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Dear Anna

Draft Enforcement Guidelines on Complaints and Investigations (for consultation) (reference 181/11, dated 16th December 2011)

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

National Grid owns and operates the high voltage electricity transmission system in England and Wales and operates the Scottish high voltage system. National Grid also owns and operates the gas transmission system throughout Great Britain and, through its low pressure gas distribution business, distributes gas in the heart of England to approximately eleven million businesses, schools and homes. In addition, National Grid owns and operates substantial electricity and gas assets in the US, operating in the states of New England and New York.

We have experienced investigations by Ofgem in relation to alleged breaches of licence conditions and alleged breaches of the provisions of the Gas Act 1986 (GA1986) and competition law. We draw on those experiences in commenting on the draft Enforcement Guidelines on Complaints and Investigations (the "draft Guidelines"). There are some key overarching points that it is useful to make in this letter: we will expand on these in our more detailed response in Appendix 1:

1. Whilst National Grid welcomes a greater degree of clarity in relation to Ofgem's approach to enforcement, it is not clear what has prompted Ofgem to review the existing Guidelines at this stage, given the wider Call for Evidence which forms part 2 of the Consultation (to which we will respond separately). We would hope that the information that Ofgem receives in relation to part 2 of the Consultation will be extremely useful and that it can be used to help Ofgem to shape its approach to enforcement, which will include the content of its Enforcement Guidelines.

2. Similarly, whilst National Grid considers that, for the most part, the additional detail set out in the draft Guidelines is helpful for regulated entities, there are still some sections of the draft Guidelines where very little information is provided to inform regulated entities about the approach that will be taken to enforcement or the process that will be followed.

3. The possibility of concluding an investigation by way of settlement is included in the draft Guidelines, but there is little specificity on the process. Settlement can be a quick and cost efficient way of dealing with a suspected regulatory or competition law breach and it would be helpful for it to be integrated into the procedure. However, as currently drafted, there is still a significant level of uncertainty for licence holders/regulated entities as to how the settlement process will work. We suggest that there should be a clear defined staged approach to

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enforcement set out in the guidelines where, in addition to considering whether it is appropriate for the investigation to continue, consideration should be given to whether settlement might be the most appropriate way forward. The practical and procedural elements of this staged process should also be clearly defined and deal, where possible, with all scenarios.

4. Since any appeal of investigations under the GA1986 and Electricity Act 1989 (EA1989) is extremely limited (appeals are only permitted under the provisions of section 30E of the GA1986 and section 27E of the EA1989), Ofgem should acknowledge that it has a duty to ensure that it does not misuse its considerable powers. We have identified several areas where greater certainty is needed in the interests of ensuring a fair and transparent process for regulated entities.

5. We have commented in detail in relation to Section 3 (Criteria for opening an investigation) and Section 4 (The investigation and decision making process), but the sub-sections dealing with investigations under the Competition Act 1998 (CA1998) and consumer legislation seem to be particularly lacking in detail, and it is not clear how investigations under these provisions are intended to work in practice.

6. Ofgem sets out the criteria for opening an investigation, including whether the breach is a priority matter for Ofgem, but no indication of relative weightings is provided. Clarity on the weighting that Ofgem gives to these priorities would be helpful. For instance, consumer harm is listed first: is this Ofgem's main priority, and is the likelihood of harm to consumers a pre-requisite for devoting resources to an investigation? In addition, National Grid is concerned that deterrent value should not be the driving factor for Ofgem in any decision as to whether and how to impose a financial penalty.

7. National Grid welcomes Ofgem's attempts to improve the process in relation to information requests. National Grid's experience in both regulatory and competition investigations is that:

    a. It is often unclear as to precisely what information Ofgem requires and time is wasted in trying to clarify this or in collecting information that is not in fact useful or relevant to the investigation;

    b. Ofgem has tended to issue multiple requests running concurrently; and timescales for responding to often complex questions can be unduly onerous where there is no corresponding sense of urgency in Ofgem making use of the information provided;

    c. Very broad requests for information can force a respondent to either provide large quantities of irrelevant information (which is inefficient for both parties) or to second guess what it is that Ofgem really requires and risk not providing what is needed (which can lead to Ofgem drawing incorrect conclusions). This is clearly also inefficient. Clarity on why Ofgem needs specific information, or how it is intended to use it, will assist the respondent in ensuring that all relevant information is provided; and

    d. Generally the process would be more efficient if there were better communication between Ofgem and the respondent. Clarity on the nature of Ofgem's concerns will often enable a party to respond more promptly and concisely.

8. Since the investigation process is such that Ofgem and the Authority between them carry out the roles of investigating officer, prosecutor and judge, there is a need for clear separation of the Decision making body and the case team. In order to avoid the risk that, even unconsciously, the decision-making team look for evidence which confirms the allegations which are being investigated ("confirmation bias"), there is a need for an impartial review of the case at each stage. The European Commission uses a hearing officer for this purpose.

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Similarly, before the investigation teams from the Financial Services Authority (FSA) send a final report and recommendations to its decision making committee (the Regulatory Decisions Committee (RDC)), the report is reviewed by an independent lawyer to ensure, for example, that the evidence gathered supports the findings made and that the recommendations are justified by those findings of fact. Both of these models could usefully be considered by Ofgem to ensure the objectivity of recommendations.

9. In addition, during the investigation phase there should be transparency in terms of making available copies of all information passing between the investigation team and the decision-making committee. Again, this is standard practice in all investigations undertaken by the FSA.

In relation to your Appendix 3, Request for Feedback, we have no comments or complaints to make on the manner in which this consultation has been conducted.

If you would like to discuss any aspect of this response please contact Janet Bidwell (01926 653000).

Yours sincerely

[by e-mail]

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UK Director of Regulation

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Appendix One

Part One: Consultation on the initial revisions proposed in Part One of the review process

Do you have any comments on these guidelines and in relation to the changes proposed to them? Please give reasons for your answer, giving examples where appropriate

Introduction – Key issues

1. It is not clear what has prompted Ofgem to review the existing Guidelines at this stage, given the wider Call for Evidence (part 2 of the Consultation), which is intended to inform a "wholesale review" of Ofgem's approach to enforcement. We would hope that the information that Ofgem receives in relation to part 2 of the Consultation will be extremely useful and that it can be used to help Ofgem to shape its approach to enforcement, which will include the content of its Enforcement Guidelines.

2. National Grid welcomes Ofgem's objective of providing greater clarity in relation to its approach to enforcement, which is, in part, provided as a result of introducing additional detail to the draft Guidelines. Nevertheless, some areas still provide very little information to inform regulated entities about what approach will be taken in particular circumstances or what process will be followed. In particular, National Grid's experience of settlement in relation to two recent investigations has identified that more detailed information about the membership of the Enforcement/Settlement Committees of GEMA and the procedures to be adopted for settlement is urgently required.

3. As an over-arching point, since any appeal of investigations under the GA1986 and EA1989 is by way of extremely limited proceedings under sections 30E and 27E of the relevant acts respectively, Ofgem should acknowledge that it has a duty to ensure that it does not misuse its considerable powers. National Grid would welcome the extension of the scope for appeals of regulatory decision-making to take the form of a full re-hearing of the facts and the law, as is the case in FSA investigations. All disciplinary decisions by the RDC are referable to the Upper Tribunal. The tribunal will re hear all of the relevant facts and law relating to the investigation and will determine what decision the FSA should have made. As a minimum, the ground of appeal under the GA1986 and the EA1986 should encompass the potentially broader scope of judicial review proceedings, including an explicit ability to challenge the decision on grounds of natural justice, including reasonableness and/or proportionality as established in public law. This is particularly relevant to page 9 paragraphs 1.5 and 1.7, which refer to a licence holder's rights to challenge a decision of the regulator through the Courts, without acknowledging the very limited nature of those rights. We acknowledge that a change in the law would be required to give effect to these suggested extensions to the right to appeal.

4. In relation to claims under the CA1998, Ofgem is investigating officer, prosecutor and judge, and although there is currently a full right of appeal to the Competition Appeal Tribunal, it is nonetheless incumbent on Ofgem to exercise particular care to avoid confirmation bias in its

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proceedings. We have identified several areas below where greater certainty is needed in the interests of ensuring a fair and transparent process for regulated entities.

5. We have commented in detail in relation to Section 3 (Criteria for opening an investigation) and Section 4 (The investigation and decision making process), but the sub-sections dealing with investigations under the CA1998 and consumer legislation seem to be particularly lacking in detail, and it is not clear how investigations under these provisions are intended to work in practice.

General issues

6. **Page 6** – paragraph 3 – There is no acknowledgement in the document that complaints can be raised via self reporting by regulated entities. National Grid has self reported problems that it has identified to Ofgem in the past and the Authority's Statement of Policy with respect to Financial Penalties (October 2003) clearly lists self reporting as one of the factors which will tend to result in a reduction in the level of any penalty imposed.

7. **Page 6** – paragraph 5 - In relation to the second bullet point, Ofgem refers to the criteria it will apply in deciding whether to open an investigation. In our view this should also refer to the criteria that Ofgem will apply in deciding whether to continue an investigation at various key stages. There is no concept within the draft Guidelines of "stage gates" which would enable Ofgem to review cases at regular intervals and consider whether a continued investigation or enforcement process is necessary or desirable. An approach of reviewing long-running projects at regular intervals is standard practice in the PRINCE2 project management methodology. Such an approach might be particularly necessary where investigations are lengthy and the application of resources to the ongoing investigation on a continuing basis might be subject to challenge. In addition, although not necessarily visible to respondents to FSA investigations, we understand that the FSA is required to review the progress of its investigations at regular intervals to ensure that resources are being appropriately deployed, and that investigations are closed if they are not progressing satisfactorily or if there is no case to answer.

8. **Page 24** – section headed "Feedback" – paragraph 4.13 - It would be helpful if Ofgem could provide an opportunity for the company being investigated and the complainant to provide feedback in respect of every investigation undertaken. In very lengthy investigations, Ofgem might consider it worthwhile to obtain feedback at significant stages of the process.

9. **Page 25** - The flow chart on this page would be considerably clearer if it set out the basis on which investigations proceed by a particular route. It is interesting that settlement negotiations appear to be catered for during the investigation phase but this is not reflected in the body of the text. There is also no reference here to the statutory obligation on Ofgem to publish the notice of intention to impose a financial penalty following enforcement proceedings or settlement under sections 30A(3) and 30A(4) of the GA1986 and sections 27A(3) and 27A(4) of the EA1989. In addition, the flow chart does not contain any indication of time periods applicable to particular stages. In National Grid's experience, there have

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been considerable delays, in particular, between Ofgem's publication of its proposed decision and the confirmation of its final decision. The introduction of a time limit for consideration of any representations received (particularly as National Grid understands that, in general, Ofgem receives few representations in respect of the publication of notices of proposed penalties) would provide much greater clarity..

Time limits for Ofgem actions

10. **Page 6** - paragraph 6 - This states that in *"90% of cases"* Ofgem will respond within four weeks of receiving a complaint. There is no explanation of why this would not be possible in relation to the remaining 10% of cases, since all that is required is a bare acknowledgement of the complaint or self referral received.

11. **Page 6** - paragraph 7 - Although this states that Ofgem intends to take decisive action within nine months of launching an investigation, again there is no justification for Ofgem not committing to take one of the actions listed (issuing a detailed statement of case, closing the case or updating the parties) within a nine month period.

12. **Page 17** – paragraph 2.1.4 - It is not clear why Ofgem should not acknowledge receipt of complaints/referrals within four weeks for 100% of cases, rather than the 90% provided here. In addition, in the interests of fairness and transparency, it would be appropriate, in our view, for Ofgem to provide reasons if it chose not to investigate a particular complaint.

13. **Page 28** - Paragraph 4.34 – This section should explicitly provide that the period of time permitted to respond to a statement of case will generally be 21 days, but may be longer if this is needed in order to allow a reasonable period of time for the response, bearing in mind the number and complexity of the issues raised in the statement of case. The draft Guidance should include an obligation for Ofgem reasonably to consider any requests for an extension of time to produce a response to the statement of case and to provide a response to such a request within a reasonable timeframe.

Procedural fairness issues

14. **Page 23** – paragraph 4.7 - National Grid welcomes the additional guidance in relation to statutory requests for information under Section 38 GA1986 or Section 28 EA1989, since these requests can be very onerous and time consuming for respondents to answer. The resources needed to respond to a request for information will depend on the complexity of the organisation and the nature of the issues raised. In order to recognise this, Ofgem should provide that it will: (i) allow reasonable timeframes for responses; (ii) will not issue more than one request for information with a concurrent time period for a response; and (iii) send requests for documentation to the respondent in draft form to enable a respondent to comment on the content and timescale for a response. This last point mirrors the current practice of the FSA, who send out draft notices and take into account comments from respondents before finalising the notice.

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15. **Page 23** – paragraph 4.8 - We note that Ofgem will take a failure to comply with an information request within the prescribed timescales very seriously: there are also, of course, sanctions for providing information which is not accurate. Timescales for responding to a request for information should take into account the time required to assess what is being asked for in the request (which, in our experience, is not always clear) and to verify that the information being provided in response is accurate and complete. It needs also to be kept in mind that, however large the company under investigation, the burden of responding to information requests usually falls on a very limited number of individuals: placing unrealistic deadlines risks being procedurally unfair not least because there can be criminal sanctions for failing to provide complete and accurate information.

16. In considering whether to grant an extension to the specified time limit provided for a response to a request for information, Ofgem should be bound to respond promptly. In the absence of this, there is the potential for considerable prejudice to respondents faced with an imminent deadline and uncertainty as to whether their request for an extension will be granted. The Guidelines should explicitly state that requests to grant requests for extension of time will not be unreasonably refused by Ofgem.

17. **Page 23** – paragraph 4.9 - In keeping the respondent and the complainant updated on the progress of the investigation, Ofgem should specify what types of information will be made available, bearing in mind obligations of commercial confidentiality, the effect of section 105 of the Utilities Act 2000 and any issues under the Data Protection Act 1998.

18. **Page 24** – paragraphs 4.15 and 4.16 – It would be helpful for Ofgem to make guidance available to regulated entities setting out the range of situations in which Ofgem will decide not to pursue the case or not to impose a penalty.

19. **Page 26** – paragraph 4.22 - It would be helpful here if Ofgem could provide guidance as to where undertakings may be appropriate.

20. **Page 27** – paragraph 4.23 - This paragraph makes clear that there is to be separation between the investigation team and the Enforcement or Settlement Committee. The following paragraph (paragraph 4.24) sets out that the Enforcement Committee is to form an independent view "*on the recommendations*" of Ofgem staff who have carried out the investigation. In the interests of transparency and fairness, communications between the investigation team and the Enforcement or Settlement Committee should be disclosed to the licence holder under investigation. In order to ensure objectivity, before a final report or any recommendations are made to the Enforcement or Settlement Committee, they should be reviewed by an independent lawyer within Ofgem who has had no involvement in the investigation. This independent review will ensure that the evidence gathered supports the findings made and that the recommendations are justified by those findings of fact. The disclosure of correspondence and the independent review are both a key part of the FSA's approach to enforcement and its focus on transparency within investigations

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21. **Page 27** – paragraph 4.25 – Decisions on breaches are matters of great importance to regulated entities with potentially serious financial and reputational effects: it should be the norm for such decisions to be taken by the Enforcement Committee and Ofgem should set out the exceptional circumstances in which the decision will be delegated to senior Ofgem officials.

22. **Page 27** - paragraph 4.27 – This states that "*Cases that may be suitable for settlement will be considered against a range of factors*." In the interests of procedural fairness, Ofgem should set out the range of factors that it will take into account when determining whether a case is suitable for settlement.

23. **Page 28** – paragraph 4.28 – Ofgem should be obliged to send the respondent a document setting out the basis on which it has reasonably reached a preliminary conclusion that there has been a licence breach, in order to facilitate settlement discussions.

24. **Page 28** - paragraph 4.30 – This paragraph presupposes that an admission in relation to alleged breaches is a pre-requisite to settlement. This inhibits early settlement, particularly where the respondent has been prepared to make enhancements to its systems or processes notwithstanding that Ofgem has been unable to substantiate a case that the licence has been breached. A requirement that the respondent must admit breach is an unnecessary barrier to settlement and likely to create procedural unfairness.

25. **Page 28** – paragraph 4.33 – Given that the investigation team will inevitably have been in a dialogue with the Settlement Committee to inform them of the background and findings to date in relation to the investigation, this reinforces the importance of transparency of communications between the investigation team and GEMA, in order to avoid a situation where settlement may break down and it is no longer possible for a fair enforcement process to continue.

26. **Page 29** Paragraph 4.36 – There should be a limitation on the number of times that Ofgem can change its case. Arguably, there should only be the ability to change the case put to the respondent on one occasion, taking into account the issues raised in the respondent's defence or mitigation. In the event that changes are made to Ofgem's case, the licence holder respondent must clearly be permitted a reasonable opportunity to make written and oral representations in response to these – a provisional timescale should be set out here in the interests of administrative certainty.

27. **Page 29** Paragraph 4.37 – This paragraph needs to correspond, in terms of the membership of the Ofgem team for the oral hearing, with the comments made previously about the composition of the Enforcement and Settlement Committee.

28. **Page 29** Paragraph 4.38 – This provides that additional material cannot be introduced at the oral hearing by the respondent under investigation. The paragraph states that the agreement of the Enforcement Committee will be required before such material is introduced. This could potentially lead to a breach of the Human Rights Act 1998 in terms of failing to

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ensure a fair hearing for the respondent. It may be necessary for notice to be provided to the Enforcement Committee of any new information to be introduced at the oral hearing or an opportunity provided for the Enforcement Committee to respond to new material, but it is important that the respondent is able to use the hearing as an opportunity to raise all arguments open to them.

Settlement procedure

29. **Page 28** paragraph 4.30 - The definition of the Settlement Committee here is not clear. It needs to be set out that the Settlement Committee will be entirely independent of the Enforcement Committee. Paragraph 4.31 states that neither party can rely on statements during the settlement discussions in subsequent Enforcement Committee hearings. In addition to this, it should be specifically stated that, in the interest of fairness and transparency, the investigation team cannot rely on information received during settlement discussions in making recommendations to the Enforcement Committee. For this reason, we have suggested above (reference p27, paragraph 4.24) that all communications between the investigation team and the Enforcement/Settlement Committees should be copied to the respondent, and that the investigation team should not make a recommendation to the Enforcement Committee as to the appropriate outcome of the enforcement proceedings.

30. **Page 28** Paragraph 4.32 – This does not take into account sections 30A(3) and 30A(4) of the GA1986 and sections 27A(3) and 27A(4) of the EA1989, which require notices to be published of the intention to impose a financial penalty before that is finally confirmed. It is National Grid's experience that in enforcement cases where there has been an agreed settlement position between Ofgem and the licence holder, such a notice has had to be published in advance of any formal confirmation of the settlement terms, and that no guarantee could be provided by GEMA that the terms of settlement would not need to be amended to take into account representations made during the notification period. This is unworkable and in the recent National Grid investigation into licence condition D10, the suggestion that the enforcement procedure would be truncated in the event that GEMA considered the settlement offer needed to be amended was a serious barrier to settlement. Absent a change in the primary legislation, Ofgem could take the view that an agreement to pay a penalty as part of a settlement agreement does not constitute the "imposition" of a financial penalty for the purposes of section 30A GA1986 or section 27A EA1989, or alternatively extend the system of undertakings to encompass the payment of a financial penalty by agreement.

31. There is no detail in the section either regarding final steps once the settlement terms are approved following the period of consultation, or as to how they are recorded in a final order. A guideline as to the time to be taken by Ofgem to confirm the terms of settlement or the terms of the Penalty Notice should be set out here.

32. The following section in the draft Guidelines, beginning with the heading "Statement of Case" needs to recognise that this will only be necessary if the matter has not settled previously or Ofgem or the investigation team has not taken the decision to discontinue the investigation.

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We have raised above the benefits of introducing a "stage gate" concept to provide a logical framework for Ofgem in proceeding to each further step in the enforcement process.

Mitigating factors and the need for a defined leniency regime/ clarity over the circumstances in which Ofgem will exercise its discretion not to investigate or to impose a fine

33. **Page 1** - The second paragraph of the "Overview" of the draft Guidelines states that the draft brings together in one document Ofgem's processes and policies for enforcement. However, the draft Guidelines do not contain any information about mitigation, as set out in the "Statement of Policy with respect to Financial Penalties" (October 2003). Ideally, the detail from the guidance on financial penalties, which includes information about mitigating circumstances, would be included here so that all the information would be available in one place. In addition, the relative weightings to be given by Ofgem to each of the elements of the Policy should be set out in the Guidance.

34. **Page 20** – paragraph 3.5 - In assessing how serious the alleged breach may be, it would be helpful if Ofgem could elaborate on the proportionate weight given to each of the factors set out as establishing the seriousness of the issues raised. For example, National Grid has been involved in investigations of alleged licence breaches where it was not clear that there was any harm to consumers or to competition arising from the alleged breach. We note that this factor is listed first in this section. Is it Ofgem's intention that potential detriment to consumers should be weighted more heavily than the other factors listed? If not, how are these diverse issues to be assessed? The introduction of the qualification of "potential harm" for consumers is uncertain and involves the respondent in trying to establish that a hypothetical argument (whether harm might have been caused to consumers) could not have been the case.

35. In addition, National Grid is concerned that the imposition of a fine should not be solely driven by its perceived deterrent value. This justification (mentioned here and in paragraph 3.10) has been used by Ofgem in circumstances where there was no harm to consumers and the breach was trivial in terms of being a non-seriousness breach of a licence condition with no aggravating factors.

36. **Page 21** - paragraph 3.6 - The attempt to extend the list of relevant factors to unknown items outside the stated list again is procedurally uncertain and likely to create unfairness. Respondents should have transparency as to the standards they have to meet and factors that will be taken into account by Ofgem in any enforcement action.

37. **Page 21** – Paragraph 3.8 – Where there are specific sanctions under a code (or other legislation) enforced by another regulatory body or indeed by Ofgem itself, it is inappropriate that a licensee should face sanctions under the licence as well. For example, where the infringement related to Health and Safety legislation governed by the HSE or, in relation to connections under Ofgem's jurisdiction, National Grid Gas plc is subject to the Gas Standards of Performance regulations, which require compensation to be paid to consumers if the requirements of the regulations are not met. The licence conditions similarly impose

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overall standards of service in relation to connections targets which can the subject of separate enforcement action by Ofgem.

38. **Page 21** – paragraph 3.9 - The statement in this paragraph that appropriate action by code owners or panels *"may lead Ofgem not to exercise its discretionary investigative powers"* seems unnecessarily vague and likely to give rise to administrative uncertainty, where arguably it would be inappropriate for Ofgem to take further action of its own.

39. **Page 30** – paragraph 4.44 – In addition to the content of the notice specified in this paragraph, consideration should also be given to whether, in the interests of greater transparency, the notice should set out any reductions in the amount of the fine by reference to the mitigating circumstances and/or Ofgem's guidance on leniency in particular circumstances.

Areas where further clarity is needed in the interests of fairness/administrative certainty

40. **Page 7** – second bullet point - In relation to a decision to close the case *"for reasons of administrative priorities"*, there is no explanation or description given of the term "*administrative priorities*" or of how these administrative priorities might work. In other regulatory guidance (for example OFT or FSA guidance) it is customary to provide examples of the types of issue that might be caught by this description. Without further details or examples, this statement is vague and uncertain. It is striking that the investigation/enforcement process outlined here does not provide for a settlement prior to Ofgem issuing a statement of case.

41. **Page 9** – paragraph 1.4 - This states that GEMA is not required to make an order where it considers that the breach is of a *"trivial nature"*. Again, the draft Guidelines do not contain any definition of the phrase *"trivial nature"*, nor any example of how this might work in practice. As such the use of this phrase is vague and uncertain. In our view, a technical licence breach that does not impact in any significant manner on consumers should fall within this definition, particularly as this would presumably not be in line with Ofgem's *"administrative priorities"*. However, National Grid notes that Ofgem has in the past interpreted the phrase "*breach of a trivial nature*" as an issue as to whether the licence condition that was breached is in itself trivial in nature. National Grid's view is that this phrase logically refers to the differing potential consequences of any breach of the licence (for example, how many customers are affected, the value of the consequences of any breach, etc).

42. **Page 9 –** paragraph 1.6 – The reference to "*applicable turnover*" here is unclear. While the Electricity and Gas (Determination of Turnover for Penalties) Order 2002 defines this term as funds "*derived by the licence holder from the provision of goods and services falling within all the licence holder's ordinary activities (whether or not such activities are authorised by a licence)*", this does not deal with a situation where the legal entity holds more than one licence. If applied literally to all of a licence holder's ordinary activities, this may therefore

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lead to procedural unfairness. It would be helpful if Ofgem could clarify that the turnover would be limited to the relevant business for the particular licence concerned in each case.

43. **Page 16** - Section headed "*Allegations of a breach of the relevant legislation"*. The scope of *"relevant legislation"* should be clarified here.

Conflicting obligations for licence holders

44. **Page 7** - Section headed *"Enforcement and Industry Code Compliance"* - While Ofgem acknowledges that where the same contravention is covered by another code or licence condition, Ofgem will take account of sanctions already being imposed or proposed by code owners, the section does not cover a situation where a licence holder may have conflicting duties under a separate code or regulation (for example, under the Uniform Network Code or health and safety legislation). For instance, the Gas Safety (Management) Regulations require a gas transporter to attend an escape of gas *"as soon as reasonably practicable"* which makes allowance for specific circumstances. Gas Transporter licence condition D10 sets a specific timescale for attending and makes no allowance for circumstances. There is a potential tension between these obligations: in times of high call outs the GS(M)R will permit the gas transporter to prioritise work to call outs which are most likely to pose a real threat to life or property. To comply with D10, the licence holder will be constrained to attend as many call outs as possible potentially at the expense of the most serious. In such circumstances the gas transporter will have to choose between compliance with GS(M)R and meeting a licence standard. The Guidance should recognise that enforcement proceedings will be inappropriate where conflicting requirements are imposed on the licence holder by another regulatory body.

45. **Page 20** – paragraph 3.5(v) - This picks up the point raised above as to the need for guidance where there are conflicting duties on the licence holder. The point is dealt with to some extent at paragraph 3.8 which provides that *"when considering the merits of launching an investigation and the possibility that enforcement action may be required in respect of any breach that is ultimately found, Ofgem will consider all of the facts. In doing so it will assess the impact of any timely and suitable action that is being taken under a relevant industry code or agreement"*. However, this does not provide guidance where there are conflicting duties on the licence holder, nor does it appear adequate since in most cases there should be no need for further sanction where the matter is being dealt with under an alternative code or industry procedure. The Guidance should recognise that enforcement proceedings will be inappropriate in these circumstances.

Specific comments in relation to Investigations under the Competition Act

46. The section of the draft Guidelines in relation to investigations under the CA1998 contains very little detail and, as drafted, contain very few safeguards for parties under investigation. At the very least there should be clarity on the timescales within which steps will be taken,

safeguards against confirmation bias e.g. the appointment of an independent hearing officer, clarity on the separation between case workers and decision makers, safeguards in relation to information requests (e.g. reasonable timescales, limited numbers) rights to oral hearings, etc. There should be a similar level of detail in relation to applicable procedure for investigations under the CA1998 as is provided for in respect of investigations under the GA1986 and EA1989.

47. In addition, there is no settlement procedure provided in respect either of proceedings under the CA1998 or under the Enterprise Act 2002 (EA2002). The OFT's guidance note on investigation procedures mentions settlement and settlement has been offered by the OFT in appropriate cases. There is no reason why settlement should not be set out in these Guidelines as available, either for CA1998 or for EA2002 cases.

48. **Page 11** – paragraph 1.13 - This states that the OFT Competition Law Guidelines "*Application in the Energy Sector*" provides advice and information about the factors which Ofgem will take into account when considering whether, and if so how, to exercise its powers under the CA1998. In our view there is insufficient detail in the draft Guidelines and it is not clear how these factors will be exercised in practice. Further clarification is needed on this issue to avoid administrative uncertainty.

49. **Page 33** – paragraph 4.51 – This states that Ofgem is only likely to accept commitments in cases where competition concerns are *"readily identifiable"*. This is open to different interpretations: if it is intended to mean that the competition concerns are very specific and so can be addressed by the party agreeing to do or not to do a specific thing this is reasonable. If, however, it means that there is doubt as to what the competition concerns are, it is not clear why the case should be investigated at all. This needs to be clarified.

50. **Page 33** - Paragraph 4.52 – The circumstances in which a supplementary statement of objections will be issued by Ofgem should be set out in much greater detail. In relation to Ofgem's investigation into metering contracts, National Grid received three statements of objections from Ofgem[1]. In the interests of fairness and transparency, it is important for a licence holder under investigation to be made aware of the circumstances in which a supplemental statement of objections might be issued. In each case, it will also be important for there to be a procedure for the licence holder to make written and/or oral representations in respect of the supplemental statements or objections.

Specific comments in relation to Investigations under Part 8 of the Enterprise Act 2002

51. **Page 34** - Paragraph 4.57 – There are no timeframes set out in this paragraph and the process of how this will work in practice is not explained. For example, the alleged consumer law infringements should be clearly set out in writing and provided to the business, and the business should be able to make representations on the alleged infringements. Ofgem

[1] The second statement of objections set out an entirely different case to that made in the first statement of objections. The third statement of objections was called a "put-back" letter but was a statement of objections in all but name since it set out yet another quite different case.

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should also provide guidance on the types of circumstances when matters will be considered urgent and *"a more speedy approach required"*.

52. **Page 34** - Paragraph 4.58 – We note that the minimum statutory time periods are referred to. It would be helpful if it could be made clear whether the actual time period for the consultation will be agreed with the business, or set by Ofgem.

53. **Page 35** - Paragraph 4.59 - It is not clear in the draft guidance whether Ofgem will set deadlines for responding to such requests, or whether they will be agreed deadlines with the Business. We note that Section 227 of the EA2002 states the deadline will be set out in a notice. The resources needed to be deployed by a business to respond to requests will depend on the complexity of that organisation and the nature of the issues raised in the request. In order to recognise this, we suggest that the guidance could state that Ofgem will provide reasonable timeframes for responses and will not issue more than one request for information with a concurrent time period for a response. If deadlines are set, the business should be able to request extensions and in considering whether to grant an extension, Ofgem should be bound to respond promptly. In the absence of this, there is the potential for considerable prejudice to businesses faced with an imminent deadline and uncertainty as to whether their request for an extension will be granted.

54. **Page 35** - Paragraph 4.60 - It would be helpful here if Ofgem could provide guidance as to where it considers that undertakings may be appropriate.

55. **Page 35** - Paragraph – 4.62 – Ofgem could provide guidance on the circumstances as to when it considers that undertakings will be made public. The business should be able to make representations on the appropriateness of this, which Ofgem should duly consider prior to making any disclosures.

56. **Page 35** - Paragraph 4.63 – The business should be able to make representations as to why undertakings have not been complied with, which should be duly considered by Ofgem and passed on to the OFT where Ofgem consults with the OFT.

57. **Page 35** and **Page 36** – Paragraph 4.65 and the flowchart – Further detail needs to added to the flowchart providing for a circumstance where Ofgem identifies a possible infringement of consumer law, the business is subsequently approached by Ofgem and following correspondence between Ofgem and the business, no undertaking is subsequently required and Ofgem decides to take no further action. Presently the flowchart suggests that, having approached the business, Ofgem will always obtain an undertaking or apply to the court for an Enforcement Order.