identity of the party making them, Ofgem seems, we believe, to have found it necessary to conceal both the identity and the details by asking questions whose scope included the entirety of the connections market within the three licensees' designated service areas.

The upshot of all this was that our network licensees had to provide substantial details, of ever-increasing complexity, about many thousands of connection projects, even though the original allegations may have been confined to a few individual connection requests. On any view of the matter, a lack of focus on this scale is neither sensible nor efficient.

We furthermore believe that if the specific allegations had been discussed with the three licensees at the very start of the investigation process, it would have been clear to Ofgem (probably in a matter of days, compared to the 11 months that the investigation actually took) that there was no case to answer.

This is a very unsatisfactory state of affairs, in which EDF Energy has been required to waste considerable time, money, and other resources defending itself against accusations which had no foundation. It also seems to be a situation that is tailor-made to encourage vexatious or strategic complaints from competitors who wish to further their own business agenda, or simply to cause mischief. This is a distinct possibility with any future allegations, such as those that may result from Ofgem's proposal to seek comments from a whole range of parties entitled to request non-contestable connection services from our three network operators.

It is possible that Ofgem may claim that the commencement of an investigation does not imply any accusation of breach. This would not be correct, however, since the very decision to use the section 28 powers under the Electricity Act confirms that it "appears" to the Authority that a licensee may have breached, or may be breaching, the licence condition or statutory requirement in question.

Looking at that threshold from the industry's viewpoint, we believe that the legal effect is that a licensee is not to be subjected to the highly intrusive exercise of the Authority's section 28 powers on the basis of a mere surmise on the Authority's part. A feeling of unease, or of concern arising from a few complaints received, is not good enough to justify the disruption of a licensee's business over a period of many months and the accompanying harm to corporate reputation.

Obviously, the Authority does not need to have a settled belief that a licensee is in breach before starting to investigate. But such belief as the Authority does have in that respect needs to be more than a mere suspicion: there has to be something that is known, or reasonably believed, about the licensee's conduct and that is prima facie capable of justifying a decision to invoke and exercise the Authority's section 28 powers. Even suspicion needs to be firmly grounded and targeted on specific facts that are clearly known to exist.

We believe, finally, that the accused has a right to know what he is accused of and that Ofgem's enforcement policy must be consistent with Article 6 of the European Convention on Human Rights (and by extension with the UK's Human Rights Act 1998). Article 6 deals with the right to a fair hearing. A licensee that is unable to know what it is accused of is placed at a substantial disadvantage with regard to its ability to defend itself and, of course, has no ability to cross-examine a complainant of whose identity it has no knowledge.

Yours sincerely

Roger Barnard

Head of Regulatory Law

Appendix 1: Comments on Ofgem's Consultation Document

EDF Energy welcomes Ofgem's intention to provide greater clarity and transparency to its enforcement policies and practices.

The first part of this response provides comments on the guidelines themselves, while the second part addresses the specific questions raised.

PART 1: COMMENTS ON THE GUIDELINES

The guidelines document would benefit from the inclusion of a matrix which sets out the legislation under which Ofgem may undertake investigations and enforcement action. This matrix should include the title of the legislation, the powers the Authority has under the specified legislation, and the relevant action which could be taken. If powers that Ofgem is entitled to use are shared with another regulator, such as the OFT, this should be clearly stated. If Ofgem has power to refer a case to another body (for example, the Competition Commission) this should also form part of the matrix.

Anti-competitive behaviour

This section clearly sets out Ofgem's powers of investigation, the process that will be followed during an investigation, and a party's ability to appeal against any decisions made under the auspices of the Competition Act.

Market monitoring and investigations

This section may benefit from some examples of the types of enforcement activity in this area to act as additional guidance.

Super-complaints

This section would benefit from some explanation of the recent example of the billing super-complaint raised by Energywatch. This was a good example of a difficult process delivered in a timely and effective manner by Ofgem.

Enforcement orders under the Enterprise Act

It would add clarity if the relationship between the OFT and Ofgem could be described in more detail in this section, with specific reference to how communication is managed between the two regulators. For example, are cases jointly managed in the same time frame or are enforcement orders produced to differing timetables?

PART 2: SPECIFIC QUESTIONS RAISED

EDF Energy supports the principle that complaints to Ofgem should be "specific, well reasoned, clear and supported by all available and relevant evidence". The evidence that parties are expected to provide to support complaints to Ofgem should be as detailed as possible, though we recognise that it may be difficult for parties to provide quantifiable evidence as to the market impact.

Criteria for opening an investigation

The comments below are subject to the general views set out in our covering letter about the way in which Ofgem initiates and conducts investigations.

We support the criteria that Ofgem is proposing to use to decide whether to begin an investigation. These criteria clearly signpost participants towards the evidence that they will be required to supply to Ofgem in order to facilitate an investigation. It may be beneficial to state that information requests to participants may be iterative in nature.

On the question of the sufficiency of grounds, it would be worthwhile adding that the participant making the complaint may be unaware of a parallel investigation being undertaken by another body. If this is the case, then the process of communicating the nature of that investigation should be clearly stated within this section.

Enforcement and industry code compliance

There would be merit in a matrix being included which sets out the industry codes and the high-level obligations they impose. The link between the code panels and Ofgem should be more clearly defined: it would be useful to include the fact that Ofgem has a seat at panel meetings. There may also be benefit in clarifying how the results of any panel actions in relation to breaches are formally communicated to Ofgem.

The investigation and decision-making process

The nine-month timescale set out in the guidance takes no account of the requirement on the Authority under Article 23 of the European liberalisation directives (for both gas and electricity) to issue a decision within two months after the receipt of a complaint.

The provisions of Article 23 entitle "any party having a complaint" against a network operator in relation to a range of matters to refer that complaint to the Authority for determination. In such a case, the Authority must issue a decision within two months of receiving the complaint, except where it requires additional information, in which case that period may be extended by up to a further two months.

Although these provisions of the two directives have not been transposed into national law within Great Britain, this does not limit their legal effectiveness in relation to the duty imposed on the Authority, in this particular context, to receive complaints and make determinations within a limited but prescribed period of time.

It is well-established law that any body which is an emanation of an EU Member State cannot avoid its obligations under European law by relying on the failure of the State to transpose a directive's provisions into national law. The Authority is an emanation of the UK as a Member State, because it is a non-ministerial government department which performs its functions on behalf of the Crown.

The guidance should therefore be amended to reflect the requirements of Article 23. It may also be worthwhile assessing whether this shorter timescale could be applied to all complaints.

Gas and Electricity Acts process

We commend the process chart, which clearly sets out the different stages of the investigation of a complaint.

EDF Energy
September 2007