



DECC Consultation on Licence Modification Appeals - AEP¹ Response

General

The Association of Electricity Producers (AEP) welcomes DECC's initiative in consulting further with industry on the implementation of the Third Package, in particular on the regulatory provisions.

AEP remains of the view that the Third Package should not entail major changes to the GB regulatory regime. In AEP's view, the existing licence modification and industry code processes have ensured a balance between the regulator and industry and have generally worked well. It would be a matter for regret if a more legalistic and less flexible regime were to be introduced, as this would probably result in a less efficient system of regulation. However, we recognise that DECC's legal advice indicates a need for changes to the licence modification process and therefore provide comments below in this light.

A particular concern for AEP is the fact that DECC's proposals could allow Ofgem to impose any licence changes whatsoever, provided that they could be argued to come within its (very broad) statutory remit. Modifications to licences often reflect policy decisions, which in other Member States would be dealt with by government and via legislation, and it should not be for the national regulator to impose these unilaterally. While the Third Package gives national regulators a responsibility for implementing the regulatory framework, it does not in AEP's view provide regulators with a basis for changing this framework or for making policy. If the Regulator is able to modify licences readily, this will increase uncertainty and damage confidence in the energy sector at a time when massive investment is required to maintain supply security and meet environmental targets.

DECC correctly states that the present proposals go beyond what is required by the Third Package. The scope for regulators to take binding decisions mentioned in Art. 37.4 of the Electricity Directive relates only to those duties set out in Art. 37.1, 37.3 and 37.6. It should be noted that these duties relate primarily to the monopoly network businesses and that there are few references to the wholesale and retail markets, other than monitoring functions. Moreover, public service obligations, which are often implemented through licences, are not covered. The Electricity and Gas Directives clearly state that governments can set obligations relating to security

¹The Association of Electricity Producers (AEP) represents large, medium and small companies accounting for more than 95 per cent of the UK generating capacity, together with a number of businesses that provide equipment and services to the generating industry. Between them, the members embrace all of the generating technologies used commercially in the UK, from coal, gas and nuclear power, to a wide range of renewable energies.

of supply, regularity, quality and price of supplies, environmental protection and various other topics. It is therefore obvious that regulators' freedom to take "binding decisions" in these areas can be restricted.

The Art. 37.4 powers are therefore clearly narrower in scope than those issues covered in GB licences. While AEP accepts that there are disadvantages in having two parallel processes for EU and UK-initiated licence changes, it believes it essential that DECC should set clear boundaries to Ofgem's ability to amend licences.

In AEP's view, DECC's proposals very much shift the balance of power towards the regulator. It is therefore essential that this is redressed by ensuring that barriers to reasonable appeals are removed and that the scope of appeal is not constrained. In particular, economic and technical issues must be fully considered.

AEP understands the Government's concerns about avoiding vexatious appeals. However, it should be noted that only one appeal has so far been concluded since the 2004 Energy Act code appeals process was introduced. In practice, companies are reluctant to use appeal mechanisms except in extreme circumstances because of the cost, the amount of management time involved and the likely damage to the company's relationship with the regulator.

DECC emphasises that all affected licensees should have an equal right of appeal. Here it should be borne in mind that smaller players will be the least well-placed to mount an appeal in terms of financial and personnel resources. If these factors are not taken into account in the design of the process, smaller players will effectively be unable to use the appeal mechanism.

Art. 37.17 of the Electricity Directive and Article 41.17 of the Gas Directive state that "Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has an appeal to a body independent of the parties involved and of any government". There is no indication in the text that these appeal rights should be restricted to licensing matters. On the contrary, AEP believes that this provision applies to any area in which the national regulator takes binding decisions. In the case of the GB market, this would include decisions on TPA exemptions and enforcement orders, where up to now only judicial review has been permitted.