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3rd September 2007

Dear Pamela,

Proposed Enforcement Guidelines on Complaints and Investigations

I am writing on behalf of all of ScottishPower's licensed energy businesses in response to the consultation paper issued on 26 June 2007.

ScottishPower appreciates the value in having a single source document, setting out Ofgem's priorities and policies on complaints, investigations and enforcement. We agree that consumer interests are best protected when investigation and enforcement powers are used effectively, and in line with the principles of Better Regulation.

The topic of enforcement underpins the key aspects of Ofgem's work, as the promotion of thriving competition must also carry sufficient threat of sanction for those who abuse the system by restricting competition or undermining the interests of consumers. However, it is essential that any enforcement or investigatory action is proportionate, reasonable and fair. While abuse must be firmly prevented, Ofgem also needs to encourage the free flow of competition, without companies constantly looking over their shoulder at the regulator.

The guidelines present a degree of transparency that is not currently present around this issue, by offering industry and other stakeholders a clearer understanding of Ofgem's general processes and procedures in this area. Against this background, we would offer the following comments:

- In order to ensure confidence in the enforcement process, it is important that a balance is struck between efficiency and fairness. Fast, efficient processes are desirable, but these must not operate at the expense of fairness, which must remain the priority.

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- It is very important that the subject of a complaint is given as much information as possible, as early in the process as possible, in order to give them a full and fair opportunity to respond in relation to the allegations.
- Ofgem must avoid any assumption of breach of obligations, either on preliminary investigation or on full investigation. The potential outcomes considered in the flowcharts within the document do not appear to recognise that there could be a finding of 'no breach', either on investigation or following a statement of case by the Licensee.

The attached annex gives detailed comments on the questions raised within the consultation and raises some points that we feel require further clarification or consideration prior to the issue of the final guidelines. We would like to thank Ofgem for the opportunity to address these points and would welcome the opportunity to work with Ofgem in moving towards the final set of guidelines, and further in maintaining robust, transparent and equitable process.

Should you wish to discuss anything included within this response, please do not hesitate to contact me, using the above details.

Yours sincerely,



Rupert Steele
Director of Regulation

ANNEX

ScottishPower welcomes the establishment of a single document on this issue. The benefits of effective enforcement are clear in protecting both consumers and industry alike and we would take this opportunity to re-iterate our commitment to working with Ofgem to promote the interests of consumers and competition within the market.

Given the unique nature of the gas and electricity markets, and the variety of regulated activities that Ofgem has within its remit, it would be easy for any complaints investigation process to become convoluted and complex. By keeping its guidelines at a high level, Ofgem avoids unnecessary complication, which would otherwise undermine confidence in the system. We would however suggest that Ofgem looks again at the document in communications terms, to see if it could be made more user-friendly.

Do you have any views on the information that Ofgem will require complainants to provide when making a complaint?

ScottishPower concurs that preliminary consideration of a complaint will be most effective when fully validated with all the necessary information to allow Ofgem to process the allegation. The proposed guidelines are comprehensive in terms of specifying the information that would be required. It is sensible that Ofgem will align its guidelines relating to Competition issues to existing OFT guidance on this matter.

It is essential that included in the information is a statement saying whether the issue in question has been raised with the alleged offender, and whether that company has been given the opportunity to resolve this with the complainant. Except in certain limited cases where confidentiality is necessary, we suggest that complaints should not be taken on by Ofgem unless these questions can be answered in the affirmative. Ofgem should also make clear that complaints referring to business commercial or contractual issues would generally be left to the market or the normal legal process to resolve.

Do you have any views on the criteria that Ofgem is proposing to use to decide whether to commence an investigation?

Given the wide range of potential issues that could arise within the gas and electricity markets requiring investigation, it would be difficult to build an exhaustive list of all the criteria that would be applicable in each case. As such, the 'guide' list contained within the consultation document would appear to be sensible.

It is not clear from the consultation whether Ofgem would involve the licensee in questions on the decision over whether to investigate the complaint. In the interests of due process, it would be beneficial for Ofgem to do this before making the decision to investigate or not. This would allow the licensee a first opportunity to respond to the allegations and give Ofgem a broader picture of the full issue. This could also give Ofgem a better understanding of the resources required, should an investigation be necessary.

Whilst we recognise and welcome Ofgem's view that it will "take account of sanctions already being imposed or proposed by Code owners" we consider that the criteria to

be used when deciding to investigate should be reinforced, to reduce regulatory uncertainty. Ofgem should expressly acknowledge the principle that where any activity complained of is governed by an industry code, then those industry self-governance arrangements should be the preferred process by which to consider and determine such matters, other than in exceptional circumstances. Without this acknowledgement the threat of double jeopardy would remain, with parties potentially being exposed to enforcement action from Ofgem, in addition to whatever other action may be taken by the applicable industry governance body.

However, we appreciate that Ofgem would still wish to reserve its right to take enforcement action in appropriate instances, such as where the activity may have been persistent, or have resulted in serious consumer harm.

Do you have any views on the process or timescales for investigations?

In terms of timescales, Ofgem states that it will aim to acknowledge receipt of complaints, and a decision on whether it will investigate, within 4 weeks of receiving the communication. On the basis that the subject of the complaint is to be given the opportunity to offer brief comments, this seems about right. However, where an investigation is to be commenced there is clear benefit in doing so as speedily as possible. The quicker an investigation commences, the more likely that evidence will be readily available, and will be recovered. While the Guidelines do not suggest that Ofgem will unnecessarily delay the commencement of an investigation, it would be useful to clarify that opportunities to move more quickly will be considered.

Ofgem also specifies a timescale of 9 months in which to investigate and make a decision, or give a further timescale in which a decision can be expected. This is generally fair, given that some complaints or investigations may be complex and require extensive consideration. However, Ofgem should also recognise that smaller issues may not require the same level of exploration, and therefore the full 9 months may be excessive in such cases. Whilst we fully appreciate the importance of due process, we welcome an undertaking that Ofgem will seek to report as soon as possible, once a thorough investigation has been carried out. Ofgem could consider, as part of its preliminary consideration of the complaint, establishing expected timescales, and notifying the complainant and subject of the complaint of these in advance.

We believe that more information should be provided to the subject of any investigation, regarding the nature of the allegation or complaint. Except where the complaint is confidential, natural justice and efficiency both demand that the licence holder be given a copy of the complaint. Where this is not possible, it is essential that the licence holder is given sufficient indication of the nature of the issues involved, in order for it to be able to respond to the matter. We would suggest that these points are reflected in the guidelines document. We welcome the proposal for the subject and complainant to be updated on the progress of the investigation on a quarterly basis.

Following the conclusion of an investigation, Ofgem should consider the value of feedback, both formal and informal, on the application of its investigation and enforcement processes. This would help to identify potential flaws that are not clear from the 'on paper' process and ensure that fairness and consistency is embedded within the process from end to end. Complainants and subjects of investigations

could both be asked to comment on their experience of the investigation process and to provide any issues of contention that may not otherwise be identified.

The consultation document does not confirm who within Ofgem will have responsibility for the investigation of complaints, or whether this will be carried out by the same team or department in each case. We understand that Ofgem has a dedicated Competition Policy and Enforcement Team, however it is not apparent from the document whether this team will be responsible for all investigations. Ofgem should follow the lead of the FSA and consider whether a dedicated, independent, Enforcement team would be more efficient and impartial in carrying out investigations, rather than the particular department within Ofgem responsible for the policy area which the alleged infringement would affect. Such an approach would lend itself to the key aims of efficiency and fairness and would allow the expedient processing of investigations, without the added confusion of 'business as usual' work.

Finally, in relation to the decision-making stage, there are some points of clarity to be addressed. The processes outlined within the document are relatively comprehensive at a high level. However, we think that it could be more explicit within the document that a finding of 'no breach' of any obligations is also a potential outcome of the investigation stage of the process. The document, particularly the flowcharts showing the Gas and Electricity Acts process and Competition Act process, should be updated to recognise that, following either a statement of case by the Licensee or an investigation by Ofgem, the Licensee may be found to not have committed a breach of its obligations as alleged. This should also be distinguished from the case where there is insufficient evidence to allow Ofgem make a decision, such as with a 'not proven' verdict.

The guidance states that a 'minded to' letter may not be issued where the decision-making has been delegated. It is not clear why this would be applicable in some cases but not in others. Further, it would be beneficial if Ofgem could provide some clarity on the circumstances in which an oral hearing would be offered. Paragraph 4.19 suggests that this will only be available in certain circumstances, whereas paragraph 4.21 indicates that this will be offered on a universal basis. It would be helpful if the above points could be explained in the final version of the guidelines.

3 September 2007