



Dora Ianora
Industry Codes and Licensing Manager
Ofgem
9 Millbank
LONDON
SW1P 3GE

Grampian House
200 Dunkeld Road
Perth
PH1 3GH
Tel: 01738 456000
Fax: 01738 457790

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Dear Dora,

Open Letter consultation on Code Modification Urgency Criteria – 30/11

We note the publication of your Open Letter on the 11th March 2011 regarding the urgency criteria to apply to industry code modifications and we welcome the opportunity to respond to that letter.

We concur with your reasons for publishing new guidelines at this time as we are mindful (i) that some time has elapsed since the previous version of the guidance for urgency criteria was published and (ii) there has recently been a significant change to the industry code governance arrangements arising from the Code Governance Review developments.

Whilst we welcome and broadly agree with the revised urgency criteria; as set out in Appendix 1¹ to your letter; we believe there should be two changes made to the final version of the guidance. The first would be an additional caveat to address the situation where a proposal is raised by a code party 'late'.

In our view where a party has had a reasonable opportunity / time to raise the modification to address the issue at hand and has, instead, (a) 'sat on their hands' or, worse, (b) deliberately decided not to raise the modification expeditiously in order that it then meets the urgency criteria (and thus is subject to a truncated industry assessment / consultation etc., process) then urgency should not be granted (even where the urgency criteria are, demonstrably, met).

¹ "What criteria would the Authority use to determine urgency?"

There is no set answer as it depends on the circumstances of each proposal. However, it is currently our view that in general, an urgent modification should:

1. Be linked to an imminent date related event

AND exhibit at least one of the following characteristics:

2. Have a potential significant commercial impact upon at least one code party or consumers if not considered urgent;
3. Have a potential significant impact on the safety and security of the electricity and/or gas systems if not considered urgent;
4. Needs to be treated as urgent to comply with an imminent legal requirement which could not have reasonably been foreseen by the proposer.

However, there may be situations when we would not allow "urgency" for a modification regardless of whether the above circumstances are met. An example would be where the modification is complex and therefore requires careful and detailed consideration.

On the other hand, there may be situations in which the above criteria are not met but, in accordance with our statutory duties, we would still decide that a modification proposal would be treated as urgent."

This would ensure that parties follow good industry practice by encouraging them to act in a timely (and expeditious) manner in raising their proposal sooner rather than latter.

Otherwise, without this caveat, there is a danger that the urgency criteria are seen, by some parties, as, effectively an incentive to delay submission of a modification till the last moment, thus requiring other industry parties, Code Panels, Ofgem etc., to act in a very speedy and less comprehensive manner in having to consider an urgent modification (rather than a non urgent modification).

This inequity (of a lack of time provided to other industry parties, Code Panels, Ofgem etc., to consider the modification, and the implications arising from its implementation, in detail) is further compounded when one considers that the party raising the 'urgent' Modification Proposal has, itself, had time to (i) develop the modification and, perhaps more importantly, (ii) considered what the implications etc., that implementation would bring to them (and other code parties).

In light of this we believe that the first 'gateway' question, about being linked to an imminent date related event, should be qualified; in the final version of the Ofgem urgency criteria guidance; along the following lines:-

"Be linked to an imminent date related event, provided that the Modification was raised in a timely manner in accordance with Good Industry Practice²"

In addition to this we note that one of the criteria for urgency is that of the "potential significant commercial impact" on at least one or more Code party (or consumers). This seems an eminently sensible criteria to have.

However, we are mindful that the potential modification suggested by the proposer of the urgent Code change proposal could, in turn, have a potentially significant commercial impact on other parties to the Code. Thus there is a risk that one urgent Modification Proposal might result in another urgent Modification Proposal that runs counter to the original as the respective proposers seek to protect their commercial position from significant impact.

In light of this it may well be prudent to consider including a second change, within the final version of the Ofgem urgency criteria guidance, namely a clear ability for Code parties to 'object'; directly to Ofgem (or the respective Executive Committee in the case of the MRA and SPAA); to the potential or actual granting of urgency on the ground of the potential significant commercial impact on them of the change proposal, if implemented.

We hope the above comments are helpful in developing your final guidance on urgency criteria, which we look forward to reading in due course.

Yours faithfully

Garth Graham
Electricity Market Development Manager

² Where 'Good Industry Practice' is defined, as per the Grid Code, as:-

"The exercise of that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced operator engaged in the same type of undertaking under the same or similar circumstance"