



Mark Feather
Director, Industry Codes and Licensing
The Office of Gas and Electricity Markets
9 Millbank
London
SW1P 3GE

E.ON UK plc
Westwood Way
Westwood Business Park
Coventry
CV4 8LG
peter.bolitho@eon-uk.com

12 January 2009

Dear Mark

The "timing-out" of Authority decisions on modification proposals

E.ON UK does not believe it is necessary to give Ofgem new powers to direct particular implementation dates for modifications under the BSC and other relevant industry codes. We consider this would establish a de facto 'open-ended' decision making process which would increase regulatory uncertainty and weaken incentives on Ofgem to make prompt decisions. It is also inappropriate for Ofgem to seek to give itself new powers through amendments to the licences of monopoly regulated network businesses given that the parties most affected by these proposals, the network users, have no formal collective right to refuse consent to these changes.

We note Ofgem's commitment to making timely decisions and welcome the setting of rigorous performance standards for modification decisions, but the discipline of time bounding¹ decisions (if only relatively loosely by back-stop "decision-by" dates) remains an important safeguard for the industry. We want Ofgem to continue to strive to make modification decisions within a reasonable period of time. In our view the practice of setting of reasonable "decision-by" dates linked to system releases under the BSC represents best practice and should, where relevant, be adopted by other industry codes.

We agree that, although pretty unlikely, it is possible for circumstances similar to the Losses Proposals case to arise again. If that were to happen we think Ofgem could easily establish a dialogue with the relevant Panel to seek to agree (but not to direct) a revised "decision- by" date

¹ Decisions on charging methodology change proposals are always time bound and Ofgem appears perfectly able to make decisions within a reasonable period. Under this more 'disciplined' decision making process a relatively short time period of time is allowed for an Ofgem decision (albeit with some leeway for Ofgem to extend the period on giving the appropriate notice). In addition if a veto decision is not received in time the charging proposal is implemented. In fact for BSC Modifications a more efficient approach might be to implement the Panel's recommendation (preferred recommendation where there are a number of competing proposals) if a decision was not made within a specified time – this would be comparable to Ofgem failing to veto a charging proposal. It should also be noted that affected parties only have 3 weeks to lodge an appeal under the Code Modification Appeals Procedures, this is in marked contrast to the generous time periods typically allowed by the BSC Panel's "decision-by" dates.

E.ON UK plc
Registered in
England and Wales
No 2366970
Registered Office:
Westwood Way
Westwood Business Park
Coventry CV4 8LG

(effectively Option B but without the element of compulsion). It is difficult to see many circumstances where the Panel would refuse to agree to this but the Panel would retain the ultimate right to stick with existing "decision-by" date(s) if they considered the request of Ofgem to be unreasonable. Thus the establishment of a de facto open-ended decision making process would be avoided but timetables could be extended if appropriate to avoid *"inefficient and wasteful duplication of procedures"* and *"losing and delaying consumer and industry benefits"* without the need to necessarily re-submit a particular modification proposal.

Ultimately we believe 'good governance' of the industry code modification process requires appropriate checks and balances on all parties and this means Ofgem as well as industry participants. If this requires some degree of time limiting of Authority decisions to ensure such decisions are made promptly and to reduce regulatory uncertainty, this is reasonable and proportionate. Ofgem can already determine and overrule Panel wishes on the timetabling of modifications² and we feel that further weakening of the role of Panels will ultimately undermine the effectiveness of checks and balances within the code modification process.

In coming to this view we have been careful to distinguish our views on 'good governance' from the particular merits of the respective Losses Proposals. E.ON UK was disappointed that the Authority felt it necessary to delay its decision on these proposals. We were content with the original 'minded-to' position to implement P203 and despite the subsequent concerns expressed by Oxera about particular conclusions drawn by Ofgem from their analysis we felt the weight of argument still favoured P203. In our view the expected Competition Commission Modification Appeal could have been successfully defended and delaying the decision further, appeared unduly cautious. After all the arguments for and against a form of zonal transmission losses had been well rehearsed over the proceeding 19 years. It might have been reasonable to expect that long standing supporters of this reform such as E.ON UK would have offered to support the defence of such an implementation decision.

We have yet to see a successful merit based challenge to a Losses Proposal, so it was frustrating that the opportunity to introduce this reform was lost on this technicality. However putting aside the substance of Losses Proposals, this procedural case raises a fundamental point of principle. Should the regulator's decisions on modifications be made 'open-ended'? We think efficient and truly accountable code governance requires that the regulators should make decisions within a reasonable period of time and "decision-by" dates provide an important discipline in that decision making process. It is also important to note that the BSC Panel had acted appropriately in the Losses case in setting reasonable "decision-by" dates and this is made clear in the Judgement.

Modification analysis and the relevance of proposed changes can have a limited 'shelf-life' and the regulatory uncertainty associated with inordinate delays to regulatory decisions can in certain circumstances outweigh the lost time effort and benefits of a lost modification "timed-out". Thus we believe it is important that Ofgem continues to be incentivised to make timely decisions.

Having seen the Judgement and with the benefit of hindsight it is easy to say that Ofgem should have sought to agree a new "decision-by -date" with the BSC Panel to give it more time to make a decision on the Losses Proposals. We think that if this had happened the Panel would almost

² At a CUSC Panel meeting in October the CUSC Panel were required by Ofgem to agree a 2 week time extension for development of CAP166 even-though because of its complexity the Panel considered a minimum of 3 months was required to properly develop the proposal.

certainly have agreed to such a request. Given this we do not think there is a need for radical changes to the current arrangements other than perhaps formalising a process whereby Ofgem can request a Panel change a "decision-by" date. If there has already been a substantial delay to a decision it may also be appropriate for the Panel to conduct a further consultation, revise the final modification report and if appropriate revise its recommendation – this is where the idea of the Authority "sending back" proposals (on a non obligatory basis) to the relevant Panel would seem to have some merit.

Overall E.ON UK believes Panel's are in the best position to take informed decisions about implementation dates taking into account, amongst other things, system releases and the implementation concerns of market participants and other stakeholders. We consider a regime that encourages a dialogue between Ofgem and Panels to amend "decision-by dates" would foster greater trust and cooperation rather than mandating implementation date changes under Options A and B.

In summary we do not consider that a regime that allows Ofgem to ultimately dictate modification implementation dates is compatible with 'good governance'. We urge Ofgem to reconsider its position on this. A simple request of the BSC Panel to amend "decision-by" dates is all that is required.

Yours sincerely

Peter Bolitho
Trading Arrangements Manager