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Mark Feather

Director, Industry Codes and Licensing

Dear Mark

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

Thank you for the opportunity to submit a further 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 via previous consultation responses and who are unconvinced of the need for imposed change as proposed.

We remain disappointed that whilst industry members have already submitted their views on this topic Ofgem persists in pursuing proposals for change, this time by using a licence power to impose a revised timetable and 'decision by' date from the relevant code owner/licensee. In our January 2009 response we stated that *'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.’ Yet again Ofgem falls short in explaining what investigations into delivery of improvements to its own internal processes were undertaken and why such remedies proved insufficient to deliver the robustness required in future. We feel this issue still needs to be addressed and the framework for improvements clearly articulated. In addition we observed that ‘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 meeting¹ 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.’ We note that Ofgem now provides an indicative timetable for modifications that are with you for determination however this information remains incomplete against the reasonable request for further transparency around Authority activities as a whole.

Our members view the issue of protracted decision-making timescales with great unease when taking into consideration, as an example, Ofgem’s handling of CAP148² and the suite of transmission access amendments³. Unfortunately this does not support the case made by Ofgem that open ended or flexible ‘decision by’ dates offer increased certainty to the industry or reduces costs. This in fact exacerbates concern by, for example, causing investment plans to be frozen or at worst scrapped due to increased regulatory uncertainty. Responding to a Regulatory Impact Assessment (RIA) is a time consuming and resource intensive process. The industry works within the challenging timeframe allowed by each individual code to undertake development and assessment of code modifications and amendments, including carrying out extensive analysis which

¹ 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?).

² CAP148 was raised in May 2007 and sent to Ofgem for determination in December 2007 Ofgem took seven months to issue their Regulatory Impact Assessment giving only six weeks for industry to formulate their response. In April 2009 Ofgem issued a further Regulatory Impact Assessment, again allowing only six weeks for industry to respond.

³ The Final reports have been with Ofgem since 6th January 2009, industry were expecting the Regulatory Impact Assessments March 2009

now embraces environmental considerations. Ofgem is involved with that process from the start and should have ample time to forecast and plan for the resource and activities it requires once a proposal passes from the relevant Code Panels to Ofgem for determination. Early sight of this would aid both the industry and code administrators to plan budgets and resource. Working closely with modification groups and code administrators it should be a simple task to identify those proposals which can be processed by Ofgem in a short period or those which will require to undergo a 12 week RIA exercise. Code Panels would work with Ofgem to set a reasonable timetable. The history for this issue is now well rehearsed.

Under Option C Ofgem is seeking powers to enable the Authority to enforce a revision to the implementation timetable, including the setting of a new “decide-by” date(s), for a modification proposal(s) currently with it for decision. This request would be made to the relevant code Panel, who would be obliged to comply with the request. Moving to such a regime whereby this right would now rest with Ofgem sits uncomfortably within a governance framework promoting better regulation principles such as efficiency, inclusivity and transparency. Our members prefer a framework which takes into account the fact that, as an industry, we are now obliged to carry out more far reaching analysis than previously required and strive to ensure increasing levels of transparency and engagement. To impose supplementary requirements post completion of the originally envisaged change process requires additional and potentially costly panel, code administrator and industry activity. Undertaking additional evaluation will not be an insignificant task. For example, the assessment of the transmission losses modifications has cost significantly more each time the process has been completed because of delays outwith the industry’s control but clearly within that of Ofgem. To continue to repeat this exercise due to delays incurred by the Authority’s inability to come to make an agreed decision will incur even more expense and potential reputational damage. The worst possible result would be that protracted Ofgem delay resulted in a requirement for the Secretary of State to exercise his special powers to resolve matters.

Any Panel in receipt of such instructions must have the ability to assess whether it requires additional information, to rerun industry consultation(s) and, in order to fulfill its duties as a Panel, the ability to revisit its original recommendation. This is taking into account the direction from the judge in his 2nd July 2008 judgment that ***‘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’***. We assume that in addition, where Ofgem had previously conducted a Regulatory Impact Assessment, this exercise will also need to be rerun. This is not therefore currently reflected in Option C whereby Ofgem oblige the panel to comply with a specific date which is determined by them. We believe therefore that this new proposal is unworkable.

Your letter once again refers to the fact that Ofgem has committed to reach a determination on at least 70% of modification proposals within 25 working days or less. With CAP148 and the full suite of Transmission Access amendments all running well over the 25 working day period we take this opportunity to reiterate our suggestion that with improved engagement on Ofgem's behalf it should be possible to attain a minimum 90% performance standard 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 once again note our disappointment that Ofgem appears to have no confidence in its own administrative processes post the 2nd July 2008 High Court judgment.

Yours sincerely

David Porter OBE
Chief Executive
(By email)

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