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Dear Andy,

CONSULTATION ON REVISED ENFORCEMENT GUIDELINES

Thank you for the opportunity to respond to the above consultation, seeking views on the proposed revisions to Ofgem's Enforcement Guidelines. This response is submitted on behalf of all ScottishPower licensees.

We welcome the approach taken by Ofgem in reviewing its enforcement approach and think that the draft enforcement guidelines are helpful in answering many of the points that we have previously raised. We are particularly pleased to see that express consideration being given to alternative actions to formal enforcement, both before and after an enforcement case is launched. We think that this approach provides potential for the greatest benefit to consumers, by allowing Ofgem to take a more flexible approach to enforcement, where appropriate. We do have some further comments on the specifics of the proposed new guidelines, the main ones of which are as follows:

- **Settlement Process.** We welcome the introduction of specific detail on the operation of a settlement process within the current enforcement framework, which provides a helpful level of information around how the process would work in practice. However, settlement does not appear to apply in cases where there is genuine disagreement about whether a breach has taken place (eg as a result of differing legal interpretations) but the parties nevertheless want to take agreed actions and move on (possibly with a change in the regulations going forward), since the current settlement process requires that suppliers must always accept a breach. We think that these cases may be intended to fall within the category of alternative action after the opening of a case, but the guidelines are not clear on this point and we request that they are refined accordingly.
- **Settlement Windows.** While the provision for three settlement windows provides useful clarity to licensees on the scale of penalties to be agreed in the settlement window, we think that there is a strong case to be made for extending the length of the first settlement window. We note that the reasonable period referred to in the Early Settlement Window is likely to be 28 days from the date that the draft penalty notice is served. We think that this period of time is likely to be too short to give the licensee adequate time to review the implications, hold internal discussions, complete settlement negotiations, and have the outcome ratified by the board of the licensee. It is also much shorter than the likely length of the middle settlement window. We think it would be significantly better if the early settlement window were at least 56 days in practice.

- **Publication of new cases.** While we welcome increased transparency in the enforcement process, we would like to see further consideration being given to the detail around: i) the manner of publication; and ii) when cases will be made public where alternative action is sought as an alternative to formal investigation.

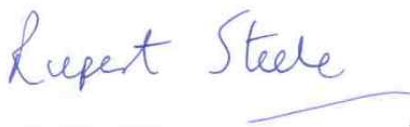
In terms of the manner of publication, we can see benefits in Ofgem defining a standard approach to this in the guidelines. In recent years the approach to announcing has varied, from a statement made by Ofgem on its website through to a high profile media announcement. High profile media announcements could run the risk of prejudicing the investigation in the early stages and may damage consumer confidence, both in the affected licensee(s) and in the market as a whole, especially if the final outcome does not match Ofgem's initial expectations. Unless the issue under investigation therefore is one with a particularly harmful impact on consumers, we would recommend that Ofgem's approach should be to publish a website statement accompanied by a routine and low key factual press notice. There should be a general presumption against further media activity on the opening of a case.

We think that the guidelines would benefit from clarity around the approach to publication in cases where alternative action is used before an enforcement case has been opened. While the flowchart on page 70 of the guidelines suggests that alternative actions would only be published where a case had been opened, Ofgem's open letter may suggest that alternative actions could be published without a case having been opened. We think that the approach suggested by the flowchart in the guidelines is the right one. Details of alternative actions pre-case opening could still be made available to relevant licensees on an anonymous basis as part of Ofgem's compliance workstream.

Finally, we would like to see further clarity in the guidelines that self-reporting would normally count in favour of a licensee. Currently the first sentence of paragraph 3.5 of the guidelines implies that this *may* be taken into account when considering what action to take (though the next sentence seems stronger). This language is uncertain and creates little incentive on licensees to self-report, which may be counter to Ofgem's twin aims of transparency and encouraging openness from licensees in the event of an error or other non-compliance. We expect that, in reality, self-reporting will mitigate the extent of any enforcement action that may be necessary in the majority of cases. It would therefore be helpful if Ofgem could replace "may" with "will normally" and in the second sentence make clear that self-reporting would tend to reduce the likelihood that a penalty would be needed as well as the quantum. It would also be useful to set out any circumstances in which self-reporting would not be considered a mitigating factor.

The Annex to this letter provides responses to the specific questions in the consultation letter. If you wish to discuss any points in our response, please contact me, or Pamela Mowat on 0141 568 3207.

Yours sincerely,



Rupert Steele
Director of Regulation

**CONSULTATION ON REVISED ENFORCEMENT GUIDELINES - SCOTTISHPOWER
CONSULTATION RESPONSE**

Opening investigations and alternative actions

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

We agree with the use of the prioritisation criteria generally to decide whether or not it is appropriate to open a case in a particular instance. We think it is appropriate that Ofgem will take account of Better Regulation principles in assessing against its prioritisation criteria.

In deciding whether Ofgem has the power to take action and is best placed to act, we would expect Ofgem to set out the test which it must meet and its reasons for determining that this test has been met. It would be helpful for the party subject to that case to have sight of that decision and the reasoning behind it. In cases where Ofgem has concurrent power to act, it is not currently clear how that decision will be reached and by whom. It would be helpful to have a standard test included in paragraph 3.35 of the guidelines.

We agree that the most serious potential breaches should be prioritised and therefore the priority criteria which Ofgem has set out are welcome. As the annual strategic priorities for enforcement will form a key consideration in prioritising enforcement action, we welcome clarity and transparency as to what these will be, and how they will be updated. We understand that the first set of priorities will be announced by autumn 2014, although it is not clear if Ofgem intends to consult on the proposed priorities prior to this. We would welcome the opportunity to provide comments on Ofgem's proposals. Beyond this, it would also be helpful to understand how any changes to these priorities in subsequent years would impact on an existing long running investigation (for example if the change in priorities may mean that the original rationale for opening that case may no longer be valid).

In relation to priority 2, Ofgem will consider the harm or potential harm arising from the breach. We understand this is relation to consumers and to competition. However, we are not clear as to what is meant by the harm to Ofgem's ability to regulate effectively. We would welcome some clarity as to how Ofgem would see this working in practice.

We fully support Ofgem's approach to pursuing general policy change to address the harm identified in preference to opening an enforcement action in certain cases. We think that in many cases this would offer the best benefits to consumers in general, as well as those who may be specifically affected by the case, and it would also offer better opportunities to build customer trust.

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

Ofgem's approach to the range of alternative actions is both appropriate and welcome. We think that it will benefit consumers if Ofgem is able to work with licensees to find alternative ways to address concerns rather than opening an enforcement case. Further, once an enforcement case is opened, the alternative actions provide opportunities for Ofgem and licensees to resolve potential breaches quickly and effectively. The benefits include quicker resolution and avoiding impacting consumer trust in the industry.

We continue to believe that it would be helpful for licensees to have visibility of complaints and other information that Ofgem considers may be worthy of investigation, but which, for reasons of priority or where alternative action has been found, Ofgem has elected not to

investigate further for the time being. Provision of such information to relevant licensees (without naming the affected licensee), along with any supporting evidence, would enable other licensees to investigate their own approach and take any necessary corrective action without the need for Ofgem having to enforce such action.

Making cases public

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

We understand Ofgem's rationale for publishing new enforcement cases and we agree that it is helpful for all stakeholders for cases to be made public.

Publication of enforcement cases and any associated actions or other information can:

1. Ensure the transparency of Ofgem's ongoing work;
2. Help consumers or companies understand if they may have been affected by a particular issue; and
3. Allow other licensed parties the opportunity to learn from Ofgem's work and rectify issues or amend their compliance approach accordingly.

We are therefore broadly supportive of the proposals to make new cases public. We appreciate the reassurance that findings of no breach will be published equally, in the same way as those of a breach.

However, there are two key considerations which remain to be addressed within the guidelines:

1. The manner of publication; and
2. Clarity on publication in cases where alternative action has been taken which avoids the need for an enforcement case to be launched.

The manner of publication

When a new enforcement case is announced, this can have a strong impact on consumer confidence. The manner in which this is announced will particularly influence this impact.

In recent years the approach to announcing has varied, from a statement made by Ofgem on its website through to a high profile media announcement. High profile media announcements could run the risk of prejudicing the investigation in the early stages and may damage consumer confidence, both in the affected licensee(s) and in the market as a whole, especially if the final outcome does not match Ofgem's initial expectations. Unless the issue under investigation therefore is one with a particularly harmful impact on consumers, we would recommend that Ofgem's approach should be to publish a website statement accompanied by a routine and low key factual press notice. There should be a general presumption against further media activity on the opening of an enforcement case.

We think that a sensible standard approach would be the publication of an online web statement, accompanied by a routine press notice. We would like to see this approach reflected in the guidelines.

Cases where alternative action results in no enforcement case

The open letter seems to suggest that, in cases where no case is launched due to suitable alternative action being taken, Ofgem may still publish the details of this in the same way as

if a formal case is launched. We do not see this within the guidelines (and Ofgem's flow chart also seems to suggest this is not the intention) so would appreciate clarification on this point.

We think that the approach suggested by the flowchart in the guidelines is the right one. As a beneficial part of Ofgem's compliance workstream details of such cases could still be made available to relevant licensees on an anonymous basis.

We believe that the approaches suggested above will address the need for transparency (and in particular each of the benefits of this outlined above) while mitigating the risks to individual licensees and unnecessary damage to the reputation of the industry more generally (with the attendant risk to consumer confidence).

Settlement procedures

4) Do you agree with the proposed settlement process?

We welcome the detail on the proposed settlement process which is useful in helping licensees understand the approach to, and opportunities for, early resolution of cases. Further awareness of the requirements of settlement and the consequences of settling is helpful and we believe that the proposed process addresses many of the gaps identified in our previous response (date 29 February 2012).

There appears to be no opportunity for settlement in cases where there is genuine disagreement about whether a breach has taken place (eg as a result of differing legal interpretations) but where the parties nevertheless want to take agreed actions and move on (possibly with a change in the regulations going forward). This is because the current process requires that suppliers must always accept a breach in order to settle a case. We think that these cases may be intended to fall within the category of alternative action after the opening of a case, but the guidelines are not clear on this point and we request that they are refined accordingly. For example, neither of the first two bullets of section 7.3 (closing a case) seems to quite fit the circumstances.

We recognise that, the sooner the licensee makes an offer to enter into settlement negotiations, the lower any subsequent penalty is likely to be. There is a natural barrier to settlement discussions very early in the investigation process, as Ofgem will naturally need time to establish its concerns and the evidence of any alleged breaches. However, at the same time, it will not always be clear to licensees at what point it is appropriate to start to engage in settlement discussions. We think it would be helpful for licensees to have an indication of how soon in the case Ofgem would expect to inform the licensee of its concerns and the implications for enforcement action.

Finally, we assume that the reference to the Authority's statutory obligation to consult on proposed penalties in paragraph 5.6 means that Ofgem will intend to consult on an agreed settlement in every case. It would be helpful if the final guidelines could confirm this, or otherwise set out the types of settlement cases in which consultation may not be necessary.

5) Do you agree with the proposed settlement windows?

The proposed settlement windows are helpful in creating more definition around the settlement process and we think that this will give licensees greater clarity on the benefits of early settlement. This also helps to create certainty that there will be equal treatment of settlement for licensees, assuming that they respond to investigations on a similar basis.

We do think that there is a strong case to be made for extending the length of the first settlement window. We note that the reasonable period referred to in the Early Settlement Window is likely to be 28 days from the date that the draft penalty notice is provided. We think that this period of time is likely to be too short to give the licensee adequate time to review the implications, conduct internal discussions, complete settlement negotiations, and have the outcome formally ratified by the board of the licensee. We think it would be a significant improvement for Ofgem to agree that the early settlement window will be at least 56 days in practice.

As currently formulated, the early settlement window looks disproportionately short compared to the middle one, given that the drawing up and consultation on a statement of case is likely to be a lengthy process.

It would also be helpful for Ofgem to clarify if and how the proposed settlement windows relate to the earlier stages of any enforcement case. In paragraph 5.7 the guidelines state that 'settlement will result in a lower penalty than would likely be imposed if the matters were contested, and the case will be dealt with more quickly.' In paragraph 5.11, Ofgem seems to encourage early requests for settlement from licensees. However, the settlement windows set out in paragraph 5.14 suggest that settlement will only really be considered – and therefore beneficial for the licensee – once Ofgem's investigation has reached the a stage where the alleged breaches have been defined sufficiently to enable a draft penalty notice and press release to be prepared.

We believe that the settlement windows and settlement framework need to fit together with the process for deciding on the scale of any penalty. Ofgem considers that the co-operation of the licensee throughout the investigation is one of the factors that will mitigate the scale of any penalty that is proposed. We assume that this is before any settlement discount is considered. Specifically it would help for Ofgem to confirm that, by offering to enter into settlement discussions at any earlier date (and otherwise fully co-operating with Ofgem), the licensee will be likely to benefit from a lower level of penalty that would be imposed otherwise. It would be this lower level of penalty that would subsequently be eligible for the early window settlement discount.

Similarly, we would expect that self-reporting would mitigate the extent of any enforcement activity in most, if not all, cases. It would be helpful if Ofgem could clarify any circumstances in which this would not be the case.

Beyond this, we consider that there will be cases where Ofgem should be willing to agree that no financial penalty will be imposed, in order to resolve a case sooner. It is unclear whether this is envisaged by the current draft guidelines as an "alternative action" outcome after the case is opened. Confirmation of this approach, along with details around when this might be utilised would be a welcome addition to the draft guidelines.

Decision-making process

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

It seems to us that the new decision-making framework will enhance the current enforcement process and will create a further level of independence between the case team and the outcome of the case.

We note that the Authority may issue guidance to the Enforcement Decision Panel (the Panel) to inform its determinations in future cases. We think it is important that this guidance will be published, to help to underpin that independence and to maintain the transparency of the enforcement process more generally.

We assume that any restrictions on a licensed party contacting the Panel will apply equally to the Ofgem case team, to ensure that the enforcement case is given a fair and independent hearing. We would also expect that the licensee in question would be provided with the same written material and representations regarding the investigation as provided to the Panel by the case team. This is not explicit in the draft guidelines and we believe that it should be.

Finally, while it is assumed that this is the case, we think that it should be clear within paragraph 6.27 that the Panel will decide the case *on the balance of the evidence presented to it*.

Accounting for our enforcement activities

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

Yes. The new procedures are likely to bring more certainty to an individual licensee facing enforcement action and to licensees more generally on how the enforcement process will operate.

We found the previous enforcement conference to be very useful in discussing Ofgem's proposed approach and offering stakeholders the chance to share views and experiences of enforcement. We would value the opportunity to attend future such conferences.

We are interested in the concept of the enforcement balanced scorecard and how the metrics around this will be defined. As each enforcement case will differ depending on its nature, it will be difficult to draw accurate conclusions on the performance of the enforcement process in individual cases, or perhaps as a whole, without appropriate context. The presentation of the information and the definition of the underlying metrics will be critical. We would encourage Ofgem to consult on its detailed proposals once developed.

However, we would add a word of caution to this approach – effective enforcement should be about ensuring the optimum outcomes for competition and for consumers in every case. Indeed, arguably the best results on the balanced scorecard would be where no cases have been opened, as a result of Ofgem's compliance work and the clarity of licensees' regulatory obligations. We should try to resist measuring performance of enforcement against targets for the number of cases opened, the value of penalties obtained and the time taken to manage these, as this will create artificial objectives which will obscure the true benefits of a robust enforcement regime, but which in reality could mean that compliance is not working effectively.

ScottishPower
May 2014