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Dear Colleague

Open Letter consultation on Ofgem's Procedure for determining disputes

The Gas and Electricity Markets Authority ("the Authority") has powers to determine (or refer for arbitration) disputes between gas and electricity network licensees (mostly transmission and distribution) and customers (both commercial and domestic) in certain circumstances. The Authority's determination powers are wide-ranging and sit across various legal instruments – primary and secondary legislation, as well as licence conditions (see further below). A non-exhaustive list of matters where the Authority can determine disputes is set out at Appendix One. This includes, amongst other things, matters such as the reasonableness of connection charges and the correct application of a licensee's charging methodology. Ofgem's current procedure that it will generally follow in determining such disputes¹ is set out in the document 'Procedure for determining disputes' dated 2003 ("the current Procedure")².

The purpose of this open letter is to set out some high level options and seek views on potential changes that it may be appropriate to make to our current Procedure, including the following:

- the proposal to limit 'oral hearings' (where the parties in dispute present their cases to Ofgem in person) to disputes where Ofgem considers an oral hearing is necessary to reach a decision
- the proposal to recover (where we have the power to do so) the costs associated with determining a dispute where those costs exceed the level of costs Ofgem would usually expect to incur or where Ofgem reasonably believes the dispute could have been resolved before referral, and
- the proposal to name the licensee in published determination decisions unless there are valid reasons to retain the licensee's confidentiality.

This letter sets out the relevant background and an initial assessment of why we consider these changes may be appropriate. We seek responses to this open letter by 12 January 2010. Subject to responses, we expect to further develop these initial proposals and, if appropriate, consult on an amended draft Procedure.

Where in this document we refer to Ofgem's views these are provisional and subject to further consideration as this consultation continues.

¹ The procedures do not apply where the disputes relate to a licence contravention in relation to which Ofgem may take enforcement action.

² <http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=7&refer=Consumers/GettingConn>

Background

There are circumstances in which disputes between network licensees and their customers may be referred to the Authority for determination. The Authority's powers to determine these disputes are set out in primary legislation³, secondary legislation⁴ and licence conditions⁵.

Ofgem receives requests for determinations from both domestic and commercial customers. Most requests relate to disputes about charges for connection to the gas and electricity distribution systems. However, Ofgem also receives requests for the determination of other disputes, for example disputes regarding connections to the transmission system and disputes concerning the application of use of system ("UoS") charges⁶. Over the past three years Ofgem has conducted approximately 26 determinations of which approximately six related to transmission disputes, 19 related to distribution disputes and one related to the Gas (Standards of Performance) Regulations 2005.

We consider it is now appropriate to review the current Procedure given that some time has elapsed since its publication in 2003. An initial review has highlighted some necessary house-keeping changes as well as a number of areas (set out in more detail below) where we consider that more significant changes to our current Procedure could increase effectiveness and efficiency. Following a review of our own processes we have already introduced internal key performance indicators for determining disputes.

In reviewing our current Procedure, bearing in mind our primary duty to protect the interests of customers, we have considered, amongst other things, the following:

- appropriate response times for party submissions and responses to those submissions
- the need to ensure our procedure remains fair and transparent
- the need to encourage parties to exhaust all efforts to resolve disputes themselves before referring them to Ofgem, and
- the need to ensure that we communicate effectively the lessons learnt from determinations so that the policy issues that they may raise are made clear to other licensees.

Oral hearings

Ofgem's current Procedure states that Ofgem intends that the exchange of information in the determination process should be largely written. However, the current Procedure also provides the opportunity for any party to a dispute which the Authority can determine to present its views in person. This is referred to as an 'oral hearing'. In the past three years Ofgem has conducted approximately 11 oral hearings, representing just under half of our determinations.

Oral hearings generally last three to four hours and involve at least four members of Ofgem staff (a legal adviser, technical adviser, case officer and the decision-maker). It is also usual for a minute taker or stenographer to attend the hearing. In addition to the labour hours on the day of the hearing, additional resources are used to prepare for and evaluate the outcome of a hearing. An oral hearing will also involve costs for the parties to the dispute.

Due to the costs and the time involved in holding oral hearings and the delays they can cause to the determination process (especially where it is difficult to find a date to suit the parties'

³ Sections 15A, 27A and 27B of the Gas Act 1986 and sections 23, 44A and 44B of the Electricity Act 1989.

⁴ The Gas (Standards of Performance) Regulations 2005 and the Electricity (Standards of Performance) Regulations 2005.

⁵ For example, standard condition 7.12 of the Electricity Distribution Licence and standard condition 20 of the Gas Transporter Licence.

⁶ For a more comprehensive list of matters that we have determined, please see Appendix One.

availability), we have become concerned that it is not always necessary to hold oral hearings in every case where they are requested.

While oral hearings can be beneficial in some complex determinations, in many cases it should be possible for the decision-maker to make an informed decision based on the parties' written submissions. In addition to the concerns set out above, the prospect of an oral hearing in all cases may detract from the quality of the parties' written submissions. In turn, low quality submissions may raise more questions and require greater clarification in which case the determination process may be unduly delayed.

We seek views on the proposal to amend the current Procedure to allow Ofgem to decline parties' requests for an oral hearing where we do not consider an oral hearing is necessary to understand the arguments set out in parties' written submissions. We may also clarify that oral hearings are included within the 'exceptional circumstances' that may trigger an extension to the timeframes within which we would usually expect our decision to be made).⁷ We seek views on this point too.

Proposal for recovering costs

The Authority has the power in many cases to recover costs incurred in determining a dispute.⁸ Where we have the power to recover costs, our power is the ability to order "such incidental, supplemental and consequential provision (including provision requiring either party to pay a sum in respect of the costs or expenses incurred by the person making the order) as that person considers appropriate"⁹. The power that the Authority has to recover costs for determinations is not reflected in the current Procedure and to date the Authority has not recovered any costs incurred in the determination process.

Ofgem notes that The Water Services Regulation Authority ("Ofwat") reflects its ability in certain circumstances to recover costs incurred in conducting determinations in one of its published processes for handling disputes and appeals¹⁰. We consider that there may be circumstances where using our ability to recover costs will better protect existing and future consumers, Ofgem's principal objective. For instance, costs incurred by Ofgem, above those it would usually expect to incur in a determination, could fall to those causing the costs to be incurred rather than be spread across all licence payers. Also, if we were to recover costs, parties to the determination may be discouraged from delaying proceedings without good reason or from requesting an oral hearing where it is not required. It is hoped that this would reduce the resources spent by Ofgem in making the determination which could in turn free up Ofgem resources to progress policies to protect consumers. Nonetheless, this should in no way discourage parties from referring disputes that require determination.

Proposed general principles of cost recovery

We therefore seek views on a proposal to amend our current Procedure to reflect our ability to recover costs. If recovery of costs is introduced into the Procedure it would be our intention to recover costs only in certain circumstances. These circumstances broadly fall into two categories: 1) where parties' actions cause Ofgem to incur costs above those we would reasonably expect to incur when determining a dispute and 2) where we reasonably believe the matter could have been resolved prior to it being referred to Ofgem. More specifically, circumstances that we are considering might result in potential cost recovery include where:

⁷ These timeframes are set out in the Procedure at footnote 2.

⁸ For example, in relation to disputes concerning connection charges and the terms of connection agreements.

⁹ See, for example, section 23(5)(a) of the Electricity Act 1989 and section 27A(9)(a) of the Gas Act 1986.

¹⁰ See Ofwat's Process for handling disputes and appeals - Requisitioning of water mains and public sewers and/or lateral drains and adoption of self laid water mains.

http://www.ofwat.gov.uk/consumerissues/selflay/gud_pro_disappmainsewer.pdf

- parties cause unnecessary and unreasonable delays to the determination process. For example, where parties to the dispute do not cooperate fully with the process and fail to present the full facts of the case resulting in increased Ofgem costs (unless, for example, such facts were not available earlier in the process)
- parties' actions result in Ofgem incurring the costs of more than one round of external technical advice
- Ofgem has previously determined a similar dispute and has already made clear its policy position
- other circumstances which mean the matter could have been resolved by the parties in question before it was referred to Ofgem, and
- a party insists that an oral hearing be held where Ofgem does not consider a hearing to be necessary.

If we were to introduce the recovery of costs as detailed above into the Procedure we would where required by the Electricity Act 1989 and the Gas Act 1986 take into account the conduct and means of the parties, as well as any other relevant circumstances in each case. We seek views on the circumstances in which we ought to recover costs and any other relevant circumstances we should take into account when deciding on the level of any cost recovery.

We also seek views on the proposed general principles of cost recovery as set out below.

One of the approaches we are considering, if costs were recovered, is the potential to charge for any additional work of Ofgem staff at a flat hourly rate¹¹. In the event that Ofgem sought and was charged for advice from external parties, in addition to that which it would normally expect to require, it is anticipated that costs for this additional external advice would be recovered as invoiced to Ofgem.

Based on recent oral hearings we have estimated that the average cost of an oral hearing to Ofgem is approximately £3500¹². Some oral hearings may be more complex and last a full day, however, in which case it is estimated that this figure could be substantially higher, e.g. £5250.¹³

We note that Ofwat's Process for handling disputes and appeals (please see link at footnote 10 above) sets out that it will not recover costs and expenses in relation to any particular case if they amount to less than £500. It also states that they will limit the recovery of costs and expenses from a party in any particular case to £5000. We seek views on the proposal that we would not recover costs below a set amount or above a capped level. We consider a £5000 cap to be reasonable and seek views on the Authority setting a similar potential cap (and lower limit) if costs were to be recovered.

Another option that we are considering is the potential to recover costs from the party responsible for Ofgem incurring the additional cost, whether or not the determination decision finds in favour of that party. We seek views on these potential options.

Above is an initial indication of some of the ways in which we might expect to recover costs in certain circumstances. Subject to responses to this consultation, we will endeavour to develop these proposals in more detail, and if we decide to recover costs, we will provide respondents with an opportunity to comment at a second stage on more detailed proposals, including the level of costs to be recovered.

¹¹ It is our initial view that this set hourly rate would be cost reflective, publicly available and amended from time to time.

¹² Estimate based on the cost of a 4 hour oral hearing involving a legal adviser, technical adviser, case officer, decision maker and minute taker. In addition to the labour hours on the day of the hearing, additional labour hours for preparation, post hearing consideration and reflecting the outcomes of the oral hearing in the statement of facts.

¹³ Based on the same level of resourcing set out in footnote 12 above.

Proposal to name licensees

Ofgem places a copy of each of its determination decisions on the public register¹⁴. Ofgem's current Procedure states that the name and address of the customer will normally be omitted from the published version of the decision and that if any party to a decision wishes any matter to be excluded from publication, it should make representations to Ofgem. Current Ofgem practice omits all names (including the name of the licensee) and places from its determination decisions prior to publishing them on the public register.

The majority of the requests for determination we receive relate to a small number of licensees. Therefore, subject to consultation, we are considering amending the current Procedure to clarify that we would normally expect that determination decisions published on the public register will name the licensees involved unless there are valid reasons to retain confidentiality. We do not propose to publish the name of the customer, however. Publishing the names of licensees involved in determinations could encourage parties to seek to resolve disputes before they are sent to Ofgem for determination thereby providing a speedier resolution of the dispute.

If, subject to consideration of consultation responses, we decide to amend the current Procedure in this way we recognise that there may be situations where Ofgem may need to remove the licensee's identity, for example in the event that a licensee or a consumer provides adequate reasons why the licensee should not be identified, e.g. identifying the licensee may result in the identification of the consumer. We invite views on the above.

Way forward

We welcome comments and views on the issues discussed in this open letter consultation. In particular we welcome responses to the questions set out in Appendix Two. Subject to consideration of responses to this consultation, if appropriate we intend to further develop these initial proposals and consult on an amended draft Procedure, including housekeeping changes.

Views are invited from any interested parties by **12 January 2010**. Where possible, responses should be sent electronically to Rebecca Langford at rebecca.langford@ofgem.gov.uk. Please ensure that your comments are received by the date indicated so that they can be fully considered.

All responses will be held electronically by Ofgem. They will normally be published on our website unless they are clearly marked confidential. Consultees should put confidential material in appendices to their responses where possible.

If you have any questions concerning this consultation letter please contact Rebecca Langford at rebecca.langford@ofgem.gov.uk or on 0207 901 7388.

Yours sincerely



Rachel Fletcher
Partner, Distribution

¹⁴ Ofgem's electronic public register can be accessed on Ofgem's website: <http://epr.ofgem.gov.uk/>

Appendix One - Circumstances in which the Authority has recently determined disputes¹⁵

We can determine certain disputes between customers and licensees. Either the customer or the licensee can refer disputes to us. Disputes that we can usually determine include but are not limited to:

- the reasonableness of a gas or electricity connection charge
- the reasonableness of a gas or electricity service alteration charge
- the reasonableness of a gas or electricity service reinstatement charge
- the reasonableness of a charge for a load feasibility study
- disputes over the terms of a connection agreement
- disputes concerning payments under the Gas (Standards of Performance) Regulations 2005
- disputes concerning payments under the Electricity (Standards of Performance) Regulations 2005
- disputes relating to variations in the contractual terms of an agreement under paragraph 3 of SLC C18 of the transmission licence
- disputes relating to an offer of terms to connect and/or use the transmission system, or proposed variations in the contractual terms of an agreement
- disputes regarding the correct application of a licensee's charging methodology

¹⁵ This list is not exhaustive.

Appendix Two – Summary of questions raised in this open letter

- Question 1 – Should Ofgem exercise its discretion to decline parties’ requests for an oral hearing where it considers an oral hearing is unnecessary to understand the arguments set out in parties’ written submissions?
- Question 2 – Do you consider that the current Procedure should be amended to clarify that “exceptional circumstances” that can lead to the timeframes (within which we would usually expect our decision to be made) being extended, include oral hearings?
- Question 3 – We would welcome views on whether you think it appropriate in principle for Ofgem to recover the costs as set out in this letter under “proposal for recovering costs”.
- Question 4 - If you consider that it is appropriate for Ofgem to recover costs, please explain what costs you consider it appropriate for Ofgem to recover and the circumstances in which it may be appropriate for costs to be recovered. Do you agree with our proposed general principles of cost recovery?
- Question 5 – Do you consider that there should be a lower limit and a cap on the costs Ofgem is able to recover? If so, do you consider a £5000 cap to be reasonable?
- Question 6 - What other relevant circumstances do you consider are likely to be relevant to our decision on the level of any cost recovery?
- Question 7 – Do you agree that it should become the norm for Ofgem to name the licensee involved in a determination unless there are valid reasons to retain confidentiality?
- Question 8 – Have respondents identified any other areas where they consider changes may be required to Ofgem’s current Procedure for determining disputes?