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**By Email Only: [prosecution.consultation@ofgem.gov.uk](mailto:prosecution.consultation@ofgem.gov.uk)**

Dear Mr Shipp

**Consultation dated 2 July 2015 on Ofgem's proposed Criminal Prosecution Policy Statement**

This is the response of National Grid plc to Ofgem's consultation on its proposed criminal prosecution policy statement. 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 and offshore high voltage systems. National Grid also owns and operates the gas transmission system throughout Great Britain and, through its low pressure gas distribution business; distributes gas in the heart of England to approximately 11 million businesses, 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. This response should be read in conjunction with National Grid's responses dated 22 May 2014 and 23 June 2014 to Ofgem's consultation on its proposed Enforcement Guidelines; and National Grid's response dated 18 February 2015 on Ofgem's proposed changes to its REMIT Procedural Guidelines and REMIT Penalties Statement, as well as National Grid's earlier responses to such consultations. In this response we set out our general remarks about the proposed criminal prosecution policy statement and then deal in Appendix A with the specific questions raised by Ofgem's consultation.

**General Comments**

Overall National Grid welcomes the proposed criminal prosecution policy statement and considers that it helps to provide a clearer framework to support Ofgem's enforcement strategy in order to protect existing and future gas and electricity consumers and businesses. However, we consider that there are some areas in which the clarity of the policy statement could be improved, particularly in relation to Ofgem's approach to carrying out criminal investigations in respect of the failure to respond to information requests and the new REMIT offences.

We note that revised Enforcement Guidelines and a Statement of Policy for financial penalties and consumer redress were published in 2014 and that revised Procedural Guidelines and a revised Penalties Statement in respect of REMIT were published in June 2015. We understand that the Criminal Prosecution Policy Statement is to be considered in conjunction with the Enforcement Guidelines and the REMIT Procedural Guidelines and Penalties Statement. It is National Grid's view that, so far as possible, all enforcement issues should be considered together and a consistent approach should be adopted.

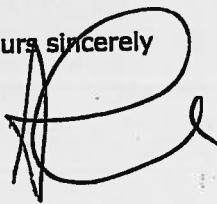
In relation to Ofgem's decision making process, National Grid welcomes the application of the Full Code Test for the purposes of deciding whether or not to prosecute, as well as Ofgem's confirmation that any such decision is made entirely independently from the investigation team. It would be useful if Ofgem could confirm the processes that it will adopt to ensure that independence from the investigation team is maintained. We note that in circumstances where public interest does not require a prosecution, Ofgem may decide to close an investigation or an alternative disposal may be considered. National Grid would welcome clarification as to the alternative actions that may be considered, as well as the circumstances that are likely to lead to the implementation of such alternative actions. It would also be helpful if Ofgem could provide examples of the circumstances in which, for example, warnings and / or advice may be issued, undertakings may be requested and civil sanctions may be pursued, rather than prosecution.

National Grid notes that for the purposes of the REMIT Criminal Regulations, the enforcement vision and strategic objectives outlined by Ofgem apply to individuals as well as businesses. We would welcome further guidance from Ofgem as to the differences in terms of the approach to be taken in making prosecution decisions in relation to individuals and businesses, particularly in relation to suspected market abuse, where prosecution decisions may be taken in relation to both individuals and organisations arising out of the same factual circumstances. In relation to REMIT breaches, National Grid would welcome clarification as to the circumstances in which a failure to respond to a request for information will lead to a decision to prosecute.

In relation to the publication of investigations, National Grid notes that Ofgem will ordinarily publish the outcome of public hearings and may make public announcements at various stages of any investigation. National Grid would welcome confirmation from Ofgem that in applying its policy in relation to the publication of matters relating to investigations it will, so far as possible, keep confidential any commercially sensitive information.

We hope that Ofgem finds these comments helpful in finalising the Criminal Prosecution Policy Statement. However, if there is anything in our response that you would like to discuss further or in the event of any questions, please contact Angela Quinn (01926 655 454, [angela.quinn@nationalgrid.com](mailto:angela.quinn@nationalgrid.com)).

Yours sincerely

A handwritten signature in black ink, appearing to be 'A. Quinn', written over the typed name.

Angela Quinn

## **Appendix A – response to specific question**

### **Q1 – Do you agree with our proposed approach to the decision to prosecute criminal offences?**

National Grid welcomes Ofgem's confirmation that the decision to prosecute will be made entirely independently from the investigation team. As stated above, it would be helpful if Ofgem could outline the measures that it will adopt to ensure that independence is maintained throughout the investigation and decision making process. National Grid agrees with Ofgem's proposal to apply the Full Code Test as set out in the Code for Crown Prosecutors. It would also be helpful if Ofgem could provide some examples of the circumstances in which alternative action may be taken.

### **Q2 – Do you agree that the additional factors set out for consideration in relation to REMIT market abuse offences are relevant and appropriate?**

National Grid notes that the additional factors listed for consideration in relation to REMIT market abuse offences is non-exhaustive and that the weight to be attached to each factor may vary depending on the circumstances. It would be helpful if Ofgem could provide further clarity in relation to the weighting to be applied to the various factors.

In general National Grid agrees that the additional factors are relevant and appropriate, and considers that these factors should be applied in conjunction with the further mitigating and aggravating factors specified in the REMIT Penalties Statement and Procedural Guidelines in relation to enforcement decisions. For example, factors mentioned in those documents such as the involvement, or lack of involvement, of senior management in relation to a breach of REMIT, are equally relevant factors to be considered in terms of a prosecution decision in relation to market abuse.

### **Q3 – Are there any additional factors you feel we should set out in this policy statement?**

National Grid considers that the following factors could be included within the policy statement:

- the extent of the suspected market abuse within the organisation concerned;
- mitigating and aggravating factors as outlined in the Penalties Statement and Procedural Guidelines;
- the status of the individuals suspected of market abuse;
- the loss which may be suffered by third parties as a result of the suspected market abuse; and
- the seriousness of the suspected REMIT breach.

### **Q4 – Do you have any other comments on this policy statement?**

Please see the general comments outlined in National Grid's covering letter.

