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Dear Megan,

Review of Ofgem's Enforcement Activities – consultation on strategic vision, objectives and decision makers

This response represents the views of the SSE Group (SSE) and Scotia Gas Networks (SGN), of which SSE is a major shareholder. SSE and SGN welcome the opportunity to respond to Ofgem's consultation on strategic vision, objectives and decision making for its enforcement activities. SSE and SGN are strongly of the view that a clear and constructive approach to enforcement is required going forward, particularly in light of the regulatory changes highlighted by Ofgem e.g. enforcing the standards of conduct and introduction of an enforcement regime for REMIT. The proposed data assurance arrangements under the RIIO price controls are an additional development that will need to be taken into account in Ofgem's enforcement policy. SSE and SGN therefore agree that it is appropriate to review the enforcement approach.

The Enforcement Vision

Context – SSE's and SGN's view

The Authority's statutory duties must lie at the heart of the enforcement approach. First and foremost, an effective enforcement policy must focus on mitigating consumer harm. Therefore, Ofgem's first priority must be to ensure that the non-compliant behaviour is addressed. This requires active engagement between Ofgem and the business concerned. This may also mean that it will be necessary for Ofgem to assist businesses to understand Ofgem's expectations and the obligations and standards of compliance that are required. This will allow both parties to gain a better understanding of how an obligation could be interpreted at the outset of any enforcement action – rather than for issues of interpretation to be raised at the stage of the Statement of Case or Response. Such an approach would allow remedial steps to be taken much sooner, which is in the best interests of consumers.



There need not be a tension between a compliance-driven approach and the deterrence objective. Neither does working positively with businesses to achieve the best outcome for customers necessarily imply “capture”. Such an approach would not necessarily preclude Ofgem from ultimately taking a robust enforcement approach in response to the breach identified and delivering a credible deterrence overall.

From SSE’s own experience of the enforcement process, Ofgem’s current approach to enforcement has been excessively formalistic and conducted at “arms length”. The process has been lengthy and cumbersome as a result, with Ofgem’s clear focus being on preparing a case for prosecution rather than working with the licensee to agree remedial steps and achieve outcomes for consumers at an early stage. Accordingly, it appears that the current purpose of enforcement is to achieve a successful prosecution rather than addressing the infringement and then pursuing an appropriate, proportionate penalty.

Accordingly, it is SSE and SGN’s view that the goal of achieving a better outcome for customers should serve as the backdrop to this enforcement review. That should be the primary objective. One tool to achieve this objective is to influence a company’s behaviour through deterrence. However, Ofgem should not lose sight of the fact that this is a tool and not the objective itself. Furthermore, enforcement action should be proportionate and targeted where needed. This supports a harm-based approach, where enforcement activity is focused on areas where consumer harm is likely to be greatest. Such an approach is consistent with the Authority’s statutory duties.

Q1: Do you agree that this is the right vision for Ofgem’s enforcement work?

SSE and SGN do not disagree that the Vision as drafted should be part of Ofgem’s approach. However, this Vision is focused on an *approach* to achieving its primary objective, rather than the primary objective itself (achieving a better outcome for consumers).

SSE and SGN suggests that Ofgem’s Vision specify an output rather than input, and should be focused around protecting consumers by identifying and addressing failures by businesses to meet their obligations. These failures may ultimately be minimised through encouraging cultural change within regulated businesses. However, driving behavioural change is not enough. Ofgem’s Vision appears to be based on an assumption that the problem is solely due to a lack of compliance culture within regulated businesses – however, it should also be recognised that a deliberate failure to comply is extremely rare and that, more often than not, non-compliance will result due to administrative oversight and/or through a lack of understanding of the scope of the rules being applied.

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?



The Strategic Objectives are reflective of a strict deterrence approach. This looks to achieve a “*credible deterrence*” and “*ensuring visible and meaningful consequences*” for failure to comply. This approach therefore appears to be focused on the pursuit of high value prosecutions, rather than working with the industry to achieve early compliance and a better outcome for consumers.

The Strategic Objectives should reflect a more constructive approach between Ofgem and the industry, to recognise that protecting the consumer through encouraging and supporting compliant behaviour should be Ofgem’s primary objective. There is still room for a deterrence approach where this is warranted – however, this should follow only once Ofgem has actively engaged with the licensee to agree how the consumer’s best interests can be safeguarded. In the rare and unlikely event that remedial action cannot be agreed, Ofgem will be in a more informed position to consider whether a provisional order is necessary and will also have gained a better knowledge of the circumstances surrounding the non-compliance that could have otherwise been gained solely through Information Requests.

Therefore, SSE and SGN would recommend that Ofgem include the objectives of acting to promote compliance and minimising consumer harm and that these should take priority over Ofgem’s other proposed Strategic Objectives.

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

There is a cynicism that can be observed from Ofgem’s proposals regarding the intentions and motivations of energy companies. Ofgem appears to assume *mala fides*. For example, in Ofgem’s Vision, it is assumed that businesses currently do not put energy consumers first or act in line with their obligations. The Vision assumes that there is a current lack of a compliance culture, while the Strategic Objectives heavily hint that this can only be addressed through wielding a “big stick”. The proposals do not consider the possibility that businesses may genuinely want to work with Ofgem in order to achieve the best outcome for consumers and that businesses do not want to be in breach of their obligations. Some breaches may be inadvertent due to a lack of understanding of the rules. Thus, the opportunity for compliance-oriented engagement has not been included in Ofgem’s strategic approach, even though taking such an approach at the outset of any investigation is very likely to be in the best interests of customers.

There can also be observed a lack of self-awareness of Ofgem’s own role of promoting compliance. Ofgem plays an important part in this regard, first, at the outset, by ensuring that the policy intent and associated licence drafting of a regulatory provision is plain and has been clearly communicated and, second, through the identification of potential areas of weakness and addressing these by issuing clear guidance.



Decision-making for contested cases, and procedural secretariat

Q4: Do you agree with the proposals for an Enforcement Decision Panel and Secretariat to take decisions in contested enforcement cases?

SSE and SGN supports the introduction of greater impartiality and independence in decision making. We agree that the introduction of an Enforcement Decision Panel and Secretariat is a positive step.

Q5: Do you agree with the proposals for settlement decisions?

We broadly agree with the proposals for settlement decisions; however we query why such decisions would not be taken by the Enforcement Decision Panel. This would better ensure a consistent approach to settlements.

Oversight

Q6: Do you agree with the proposed arrangements for the Authority's oversight of the Panel's work?

We agree with the proposed arrangements for oversight.

SSE and SGN look forward to engaging further with Ofgem in relation to this topic.

Yours sincerely

A handwritten signature in black ink that reads 'Lesley Gray'.

Lesley Gray
Regulation Manager