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Dear Mark

THE “TIMING-OUT” OF AUTHORITY DECISIONS ON MODIFICATION PROPOSALS

British Energy welcomes the opportunity to comment on the issues raised in your consultation paper on the above as published on 18th November 2008.

Headlines:

- **We do not support any change to the current code governance arrangements in respect of implementation timetables.**
- **The case for introducing a new power to the Authority to vary implementation timetables has not been made.**
- **The current arrangements strike the right balance between reducing regulatory risk and providing the Authority with a flexible and reasonable time period to assess and determine on proposed modifications.**

We do not support either of the options to vary implementation timetables prior to a decision being reached by the Authority as set out in the consultation document. The current structure used by the BSC Panel strikes the right balance between providing some regulatory certainty to the market as to when decisions on modifications will be made and providing GEMA with a flexible and reasonable time period in which to assess and ultimately determine on each proposal. A case has not been made to remove incentives on GEMA to make timely decisions by including provisions for the timetable to be amended by either the Authority or the code panel following a request from the Authority. By increasing uncertainty about future arrangements, we consider that efficient market operation would be hindered.

The case for change

The current construct within the BSC and the other industry codes has to date been extremely successful and GEMA generally make decisions well in advance of the ‘decision by’ dates.

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It appears that the unique circumstances associated with recent modification proposals relating to transmission losses are the key driver for changing the existing process despite this being the only time since the introduction of the new trading arrangements in 2001 that a modification proposal has “timed out” prior to a decision being made.

However, for the following reasons we do not believe that the events that surrounded consideration of these particular proposals in any way justify the proposed changes put forward by Ofgem:

- GEMA was provided 12 months consideration time for all but one of the transmission losses proposals. We consider this to be a reasonable time period for GEMA consideration;
- No additional information or unforeseen circumstances arose following the submission of the proposals to GEMA. The concerns expressed by parties had been clearly set out prior to the submission of the modification report to GEMA. We do not support Ofgem’s view that last minute unforeseen issues were raised during its assessment;
- At no point during the judicial review proceedings¹ did any party (including GEMA) challenge the manner in which the timetable for the modifications was set or the appropriateness of that timetable.
- These modifications timed out as a result of Ofgem’s assumption with respect to its powers rather than an inappropriate timetable.

We accept that during the judicial review proceedings the Judge commented on the need for consideration to be given to the current governance process with a view to avoiding scenarios where substantive work from the industry is lost due to modifications being timed out. However, as indicated above we consider the risk of such a future event to be so small that the changes proposed are not warranted. Furthermore, we note that the judge also expressed concerns about long consideration times that could potentially arise if existing processes were changed, particularly in cases where the analysis of the costs and benefits is very time sensitive. In such cases the judge questioned whether GEMA was in substance and reality actually considering the same modification that has been submitted by the Panel when there is a long delay in GEMA making a decision. We consider the current BSC Panel construct appropriately addresses the above risks.

Of the options presented, we note that Option B where the Panel would be required to provide a new implementation timetable if requested by the Authority is very similar to Proposed Modification P93. As noted by the Judge in the JR judgement regarding the Authority’s assessment of this modification “*at that time the Authority decided in unequivocal terms that, first no such power was necessary for the efficient administration of the BSC and, secondly, that in the interests of regulatory certainty, the Panel should not have such a power..... It has not been suggested that there has been any material change in circumstances since the Authority rejected Proposed Modification P93.*” We concur with these views and believe that there is still no case for such a change to the timetable arrangements.

Industry Code Governance Review

As part of Ofgem’s Industry Code Governance Review it is seeking improvements in the quality and depth of analysis contained in modification reports including the greater consideration of environmental issues. These improvements amongst other things should ensure that GEMA is not faced with the task of obtaining/producing further extensive analysis prior to it being in a position to

¹ Judicial Review of GEMA in respect of power to approve proposed modifications to the BSC other than in accordance with the implementation timetable. Case CO/11010/2007.

make a decision based on clear and transparent reasoning and robust analysis. It should also reduce the amount of time required by GEMA for considering modification proposals, minimise further the risk of “timing out” of GEMA decisions and thus avoid the need for the proposed changes set out in this consultation document.

In addition, Ofgem is also looking at fundamental reforms to the whole modification process² including proposals to have three distinct paths available for modifications to be processed. In particular, modifications that are likely to be contentious and have significant commercial implications may be processed through a very different modification path with much greater direct Ofgem involvement than that which currently exists. If implemented these developments could reduce further the risk of decisions being “timed out” particularly for those modifications that under the current model generally require more regulatory assessment. It would therefore seem prudent to await the development of these proposals before amending the existing governance arrangements in respect of implementation timetables for what is widely recognised to be a very small and manageable risk.

Ofgem Proposals

As set out above, we oppose both approaches presented by Ofgem. Notwithstanding this view, we do consider that of the two approaches Option B is better than Option A yet neither option is an improvement on the current arrangements. Despite strong industry opposition, if Ofgem persists with proposals to change the current arrangements in respect of implementation timetables, at the very minimum it is imperative that the relevant code panel is formally involved in this process. Further, prior to the code panel issuing any new implementation timetable to Ofgem this should be subject to a short industry consultation in order to obtain views on the revised timetable and any potential implications of such an event.

We also consider that the ability of Ofgem to seek a revised timetable should be constrained. As noted by the Judge whilst considering this matter in the judicial review *“It would be a limited power to vary, solely so that the Authority could take a decision within a reasonable time in light of the circumstances that had arisen following receipt of the Modification report. It would not be a power that would enable the Authority to set, for policy reasons, a different implementation date, or to sit upon a Modification Report for years and then seek to restart the exercise by a purported variation of the timetable set in the Report”*. If either Option is to be implemented these safeguards should be on the face of any required licence changes needed to introduce such a power.

If you have any questions regarding this response please do not hesitate to contact me.

Yours sincerely



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² Code Governance Review: Major Policy reviews and Self Governance – 19th December 2008.