

Mark Feather  
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Ofgem  
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Dear Mark,

## **CODE GOVERNANCE REVIEW – MAJOR POLICY REVIEWS AND SELF GOVERNANCE**

ScottishPower is pleased to respond to your consultation dated 19 December 2008 on the package of Major Policy Reviews and Self Governance. This response is on behalf of all ScottishPower's businesses including our networks, generation and supply businesses as well as ScottishPower Renewable Energy Limited.

We recognise that there are concerns over timescales and organisation of code modifications in some cases, and that it would be beneficial to find a way of better coordinating changes across several codes in response to a single policy initiative. However, we doubt whether the proposals for the Major Policy Review (MPR) process and the stratifying of modifications into three channels will actually help in the way intended.

In particular, we think that the MPR process will leave Ofgem in an awkward position of ruling on modifications it has either drafted or directed the industry to draft. This would inevitably lead to suggestions of bias or that Ofgem is seeking to act as judge in its own cause. It also moves away from the original purpose of Ofgem's role in code modifications (namely to vet proposed modifications, in the light of its statutory duties, to ensure that they meet code objectives and to resolve disagreements among code parties as to whether they should be made), and towards a position where Ofgem is seeking wide-ranging powers of specific direction. We think that neither a process where Ofgem drafts modifications – nor one where licensees are compelled to bring forward ones directed by Ofgem – is likely to work well in practice.

We recognise the benefits in seeking improvements to the industry governance arrangements to meet the challenging demands brought about by the changing political and environmental objectives that the industry now faces. However, in our view, improvements to the quality, timeliness and coordination of code changes can be achieved more straightforwardly – and much more quickly – within the existing framework. For example, greater engagement from Ofgem during the development of proposals would be beneficial. This would reduce the likelihood of wasted effort being expended on proposals that would have little chance of being approved and

help ensure that the analysis undertaken was likely to meet Ofgem's reasonable requirements.

We think that a self-governance route could be a useful way to speed up the non-contentious "housekeeping" issues. There is already provision for this in some codes (such as DCUSA), but this could be extended more widely. However, we do not think that it is appropriate to "package" this with the proposed MPR changes. Each should be considered on its merits.

I attach a note giving more detailed comments on the consultation and we would be pleased to answer any questions you may have on our observations – please contact me using the details printed on the previous page.

Yours sincerely,

A handwritten signature in blue ink that reads "Rupert Steele". The signature is written in a cursive style and is positioned above a horizontal line.

**Rupert Steele**  
Director of Regulation

## CODE GOVERNANCE REVIEW: MAJOR POLICY REVIEWS AND SELF GOVERNANCE (172/08)

### Comments by ScottishPower

#### Chapter 2

##### *Question 1 – the case for reform*

In our view Ofgem already has adequate powers to conduct major policy reviews (excluding the 'binding' status of outcomes now proposed). In the case of the recent Transmission Access Review being an example, the industry committed significant resources to address the outcome of that review. The timescales for consideration and development of proposals reflect the complexities of the issues involved rather than necessarily indicating flaws in the underlying process.

One danger of streamlining the process for industry engagement and development of proposals for change is a greater risk that outcomes may need to be unwound or amended as a result of legal challenge or are widely seen as unworkable.

We believe that Ofgem's current remit fits better with the established principles of Better Regulation than the current proposal. We welcome Ofgem's acknowledgement of the nature of the powers that they propose to take to themselves and the important role that appropriate checks and balances must play. We note that the Competition Commission has already voiced concerns about a more active role for Ofgem in code modifications in their decision on E.ON's appeal concerning UNC Offtake Reform – *"However, it is less clear that the system of checks and balances established in the code modification procedures works if GEMA is, to use GEMA's words, the 'effective progenitor' of a proposal (or at least if it is perceived as such)."*

However in light of this we find it surprising that no bespoke additional checks and balances are proposed. Instead, reliance is placed mainly on the pre-existing right of appeal to the Competition Commission introduced by the Energy Act 2004. That process was not designed to accommodate appeals of the kind now envisaged. Those appeals, although merit based, apply only in limited circumstances, namely where Ofgem has reached a decision contrary to the recommendation of the particular Code Panel, and appeals can be excluded entirely if the issue is considered to be one where the appeal process would impact negatively on security of supply. The appeals mechanism also currently excludes a number of codes, including DCUSA.

##### *Question 2 – the MPR process and effective and efficient treatment of strategic issues*

We don't consider that the case has yet been made for such a radical reform as the Major Policy Review (MPR).

Measures that Ofgem could take within the existing framework to increase the efficiency of dealing with strategic issues include:

- Early and continuing engagement with industry groups and code administrators to ensure that timely progress is made, cross-code issues are identified, and that multiple proposals or those with little chance of being approved are minimised;

- If necessary, formal licence modifications(s) could be proposed if progress was seen as inadequate.

We think that the development of codes should continue to be the responsibility of users that operate them. However, Ofgem is within its current remit to indicate – after consultation – areas where it believes changes need to be made and to take further action if these are not followed up.

#### *Question 3 - Self governance*

We cannot see that there needs to be interdependence between MPR and self-governance. We can see merit in increased self-governance in isolation. In the case of DCUSA there is already provision for such modifications. Self governance, where appropriate would free up Ofgem resources to deal with matters of greater consequence. It would be unfortunate to lose those incremental benefits as a result of an unjustified linkage.

#### *Question 4 - The case for an Improved Status Quo path*

We would be supportive of improving the existing procedures. See comments on question 1 above in relation to the MPR process.

#### *Question 5 – which codes should be affected*

See comments on question 1 above.

### Chapter 3 – decisions on filtering

In our view the relevant Code panel should decide which of the available governance procedures should apply, subject to an Authority veto.

### Chapter 4

#### *Question 1 – the process for Major Policy Reviews*

One of our concerns about the MPR proposals is the lack of detail given about the consultation process to be followed. Paragraph 4.7 says that consultation will be proportionate to the subject and scope of the review. As stated above, we believe that Ofgem can in effect carry out a major policy review within its existing powers (but it then needs to encourage at least one industry or consumer stakeholder to propose the modifications). This is only a major disadvantage for proposals for which no support can be found.

#### *Question 2 – Options for the outcome of a review*

We have particular concerns about option 3 as stated above. Without a 'binding' status, Option 1 - stating the policy framework within which Ofgem expects code modifications to be submitted, but following full consultation - would be consistent with current arrangements. We question how effective an obligation to bring forward modifications to implement a policy which the licensee does not support will be. For example, how will the quality of the proposal be assessed?

*Question 3 – Implementation of MPR outcomes*

See answer to question 2 above.

*Question 4 – Safeguards and appeal mechanisms*

As mentioned above the Energy Act code appeals mechanism does not currently apply to a number of codes, including the DCUSA. This needs to be remedied as soon as possible.

*Question 5 – Moratorium on modifications following an MPR*

If there is an MPR process, logic suggests that there should be provision for modifications to be restricted within a period of time thereafter. However, there is a problem with a rigid restriction in case it is widely agreed that fine tuning is required.

Chapter 5

*Question 1 – voting arrangements for codes*

We do not see a strong case for a change from current arrangements, subject to the outcome of the separate consultation on code administrators and arrangements for consumer representation.

*Question 2 - Consumer and small market participant representation.*

See response to question 1.

*Question 3 – Voting arrangements*

See response to question 1.

*Question 4 – Appeal arrangements*

There is not presently an appeal mechanism in DCUSA for 'part 2' matters. An appeal mechanism could threaten the benefits of a self-governance path for some modifications. However, if there were no appeal rights for this class of change, it would be necessary to ensure that matters of significant commercial impact are not processed through a route without appeal.

*Question 5 – Consumer and small participant representative right of appeal*

See response to question 4.

Chapter 6

*Question 1 – Assessment against Review Objectives*

As argued above, we believe that benefits of more effective treatment of strategic issues can be obtained within the existing framework.

*Question 2 - Quantitative assessment*

It is not clear that the figures quoted in relation to the cash-out review are likely to be typical of other areas. The costs savings figures given do not appear to be highly significant.

*Question 3 – Sustainable development*

We would have liked to have seen an assessment of potential benefits through a more proactive approach by Ofgem within the existing framework.

*Question 4 – Potential unintended risks and consequences*

It is not clear that risks of outcomes being subject to legal challenge or being seen as unworkable have been adequately been taken into account.