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Ofgem
9 Millbank
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18th September 2009

Dear Jon,

**Code Governance Review: role of code administrators and small participant / consumer initiatives
– Initial Proposals**

Drax Power Limited ("Drax") is the operating subsidiary of Drax Group plc and the owner and operator of Drax Power Station in North Yorkshire. In March 2009, Drax acquired a small electricity supply business, Haven Power Limited ("Haven"); Haven supplies some 20,000 small and medium sized business customers and provides an alternative route to market for some of Drax's power output.

Drax welcomes Ofgem's latest consultation regarding the role of code administrators and small participant / consumer initiatives. A full response to the questions raised in the consultation can be found in Appendix 1; however, Drax would like to put forward the following high-level views:

- Drax agrees with the principle of a 'critical friend' role for code administrators; however, consideration must be given as to whether the 'critical friend' model is appropriate for *all* industry codes (given the diverse array of subjects that the industry codes cover);
- Drax believes that the code administrator is best placed to decide how to provide its service based upon the nature of the code it operates; it may be more appropriate for the 'critical friend' approach to retain some flexibility and for it to be implemented via a voluntary code of practice developed in conjunction with Ofgem and industry participants;
- The issue of participant "size" appears to be a distraction from the real usefulness of the 'critical friend' approach; code administrators should provide help and advice to *all* parties, regardless of the size of their respective businesses;
- Drax supports the introduction of independent chairs to the CUSC and UNC panels, although it would seem reasonable to suggest that if the regulator held the power to raise modifications (as suggested under the Major Policy Review proposal), then the Authority should not be the body that appoints the panel chair;
- Drax does not support the suggested 'call-in' intervention; such an intervention would not be necessary if Ofgem were to provide more advice / feedback to code panel and working group meetings during the modification process;
- The suggested 'send back' power may be more reasonable, in that such a power could help to ensure modifications do not become defunct prior to consideration by the Authority; however, Drax believes that such a power should be limited to a single use for each modification and time-limited;
- Drax agrees that it is important for the reasoning behind the decisions and recommendations of code panels and modification working groups to be documented; however, a voluntary code of

practice, developed by code administrators, industry participants and Ofgem, should provide adequate guidance on the information that is expected from code panels and modification working groups without the need for the introduction of licence conditions.

We look forward to viewing both Ofgem's and industry participants' responses to this consultation. In the meantime, if you would like to discuss any of the views expressed in this response, please feel free to contact me.

Yours sincerely,

By email

Stuart Cotten

Regulation
Drax Power Limited

Appendix 1: Drax Response to Consultation Questions

Chapter 3: Further proposals

Question 1: Which activities should be considered within scope of the ‘critical friend’ approach?

Question 2: What is the appropriate mechanism to introduce the ‘critical friend’ approach?

Question 3: Should a specific obligation be placed upon code administrators to assist smaller participants and consumer representatives?

Drax believes that code administrators should test the appropriateness of the analysis used for code modifications, as should members of the relevant modification groups. Code administrators should also guide modification groups to ensure that the relevant Terms of Reference are met in order to provide the relevant code panel, and ultimately the Authority, with the information required to progress a modification.

Likewise, it seems reasonable to suggest that code administrators should be expected to assist industry participants and consumer representatives that may not have the resource or expertise required to engage in code modification activities. Prior to raising a proposal, code administrators should (a) provide advice to participants / consumer representatives on how to raise modifications, (b) advise on points to consider when raising a modification, and (c) test the proposal for reasonableness and whether it helps to attain the relevant code objectives. Once a proposal has been raised, the code administrator should provide education on the proposal(s), in plain English, and engage with parties to ensure there has been constructive debate across the industry.

It could be argued that certain code administrators, such as Elexon with the BSC and National Grid with the CUSC, already perform such a role, including the questioning of modification groups actions, providing advice to parties wishing to raise modifications and helping parties to obtain details of, and participate in, industry discussion. Such a role appears to be well suited to these codes; we are unable to comment on the appropriateness of such a role for other industry codes.

Drax supports formalising the role of code administrators to act as a ‘critical friend’, if it is felt that such formalisation is required. However, Drax is unaware of any incidents where a code administrator has failed to assist parties with enquiries / advise on modification proposals and procedures. As mentioned above, our experience has been that *code administrators are currently forthcoming with help and advice*, effectively performing a ‘critical friend’ role. On that basis, we are unsure of the need to formalise this role via licence conditions and believe that it may be more appropriate to introduce the role via a voluntary code of practice.

When considering formalising such obligations on the code administrators, care must be taken to leave sufficient flexibility for the relevant code administrator to choose how best to go about its duties; the code administrator is best placed to decide how to provide the service based upon the nature of the relevant code. Care must also be taken when attempting to monitor the usefulness of such measures; whilst parties can be encouraged to participate in industry debate, they cannot be forced.

Question 4: For the purposes of identifying those who will be offered greater assistance by the code administrator, what is the appropriate threshold between small and large participants for each category of party?

The “size” of an industry participant appears to be a distraction from the real usefulness of the ‘critical friend’ approach. The code administrator should provide advice to *all* parties, regardless of the size of their respective businesses. Drax believes that the aim of the proposals should be to:

- (a) ensure that code administrators are able to assist *all* parties on *all* matters surrounding the raising of, progression of and education on tabled modifications; and
- (b) ensure participants that have less available resource are made aware of proposed changes to codes, have an opportunity to provide comments to consultations and are canvassed for their opinion on relevant modifications to aid modification group debate (i.e. engaging with relevant parties that are not present at meetings).

Again, it must be recognised that parties can only be *encouraged* to participate in industry debate, they cannot be forced.

Question 5: Is it appropriate to modify the Gas Transporters licence in order to provide voting member status to consumer representatives on the UNC?

Question 6: Are there any other bodies in addition to Consumer Focus which the Authority should consider as potential consumer representatives on the UNC?

Drax is not best placed to comment on the UNC, although it does seem to be a reasonable suggestion to consider consumer representation.

Question 7: Do you agree that the Authority should appoint the chairs of the UNC and CUSC panel in addition to the BSC?

Question 8: Should such an appointment be made only at the end of the current chairs ordinary tenure?

Question 9: How should the salaries of the independent chairs be funded?

Question 10: What is the appropriate mechanism by which these proposals can be introduced?

The use of independent chairs for the CUSC and UNC appears to be a reasonable suggestion. However, consideration must be given regarding which body appoints the 'independent' chair of a given panel; it would seem reasonable to suggest that if the regulator were to have the ability to raise a modification (as suggested under the Major Policy Review proposals), then the Authority should not appoint the chair of the panel.

Drax believes that if the proposal for independent chairs is implemented, the voting ability of the chair should replicate that found under Section B Clause 4.4.4 of the BSC:

"The Panel Chairman shall not cast a vote as a Panel Member but shall have a casting vote on any matter where votes are otherwise cast equally in favour of and against the relevant motion; provided that where any person other than the Panel Chairman is chairman of a Panel meeting he shall not have a casting vote."

With regards to timescales, Drax believes that the new appointments should take place upon conclusion of the Code Governance Review. The associated proposal for the cost recovery mechanism appears reasonable. Introducing the independent chair proposals via licence conditions also appears to be a reasonable suggestion.

Question 11: Do you consider it necessary to include the powers to 'call in' and 'send back' modification proposals within the relevant licences?

As Drax has previously responded, we believe that it may be more efficient if Ofgem were to provide greater advice / feedback to working group and code panel meetings, rather than introducing 'call in' and 'send back' interventions that may further frustrate the evolution of the codes.

It is reasonable to suggest that the 'call in' powers listed in the consultation document, such as issuing directions regarding timetables, analysis, terms of reference and reporting, are all available to the Authority now by either (a) attending and partaking in modification group or code panel meetings, or (b) making a simple request to the relevant modification group or code panel. It would be highly unreasonable for any modification group or code panel not to consider and act on such a request without good reason. This issue could also be addressed via a voluntary code of practice.

A 'send back' power may be more reasonable, in that such a power could help to ensure that modifications do not become defunct prior to consideration by the Authority. However, such a power should be constructed in a way that does not allow the timetable of a given modification to become open-ended (e.g. by a modification being sent back to the panel (on one or more occasions) due to the analysis being out of date as a result of a delay in a decision by the Authority); this could be achieved by limiting

the option to a single use (for each modification) and making it time-limited. Drax has raised concerns regarding the ability of the Authority to modify / delay the decision timetable via responses to “the “timing-out” of code modification proposals” work-stream. Such issues would need to be addressed prior to the implementation of a ‘send back’ proposal.

Question 12: Do you consider that a licence modification requiring more explicit provision of reasons for recommendations is appropriate?

Modification groups and code panels do at present provide reasons for votes as part of the voting process. Drax believes that it is essential that such comments and considerations are documented and form a part of the final modification reports, in much the same way as it is important for the regulator to explain and document the reasons behind its decisions.

However, this is a matter of common sense and we feel that this should be addressed by way of the suggested voluntary code of practice, rather than via licence modifications. A voluntary code of practice, developed by the code administrators, industry participants and Ofgem, should provide appropriate guidance on the information that is expected to be present in a given Final Modification Report with regards to the reasons behind voting decisions. If there are concerns regarding the documenting of decisions after such guidance has been put in place, then Ofgem may wish to consider further action.

Question 13: Do you consider that a regular scorecard evaluation of the code administrators’ conducted by Ofgem would be of value, particularly in influencing the behaviour of the code administrators?

As suggested in our previous response, whilst Drax believes it is important for Ofgem to evaluate the performance of the code administrators, it is also important that the benchmarking system involved does not incentivise code administrators to put the aims of the scorecard above the objectives of the code. A ‘light touch’ to performance evaluation may be the most appropriate approach.

Question 14: Do you consider that code administrators’ should be required to obtain and maintain ISO9001 accreditation for their processes?

Drax remains unconvinced of the benefits of forcing code administrators to acquire ISO9001 accreditation through licence conditions. It should be the decision of the relevant code administrator as to whether pursuing accreditation would benefit the management of the given code / their working practices.