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Dear Mark,

Response to the “timing-out” of Authority decisions on modification proposals

Thank you for the opportunity to respond to your letter seeking views on the “timing-out” of Authority decisions on modification proposals. This response is submitted on behalf of ScottishPower Energy Management Ltd, ScottishPower Generation Ltd and ScottishPower Renewable Energy Ltd.

We do not support either of the options proposed in the letter for removing the potential that modification proposals relating to the Balancing and Settlement Code (BSC), Connection and Use of System Code (CUSC) and the Uniform Network Code (UNC) may “time-out” before the Authority can conduct, procure or consider information that is necessary for it to make a decision.

We do not see the need for the Authority to be empowered to vary implementation timetables prior to reaching a decision on a proposal following consultation. The situation that arose with the zonal losses proposals where the Authority was allowed around 1 year to make a decision and “timed-out” is very unusual and with hindsight now it is clear that with such a delay the modelling required to be updated to the extent that the Authority’s assessment would have been so different to the BSC Panel’s assessment that the whole process would have been invalidated. In the dynamic electricity market provided the Panel allows the Authority sufficient time to make its decision, as they have done to date, it is unlikely that such a power will be used.

The letter makes no reference to the reasoning set out by the Judge in the High Court order issued on 2 July 2008 (the “Judgement”) finding in favour of the four generators who challenged whether the Authority had any power to reach a decision on the BSC zonal transmission losses modification proposals after the latest date for a decision set out in the relevant Final Modification Reports.

The Judge concluded in the Judgement that:

‘... I do not have sufficient grounds to conclude that the power claimed is necessary or would, on balance, advance the objectives of the BSC, particularly taking account of the reasons for the Authority’s strong rejection of a not dissimilar power in the Panel, and the absence of any material change in circumstances since that rejection.’

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Here the Judge was referring to the Authority's determination of 21 November 2002 in relation to BSC Modification Proposal P93 which sought to allow the Panel to amend the proposed Implementation Date in a Modification Report submitted to the Authority for a determination, but on which a decision had not yet been made. The Authority stated in the determination that:

'The rationale behind submitting an Implementation Date is to provide certainty to Parties as to when a change to the Code will take effect. Ofgem considers that the addition of yet another mechanism to alter the Implementation Dates would introduce regulatory uncertainty to the market with no corresponding gains in efficiency. This would not better facilitate achievement of the Applicable BSC Objectives in that it would not promote efficiency in the implementation and administration of the balancing and settlement arrangements.'

The letter does not address this issue nor does it state what material change in circumstances there has been since the Authority rejected Proposed Modification P93 which has led to the Authority changing its view on regulatory uncertainty. This in itself increases regulatory uncertainty with the Authority changing its view without any justification and without any consultation.

Below we set out our views on Ofgem's initial views on the arguments raised through the BSC Consultation against the specification of more flexible dates as set out in the Appendix to the letter.

- **Ofgem forewarns the Panel of risks.** We recognise that Ofgem frequently communicates with Panels regarding its likely decision-making timetables and agree it is always possible for new issues to arise during Ofgem's assessment of a modification proposal which it is unrealistic to expect Ofgem or any other party to predict. However this is one important reason for the Panel setting proposed implementation dates for important modifications to reduce the chance of Ofgem assessing a modification proposal against different criteria from the Panel because of a change in circumstances.

We do not agree that key last minute issues were raised in the assessment of the zonal transmission losses proposals which could not have been foreseen. The key issue was the inadequacy of the modelling on which Ofgem was basing its decision which was pointed out by us and other respondents throughout the consultation process.

We recognise that competing demands on Ofgem can affect the timetable for consideration of a modification proposal and this is another important reason for the Panel setting proposed implementation dates for important modifications to enable these to be prioritised by Ofgem.

- **An incentive for timely decisions.** We recognise the Authority's timely performance in reaching determinations on modification proposals particularly for the majority of modification proposals with unconstrained Authority decision windows. However we do not accept Ofgem's argument that Decide-by Dates do not create an incentive for the Authority to issue prompt decisions. In the small number of modification proposals that include Decide-by Dates it is precisely for this reason that the Panel has set these dates. Provided the Panel has allowed sufficient time for the Authority to make its decision, and there was no suggestion for the zonal losses proposals at the outset that the year allowed for the Authority to make its decision was not sufficient, then this provides the Authority with an appropriate incentive to make its decision by the date and to prioritise its work accordingly. Where the Panel has set Decide-by-Dates it has very good reasons for doing so and to allow the Authority to change these dates would negate this incentive.

- **Industry uncertainty.** This is a key area and as set out above Ofgem has not provided any indication of what material changes have taken place for it to change its clearly stated view at the time of Modification Proposal P93 that the addition of another mechanism to alter the Implementation Dates would introduce regulatory uncertainty to the market with no corresponding gains in efficiency.

If new issues arise during Ofgem's assessment which would require the Decide-by-Date to be extended then it is likely that these issues would not have been considered by the Panel in its assessment of the modification proposal. These issues could have influenced the Panel's assessment had they been aware of them at the time and may have changed their recommendation to Ofgem. It would thus not be consistent for Ofgem to incorporate these issues into its assessment without allowing the Panel also to do so. In such a situation for a modification which has important implementation timetabling issues then for consistency in the overall assessment process it would be necessary for Ofgem to have the power to remit the modification back to the Panel for it to re-assess. The current process does not allow for this.

It is thus likely that if there is a need for the Decide-by-Date to be extended then there will also be a need for either a re-assessment to be undertaken by the Panel or alternatively for the current modification to be terminated allowing a new similar modification to be raised within 2 months.

Allowing Ofgem alone to extend a Decide-by-Date will increase regulatory uncertainty compared to either allowing referral back to the Panel or allowing a new modification to be raised after a short period.

- **The validity of the analysis.** This is also a key area particularly for modifications such as the zonal losses proposals where the assessed impacts can vary significantly year on year. For such modifications an extension of the Decide-by-Date would be likely to delay the implementation date which in turn would extend the assessment period. As above it would be inconsistent for Ofgem to be using a different assessment period to that used by the Panel requiring either a reassessment by the Panel or termination and the raising of a new modification.

We do not consider it is necessary or desirable for Ofgem to have the power to vary implementation timetables. At the outset the BSC Panel allows Ofgem the time it needs to assess a modification and if Ofgem subsequently requires more time then it is likely that a further assessment would also be required by the BSC Panel. In such a situation rather than extending an already protracted process it is simpler to allow a new modification proposal to be raised.

I hope these comments are helpful. If you wish to discuss or clarify any of the points we have raised then please do not hesitate to get in touch.

Yours sincerely,

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