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Dear Mark

The "timing-out" of code modification proposals

EDF Energy is pleased to have the opportunity to respond to a third consultation on the timing out of modification proposals with regard to Ofgem's decision timescales.

We remain concerned about prolonged decision timescales in relation to some industry code change proposal. A case in point is CAP148, where extra work is generated by the delay, resulting in Ofgem re-consulting on the basis of a revised impact assessment. In the meantime, alternative proposals ("interim connect and manage") have been implemented, which leave CAP148, along with the more recent CAP164 and CAP164 alternatives, "stranded" and redundant. The net effect is that the industry devotes significant time to these change proposals. EDF Energy would question whether this represents an economic and efficient process.

There was a shift of emphasis on the part of Ofgem during 2008 regarding who should carry out analysis, particularly with regard to environmental impact assessments. The industry Panels, whilst lacking Ofgem's wider statutory duties, are now expected to make such assessments. This leads to a far more labour-intensive and extended industry assessment process. This is an issue that is present with BSC Modification P229 (zonal charging for transmission losses). This in turn should mean that a modification is handed over to Ofgem in a form that requires Ofgem to undertake less analysis, thereby allowing Ofgem to reach a decision in a more timely manner.

It appears that the unique circumstances associated with the modification proposals relating to transmission losses in 2008 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. We consider it unlikely that these circumstances will materialise again, as these modifications timed out as a result of Ofgem's assumption with respect to its powers rather than because of an inappropriate timetable, as many respondents have noted in the previous two consultations on this topic. We consider it even more unlikely that the situation would arise in respect of modifications processed by other panels, as the issue of hard-coded implementation dates arises mainly in the BSC.

We do agree with the majority of respondents to the previous two consultations, who felt that an excessive period of time between a panel recommendation and an Authority decision under a revised implementation timetable might invalidate the original analysis undertaken on the modification, leaving the industry decision process rather dated. Furthermore, we note that the judge in judicial review proceedings in 2008[1] 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 Ofgem is in substance and reality actually considering the same modification that has been submitted by the Panel, when there is a long delay in Ofgem making a decision. We consider the current BSC governance arrangements appropriately address the above risks. We would also note that having a number of open modifications of significant commercial effect pending a decision from Ofgem does increase regulatory risk – and it is generally the modifications of most significant commercial effect which are the ones that Ofgem takes longest to decide.

We do not believe that a new licence power as described in "Option C" is required. Option C requires the industry to commission fresh analysis on modifications referred back to it by Ofgem where the modification is about to "time out" due to the regulatory decision process taking longer than expected. However the judgement in the judicial review proceeding referred to above made clear at paragraph 83 that time-limited modifications should be referred back to the relevant industry panel for a full process, which would include a fresh panel vote – not merely for the production of fresh analysis. Specifically, the judgement said : "….In such circumstances a power to remit the matter to the Panel **for complete reconsideration**, 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". This is also important in terms of the ability to successfully appeal to the Competition Commission. Without the re-vote then the Authority could argue, at the Competition Commission, that its decision is based on more up to date 'new' analysis, clearly, if not explicitly, implying that the original Panel decision is flawed (because it was based on the 'out of date' information in the 'original' analysis).

We would also note that, as part of the Code Administrators Working Group (CAWG) consultation, there is a view that, in the BSC and CUSC, the modification proposer would be responsible for developing and modifying their proposal. We would note that under the UNC the panel is unable to vary a modification proposal, and so we would question whether this is an appropriate change to implement at this time. We do not, therefore, consider Option C to be desirable. It would appear that this issue should be addressed within the whole Governance Review framework, as it appears that there is a significant risk that a

[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.

change could be implemented that would become redundant in the near future. We do not believe that change is needed at this time.

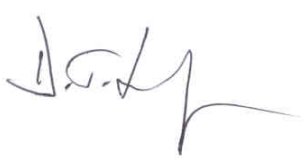
We would like to refer back to the Authority's comments on BSC Modification proposal P93 ("Introduction of Process for Amendment of Proposed Modification Implementation Dates") in its Decision Letter of 21st November 2002 : "The rationale behind submitting an Implementation Date is to provide certainty to Parties as to when a change to the Code will take effect. Ofgem considers that the addition of yet another mechanism to alter Implementation Dates would introduce unnecessary regulatory uncertainty to the market with no corresponding gains in efficiency. "

We recommend, instead of Option C within the consultation, that, in the event that exceptional circumstances arise again, Ofgem could refer the matter back to the relevant industry panel and request from it a new timeframe for the modification. There is no need for a licence modification to support this. We do not believe that a code change is needed either, as the BSC code (for which this is relevant) clearly does not prohibit this. If Ofgem for its total comfort nevertheless preferred to see such a code change, we would support the change proposal.

However, the ability of Ofgem to seek a revised timetable should in our view 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".* We consider these safeguards should form part of any proposals to change the current code arrangements.

If you have any queries on this response, please do not hesitate to contact Paul Mott on 020 3126 2314 or myself.

Yours sincerely



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