

**LAURENT FERRARI**  
Managing Director, Networks



Maxine Frerk  
Director, Governance and Consumer and Social Affairs  
Ofgem  
9 Millbank  
London  
SW1P 3GE

1 September 2009

By email only

Dear Maxine

**Investigation under SLC 4D/12: Notice of the Authority's Proposal to impose a Penalty**

I attach the combined response of EDF Energy Networks (EPN) plc, EDF Energy Networks (LPN) plc and EDF Energy Networks (SPN) plc to the Notice which was published by the Authority on 24 July 2009, under s27A of the Electricity Act 1989. As requested, the response and this covering letter have been emailed to Andrew Burgess as one pdf file.

I would be grateful if you could acknowledge receipt of both documents to Paul Measday, the Networks Regulation Manager.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Laurent Ferrari', written over a horizontal line.

Laurent Ferrari

Cc Judith Hanratty OBE, Authority Committee Chair  
Vincent de Rivaz, CEO, EDF Energy plc  
Andrew Burgess, Head of Enforcement and Competition Policy  
Paul Measday, EDF Energy Networks Regulation Manager

Notice published by the Authority under s27A of the  
Electricity Act 1989 on 24 July 2009

Response of EDF Energy Networks (EPN) plc,  
EDF Energy Networks (LPN) plc  
and EDF Energy Networks (SPN) plc

1. This is the combined response of EDF Energy Networks (EPN) plc, EDF Energy Networks (LPN) plc and EDF Energy Networks (SPN) plc (collectively referred to as "EDFEN") to the Notice published by the Authority under s27A of the Electricity Act 1989 on 24 July 2009 (the "Notice").
2. EDFEN accepts, and indeed very much regrets, that its breaches of SLC 4D and SLC 12 caused harm to its customers. However, EDFEN considers that a penalty of £2 million, representing a penalty of £42,553 for each of the 47 breaches concerned, is disproportionate and unreasonable.
3. The Authority has not set out in the Notice the basis for its determination of the penalty it proposes to impose on EDFEN. However, EDFEN considers that the penalty is excessive, given the circumstances of the breaches, which in summary are as follows. The contraventions were not intentional. They affected under 0.4% of all projects for which EDFEN provided quotations in the relevant period. Actual harm to customers, which the Authority has accepted in its decision is the appropriate measure of consumer detriment, was low; valued by the compensation payments made by EDFEN and accepted by customers, the average was £4,310 per customer.
4. In the light of these factors, and EDFEN's transparency and cooperation during Ofgem's investigation, we consider that a £2 million penalty is unreasonable.
5. The proposed penalty is also disproportionate in the light of the Authority's only other penalty decision in relation to a failure to provide connection offers within a specified time – its 19 December 2007 decision to impose a penalty of £25,000 on Northern Gas Networks Limited ("NGN") for a failure to provide timely gas connection offers to 36,500 customers<sup>1</sup>. This represented a penalty of £0.68 for each breach.

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<sup>1</sup> The Authority's May 2004 decision to impose a penalty on Transco concerned delayed connection quotations only as part of a wider range of infringements.

6. There is a vast disparity between the levels of the penalty imposed on NGN and the penalty proposed for EDFEN.
  - The £2 million penalty proposed for EDFEN is in respect of infringements affecting 47 projects, less than 0.4% of projects for which EDFEN provided connection quotations. By contrast, NGN's £25,000 penalty was imposed in respect of 36,500 infringements.
  - Per customer, NGN made a total payment of £28, of which £0.68 is attributable to the £25,000 penalty. The penalty proposed for EDFEN would mean that EDFEN would pay a total of around £46,861 for each of the 47 customers, of which £42,553 would be attributable to the proposed penalty.
  
7. EDFEN appreciates that the circumstances of its infringements differ from those of the NGN case. Nevertheless, these differences are not so great as to justify the disparity identified above:
  - Like NGN, EDFEN was transparent, voluntarily brought the 47 infringements to Ofgem's attention as soon as it understood the nature of the problems it faced and cooperated fully with Ofgem throughout the investigation.
  - Both NGN and EDFEN paid compensation to customers affected by their breaches. Compensation is not mandated by the electricity regulatory regime as it is in the gas regulatory regime, and EDFEN acknowledges that it took a little longer to act than NGN. Nevertheless, EDFEN made significant efforts, as recognised by the Authority, to compensate all affected customers for any inconvenience or loss caused, via ex gratia payments.
  - The different circumstances of NGN's and EDFEN's breaches justified different types of reaction by the companies. NGN's circumstances were acute: the large volume of almost simultaneous breaches created a crisis requiring NGN to take immediate action. EDFEN's circumstances took longer to unfold: identification of a single breach in April 2006 led to remedies that EDFEN acknowledges were insufficient and resulted in further breaches, identified only from late 2007. These later breaches led to EDF Energy ensuring a comprehensive remedy was in place from July 2008.
  - NGN's and EDFEN's ability to recruit additional staff to ensure compliance differed. NGN recruited additional gas connections staff quickly. EDFEN could not recruit additional electricity connections staff with similar ease, due to the national shortage of electrical connection designers.



- The extraordinary levels of connections activity in EDFEN's three regions, with service orders (a proxy for volume of connections work) rising by 94% between 2005 and 2007, do not appear to have been faced in NGN's region at the time of its infringements, although the Authority's decision refers to inadequate contingency planning on NGN's part.
8. In light of these factors, EDFEN contends that the approach taken in calculating the penalty proposed for it should be consistent with the approach taken in calculating the level of the penalty imposed on NGN. EDFEN recognises that its penalty may need to be higher than NGN's penalty. However, it must fairly reflect the parallels and differences between EDFEN's circumstances and NGN's circumstances.
  9. In its corporate and strategy plan for 2008–2013, Ofgem states under the heading "Regulating networks effectively" that *"By regulating networks in a transparent and consistent manner we will further strengthen confidence in the regulatory regime"*. It is important in the interests of precedent that the Authority sets the penalty imposed on EDFEN in a consistent manner and in such a way that the basis for the penalty is clear to all regulated network owners. EDFEN believes that the level of the penalty proposed for EDFEN is not consistent with the approach taken in the NGN case, for the reasons set out above. We believe that a decision to impose a £2 million penalty on EDFEN in these circumstances will create regulatory uncertainty and will weaken confidence in the regulatory regime.

#### Other commitments

10. EDFEN has fully accepted Ofgem's proposed reporting measures to monitor future compliance, as set out in the Notice at paragraph 2.13. It has already arranged a meeting with Ofgem to discuss the detailed operation of these measures and views them as long-term commitments.
11. EDFEN has also offered to continue to report to Ofgem on its performance against SLC 12 beyond the six-month period suggested by Ofgem, in order to underline its commitment to compliance with SLC 12 going forward. The Authority has also not commented on this further proposal in the Notice.
12. EDFEN regrets that the Authority has been unable to select a way of converting the proposed penalty into measures that would deliver direct and immediate benefits to customers.

## EDFEN's response to specific paragraphs of the Notice

13. EDFEN has a number of comments relating to specific paragraphs of the Notice. These are set out in more detail below.

### *Paragraph 2.10*

14. The Authority has referred to 108 breaches out of several thousand connection offers. However, EDFEN would like to specify that there were 108 instances of breach out of just over 12,000 connection offers, less than 1% of the total.

### *Paragraph 5.6*

15. EDFEN would like to confirm that it in no way deliberately sought to breach SLC 4D or SLC 12 for financial gain.
16. Furthermore, EDFEN considers that the insufficiency of its resources was due primarily to a national shortage of connection designers, exacerbated by unprecedented workloads. EDFEN has taken, and has continued to take, substantial steps to mitigate the effect of this shortage on its customers.

### *Paragraph 5.11*

17. EDFEN would like to clarify that the vast majority of the 108 contraventions were not drawn to EDFEN's attention by Ofgem, but rather were discovered by EDFEN independently and reported voluntarily to Ofgem.

### **Conclusion**

18. EDFEN believes that the £2 million penalty proposed by the Authority is disproportionate and that the approach the Authority has taken to determining it is inconsistent with the approach taken in the NGN case, even taking account of the different circumstances of EDFEN's case. EDFEN respectfully requests the Authority to consider the points made above and, before coming to a conclusion in this case, to satisfy itself as to the consistency of the decision it proposes to make in this case with the decision in the NGN case.