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Mark Feather

12<sup>th</sup> January 2009

Director, Industry Codes and Licensing

Dear Mark

### **The 'timing-out' of Authority decisions on modification proposals**

Thank you for the opportunity to submit a response to your consultation on the perceived threat of 'timed-out' Authority decisions and proposed Ofgem remedies. I write on behalf of Association members who are fully engaged in the electricity and gas code governance arrangements, many of whom have already provided their individual views on this topic as outlined in your letter of 18<sup>th</sup> November 2008.

It is disappointing that whilst industry has already submitted views regarding change to current working practices with regard to decision-by dates that Ofgem continues to pursue the opportunity to impose its will in this area.

As you highlight the issue of Transmission Losses has historically proven a difficult topic for Ofgem's administrative processes to handle, it is therefore disappointing to note that your proposed solution is to impose change on the efficient industry code governance modification arrangements rather than provide information on how Ofgem has

responded to the judges' criticisms of Ofgem's own internal process shortcomings. This omission makes it difficult to favour any option which would enable Ofgem, by extending any decision-by date, to continue to use an obviously flawed approach towards provision of timely information to the Authority.

Association members assume that the Authority is provided by Ofgem with a forward looking modification decision schedule at each of its meetings. This would appear to be sensible good business practice. However the current lack of openness and transparency around Authority meetings in that there are no agenda published in advance, no papers, pre or post meeting, limited minutes published many months after the meeting<sup>1</sup> makes it difficult to be certain that this process exists. We would encourage Ofgem regularly to make this schedule available to industry and the relevant panels in order that any future difficulties regarding the decision making process are flagged up to all stakeholders, including the Authority, at an early stage. As an example the major changes proposed for the electricity transmission access regime have serious implications for future plant investment. At the earliest opportunity, the industry needs to be fully appraised of the expected decision making timeline to be followed by the Authority and any potential delays.

Option A proposes that 'the Authority would be empowered to vary implementation timetables prior to reaching a decision on a proposal and following consultation'. At first reading, and without the benefit of further information regarding the process for enforcement of such powers .e.g. this could presumably be invoked at very short notice approaching the decision by deadline, this suggests the potential for significant further delay. Presumably Ofgem would initiate a consultation with a minimum of four weeks for industry to formulate its response however we are not given any indication of whether the Authority provides an indicative timetable for when it would provide a final determination at that stage. There is too little information here to make an informed decision about the potential risks and additional costs associated with this approach.

Under Option B the Authority would be empowered to request a revised implementation timetable, including a new "decide-by" date(s), for a modification proposal(s) currently with the Authority for decision. This request would be made to the relevant code Panel, who would be obliged to comply with the request. To avoid any risk that the Panel could simply replace one decide-by timetable that is not viable with another one that is also not viable, the request could include binding directions setting out a minimum length of

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<sup>1</sup> The Minutes for the 19 June 2008 Authority meeting were published on 29/10/2008, the Minutes for 17 July 2008 on 30/10/2008, the Minutes for 18 September 2008 on 27/11/2008, the Minutes for 16 October 2008 on 18/12/2008 and the Minutes for 20 November 2008 on 19/12/2008 (why if the November Minutes could be published in less than one month did it take over four months to produce the June Minutes?).

time for which the new decide-by date(s) must be valid. The lack of industry consultation prior to the point where Ofgem obliges the relevant code Panel to comply with the request within this option is a concern. To date implementation dates have always been subject to full industry and Ofgem dialogue. To move to a regime whereby this right would be removed sits uncomfortably within a governance framework promoting efficiency and transparency.

Indeed when taking into consideration the fact that the Judge raised concerns about the impact of delays by the Authority in reaching a decision stating that 'If for any reason there were then a long delay before the Authority could take a final decision, a question might arise whether the Authority was in substance and reality considering the same modification as had been submitted by the Panel, or was considering an altogether different modification, putatively predicated on a cost benefit analysis that the Panel did not, and could not have, evaluated.' The Judge then observed that '**In such circumstances a power to remit the matter to the Panel for complete re-consideration, rather than a power in the Authority to change the timetable for implementation of what had in substance become by lapse of time a different modification, might better preserve the institutional balance between the Panel and the Authority and better serve the objectives of the BSC**'. This is not the same as the option described in Option B whereby Ofgem oblige the panel to comply with a specific date determined by them without industry dialogue.

The current code governance change regime works for the industry, indeed the Balancing and Settlement Code Panel has already agreed that given improved dialogue from Ofgem the current code provisions will fully support flexibility prior to finalising decision by dates. I refer you to the Balancing and Settlement Code provisions within sections F2.6.8 to F2.6.10 which state that:

F2.6.8: Prior to the taking of any steps in an Assessment Procedure which would result in the incurring of significant costs (as determined by the Panel in each case in the relevant terms of reference) for BSCCo, the Modification Group shall seek the views of the Panel as to whether to proceed with such steps and, in giving its views, the Panel may consult with the Authority in respect thereof.

F2.6.9 For the purposes of paragraph 2.6.8, the steps include:

- (a) the commissioning of detailed impact assessments;
- (b) the commissioning of legal text to modify the Code in order to give effect to a Proposed Modification and/or an Alternative Modification.

F2.6.10 At any stage during an Assessment Procedure:

- (a) the Panel may request the Modification Group to prepare an interim report setting out its provisional findings in respect of the matters referred to in BSC/V15.0 F – 20 of 33 Effective Date: 1 October 2008 paragraph 2.6.4 (or such of those matters as it has been able by then to evaluate); and

(b) the Panel may seek the views of the Authority as to whether the findings of such report are consistent with the Authority's provisional thinking in respect thereof; and

(c) the Panel may issue such directions as it sees fit to the Modification Group in consequence of the Authority's views.

The provisions within section F2.6.10(c) therefore should provide additional assurance and opportunity for Ofgem to influence its preferred decision by timetable taking into account industry budgetary and system requirements.

Equally there is no evidence that your proposals are appropriate for Connection Use of System and the Uniform Network Code.

Your letter refers to the fact that since 2005-6 Ofgem has committed to reach a determination on at least 70% of modification proposals within 25 working days or less and that your current 2008 performance stands at 90%. The industry, supported by the various Code Administrators, has delivered Final Modification Reports for your determination to a 100% standard. We would suggest that with improved engagement on Ofgem's behalf it should be possible to improve on the 90% performance standard in future going some way to ensuring that you do not fail the Authority in future.

The vast majority of our members therefore do not see merit in or requirement for any Licence amendments as currently proposed and note with disappointment that Ofgem appears to have no confidence in its own administrative processes post the 2<sup>nd</sup> July 2008 High Court judgement.

Yours sincerely

David Porter OBE  
Chief Executive  
(By email)

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