

18<sup>th</sup> September 2017

Andrew Wright  
Senior Partner, Energy Systems  
Ofgem  
9 Millbank  
London  
SW1P 3GE  
[connections@ofgem.gov.uk](mailto:connections@ofgem.gov.uk)

Dear Andrew,

### **Consultation on penalties for the DNO's under the Incentive on Connections Engagement**

1. Please find below the response from Energy Networks Association (ENA) to the above consultation in which Ofgem seeks views on the performance of the electricity Distribution Network Operators (DNOs) on specific areas of the Incentive on Connections Engagement (ICE).
2. ENA welcomes the opportunity to respond to the consultation. This response sets out a number of concerns raised by its electricity network members about the consultation document and in particular the process that Ofgem is following in assessing whether to apply ICE penalties. Our DNO members will also respond individually to the consultation.

### **About ENA and our members**

3. ENA represents the “wires and pipes” transmission and distribution network operators for gas and electricity in the UK and Ireland. This response comes on behalf of our Electricity DNO members who control and maintain the critical national infrastructure that delivers vital services into customers’ homes and businesses.

### **General concerns**

4. Our members have an overarching concern that as drafted the consultation is unclear and provides an incomplete analysis of the DNOs’ performance, despite it reaching initial conclusions on penalty amounts. The consultation does not give sufficient weight to the many positive comments made about the DNOs and makes selective references to specific stakeholder comments out of context or that are subjective in nature. It also makes reference to a number of market segments that are not covered within the DNOs’ ICE work plans. Without suitable qualification, this could lead to overly negative perceptions of a particular DNO’s performance and influence stakeholder responses to the consultation. At worst the consultation could

be construed in a way that potentially introduces bias, which is a concern in Ofgem coming to any decision.

### Process concerns

5. Members have also raised concerns about the process applied in evaluating DNOs' performance against their plans and the tone and perceived direction of the narrative in the consultation. Whilst we believe that the consultation is intended to gather further stakeholder feedback on specific instances of their customer experience of the connections process, including their interactions with the DNOs, this will be the first opportunity to present evidence provided to DNOs, yet the title and several references throughout the consultation document clearly suggest this is a '*minded to apply penalties*' position.
6. The use of terms such as "*consultation on penalties*" perhaps suggests that this is the consultation referred to in paragraph 5.1(c) of Ofgem's ICE Guidance document (headed 'Penalty consultation'), whereas that stage has not been reached yet and may never be. Therefore we believe this may cause confusion for stakeholders reviewing this consultation. Stakeholders may not realise that Ofgem is still at the stage in the process referred to in the second paragraph of 5.1(b) (headed 'Assess ICE submissions against minimum criteria') under which Ofgem has opted to gather more information to help determine whether the minimum criteria have been met. Only if Ofgem finds that the minimum criteria have not been met is it appropriate for Ofgem to consult on penalties.
7. We believe this creates a risk of 'leading' stakeholder feedback, which is heightened by the absence of DNOs' responses to the specific issues set out in the consultation document and the stakeholder comments used. This could have been avoided by providing DNOs with the opportunity to respond to issues and criticisms raised by stakeholders, as provided for in Section 5.1(b) of the Ofgem Guidance Document, ahead of the consultation. This would have enabled Ofgem to better test their validity ahead of further consultation and ensure decisions are fully informed. It is extremely disappointing that Ofgem has chosen not to exercise the options available. Had it done so, it would have provided a more comprehensive and balanced evidence base to support its decision on whether to apply penalties in the next stage of the process. We seek assurance from Ofgem that the process next year will include this approach.

### Proportionality concerns

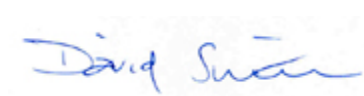
8. Given the fact that many of the responses are positive about the DNOs' work and the limited number of negative stakeholder responses cited, the suggestion (see Annexes 7&8) that Ofgem may apply the full penalty seems to be clearly disproportionate. The consultation makes no mention of the actions that have been delivered by DNOs as part of ICE.

9. The mechanism must be operated in a manner that is proportionate to ensure the Authority remains in line with its statutory obligations. Ofgem must therefore apply a high bar for the decision on whether a penalty is merited in the first place, as to do otherwise could lead Ofgem to impose a material penalty for a relatively minor failure. This follows because the value of any penalty, if one is imposed for a particular licensee and market segment, is a fixed and material amount. The approach set out in the consultation fails to recognise the consequence of this facet of the design of the incentive.

### **Conclusions**

10. Our members would ask that Ofgem consider carefully the points that have been made above and the process and practices that it has applied in conducting this assessment of the DNOs' performance under the ICE. We believe that there are legitimate concerns over the approach that has been applied in conducting this process and whether this can be considered consistent with good regulation.
11. Our members object to the penalties proposed under this process based on: (i) the evidence presented (ii) the highlighted flaws in the process (iii) conclusions being based on an incomplete and inaccurate analysis of stakeholders' evidence and (iv) the Authority not acting in a transparent, accountable and proportionate manner.
12. We therefore believe that the weaknesses highlighted in the context of the balance between encouraging innovation, setting challenging ICE plans and the application of penalties may lead to outcomes that are not in the interests of current and future consumers.
13. If you have any questions on the points raised in this response, please contact John Spurgeon, Head of Regulatory Policy email: [john.spurgeon@energynetworks.org](mailto:john.spurgeon@energynetworks.org)

Yours sincerely



David Smith  
**Chief Executive**