

Corporate Response Form 'Ofgem Licence Modification Appeals' Consultation URN 10D/807 Open: 01/10/2010 Close: 29/10/2010	
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Consultation Questions

What should be the scope of the appeal mechanism?

- 1** Does the fundamental nature of price controls require they be subject to different treatment from other licence modifications? Please explain what changes you consider are required, why you consider they are required and how they would be compatible with the Third Package.

Drax recognises the complex nature of price control decisions and the need to ensure a close level of scrutiny during the appeal process. However, rather than creating two tiers of appeal process depending upon the type of licence amendment (one more detailed than the other), the appeal body should have the option to conduct a full investigative hearing for all types of licence amendment, should the appeal body deem that such an approach is appropriate. This would ensure a full range of powers remain open to the appeal body, whilst also providing consistency between industry code modification appeals and licence amendment appeals.

What should be the structure of the appeal?

- 2** Do you agree that a rehearing approach to appeals for modifications other than price controls strikes the right balance between appropriate economic scrutiny of the regulator's decisions and a timely appeals process that controls potential costs for the parties?

Appeals for all types of licence amendment should allow for a full investigative hearing, should the appeal body deem that such an approach is required. This would ensure a consistent approach is taken for appeals to both licence amendments and industry code modifications.

3	Do you agree there should be a full investigative hearing for price controls?
<p>As mentioned in answer to questions 1 and 2, Drax believes that any appeal process should allow for a full investigative hearing (if required), regardless of the type of licence amendment appealed.</p>	
<p>Grounds for appeal</p>	
4	Do you agree with our proposal for an appeal on the merits?
<p>Should a change to the licence amendment process be justified, it would seem logical to introduce an appeals regime that is consistent with those provided by the Energy Act 2004 for the industry codes. On this basis, a merit based approach, such as that outlined in the consultation document, would appear appropriate.</p> <p>Drax agrees that there should be arrangements for the appeal body to dismiss appeals that are judged to be trivial, vexatious or have no reasonable chance of success. This is consistent with the industry code modification appeal process.</p>	
5	Would our proposed grounds allow for consideration of legitimate legal, factual and economic issues, without undermining regulator independence? If not, please state why.
<p>The proposed grounds appear reasonable, should a change to the licence amendment process be justified.</p>	
<p>What who are the affected parties who should have right of appeal?</p>	
6	Do you see any case for extending the right of appeal in relation to an Ofgem decision to any licensees or other materially affected parties beyond directly affected licensees? Please explain which and why.

Drax believes that there is a case for extending the right of appeal to licensees that do not hold the type of licence being amended. An example being where a licensee (e.g. a transmission licensee) agrees to a new licence condition that requires a change to industry practice, an industry code or associated industry guidance; without a right to appeal, licensees that do not hold the type of licence being amended (e.g. a generation licensee) would remain outside of the licence amendment process, regardless of the potential for such licence amendments to cause a material affect on other types of licensee.

The appeal body

7	Do you agree the CC is the most appropriate appeal body? Why/ why not?
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Should a change to the licence amendment process be justified, it would seem appropriate for the Competition Commission to act in the capacity of the appeal body. This will ensure consistency with the industry code modification appeal route and the current licence amendment referral route.

Drax agrees that the Competition Commission has valuable expertise in handling economic based issues and is well placed to further develop an understanding of the energy sector.

Outcome

8	The Government would welcome views on whether the appeal body should have the power to vary Ofgem's decisions on matters, other than price controls, or whether such cases would be better handled by remitting decisions back to Ofgem to re-take, with any necessary binding recommendations.
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The appeal body should have the ability to conduct a full investigative hearing for all types of licence amendment, should the appeal body deem that such an approach is appropriate. As such, the appeal body should have a full range of remedies at its disposal, including the ability to substitute its own determination for that of Ofgem.

This will ensure consistency between the approaches taken to all types of licence amendment, plus ensure consistency between licence amendment and industry code modification appeal processes.

Time Limits for the process

9 Do you think the Government's suggested timescales of 4 weeks to lodge an appeal, and a period of 4 months for the hearing of most appeals will ensure appropriate scrutiny and efficient decision making?

Whilst it is appropriate to promote timeliness in the lodging of appeals and decision making, Drax believes that the timescales should match those of the current Competition Commission appeal process for industry code modification decisions.

It would appear sensible to ensure that there is a degree of flexibility in the appeal hearing timescale, depending upon the nature of the case. It will be more important to ensure that the correct outcome is reached and that the appeal process is followed correctly, than a quick decision that is potentially open to further legal challenge.

The timeline for any appeal must allow for the merits of a case to be fully considered prior to determination by the appeal body. It is essential that an appeal timeline does not, in itself, compromise the appeal process; this could lead to increased challenge via the Judicial Review process, which would not be conducive to an 'expeditious' or 'efficient' licence amendment process.

10 Do you see any circumstances in which an appeal may need to be subject to a faster timeline. If so can you provide examples?

See answer to question 9.

Can Ofgem's decisions be suspended?

11 Do you agree the appeal body should be given the discretion to suspend Ofgem's decisions on application if they could lead to significant and potentially unnecessary expense and/or disclosure of confidential information?

Yes. It appears wholly appropriate to ensure that resource is not wasted (to the cost of consumers) and that information of a commercially sensitive nature is not disclosed (to the detriment of market competition) whilst a Competition Commission appeal is in progress.

How will the costs be recovered?

12 What will be the likely costs and benefits of these changes on your organisation?

The current process allows licensees with similar views to oppose a given licence amendment collectively; whilst this process has its drawbacks, in terms of the relative market shares of individual GB market participants, it is a relatively inexpensive way to oppose licence amendments that are unworkable or unjustified.

When deciding whether to lodge a Competition Commission appeal (or raise a Judicial Review), a business must consider the resource required to take such action, in terms of the cost of legal advice, the cost of employee time and, where employees are removed from their normal duties, the implications of lost knowledge from other areas of the business. Further to this, a business must also consider the cost of losing the appeal, in terms of covering the costs of the successful party.

The costs of mounting a Competition Commission appeal are not insignificant; this is a particular issue for small parties, where the potential consequences of losing an appeal render the option of using the appeal route unjustifiable. This places small market participants at a distinct disadvantage to their larger counterparts.

13 How do you recommend potential costs could be reduced? How could we maximise the potential benefits to the regulatory regime as a whole?

Drax does not believe that there is a sufficient justification for moving to the proposed licence amendment regime; the proposal will significantly increase the cost of challenging licence amendments, disadvantaging parties with less resource. See "Additional Comments" section (below).

Impact Assessment Questions

These are partial Impact Assessments containing our initial qualitative assessment of the costs and benefits. We therefore would welcome any quantitative evidence to support the further development of these impact assessments. Any information provided will be treated with sensitivity and anonymity.

14	<p>Are the assumptions made in the Impact Assessment correct and have we correctly identified the costs and benefits associated with this measure? The Government would welcome any information that could improve our analysis of the costs and benefits highlighted in the Impact Assessment.</p>
<p>Drax does not believe that there is a sufficient justification for moving to the proposed licence amendment regime; the proposal will significantly increase the cost of challenging licence amendments, disadvantaging parties with less resource. See “Additional Comments” section (below).</p>	
15	<p>What would be the likely costs and benefits of the 'minimum implementation option' of having two parallel separate regimes; one for those relating to regulatory tasks and Third Package duties, and one for Ofgem’s domestic tasks? How would these compare to the costs and benefits of the proposed implementation option?</p>
<p>Drax does not believe that there is a sufficient justification for moving to the proposed licence amendment regime; the proposal will significantly increase the cost of challenging licence amendments, disadvantaging parties with less resource. See “Additional Comments” section (below).</p>	
<p>Additional Comments</p>	
<p>Drax believes that DECC’s proposed approach to licence modifications is inappropriate. The approach (a) goes beyond that required by the Third Package, (b) has the potential to create greater regulatory uncertainty and (c) may not improve the ability of small parties to challenge licence modifications.</p> <p>Ofgem currently enjoys a comprehensive set of powers that include the ability to propose changes to a relevant licence and the ability to direct changes to industry codes via Significant Code Reviews (SCRs) (where the transmission licence holder is instructed to raise a modification to an industry code document in order to implement a SCR’s binding conclusions). As such, Drax does not agree that the proposed changes to the GB regulatory regime are required.</p> <p>Whilst Drax agrees that Ofgem is not currently able to <i>force</i> licence changes, this does not mean that the current collective licence modification process is incompatible with the Third Package; in fact, Drax believes that the current process does comply with the Third Package, allowing the regulator to implement change in an “efficient and expeditious” manner and is, therefore, fit for purpose.</p>	

The current process ensures that the regulator is able to propose the required changes to licences, whilst providing the licence holders with an associated process to collectively challenge the chosen approach should such changes appear unworkable or unjustified. Implementing a process that effectively allows the regulator to modify licences at will, would increase regulatory uncertainty and potentially undermine market, thereby investor, confidence. Furthermore, whilst a Competition Commission appeal route has been proposed (as detailed in this consultation), consideration must be given to any costs that a party may incur if they were to appeal a licence modification; if the licence modification appeal route were to work in a similar way to the code modification appeal route (as proposed), the associated costs may make the appeal route unviable for many market participants, particularly small parties.

Drax believes it should be the Government that interprets European legislation and sets the high level policy framework for GB, raising and / or amending legislation where required; this should not be the work of the independent National Regulatory Authority. Historically, market participants have been cooperative in the delivery of licence and code changes that have resulted from national legislation and EU requirements; there has been no indication that such cooperation will not be forthcoming in the future. As such, Drax does not support the change in approach to licence amendments or the associated appeal process.

