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To whom it may concern

## **GUIDANCE ON MODIFYING THE STANDARD LICENCE CONDITIONS OF GAS AND ELECTRICITY LICENCES**

Ofgem has published its Guidance on how it intends to proceed when proposing collective licence modifications. This document is available now on the 'Publications' page of Ofgem's website at [www.ofgem.gov.uk](http://www.ofgem.gov.uk).

The purpose of this letter is to provide a summary of responses to the recent consultation on the draft Guidance and to set out (in bold type) Ofgem's position with respect to the issues raised by respondents, thereby drawing your attention to the main changes in the final form of the Guidance. An annex provides a list of the organisations that responded to the consultation.

References below to paragraph numbers refer to the draft Guidance as set out in the consultation document published in July.

### **Summary of responses**

#### ***General***

Ofgem received twelve responses, almost all of which were broadly supportive of Ofgem's proposals. Some of the responses stated that publishing the draft Guidance had improved the transparency of the process.

#### ***Code of Practice***

EDF Energy and Powergen considered that the final Guidance should be a binding Code of Practice that could only be changed following a further consultation. EDF Energy believed that this would make it clear that Ofgem was committing itself generally to behave in a particular way without fettering its discretion in special circumstances. Powergen stated that this would improve transparency and help prevent unnecessary disputes.

**Ofgem would not expect to make any material change to the Guidance without conducting a further consultation and notifying relevant licensees of any changes to its Guidance.**

### *Group responses*

Scottish and Southern suggested that the Guidance should clearly specify that all of the licences within a single group would be amalgamated for the purposes of calculating the number of relevant licence holders that objected to a proposal, since only this interpretation would seem to fit with the original intent of the dual test which was to protect smaller licensees. Scottish and Southern believed that it would be an abuse of process if individual licences within large groups were counted separately for voting purposes.

**Ofgem considers that the legislation does not permit this interpretation and that licences must be counted on an individual basis.**

### ***Chapter 3 – Background***

#### *Legal framework for standard licence conditions (paragraphs 3.3 and 3.4)*

BP Energy believed that Ofgem should in its consultations encourage licence holders actively to decide on their position given that non-responses under the new process would be taken as consent to a modification proposal.

EDF Energy noted that while the draft Guidance states that objections must be registered ‘in the manner’ specified in the statutory notice, Ofgem has no power to require that objections be submitted in a particular ‘manner’. However, EDF Energy stated that it was clearly desirable that Ofgem should indicate to licence holders the manner in which it would like to see objections registered, since that would encourage consistency. EDF Energy added that if licence holders chose to depart from the standard form, they would be doing so at their own risk of any consequent ambiguity being construed against them.

**Ofgem will make it clear in any consultation document that it is incumbent upon parties who are opposed to a particular proposal formally to register their objection. Ofgem wishes to encourage responses that are unambiguous but agrees that it cannot compel an objection to be submitted in a particular manner. We have amended paragraph 3.4 in order to make it clear that Ofgem may only specify the time within which responses must be made.**

#### *Relevant licence holders (paragraphs 3.7 and 3.8)*

EDF Energy noted that Ofgem’s assessment of who is a relevant licence holder was legally accurate. However, EDF Energy believed that the relevant provisions of the Gas Act and Electricity Act were badly drafted and that Ofgem should press for amendment of the provisions when a suitable opportunity arises.

United Utilities stated that where a licence modification is to amend an existing condition, it must be correct that only those licence holders affected by such an amendment should be entitled to object.

Scottish and Southern believed that Ofgem had incorrectly interpreted the use of “modified” in section 11A (10)(a) of the Electricity Act; for a licensee to be able to object to a new condition that would not be ‘switched on’ in its licence, would be an unreasonable interpretation of “modified” that could be open to challenge. In Scottish and Southern’s view it would be reasonable to treat new conditions in the same manner as that proposed for modifying existing conditions (ie. only licence holders with the condition switched on could register a statutory objection).

**Ofgem notes these points, but cannot override the clear provisions of the Acts.**

Scottish and Southern also stated that Ofgem should make known which licensees it considered to be “relevant” when issuing the statutory notice of modification, since it would enable parties that had not been considered “relevant” by Ofgem to raise the matter within the timetable of the consultation.

**Ofgem will identify the type of licensee and the relevant condition (e.g. “all holders of an electricity supply licence with standard licence condition [x] paragraph [y] in force”). Ofgem will consider further whether any additional information should be provided.**

*Consulting affected licence holders (paragraph 3.10)*

Whilst Powergen agreed that there may be instances where it is necessary to proceed directly to a statutory consultation, it felt that the reference to Ofgem not conducting informal consultation when it considered it “unnecessary or inappropriate” was rather sweeping. Powergen stated that the circumstances when informal consultation would not be carried out should be clearly identified to avoid uncertainty and accusations of unfair discrimination.

Northern Electric Distribution (NEDL)/Yorkshire Electricity Distribution (YEDL), and United Utilities found it hard to foresee instances in the distribution sector in which the urgency of the public interest would be so great as to preclude informal consultation before the statutory consultation. NEDL/YEDL also commented that a “related workstream” might not have direct representation of all relevant parties. United Utilities stated that although there may be rare circumstances affecting suppliers, such as marketing abuse, that required special urgency, this was much less likely with distributors.

ScottishPower saw no case for dispensing with informal consultation where the case was urgent, and suggested that circulating the draft licence modification and background information by email to relevant licence holders would take very little time and could improve the final result. ScottishPower therefore concluded that informal consultation should occur in all cases.

Aquila Networks, BP Energy and United Utilities also hoped that Ofgem would consult informally on every possible occasion.

**Ofgem notes the comments from various respondents that it is difficult to foresee the circumstances in which it would not be possible to conduct an informal consultation. Ofgem would like to reiterate that only in exceptional circumstances would it expect to omit consulting informally prior to conducting a formal consultation exercise. However, it would be inappropriate to purport to fetter our discretion by suggesting that we will always consult informally. We consider that the Guidance ought to be clear that in exceptional circumstances Ofgem may proceed directly to a formal consultation although, in such a case, Ofgem would explain its reasons for so doing. We have, however, amended paragraph 3.10 to make clear that we will take into account the extent to which a “related workstream” is properly representative of relevant licence holders in deciding whether or not to hold further informal consultation prior to publishing the statutory notice.**

Powergen suggested that Ofgem ought to include a Regulatory Impact Assessment in its statutory notices proposing modifications, even though it is not obliged to under section 11A(3) of the Electricity Act or section 23(3) of the Gas Act.

**Ofgem has agreed to produce Regulatory Impact Assessments (RIAs) for significant new policy proposals. Where a collective licence modification proposal constitutes a significant new policy proposal Ofgem will carry out a RIA and publish it as part of the statutory notice.**

*The statutory consultation process (paragraph 3.14)*

EDF Energy suggested that because Ofgem in some cases must consult the Health and Safety Commission (HSC) in relation to electricity issues such as licence modifications, it should send copies of all statutory modification notices in respect of electricity licences to the HSC.

**When proposing a collective electricity licence modification, Ofgem will contact the Health and Safety Executive (HSE) to establish whether or not HSE has a safety-related interest in the proposal. Ofgem will send a copy of the collective electricity licence modification notice to HSE where HSE has indicated to Ofgem that it has a safety-related interest in the proposal.**

*Considering responses (paragraphs 3.15 and 3.16)*

Aquila Networks commented that these paragraphs did not explicitly recognise the scope for proposals to be amended as a result of any representation. Similarly, ScottishPower stated that it would be helpful if the Guidance acknowledged the scope for representations to be taken into account, particularly in the light of changes made to draft licence modifications made since previous consultations, (including informal consultation). NEDL/YEDL said that Ofgem should publish details of any representations made and the outcome of its consideration of them.

**Ofgem will alter the relevant paragraphs of the Guidance to make it clear that proposals may be amended as a result of representations made (although this may necessitate a further statutory notice). Ofgem will as a matter of course publish representations to the extent that they are not confidential, and will set out in decision documents how it has taken account of the representations made to it during the consultation.**

Given the Secretary of State's power to direct that modifications not be made, BP Energy suggested that Ofgem should seek her advice prior to undertaking a statutory consultation. ScottishPower believed that the Guidance should set out the criteria under which the Secretary of State is permitted to make such a direction.

**Ofgem would expect to seek views from the DTI as part of any informal consultation that preceded the statutory consultation process, and would of course take those views into account in deciding whether or not to proceed with the formal consultation. The Secretary of State would be exercising a function to which the principal objective and general duties will apply.**

*Blocking minority threshold tests (paragraphs 3.20 and 3.24)*

National Grid Transco (NGT) sought clarification on whether Ofgem would conduct the relevant licence holder numbers and market share tests simultaneously or sequentially, and suggested that the market share test might not be required if the licence numbers test already indicated the existence of a blocking minority.

**Ofgem expects to conduct the ‘number of licences’ test first. Ofgem would then expect to carry out the second test (market share) only if the first test does not indicate that a blocking minority exists in relation to a modification proposal.**

NGT supported the approach outlined in the draft Guidance of applying only the first test (ie. the number of licence holders objecting) in relation to collective modification of transmission licences. However, it noted that any future proposal to grant further transmission licences would bring with it the need to introduce a market share test into the Order, and that guidance relating to the determination of market shares for electricity transmission would then be required.

**Ofgem notes the comments made by NGT and agrees that the Government will need to consider whether to amend the Statutory Instrument if new transmission licences are granted. Ofgem will draw this to the attention of DTI.**

*Registering a statutory objection (paragraphs 3.25 to 3.28)*

NEDL/YEDL stated that Ofgem should stipulate the level within its organisation at which statutory notices would be authorised. United Utilities believed that the person specified in the statutory notice should be of sufficient seniority that they would be accountable for the process, such as the relevant Managing Director but not lower than the relevant Director.

**Ofgem notes the comments made. In accordance with its established practice, all statutory notices are authorised by the relevant Managing Director or by the relevant Director, although the person named in the notice to receive responses or to whom questions may be may be addressed may be a less senior member of the Directorate.**

Scottish and Southern thought that Ofgem should use a pro-forma notice of statutory objection, since it would increase transparency and reduce the extent to which Ofgem had to interpret a licence holder’s intentions, for example in relation to qualified objections.

EDF Energy thought that Ofgem could legitimately encourage each licence holder to use a ‘tick box’ approach indicating ‘yes’ or ‘no’ to the question whether it objects to the modification. Whilst noting again that this approach would not be binding on respondents, EDF Energy thought it likely that licence holders would use it if Ofgem promoted it as the recommended means of indicating objection. EDF Energy suggested that in this way what was said in the text of a licence holder’s detailed response would cease to be relevant for the purposes of the vote.

**Ofgem is aware that it cannot compel respondents to make objections in a given manner. However, we agree that it would be sensible as far as possible to encourage licence holders to submit responses in a consistent way, and that the best way to do this is by attaching a pro forma to the statutory notice. Ofgem has therefore included a pro forma as an annex to the final guidance, and hopes that relevant licence holders will use the pro forma to indicate clearly whether they do or do not object to a particular collective licence modification proposal. While this cannot prevent a relevant licensee from objecting without using the pro forma, it will clarify the status of objections where the pro forma is used.**

EDF Energy presumed that if a notice of objection were sent in hard copy by hand, special delivery and courier, a signature on delivery would be adequate evidence that the objection had been ‘lodged’ with Ofgem. EDF Energy also stated that if it were sent by ordinary post it would

be presumed in the absence of evidence to the contrary to have been delivered in the normal time period for post by virtue of section 7 of the Interpretation Act 1978.

**Ofgem concurs with EDF Energy's presumptions.**

EDF Energy noted that if the objection were sent by email or fax, evidence of receipt would depend upon Ofgem sending an acknowledgement. EDF Energy stated that it was unhelpful that Ofgem was committing itself only to acknowledge receipt within two working days. EDF Energy believed that unless Ofgem was able to provide a much quicker form of acknowledgement, it should be sufficient for a licence holder to show that it sent the notice by a means that would normally have resulted in its being delivered within the deadline.

Both ScottishPower and Scottish and Southern considered that Ofgem should acknowledge responses within two days of receiving them, rather than waiting until the close of the consultation period. United Utilities expressed a preference for Ofgem to acknowledge responses by email with a letter to follow.

**Ofgem will acknowledge receipt of statutory objections within two working days of receipt, rather than two working days after the consultation period has closed, and has amended paragraph 3.28 accordingly. Ofgem will acknowledge receipt by email with letter to follow. However, those respondents not intending to reply until the closing date may wish to consider responding earlier or by a means that will ensure due delivery.**

*Withdrawing a statutory objection (paragraph 3.29)*

EDF Energy stated that its concerns with paragraph 3.28 applied equally to paragraph 3.29.

United Utilities noted that while a licence holder could object by post, fax or email, it could withdraw an objection only in writing, and suggested that withdrawals should also be able to be sent by email. NEDL/YEDL asked for an explanation of the rationale for any intended difference.

**Ofgem will acknowledge withdrawal of statutory objections within two working days of receipt, rather than two working days after the consultation period has closed, and has amended paragraph 3.29 accordingly. Ofgem will acknowledge receipt by email with letter to follow.**

**Ofgem agrees that relevant licence holders should be able to withdraw objections in the same way as they register them. Paragraph 3.29 has been amended to make clear that objections may be withdrawn by post, fax or email.**

*Qualified objection (paragraph 3.30)*

Powergen stated that a response clearly indicating that a party will object unless a certain material amendment is made to the proposal should be treated as a statutory objection. United Utilities asked whether it would be possible to send a qualified response seeking qualification or clarification at the beginning of the consultation period that also indicated that the respondent would send a further response at the end of the consultation period, without the initial response counting as an objection.

**It is always open to those interested in a proposal to seek clarification on matters during the consultation process. Ofgem will endeavour to provide clarification to a respondent that has requested it.**

*Reducing the burden (paragraph 3.31)*

Powergen stated that Ofgem should indicate during any informal consultation whether (and why) it believed that a proposal met the requirements of section 11(8) of the Electricity Act and section 23(10) of the Gas Act. BP Energy, Innogy and Scottish and Southern agreed that Ofgem should do so as part of the statutory consultation since that would enable parties to comment.

BGT and ScottishPower called for more guidance on this issue, in particular on how Ofgem proposed to ensure that a reduction of the burden on licence holders would occur without disadvantaging other licence holders. EDF Energy believed that Ofgem should always use reluctantly the power to modify standard conditions, despite an objection threshold being passed, because the modification was deregulatory in nature. EDF Energy also suggested that licence holders might be expected to be the best judges of whether a regulatory burden was being removed, and that they would be very unlikely to object if it was.

Powergen stated that Ofgem should not be able to argue, in the light of late evidence, that a modification reduced the regulatory burden and could therefore be made even if a blocking minority existed. In such a case, Powergen believed that Ofgem should conduct a further statutory consultation incorporating any additional information.

**Ofgem will indicate at the earliest possible stage whether it believes that a proposal is essentially deregulatory. Usually this will be at the informal consultation stage but in any event Ofgem will do so in the statutory notice. Ofgem does not propose in advance to give broad guidance on the circumstances in which a reduction of the burden on licence holders would occur without disadvantaging other licence holders since this will be dependent on the circumstances of each case. However, we would of course give our preliminary view in relation to any particular proposal that we thought would have this effect, and would have to give our reasons if we decided to use this power under 49A of the Electricity Act or section 38A of the Gas Act.**

#### ***Chapter 4 – The determination of market share for the purposes of a collective modification of SLCs***

*Checking obvious material errors (paragraph 4.2)*

PricewaterhouseCoopers sought clarification of the statement that Ofgem “does not intend to audit the data provided to it (other than looking for the most obvious errors)”, on what constituted “the most obvious errors”, and asked whether the party conducting the independent verification would be required to look for these errors. BGT sought clarification on whether the audit would cover the whole consultation process or only the vote calculation.

**The audit refers only to the vote calculation and not to the consultation process as a whole. It is for Ofgem and not any independent verifier to check for obvious errors. Since Ofgem will be collecting the relevant information on a continuing basis, such errors might include a significant change from that for the previous month without any obvious reason.**

Notwithstanding paragraph 4.2, BGT expected that, if an error in calculating the minority thresholds was due to an error in the data used, Ofgem would as a reasonable and prudent operator take responsibility for this. BP Energy noted the importance of ensuring that licence holders are confident that the source of the data is reliable.

**Ofgem appreciates fully the relationship between the accuracy of the data and the integrity of the process. However, Ofgem will not take responsibility for inaccurate data. Ofgem considers that by using formal powers to request data the onus is on those providing the data to ensure that it is accurate, having regard to the purpose for which it is required and the potential consequences both for relevant licensees and the information provider if there is a material error.**

*How will metering points be measured? (paragraph 4.6)*

ScottishPower stated that it would be helpful if it were made clear that metering points on the transmission system will only apply to directly connected customers, and not to customers connected to it via the distribution system.

**The Guidance reflects the wording of the Order. However, the Order makes clear that, in relation to the transmission system, suppliers could only be registered suppliers in relation to directly connected customers.**

*Supply on a distribution system (4.9 and 4.11)*

ScottishPower believed that the Guidance should be clear that Market Participant Identification Codes (MPIDs) did not equate to supply licences and that, where one licence holder had more than one MPID, the Metering Point Administration Numbers (MPANs) from each MPID would have to be summed to give the true market share for that licence holder.

**Ofgem has taken into account the fact that MPIDs do not necessarily equate to supply licences and agrees that where a supply licensee has more than one MPID, the MPANs from all of its MPIDs will be included in the market share for that licensee. Paragraph 4.9 has been amended to reflect this and suppliers have already been asked for information that will enable Ofgem to allocate MPIDs to licences.**

ScottishPower noted that the draft Guidance stated that calculations of MPANs registered to suppliers would include unmetered MPANs such as those servicing shared unmetered supplies, but questioned the relevance of such supplies for the calculation given that they were no longer billed directly but were included in distribution losses.

**Ofgem has considered whether the inclusion of unmetered MPANs would be material in any vote and has concluded that it would not be. The information that Ofgem currently receives about non half-hourly data from distribution companies already includes unmetered MPANs and it does not therefore seem necessary to change the reporting requirements.**

*Supply on a transmission system (paragraph 4.14)*

ScottishPower sought clarification on whether Ofgem intended to exclude from the calculations all customers directly connected to the transmission system since they did not fall within the definition of supply in the Electricity Act; ScottishPower felt that it would be unreasonable to do so on the basis of what appeared to be a legal loophole.



**Under the terms of the Order, only meter points registered to licensed suppliers are relevant. However, Ofgem notes that DTI is consulting on the definition of “supply”.**

*The calculation of market share for gas suppliers (paragraphs 4.36 to 4.40)*

BP Energy was disappointed that the draft Statutory Instrument prescribed that market share would be calculated using the number of registered customers rather than taking into account the volume of gas supplied, since this disadvantaged industrial and commercial gas suppliers who had few live supply points compared with domestic gas suppliers. BP Energy accepted that sourcing data from Transco was the most convenient method at our disposal.

**Ofgem notes that this is not a matter for the Guidance, but rather relates to the Order that was made on 15 July 2003. However, in each case Ofgem will still need to consider the content of all objections raised, including those by suppliers to large customers, even if they represent less than the prescribed market share, and be satisfied in each case that it is appropriate to proceed to make the modification.**

**Industry parties should note that because Transco’s gas supplier data cannot be systematically categorised on a licensee basis, Ofgem will request gas supply data directly from licensed gas suppliers. Paragraphs 4.39 and 4.40 have been amended to reflect this.**

*The calculation of market share for gas shippers (paragraphs 4.42 to 4.48)*

BP Energy stated that basing the calculation on a shipper’s share of total gas flowed through the National Transmission System over a twelve-month period, and the method of calculation, both seemed reasonable.

*The calculation of market share for gas transporters (paragraphs 4.49 to 4.54)*

NGT supported the proposed approach to calculating the market share for gas transporters.

**Ofgem notes the comments made.**

## ***Chapter 5 – Arrangements for publishing voting calculations where a statutory objection has been received***

*Options for publication (paragraphs 5.4 to 5.7)*

BP Energy, NEDL/YEDL, NGT, ScottishPower and United Utilities supported Ofgem’s preferred approach of publishing the names of objecting licence holders and the overall percentage objecting.

EDF Energy had no major concerns about publishing the names of all licence holders involved in the process, or their market shares, or the identities of those objecting. EDF suggested that publication would usually be permitted under section 105 of the Utilities Act 2000. EDF Energy noted Ofgem’s decision of 11 June 2003 in favour of publishing much of that data in another context, and the conclusion in that paper that it had the power to do so. A great deal of the relevant information would be in the public domain anyway and EDF Energy felt therefore that significant issues of commercial confidentiality would be unlikely to result from the collective licence modification process. In contrast, ScottishPower emphasised the unacceptability of publishing names and percentage shares for each vote because, in its view, this would result in the publication of commercially sensitive and confidential information.

BGT noted that publishing the names of the objecting parties and the aggregate market share could be synonymous with publishing the market share of an individual market participant, for instance where only one party objected or where a number of objections were registered but these came from one significant market player and from a number of smaller competitors. BGT also stated that doing so would be contrary to Ofgem's practice in the recent non-domestic Competitive Market Review report. BGT therefore favoured publishing the aggregate percentage result of both tests. Innogy also favoured this approach, citing the possibility that if an objector wished its response to remain confidential its objection could not be disclosed. BP Energy suggested that where there are two or less objections to a modification publishing a percentage range rather than an exact percentage might help to address confidentiality issues.

**Ofgem noted the range of views expressed and considers that its original proposal represents a fair balance between encouraging transparency and protecting confidential information.**

**Ofgem has recently published a variety of data for group market shares for both domestic and non-domestic gas and electricity suppliers using its powers under section 35 of the Gas Act and section 48 of the Electricity Act. In both cases Ofgem consulted suppliers and concluded that publication of individual market share information would not seriously or prejudicially affect suppliers' commercial interests. Information about market share is often published by companies themselves and is available to analysts and brokers. Industry participants can also purchase information from organisations that conduct surveys and/or market research. Ofgem does not therefore consider that publication of market share information is particularly market sensitive or that it is likely to affect a licensee's share price. In addition, any supplier market share information published for CLM purposes (even if only one licensee objects) would be in a more aggregated form than in the recent documents. Ofgem therefore remains of the opinion that publishing this information would not seriously or prejudicially affect licensees' commercial interests.**

**Ofgem therefore intends to publish the names of relevant licensees that have objected to a proposal and the total market share of those that have objected, even if two or less licence holders object.**

*Adjudication/verification of results (paragraphs 5.8 to 5.12)*

Aquila Networks, BGT, BP Energy, NEDL/YEDL, NGT and United Utilities supported Ofgem's preferred approach of seeking independent verification of results that place the objections between 15 and 25 per cent.

Scottish and Southern supported Ofgem's approach only provided that a pro-forma was to be used during the consultation process; however, if a pro-forma was not to be used, Scottish and Southern believed that all votes, including at least samples of Ofgem's interpretation of licensees' intentions, should be audited.

EDF Energy accepted that an audit of the underlying data should in most cases constitute sufficient evidence that the process was a correct one. In view of the greatly increased transparency of the modification process under the draft Guidance, EDF Energy questioned whether such an audit needed to be carried out by an external body. EDF Energy concluded that it would be adequate for it to be carried out by a senior person within the organisation not directly involved in the modification process, such as a non-executive member of the Authority.

EDF Energy stated that this could reduce costs to the point where the calculations could be certified as correct in all cases, not merely those which fell within a narrow band.

Powergen preferred that any audit be carried out independently, and that any compromise process should allow for audit of results where the objection level was between 5 and 35 per cent.

**Ofgem considers that the proposal to seek independent verification where the level of objections is between 15 and 25 per cent meets the requirements of the majority of the respondents. Ofgem will therefore take steps to ensure that an independent party is able to verify the calculation where the objection level is between 15 and 25 per cent. Ofgem will publish the results of any such verification.**

**Annex            List of organisations that responded to the consultation**

Aquila Networks  
British Gas Trading Ltd  
BP Energy  
EDF Energy plc  
Innogy plc  
National Grid Transco  
Northern Electric Distribution Ltd/Yorkshire Electricity Distribution plc  
Powergen plc  
PricewaterhouseCoopers LLP  
Scottish and Southern  
ScottishPower plc  
United Utilities plc

All of these responses may be read on the Ofgem website at  
[http://www.ofgem.gov.uk/ofgem/whats-new/archive.jsp?section=whats-new&levelids=,1\\_3929#top3929](http://www.ofgem.gov.uk/ofgem/whats-new/archive.jsp?section=whats-new&levelids=,1_3929#top3929).