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Sent via e-mail: enforcementguidelines@ofgem.gov.uk

23rd May 2014

Response to Ofgem's consultation: Draft enforcement guidelines

Dear Anna,

I am pleased to attach Energy UK's response to the above consultation. It is not confidential.

If you have any questions, please do not hesitate to contact me on 020 7747 2963 or daisy.cross@energy-uk.org.uk.

Yours sincerely

Daisy Cross
Policy and External Relations Executive

Ofgem's draft enforcement guidelines

Energy UK response

23 May 2014

1. Introduction

- 1.1. Energy UK is the trade association for the energy industry. We represent over 80 members made up of generators and gas and electricity suppliers of all kinds and sizes as well as other businesses operating in the energy industry. Together our members generate more than 90 per cent of the UK's total electricity output, supplying more than 26 million homes and investing in 2012 more than £11 billion in the British economy.
- 1.2. This is a high-level industry view; Energy UK's members may hold different views on particular issues. We would be happy to discuss any of the points made in further detail with Ofgem or any other interested party if this is considered to be beneficial.

2. Executive summary

- 2.1. Energy UK welcomes Ofgem's review of its enforcement and compliance process, and the opportunity to respond to this consultation. As highlighted in previous responses to Ofgem's consultation on its enforcement vision, objective and decision makers, Energy UK feels the review is timely and necessary; timely in mind of regulatory changes such as Ofgem's introduction of Standards of Conduct following the Retail Market Review and acquisition of new redress powers under the Energy Bill; necessary in order to improve the effectiveness of Ofgem's enforcement process.
- 2.2. Energy UK has considered this response against the backdrop of Ofgem's wider work around compliance, redress and financial penalties. In this response Energy UK refers to Ofgem's associated consultation on its policy statement on financial penalties and consumer redress. Energy UK will also provide a separate, formal response to this consultation, and to Ofgem's open letter on regulatory compliance.

3. Responses to individual consultation questions

- 3.1. *Question 1: Do you agree with the proposed changes to our prioritisation criteria?*
- 3.2. Energy UK is broadly supportive of Ofgem's prioritisation criteria.
- 3.3. Point 1 of the prioritisation criteria refers to Ofgem's 'annual strategic priorities'. Energy UK looks forward to commenting on Ofgem's Enforcement Priorities once these are published.
- 3.4. Point 8 relates to prioritisation where a series of concerns around a potential breach have been raised over time. Energy UK believes that this matter falls under point 10 - which relates to gathering of evidence - and suggests that Ofgem rationalises its list by incorporating point 8 within point 10.
- 3.5. As a general point, Energy UK understands that it is efficient for Ofgem to undertake the majority of its evidence gathering after opening a case. However, we would like to stress the importance of Ofgem assimilating sufficient evidence of a potential breach before it opens a case, and remind Ofgem that damaging and irreversible reputational effects could arise from a case being opened, regardless of whether or not a genuine breach is ultimately uncovered. In practice, early evidence presented in certain cases may suggest that a case need not be progressed to prioritisation stage.

- 3.6. *Question 2: Is our approach to the range of alternative actions appropriate?*
- 3.7. Energy UK is broadly supportive of the range of alternative actions which could be considered by Ofgem before - or in place of - proceeding to the use of its statutory enforcement powers.
- 3.8. For clarity, it is Energy UK's understanding that the list detailed in the consultation document is not exhaustive.
- 3.9. *Question 3: Do you agree with our proposals for making new cases public?*
- 3.10. Ofgem's move towards principles-based regulation will mean that interpretation around the licence will evolve. In its recent letter on regulatory compliance¹, Ofgem promises to 'engage with suppliers and where relevant share insight' to promote effective compliance with Standards of Conduct as part of a general commitment to work collaboratively with stakeholders.
- 3.11. In light of this, Energy UK seeks clarity from Ofgem around what constitutes a case becoming 'open' and therefore eligible for publication. For instance, we would not expect Ofgem to publish a letter it has addressed to a supplier asking for an initial discussion on a potential compliance issue.
- 3.12. Ofgem has not stated in its guidelines whether or not it plans to name individual suppliers when it publishes cases. Energy UK asks for clarity on this point, and – if Ofgem does plan to name suppliers in these publications - asks Ofgem to share its rationale for doing so. If Ofgem's rationale for sharing is to highlight potentially concerning practices to other companies as soon as they occur, Energy UK considers that this could be achieved just as well by publishing the case but withholding the name of the company.
- 3.13. Energy UK wishes to understand whether Ofgem intends to consult with suppliers on statements and press releases which are issued with the objective of making cases public.
- 3.14. *Question 4: Do you agree with the proposed settlement process?*
- 3.15. Energy UK understands that, in the past, some cases have been settled without company fault or breach being established. In its consultation Ofgem states that 'to settle a case, a company under investigation must be prepared to admit to the breaches that have occurred'. Energy UK would like to see an option retained which allows companies to settle a case without having to accept the judgement that a breach has occurred. This would ensure that the final judgement in such cases reflects the fact that a breach has not been formally established. Could Ofgem, for instance, include settlement without the finding of a breach as a designated alternative action under 3.25 in its draft enforcement guidelines?
- 3.16. Ofgem does not refer to partial settlement - and its treatment of this scenario - in its draft enforcement guidelines. Energy UK wishes to understand whether partial settlement is possible under the guidelines, and how this would work in practice (would the proposed settlement windows apply, and how would this circumstance be reflected in the case closure notification, for instance?). Partial settlement could bring cases to a conclusion earlier than if decisions are contested. Therefore, any redress to consumers would be delivered quicker under a partial settlement arrangement.
- 3.17. *Question 5: Do you agree with the proposed settlement windows?*
- 3.18. In its recent consultation letter on financial penalties and consumer redress², Ofgem states that discounts will only be applied to the penal element of its fines, rather than to both the penal and

¹ <https://www.ofgem.gov.uk/ofgem-publications/86894/openletteronregulatorycompliance28march2014.pdf>

² <https://www.ofgem.gov.uk/ofgem-publications/86948/penaltiesandredresspolicystatementconsultationletter31march2014.pdf>

redress elements. Energy UK agrees that settlement discounts should not apply to use of the statutory redress power, as this would not fully compensate customers affected, and would therefore fail to reflect fair redress to the appropriate group of customers.

- 3.19. Energy UK believes that discounts Ofgem applies should encompass both voluntary and mandated parts of a financial penalty. This would ensure that the full penalty sum is subject to discount in every case (guaranteeing consistency and fairness across all cases), and that Ofgem's intent to incentivise swift settlement is reflected. Energy UK asks Ofgem to clearly state that this is the case in its guidelines.
- 3.20. *Question 6: Do you have any views on how we propose to implement the new decision-making framework?*
- 3.21. Our Members feel that Ofgem's proposals are a step in the right direction regarding the decision-making Panel's independence from other parts of Ofgem. However, the construction of the Panel is such that it is not able to challenge Ofgem's own adherence to its enforcement guidelines.
- 3.22. *Question 7: Are these proposals an effective way to allow stakeholders visibility of our timetables and performance?*
- 3.23. Members would find Ofgem's planned introduction of provisional timelines for how an investigation is likely to progress useful, and are supportive of Ofgem's planned publication of relevant data on case handling and the settlement process.
- 3.24. Members would like to understand whether the timeline proposed would refer to the formal investigation timeline only, or whether the full process of initial Ofgem inquiries through to closure will be covered. This would aid resource planning.
- 3.25. Energy UK considers that timelines will likely require updating at intervals to reflect the indeterminable nature of the enforcement processes.