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Dear Mr McFaul

Consultation on revised enforcement guidelines

This is the response of National Grid plc to Ofgem's consultation on its revised enforcement guidelines. National Grid owns and operates the high voltage electricity transmission system in England and Wales and, as National Electricity Transmission System Operator (NETSO), operates the Scottish high voltage and offshore transmission system. National Grid also owns and operates the gas transmission system throughout Great Britain and through our low pressure gas distribution business we distribute gas in the heart of England to approximately eleven million offices, schools and homes. National Grid also has interests in Great Britain in gas metering, gas storage, LNG importation, electricity interconnectors and carbon capture and storage.

This response is made on behalf of all National Grid's regulated businesses in Great Britain. In it, we set out our detailed comments about the proposed enforcement guidelines and then deal in Appendix A with the specific questions raised by Ofgem's consultation.

Detailed comments

Paragraph 1.5: National Grid is wholly supportive of a financial penalty being reasonable in all the circumstances of the case. However, there is no mention of consumer redress orders also being reasonable in all circumstances of a case. Please would Ofgem include a statement that it will act reasonably in imposing a consumer redress order, especially when taking into account the administrative costs of any redress scheme. Furthermore, we consider that, while it may be not be appropriate to allow a discount to the penal element of a financial penalty to take account of the administrative costs of any redress scheme, the Authority should take these into account in to ensure that the overall financial burden of a redress scheme and penalty combined to not lead to disproportionate financial consequences for the subject of the enforcement action.

Paragraph 2.2: Please see our comments in relation to Ofgem's strategic objectives in its enforcement work made in the context of its recent consultation on its draft Enforcement Guidelines.

Paragraph 2.3: We query whether "fair outcomes for consumers" are relevant to penalties policy: clearly this is relevant to redress issues, but we consider that penalties should be considered separately and the ends of justice (rather than fairness) served in relation to the imposition of fairness.

Paragraphs 2.4 and 2.5: We consider that the thrusts of these paragraphs are very similar: can they be more clearly distinguished or should they be conflated? Given that compliance costs are disregarded in the context of setting a redress scheme, should there be some mention of these here (subject to the comment above about the need to consider these to ensure the overall package of measures is not disproportionate).

Paragraph 2.6: National Grid understands the approach Ofgem is taking in determining the value of financial penalties. However, National Grid notes the statutory obligation upon Ofgem that the amount of any financial penalty must be reasonable in all the circumstances of the case (see paragraphs 1.5, 3.3 and 5.1) and suggests that this is also referred to in this para to ensure all appropriate considerations are taken into account.

Paragraph 2.7: We consider that the reference to financial penalties and consumer redress requirements being targeted and proportionate is, without more, largely meaningless: further clarification is required here.

Paragraph 3.2: We consider that the question of whether any consumers have suffered loss or damage as a result of the contravention should also be relevant to the level of any fine, given Ofgem's primary duties under the Acts.

Paragraph 3.5: National Grid notes that the criteria and factors listed in this paragraph are not exhaustive. It would be helpful if Ofgem could explain in what circumstances it may consider other criteria and factors and what these might be.

Paragraph 4.2: While the minor nature of an infringement may indicate a penalty is not appropriate. Indeed, if an infringement is truly minor, it begs the question why enforcement action had been taken in such a case.

Paragraph 4.3: This statement is unclear: perhaps an example might be given to illustrate the kinds of circumstances in which this consideration might be applicable?

Paragraph 5.2: National Grid notes the provisions of this paragraph but considers that reference should also be made to the requirement upon the Authority to ensure that financial penalties and consumer redress orders are targeted and proportionate.

Paragraph 5.3: National Grid notes the two elements of an amount payable by a regulated person. However, it would be helpful if Ofgem would include confirmation in this paragraph that there is no risk of a regulated person being penalised twice as a result.

Paragraph 5.10: It is not clear what the Authority means by redress being "wholly impracticable" – does it mean that it is impossible to identify the parties that have suffered loss or does it imply that some sort of cost/benefit analysis will be applied to determine whether a redress scheme be put in place (or both). See comments on paragraph 6.4 below.

Paragraph 5.11: It appears that if adequate redress is being provided then no further redress should be put in place, otherwise injured parties will be over compensated and there will be no incentive on licensees to put in place adequate voluntary schemes.

Paragraph 5.18 (9th bullet) and 5.19 (last bullet): National Grid would welcome some further explanation of how full cooperation with Ofgem's investigation could be achieved. It considers that this would help both Ofgem and regulated persons to understand Ofgem's expectations more fully in the event of an investigation.

Paragraphs 5.21 to 5.23: National Grid notes the provisions relating to adjustments to a penalty to ensure deterrence and reasonableness. Four examples of when Ofgem may adjust the penalty to achieve deterrence are provided but no examples are provided of when Ofgem may adjust a penalty to ensure reasonableness. National Grid would find these additional examples helpful to achieve visibility of how Ofgem's statutory obligation to act reasonably will impact upon the level of penalty which it imposes and whether any adjustments for reasonableness will impact the penal element of both financial penalties and consumer redress orders.

Paragraph 5.21/generally: National Grid notes the importance which Ofgem attaches to deterrence and supports this. In order to provide greater clarity about how Ofgem will approach its attempts to deter infringements, National Grid would find it helpful to understand how Ofgem will measure its impact upon deterrence and determine how Ofgem will quantify what level a penalty should be set at in order to achieve deterrence.

Paragraph 5.24: Even though it may not be prepared to take redress implementation costs into account when setting penalties, it appears that the Authority should have regard to these at least when reviewing the overall reasonableness of the redress/penalty package.

Paragraph 5.26: National Grid notes that the settlement discounts will only apply to the penal element of a financial liability and not to the values attached to gain or detriment. This distinction may operate against achieving settlement in certain cases because the financial benefits for the regulated person which are achieved by settlement may not be sufficient, particularly in cases, for example, where the value attaching to the gain or detriment is significant and the penal element is comparatively low. This distinction could discourage settlement.

Paragraph 5.28: These discounts for settlement appear relatively low and may not be sufficient to encourage early settlement of cases, particularly given that they will only apply to the penal element of the penalty and not the total financial liability which may be imposed upon a regulated person. In particular, they look low in comparison to discounts potentially available in competition cases.

Paragraph 6.4: National Grid has concerns about this because it (like other network operators) does not hold end customers' details. Ofgem should, therefore consider the capability of network licensees to administer any compensation orders as, typically they neither have access to individual consumer details, nor large resources to manage customer interfaces. This is particularly true of Transmission networks: some alternative less complex approach needs to be identified.

Paragraph 6.5: National Grid is concerned by this statement as it suggests that even if Ofgem cannot demonstrate any detriment to consumers, a consumer redress order may be payable (despite the example provided in 6.6). This could well impact National Grid because it does not have a direct relationship with consumers. Furthermore, it does not appear appropriate to "compensate" the "wrong" consumers – this is surely properly addressed by a penalty rather than by giving a windfall to consumers who have suffered no loss.

Paragraph 6.7: It is not clear why the Authority may impose a consumer redress order where the regulated person may have derived a gain from the contravention or failure rather than focussing on the consumer detriment. It is understood that consumer redress orders are designed to compensate consumers for detriment they have suffered rather than gains made by regulated persons. A financial penalty would be more appropriate in these circumstances.

Paragraph 6.9: The sentences in this paragraph appear to contradict each other. Further clarity would be welcomed about which sentence is main one.

Paragraph 7.2: Please provide clarification about what "other ways" are envisaged by Ofgem in these circumstances.

Paragraph 7.5: National Grid had understood that consumers would be compensated for any detriment suffered. Please would Ofgem therefore clarify in what circumstances such payments may be made to consumers not directly affected by a contravention. As stated above, it appears strange to give windfall gains to consumers who have suffered no loss – a payment to charity or penalty seems more appropriate here.

Paragraph 8.2: National Grid welcomes Ofgem's confirmation that it does not expect regulated persons to compensate individual consumers twice. See also the comment on paragraph 5.11 above.

Paragraph 8.5: National Grid agrees that the costs should be met by the regulated person provided they are not unduly onerous, for example, where consumer details are not held by the regulated person. It is also of interest that Ofgem has applied many of the same provisions to imposing consumer redress powers as it has to financial penalties. It would be helpful if more clarity were provided as to how this will work in practice. In particular, as commented in relation to paragraph 5.24 above, National Grid considers that the overall cost of the remedies package should be considered in determining whether it is proportionate overall.

We hope that Ofgem finds these comments helpful in finalising the Enforcement Guidelines. However, if there is anything in our response that you would like to discuss further, please do not hesitate to contact James Wynn Evans (01926 655448), james.wynn-evans@nationalgrid.com.

Yours sincerely

[By e-mail]

Paul Whittaker
UK Director of Regulation

Appendix A – responses to specific questions

Q 1: Are these objectives appropriate?

Please see our comments on paragraph 2.3 of the consultation.

Q2: Is the proposed process for determining the amount of penalties and/or redress appropriate?

Please see our comments on paragraphs 5.3 to 5.28 above.

Q3: Do you agree with the proposed factors that may aggravator mitigate the amounts of a penalty or redress payment?

Please see our comments on paragraph 5.18 and 5.19 above.

Q4: Do you agree with the proposed settlement percentage discounts in cases under the Gas Act or Electricity Act.

Please see our comments on paragraph 5.28 above.

Q5: Do you agree with the proposed policy on determining who receives payments where consumer redress powers are used?

Please see our comments on paragraphs 6.7 and 7.5 above.

Q6: Are there any other potential consumer redress requirements that we should specifically refer to in section 7 of the policy statement>

Please see our comments on paragraph 7.5 above.

Q7: Do you agree with the proposed approach to the treatment of detriment?

Please see our comments on paragraph 6.5 and 6.7 above.

Q8: Should administrative costs be borne by the company in addition to any compensation or other payments that may be required?

Please see our comments on paragraphs 5.24 and 8.5 above.