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Review of Ofgem's enforcement activities – consultation on strategic vision, objectives and decision makers

EDF Energy is one of the UK's largest energy companies with activities throughout the energy chain. Our interests include nuclear, coal and gas-fired electricity generation, renewables, and energy supply to end users. We have over five million electricity and gas customer accounts in the UK, including residential and business users.

EDF Energy welcomes the opportunity to comment on the issues raised in your consultation on proposed changes to aspects of Ofgem's enforcement policies and procedures, and in particular proposals on a strategic framework and decision makers.

We believe Ofgem's enforcement review is appropriate given the increasing emphasis on regulatory compliance, together with the introduction of a number of significant new regulatory initiatives, such as the proposed introduction of new standards of conduct for suppliers, powers to enforce REMIT, and the ability to compel regulated business to provide consumer redress.

We share a common goal with Ofgem to help rebuild consumer trust, confidence and engagement, and together with safety this is a top priority for EDF Energy. Consistent with this goal, we believe there is a clear need for a robust, transparent, consistent and fair enforcement regime to promote best practice, protect consumers' interests and competition.

Our detailed responses are set out in the attachment to this letter. Should you wish to discuss any of the issues raised in our response or have any queries, please contact Steven Eyre on 01452 653741, or myself.

I confirm that this letter and its attachment may be published on Ofgem's website.

Yours sincerely,

A handwritten signature in blue ink, reading "Paul Delamare".

Paul Delamare
Head of Downstream Policy and Regulation

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Attachment

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EDF Energy's response to your questions

Q1. Do you agree that this is the right Vision for Ofgem's enforcement work? Please provide us with any comments you have on the Vision.

As a customer focused business, EDF Energy strives to provide affordable services that meet all of our customers' needs. We are committed to rebuilding consumer trust and engagement in the energy sector, as demonstrated by our Customer Commitments on Simplicity, Fair Value and Better Service. In addition to this goal, we are committed to securing compliance with all applicable laws, regulations and standards across all areas of our business. We believe EDF Energy's commitments are consistent with Ofgem's proposed vision for enforcement and we would like to see a constructive approach.

However, we are unclear on the need for a distinct 'Vision' for enforcement, and, in particular, how such a vision sits with Ofgem's statutory duties. We note that Ofgem states that the vision will give regulated companies context to its actions, and yet no explanation is given as to how the vision interacts with the powers provided to the regulator under legislation.

We particularly note that the proposed vision contains two separate elements that seek to achieve a culture "where businesses put energy consumers first and act in line with their obligations". We would question whether this vision is consistent with the statutory powers provided to Ofgem and the regulatory obligations placed on licensees. In any case, it is unclear what putting "energy consumers first" actually means in practice for licensees. For example, if it is intended to refer to the Standards of Conduct, the language of the vision should be consistent with treating customers fairly. While not agreeing with the need for a vision, we note the wording could be improved by replacing "and" with "through" and referring to "licensee" as opposed to "businesses" in order to reflect the regulatory powers provided to Ofgem through statute.

Q2. Do you agree with Ofgem's proposed Strategic Objectives, and principles for achieving them, and do you think it would be helpful to adopt annual strategic priorities? Please explain the reasons for your answer and any aspects which you think we should consider.

Ofgem's primary objective in terms of designing an enforcement regime should be to develop robust, transparent, fair and consistent arrangements which deliver timely, credible and cost effective outcomes for consumers and licensees.

There are a number of improvements to the regulatory arrangements that if implemented would better meet the above objective. The introduction of the Standards of Conduct (SoC) and other new significant regulatory measures should be accompanied by guidance from Ofgem on its interpretation of the proposed licence condition to help remove uncertainty and to provide clarity to suppliers and consumers. In addition, we continue to believe there are significant benefits in Ofgem adopting a two stage approach to investigation and enforcement. Under such an approach formal enforcement would only commence following an initial stage of dialogue between the regulator and the licensee

and where the licensee has failed to resolve the issues giving rise to the original concerns or suspected breach. We believe this new approach to enforcement would promote best practice, improve and rebuild trust in licensees and confidence in the sector generally. Furthermore, this approach is important towards ensuring that Ofgem's enforcement policies and procedures are more aligned with the principles of Better Regulation in terms of accountability, proportionality and consistency.

Ofgem's proposed approach includes a strategic objective to "deliver credible deterrence". It is unclear how this objective differs from the second objective to "*Ensure visible and meaningful consequences for businesses who fail consumers and do not comply*". While we accept that Ofgem's enforcement regime should consist of a deterrence element, we do not believe that a regime should be developed around this as a primary strategic objective and that this will not be sustainable in the long term, with increased regulatory risks resulting from subjective interpretation of principles-based regulation. It is critical that energy companies and Ofgem are seen to be working together for the best interests of consumers. This will promote competition through greater consumer engagement. It is imperative therefore that Ofgem's enforcement regime facilitates a compliance-based approach that allows for constructive dialogue between licensee and the regulator, in advance of any formal public investigation being launched. Deterrence should be a factor that is considered in the setting of any penalties that arise following investigations that have established and appropriately demonstrated a regulated business has breached a relevant obligation.

We fully support the adoption by Ofgem of a range of enforcement tools to be used to achieve its strategic enforcement objectives, including the use of warning letters etc. However, there is clearly a judgement to be made by Ofgem as to which tool is appropriate for each case and what is in the best interests for consumers overall. We would welcome additional clarity on how Ofgem intends to use the range of enforcement tools available and what decision-making process it will adopt in deciding which tool is appropriate.

We believe that Ofgem's objectives should include a desire to undertake timely and cost effective enforcement processes. Historically, a number of investigations have taken a significant time to complete, with some extending to a number of years. Lengthy public investigations are not in the interests of consumers nor licensees. Firstly, any consumer benefit derived from the required remedial action from the licensee in breach will take longer to be secured, and secondly, there is a public perception risk that any breach has continued to exist for the entire duration of the investigation period. Such instances can damage consumer trust and we therefore believe that whilst investigations should be comprehensive and robust they should also be performed in a timely and cost effective manner.

We accept that licence holders who fail to comply with their obligations that result in consumer detriment should be subject to visible consequences. We fully support the publication of formal enforcement notices/orders as part of a transparent and fair regime. However, we would question the value in publishing announcements around the commencement of investigations. Once a licensee becomes subject to an announced investigation, there is a risk that guilt will immediately be perceived by the public. The adoption of such a process and the resulting public perception that can arise can have significant impacts on the licensee in question, including reputational damage, as well as adding to wider stakeholder perceptions of mistrust. We note that the Financial Conduct Authority's normal practice is not to publish information about investigations until

Decision and Final Notices are issued. We would support the adoption of a similar policy by Ofgem.

Q3. What obstacles do you consider that Ofgem may encounter in achieving its Vision and Strategic Objectives?

Ofgem's proposed vision aims to ensure that licensees act in line with their obligations. However, the increase in number, scope, scale and complexity of relevant obligations, including social and environmental and economic obligations, increases the potential for non-compliance. In particular, the SoC proposed under Ofgem's Retail Market Review (RMR), represents a significant move towards a principles-based approach to regulation. The inherently subjective nature of the SoC would introduce additional regulatory risk and uncertainty in terms of managing compliance, particularly in circumstances where Ofgem has assumed or expected a different type of response and approach from suppliers towards meeting the new standards.

Recent investigations have clearly demonstrated the gap that can exist between Ofgem and a supplier when it comes to the interpretation of licence requirements and the acceptability (or otherwise) of the compliance response. We do not consider it appropriate for licensees to gain Ofgem's interpretive policy only through enforcement investigations. Such a regime is clearly not in the interests of consumers nor licensees. We believe interpretation obstacles can be reduced by the publication of appropriate accompanying guidelines that seek to remove uncertainty and provide clarity to licensees and consumers. We also believe that an enforcement regime that facilitates constructive dialogue taking place between licensee and Ofgem where compliance concerns exist.

Furthermore, there is a clear need for strong communication links between the Ofgem investigation and policy teams. Interpretation of, and thereby compliance with, regulatory requirements can evolve over time, both within Ofgem and by individual licence holders. An example is the complex new framework being enacted under the RMR through licence conditions. As this understanding develops, through direct meetings with Ofgem policy teams or through published regulatory guidance, a view of expected standards and conduct may be formed. It is important that any established interpretation is applied consistently within Ofgem, so as to avoid inappropriate investigations being launched as a result of, for example a strict narrow interpretation being adopted by the enforcement team.

Q4. Do you agree with the proposals for an Enforcement Decision Panel and Secretariat to take decisions in contested enforcement cases? Please explain the reasons for your answer.

We welcome moves to introduce greater independence in to the enforcement decision-making process. We believe that the introduction of the proposed Enforcement Decision Panel and Secretariat will introduce a degree of independence, compared to that which exists today. However, we maintain the view that a Panel recruited by Ofgem and required to have regard to decision making guidance and Strategic Priorities set by the Authority is no substitute for a truly independent merits-based appeal right of enforcement decisions. Such an appeal right would improve accountability through incentivising the Authority to ensure that its decisions are robust, transparent and informed by evidence so as to withstand independent scrutiny.

We also consider greater independence should be applied to the decision-making process associated with launching formal investigations under the Electricity/Gas Acts (e.g. s28 of

the Electricity 1989). We believe that a Committee of the Authority, fully comprised of non-executive members, is the most appropriate body to assess the extent to which, given the evidence at the time, whether a licensee is or has contravened a licence requirement and whether a formal investigation is the most appropriate course of action. This amongst other things would help to ensure that the decision to launch investigations is based on robust and transparent evidence and not subject to any strategic/political interference.

In terms of the structure of the proposed Enforcement Decision Panel it remains unclear what the terms of reference of the Panel/Committees will be and we would welcome additional clarity in this area. Furthermore, we support the development of a Pool of Panel Members which is sufficiently large enough to contain the relevant broad experience required to perform their duties including legal, financial and consumer expertise, as well general energy industry experience.

We note the Panel will be supported by a new Secretariat unit which will be separate from the enforcement case teams who carry out investigations. We welcome this move as it will introduce greater separation between the decision making and investigatory teams and may lead to more efficient resolution of investigations.

Q5. Do you agree with the proposals for settlement decisions? Please explain the reasons for your answer.

We fully support measures to bring, where appropriate, investigation proceedings to an early resolution without the need for formal enforcement. We welcome Ofgem's proposal to formally adopt a Settlement Procedure which, in principle, allows the option to seek resolution without the need for utilising significant resources and results in a reduction of the penalty imposed. However, it is important that Ofgem is transparent in the way it decides whether a case is suitable for early settlement.

Q6. Do you agree with the proposed arrangements for the Authority's oversight of the Panel's work? Please explain the reasons for your answer.

We fully support the development of arrangements that seek to ensure enforcement decisions are taken on a consistent basis. We acknowledge the need for the Authority to have strategic oversight over the operation of the enforcement arrangements given its statutory role. In terms of the Authority providing guidance to decision makers in order to provide direction and promote consistency, we believe such guidance should form part of Ofgem's Enforcement Guidelines and be subject to public consultation.

Q7. Do you have any additional comments on the matters covered in this Letter?

We have no further comments to add at this stage but look forward to participating in the next stages of Ofgem's Enforcement Review.

**EDF Energy
May 2013**