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Dear Michael

PROPOSED DISTRIBUTION LICENCE MODIFICATIONS

As you will know, the Authority is proposing to modify the standard conditions of the electricity distribution licence in order to require the 14 licence holders who are Distribution Services Providers ('the DNOs') to prepare and implement a common distribution charging methodology ('CDCM') with effect from next April.

The following comments are submitted as a collective representation to the Authority from the DNOs, each of whom has read and approved the contents of this letter, and on whose behalf I am authorised to write.

The DNOs have a continuing concern about the legal formulation of the obligations to be imposed on them by Ofgem's proposed new standard condition 50. By virtue of paragraphs 2 and 11 of the condition, taken together, the DNOs would be under a duty to comply both individually and severally with all of the requirements of the condition relating to the development and implementation of the CDCM within the prescribed timeframe.

That duty exists, in its present formulation, as an absolute obligation, unqualified by any standard of reasonableness or other weighting factor. As drafted, therefore, the duty fails to reflect, still less to make provision for, the underlying reality that no individual DNO is able to secure the compliance of any or all of the other 13 DNOs with the requirements in question. This means that, without amendment, the new condition would put the DNOs into a position in which all 14 of them would be in breach of a requirement of their licence because of a failure (for whatever reason) of one or more of them to comply with it.

In the context of this particular project, the DNOs consider that, as a matter of good drafting practice, they should not be expected to accept an absolute obligation, in respect of a common activity, that would have the effect of making their own individual compliance dependent on the actions of others.

Ofgem no doubt sees the placing of such an obligation on DNOs collectively as a desirable way of concentrating their minds on the need to make the project succeed. It is also the case that a similar formulation was accepted by the DNOs (under old standard condition 9B) for developing and implementing the DCUSA.

However, the DCUSA condition is not an accurate precedent for the CDCM case, in part because the DCUSA project proceeded from an agreed baseline that was much more advanced than the starting point for the CDCM, and in part because that baseline largely codified the common elements of existing practice. In addition, of course, issues of pricing and charging were not in scope in the case of the DCUSA, whereas they are at the heart of the CDCM project.

Against that background, it is clear to the DNOs that, as individual licence holders, they are exposed to a greater degree of risk under the CDCM project than they were under the DCUSA project. Accordingly, under the procedure established by the Electricity Act 1989 for making modifications of standard licence conditions, the DNOs now formally request the Authority to amend paragraph 11 of proposed new standard condition 50 by inserting the following emboldened words:

‘The licensee must **take all appropriate steps within its power to** develop the CDCM in compliance with the following requirements’.

This insertion would give explicit recognition to a weight of obligation commensurate with the manifest legal inability of the licensee to comply with the requirements of the condition except in respect of those steps that are actually within (or are capable of being brought within) the licensee’s own control.

The period of time allowed for making representations or objections to the Authority about the licence modification proposals expires on 8 June. It would be helpful if the Authority’s response to this letter could be received by the end of this month, so that each DNO can take that response into account in deciding its position on the Authority’s proposals.

This letter is without prejudice to any representations or objections that individual DNOs may be making to the Authority concerning any other aspect of the proposed licence modifications.

Yours sincerely

Roger Barnard

(Head of Regulatory Law at EDF Energy)

on behalf of the 14 DNOs