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Consultation on Ofgem's Draft Enforcement Guidelines

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 revised enforcement guidelines. 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

Q.1. Do you agree with the proposed changes to our prioritisation criteria?

We support, in principle, Ofgem's proposed prioritisation criteria and welcome the additional clarity provided by the inclusion of an expanded range of factors Ofgem will consider when deciding whether to open a case.

A significant factor Ofgem should consider prior to opening a case is the extent to which it has reasonable grounds that a breach is or has occurred. We accept that extensive information gathering will form an integral part of an investigation once opened, however, as part of the initial inquiry phase it is important that sufficient grounds have been established prior to a case being opened. Furthermore, in the interests of fairness the evidence presented to the Authority when judging whether to open an investigation and use its statutory powers should be made available to the party concerned.

Given Ofgem's policy of making cases public, 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. Whilst we accept that assessing the strength of evidence forms part of Ofgem's prioritisation criteria, we consider it requires higher prominence in the decision making process particularly in the context of increased regulatory risks resulting from subjective interpretation of principles-based regulation.

Q.2. Is our approach to the range of alternative actions appropriate?

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.

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. In terms of transparency, we welcome the inclusion within the guidelines of examples of alternative actions Ofgem may take. However, we would welcome additional clarity on the decision-making process Ofgem will adopt in deciding which tool is appropriate.

Q.3. Do you agree with our proposals for making new cases public?

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 formal opening of enforcement cases.

In particular, we do not support the naming of the party at the outset of an investigation. As we have set out above, the resulting public perception that can arise can have significant detrimental impacts on the licensee in question, including reputational and brand damage, as well as adding to wider stakeholder perceptions of mistrust. We note that an argument for making public parties under investigation is *"to prompt other parties to consider whether they are complying with their obligations and encourage them to improve"*. However, this could be similarly achieved by making public details about the case and matters under investigation without the need to name the party involved. We would welcome additional clarity on what is deemed to constitute 'making cases public'.

Q.4. Do you agree with the proposed settlement process?

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 within its enforcement guidelines which provides a party with the option to seek resolution without the need for utilising significant resources and results in a reduced penalty than would otherwise be imposed if the matter is contested. We note that the levels of discount available at each settlement window is part of Ofgem's consultation on its financial penalties and consumer redress policy statement to which EDF Energy will be responding to shortly.

In terms of the proposed settlement process set out within the guidelines, we note that for settlement to occur the party must admit to the breach. We believe that parties should be provided with the ability to settle on a 'without prejudice' basis and settle on the basis of avoiding expending significant time, resource and costs etc rather than on an admittance of guilt. This arrangement could still be accompanied by an agreement not to appeal any penalty or consumer redress order.

In addition, the enforcement guidelines should facilitate the ability for partial settlement. It is possible that as a case proceeds through the information gathering stage, discreet non-compliances of regulations are identified by Ofgem. Under such a scenario there may be benefits for both the party and Ofgem to treat the non-compliances separately and provide the party with the option to settle on one element and continue to contest the other. This flexibility would allow for elements of what was originally part of a single case to be concluded earlier than if Ofgem was to continue to treat it as a single contested case and thereby allow any consumer redress to be delivered quicker.

Q.5 Do you agree with the proposed settlement windows?

We support in principle the introduction of settlement windows together with a sliding scale discount to be applied to a penalty amount. However, we are concerned with the timing of the first settlement window within the investigation process. The opening of the initial window follows the production by Ofgem of a summary statement of initial findings and a draft penalty statement and/or consumer redress order i.e. at no point during this window will an initial statement on the case findings and alleged breaches be produced by Ofgem. Further, we note that following the production of the draft statement there is a 'reasonable period' for discussions to take place and for settlement to be agreed. However, it is unclear as to whether this period will allow for appropriate discussions to take place and documentation to be produced in order reach a shared acceptance of the scope, nature and severity of the breaches (as indicated in para 5.20).

We are therefore concerned that in practice it may be difficult for parties to sensibly commit to settlement during the first settlement window without an initial statement of case being produced. Consequently, we believe the timing of the initial window should be reviewed.

Q.6. Do you have any views on how we propose to implement the new decision-making framework?

We welcome the introduction of arrangements that seek to introduce greater independence and consistency in the contested decision making process and therefore support the creation of an Enforcement Decision Panel supported by a Secretariat independent of the case team. Despite the need for the Authority to have oversight over the operation of the enforcement arrangements given its statutory role, we welcome acknowledgement within the guidelines that the Authority will not seek to influence the outcome of particular matters or change any decision by the Panel. However, we note that the Authority may issue further guidance to the Panel to inform future determinations. We believe any such guidance should be subject to public consultation.

Q.7. Are these proposals an effective way to allow stakeholders visibility of our timetables and performance?

It should be an objective that Ofgem's enforcement processes are undertaken in a timely and cost effective manner. We therefore support the introduction of any measures that will improve the efficiency and the transparency of the enforcement process. The sharing of a provisional timeline for the key steps of an investigation with a party is welcome as it will facilitate effective case management. We also support the greater transparency that will be provided by the annual publication of case metrics.

EDF Energy
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