Inveralmond House
200 Dunkeld Road
Perth
PH1 3AQ

Catherine Wheeler
Industry Codes and Licensing
Ofgem
9 Millbank
London
SW1P 3GE

Telephone: 01738 455189
Facsimile: 01738 456415
Email: Rhona.McLaren@
scottish-southern.co.uk

Our Reference:
Your Reference:

Date : 12th May 2010

Dear Catherine,

Open Letter Consultation: Code Administration Code of Practice
Ofgem Ref: 45/10

Thank you for the opportunity to comment on the above consultation.

In our view, the Code Administration Code of Practice should be a voluntary, stand alone Code (in line with the Code Administrators Working Group's key recommendations). We are therefore disappointed to note that Ofgem intends to place a licence obligation on licensees to adhere to the principles contained in the Code. Notwithstanding this, however, we have a number of comments on both the Code itself and the Key Performance Indicators proposed by Ofgem, which we have set out in turn below.

Code Administration Code of Practice

Principle 2

We believe that the emphasis of the third bullet point under this principle should be changed to "Technical language and use of acronyms will be accompanied by a supporting glossary when appropriate" as the industry codes are, by the very nature of the subject matter they address, complex technical and legal documents and this should be recognised.

Principle 4

Principle 4 of the Code sets out an amendment and review process for the Code, including who can propose amendments, the consultation required and that such amendments are to be subject to Authority approval. Given that Ofgem are proposing to introduce a licence obligation on licensees to adhere to the principles of the Code, the process for changing the Code must be both clear and robust. In our view, as it stands, Principle 4 outlines an overarching change control process but provides very little detailed governance around such a process.

In particular, we believe that clear rules must be established for determining who can raise an amendment and what recommendation is made to the Authority on suggested amendments. We strongly believe that it would be inappropriate for Code Administrators to be able to propose amendments to the Code of Practice as this would be detrimental to their objectivity; rather it should be the relevant Code Panels' role to propose amendments to the Code of Practice (as is the case, for example, with the BSC code modifications, where the Administrator presents the justification for a change to the Panel and a change proposal is raised, in the Panel's name). This will ensure the 'checks and balances' of good governance are maintained. Otherwise there is a risk that, as an interested party in the outcome of a Code of Practice change, the Code Administrators might be perceived as promoting a change for their own benefit. The respective independent Panels would act as a curb on any such tendencies.

In addition, in our view, the most appropriate approach at this stage would be to require unanimous support from the relevant Panels before an amendment is recommended for approval by the Authority. This approach would also allow other Code Administrators to voluntarily adopt the Code of Practice as they would know what they are signing up to and what the arrangements are for governing changes to those requirements.

Also, the first paragraph of Principle 4 states that the Code will be reviewed "at least annually". Given that the Code Administrators are to meet regularly to discuss the operation of the Code and that any Panel or user can suggest an amendment at any time, we do not believe that it is necessary to stipulate an annual review. We would therefore suggest that a requirement to review regularly would be sufficient.

Principle 6

We support the principle that a proposer should retain ownership of their modification proposal. However, we believe that a more effective approach would be to turn the first bullet point around from "*only a proposer can amend their modification…*" to "*the proposer will have the right to veto any amendment to their modification proposal*".

Principle 9

We fully support the default position that legal drafting will always be developed in time to allow for consultation before a modification is recommended for approval. We would also suggest that a further bullet point is added under this principle stating that where, following consultation, the legal text is changed significantly that it will undergo a further round of consultation before being finalised.

Principle 10

This principle proposes a standard 15 business day consultation period will apply; it should be clear that this time period applies per consultation, given that there may be a number of consultations per Code change proposal.

<u>Annex 1</u>

In addition, Annex 1 sets out an indicative timetable from a Modification being raised to a decision being issued by the Authority. In the implementation phase, it should be recognised that in addition to potential changes to the Codes and the Code Administrators' systems there

could also be changes to industry participants' processes and systems which may necessitate a longer implementation period being required.

Report to Panel / Panel Recommendation

It is suggested (on page 15) that "Modification proposers will be entitled to attend and speak at panel meetings". Whilst we can see why, on initial examination, allowing the proposer the *right* to speak at all the Panel meetings (where their proposal is being discussed) might appear to have some merit we believe, on reflection, that this is a very retrograde step.

Whilst it is wholly appropriate that they do so at the first Panel meeting (as outlined under "Panel Consideration" on page 14) following the raising of their change proposal, we do not support the proposer having the *right* to speak to the Panel meeting(s) after this, and especially not at the Panel meeting where the Panel is to recommend, to the Authority, if a change should be accepted or rejected.

We have set out our views on this matter in detail in our response to the recent P247 (BSC) Modification Proposal. We note that our view is shared by the BSC Panel (who recommended rejection of P247).

Briefly, we believe that the proposer already has an inbuilt advantage, by virtue of raising their original change proposal, to clearly set out its position (which includes an initial presentation to the Panel). The proposer, like all Code Parties, is permitted to set out, in writing, its response to the consultation(s) associated with their change proposal. The Panel sees these written representations before they vote on any particular change proposal.

Allowing the proposer (alone) the unfettered *right* to speak at the Panel meeting where a recommendation is to be made would give them a wholly unfair advantage which is out of all proportion to what is merited. The proposer could, for example, use the time afforded by this *right* to present to the Panel (i) a distorted view of the counter arguments and / or any alternative(s) developed by the working group and (ii) a distorted view of the attributes etc., of their original change proposal. Whilst the Code Administrator would be present at the Panel meeting, they are not as knowledgeable or familiar with the details of the issues at hand to appreciate the implications of the distortions that could be made, innocently or otherwise, by the proposer. Finally, it is against natural justice that <u>only</u> the views in support of an original change proposal can be heard before the Panel with no ability for counter views to be given.

If the suggestion is that these counter views are 'present' at the Panel meeting via the written responses to the consultation(s) associated with any change proposal then it must be recognised that this would equally be the case with the proposer's views. However, only the proposer, would have, according to the proposed wording in the Code of Practice, the *right* to speak to the Panel. This, in our view, places the proposer in a position of unfair advantage that discriminates against other Code Parties.

<u>Key Performance Indicators</u>

Under quality of assessment, Ofgem propose a KPI of "number of final decisions in line with panel recommendations" with an associated target of the number increasing over time. While we understand the rationale for recording this information, we do not support the target of increasing the number of decisions in line with Panel recommendations. We do not agree

"the aim of the proposer and to an extent the CA and panel should be to ensure that any proposal that has gone full term has the best possible chance of being accepted". There may be wholly acceptable reasons why the Panel's recommendation is not in line with the Authority's final decision, not least because the Authority has to consider Code changes in the light of its wider statutory duties, whilst the proposer and the Panel are specifically limited to the Applicable Code Objectives. Given this whilst the aim is correct; that "the Panels assessment is thorough, impartial and well presented"; this cannot be measured by a rising number of Code change decisions from the Authority which conform with Panel's decision. We would not, for example, think that the Authority would wish to have such an equivalent KPI placed upon itself and, therefore, we think it inappropriate to place such an undue burden upon the proposers, CAs and Panels.

We also believe that the requirement to produce and consult fully on legal text prior to a modification proposal being recommended for approval/rejection to the Authority should form a KPI. In addition, the 'critical friend' KPI should in our view be restricted to those parties receiving special assistance from the Code Administrators i.e. small participants.

We support the suggestion, with regard to Principle 8 of the Code and 'implementation costs' that the actual costs of all change proposals are recorded in the report to the Authority. We note, for example, that up to now the cost of developing a change proposal has been limited to just those costs incurred by the Code Administrator. The substantial industry contribution and associated costs are currently unrecorded.

Finally, we do not believe that it would be appropriate to set targets under the agreed KPIs in the first year. Rather, monitoring procedures should be established and individual performance measured, thus providing a clear baseline for setting targets going forward.

I hope that the above comments are helpful.

Yours sincerely

Rhona McLaren
Regulation Manager