SCOTTISHPOWER

Smart Metering Implementation Programme
DECC
3 Whitehall Place
London
SW1A 2AW

23 January 2013

Dear Sir/Madam,

Consultation on draft legal text for Stage 1 of the Smart Energy Code

Thank you for the opportunity to respond to the consultation on the draft legal text for Stage 1 of the Smart Energy Code. We are in broad agreement with the proposals set out in the consultation document. However we have some comments set out in the attached Annex and would highlight the following key points:

- We believe that Panel Chair Appointees should not be necessary in general, and should only be appointed in circumstances where specific expertise is required within the Panel. They should not be entitled to vote.
- At this early stage of the Smart Energy Code's development, we do not believe it is sensible to decide whether unlimited liability is appropriate. In our experience, it is generally harder to move away from an established position, so we believe it would be best not to set that position now.
- The primary means of appeal should be to the Competition Commission after Ofgem's decision. Any earlier appeal should be without prejudice to that and should be to the Panel. To avoid the Panel becoming the *de facto* decision taker, it should be required to dismiss appeals unless it seems that the Change Board has made a material error.

Should you wish to discuss any of the above points, please contact me or

Yours faithfully,

ScottishPower London Office, 4th Floor, 1 Tudor Street, London EC4Y 0AH
Telephone

Printed on 100% recycled paper

Annex

CONSULTATION ON THE LEGAL TEXT FOR STAGE 1 OF THE SMART ENERGY CODE – SCOTTISHPOWER RESPONSE

Chapter 3 – Developing the Smart Energy Code

Question 1: Do you agree that the Government conclusions are appropriately reflected in the SEC Stage 1 legal drafting? Please provide a rationale for your views, and any further comments on the draft legal text.

The drafting does appear to reflect the Government's conclusions; however, we believe a number of points merit further consideration, as detailed in our answers to the questions below.

Chapter 4 – Responses to the Smart Energy Code April 2012 Consultation, and further questions for consideration

Question 2: Do you have any comments on format of the DCC's Charging Statement for Service Charges?

We have no comments on the format of the DCC's Charging Statement for Service Charges.

Question 3: Do you agree with the thresholds applied to the 'first comer / second comer' principle (Five Year Rule for costs over £20,000)? If you disagree please set out the reasons for your preferred approach.

While we are broadly satisfied with the proposed approach, and agree that five years will be an appropriate timeframe in the majority of cases, we wonder whether it may be appropriate to allow a longer period where the costs substantially exceed £20,000. For example, a ten year period might be allowed for costs which exceed £1,000,000.

A good example of this might be where an elective service necessitated the establishment of a completely new IT estate, perhaps to accommodate a variation in the security architecture. In such a case, the initial costs would likely be very high indeed and it is possible that a five year rule may adversely affect the commercial viability of such a venture.

Question 4: Do you think the members of the Panel nominated by industry should be drawn from and elected in equal numbers by Party category OR be elected by all Parties (as set out in the legal drafting). Please give reasons for your answer.

Electing panel members by Party Category (Option A) ensures a degree of representativeness, guaranteeing at least one Panel member is elected from (say) the Large Supplier Category. However, an approach that requires one person to be elected to represent all the members of a category, with all of their competing interests, may serve to marginalise the views of individual parties.

Election of panel members by all Parties (Option B) should result in the appointment of Panel members that are acceptable to all Parties, but the resulting lack of representation could actually serve to marginalise the views of entire Party Categories. In particular, we would be concerned that such an approach could effectively disenfranchise those making

the largest investment, leaving them without influence and, perhaps, denying the Panel access to real operational expertise. On balance we would therefore prefer Option A.

We differ from the Government's position with regard to the proposed Panel Chair Appointee. Although such appointees are a feature of some other codes, we do not believe one is necessary here, particularly as the Panel will not normally determine on Modifications. Should the Government decide to retain the chair's discretion in such matters, we would suggest that any Panel member so appointed should not be entitled to vote, but should provide support and expert advice, in a relevant area, where the Panel would otherwise be lacking in expertise.

It would be sensible for there to be a review process for any Panel Chair Appointee to avoid them becoming 'part of the furniture'.

Question 5: Do you support the proposed composition of the Change Board and its decision making arrangements?

Paragraph D8.8 of the SEC requires that Change Board members act in the interests of the Party category that elected them. We doubt that this is a practicable requirement and think it could lead to challenges of decisions. This is because within a given Party category, the members' interests may not be aligned and this could lead to intra-Category disputes. A Change Board member representing more than one party may not always know what the interests of all the parties are or how best to balance them.

We think that the Change Board members should act personally. Clearly, if they are not attentive to the wishes of the category electing them, they are unlikely to be re-elected.

We are otherwise broadly content with the provisions here.

Question 6: Do you think that the SEC should provide for Parties and the consumer representative to appeal Change Board recommendations before they are submitted to Ofgem? If so, what is the appropriate mechanism for determining such appeals?

We think that the question of whether an appeal is necessary at this intermediate stage is finely balanced. On one hand, it provides an opportunity for a party to raise questions where it seems likely that Ofgem and the Change Board will agree, and could also allow for a less cumbersome process than a Competition Commission appeal. But on the other hand, it could lead to a lot of appeals, not all of them well-founded.

It may be that the best way forward is to provide for an appeal at this stage to the Panel, but that the Panel should only consider an appeal where it considers that there is a prima facie case that the Change Board has made a material analytical or procedural error. This would give the Panel power to reject vexatious appeals without hearing them.

We also believe there may be some question as to the effect on a Party's subsequent right of appeal to the Competition Commission where an initial appeal of this type has proven unsuccessful. In our view, it is very important that a party should not be prevented from appealing to the Competition Commission by reason of having been unsuccessful in an initial appeal of the type discussed here.

Question 7: Do you have any further comments, or views on the cost implications to SEC Parties, regarding the proposals for governance, the modification process and the approach to appeal rights set out here and reflected in the legal drafting of Stage 1 of the SEC?

Party costs will always present an issue and inhibit engagement. We would, therefore, welcome the introduction of technology, wherever possible, to minimise staff travel costs etc. Such technology may prove particularly beneficial where the introduction of an early appeals process served to elongate the overall modification process, as this might otherwise serve to increase costs and reduce Party engagement.

In our view, there would be little need for a Change Board if the Authority simply received all responses to Modification consultations and made its decision absent any perceived 'recommendation' from the industry. The appeals process would, thereafter, be available to any that wished to pursue an appeal, though that could be subject to a test of relative materiality.

We also think it is unclear whether a variation is the same thing as a modification, or a variation to a modification (as opposed to an alternative modification). If it is the latter, then there is no reference to the need to satisfy objectives when determining whether to recommend acceptance or rejection of a modification. However, if it is, as it appears to us to be, the former, then we believe the more consistent approach would be to refer to 'Modification', 'Modification Proposal', and 'Alternative Modification Proposal' throughout.

Question 8: Do you agree that liability provisions for intellectual property rights and confidentiality should be included in the SEC? If so, do you agree that they should be unlimited?

In our opinion, the approach should be consistent with other industry codes wherever possible, but it remains important that the SEC allows for adequate sanctions to be applied in protecting IPR and Confidentiality. Recognising the uniqueness of the SEC, in having both licensed and unlicensed Parties utilising the same services, we are also cognisant that this could mean that the threat of expulsion from the code, which might otherwise be relied upon to ensure compliance, might not be so effective with regard to unlicensed Parties.

Nonetheless, while we note the Government's view that it would be extremely unlikely for a Party to unwittingly find itself in breach of provisions relating to IPR or confidentiality, we would be concerned as to how compliance with such provisions might be construed in practice. This is particularly relevant while the nature of IPR and Confidentiality ownership breaches and their consequent costs remain unclear: with regard to customer consumption data. (For example, the programme has yet to clarify how and where records of consent are to be maintained.) Parties must be permitted to know the exact extent of any requirements before they can be expected to comply with them.

We believe the rights and interests of the various groupings envisaged within the Code need to be more clearly established, and reflected in the Code, before the potential results of unlimited liability can be properly assessed. Therefore, at this early stage of the Code's development, we do not believe it is sensible to decide whether unlimited liability is appropriate. In our experience, it is generally harder to move away from an established position, so we believe it would be best not to set that position now.

Question 9: Do you agree with the Government's proposal that in instances where the DCC is exposed to liabilities that exceed what it can claim from the person causing the original breach, the net liabilities for the DCC will be recoverable from SEC Parties by way of an increase in the DCC's fixed charges?

We agree that this offers a pragmatic approach that insulates the DCC from prohibitively expensive insurance costs (which would likely be passed through to users anyway) for a very low risk to Parties in general.

Question 10: Do you agree that the Government's proposal to allow DCC to link service provider and SEC disputes in the arbitration process?

This appears to be a sensible and pragmatic approach that should deliver better outcomes more cost effectively.

Chapter 5 – Additional sections of Stage 1 of the SEC for consultation

Question 11: Do you agree that the proposed legal drafting covering change co-ordination with other codes meets the requirements as set out in chapter 5?

Yes, we agree that the SEC Panel must establish suitably robust joint working arrangements with the other Energy Codes, and that the relevant draft text in section C should satisfy that purpose.

Question 12: Do you agree that the proposed legal drafting for the SEC covering obligations on SEC Parties to pass registration information to the DCC is appropriate? Please provide a rationale for your views.

We agree that the drafting broadly supports the requirements.

Question 13: Do you agree with the proposed variation to the SEC modification regime in the transitional period, including a right of veto for the Secretary of State?

The approach is broadly satisfactory, although we would be concerned to ensure that the Secretary of State's right of veto was strictly limited to within a clear and unambiguous timeframe. To that end, we would wish to see a date specified in the code, rather than a reference to a date to be determined by the Secretary of State himself.

Question 14: Comments are invited on the approach to transition as set out in this chapter and section L of the SEC. Please provide rationale to support your views.

In our view, L1.4 (a) ought to extend to the Meter Operator ID, which the DCC will need to be aware of for the installation process to work.

Chapter 6 – Establishment of the SEC

Question 15: It is the Government's intention to introduce a regulatory obligation on suppliers to enrol SMETS-compliant domestic meters with the DCC and that this obligation would apply in relation to smart meters installed (from a specified point in the future). Do you agree with this intention? Please provide a rationale for your views.

Yes. We think it is vital to the overall success of the smart installation programme that the principle of the DCC at the centre is one that can be relied upon. However, we also recognise that commercial imperatives might make other mechanisms more immediately attractive, frustrating the uptake of DCC services and, potentially, increasing costs to the wider market. We would, therefore, suggest that all meters that can be enrolled in the DCC should be.

Clearly, this does raise the question of where the costs of such enrolment/adoption should lie, but we have remained convinced throughout this process that the installing supplier, as the Party responsible for procuring the equipment and infrastructure in the first place, must accept the burden of any subsequent costs that might arise as a result of its necessary enrolment/adoption. The Government clearly stated, in its response to the Prospectus consultation, that those installing smart meters ahead of the full technical requirements being available, did so at their own commercial risk.

Question 16: Do you agree in principle with the placing of a licence condition on gas and electricity suppliers to accede to and comply with the SEC?

Yes, we agree that this is necessary. We also think it consistent with the approach taken with other industry codes.

Question 17: Do you agree that the licence conditions as drafted meet the policy requirements as set out in the chapter? Please provide a rationale for your views.

Yes, they appear to satisfy the requirements with regard to Domestic suppliers and those using smart meters in the premises of small non-domestic customers.

Question 18: Do you agree in principle with the placing of a licence condition on gas and electricity network operators to accede to and comply with the SEC?

Yes, we agree that this is necessary. We also think it consistent with the approach taken with other industry codes.

Question 19: Do you agree that the licence conditions as drafted meet the policy requirements as set out in the chapter? Please provide a rationale for your views.

Yes, we agree that the proposed licence condition meets the requirements, in that it will allow DCC's fixed costs to be recovered, in part, from network operators. Without such an obligation, there must be some question as to how many network operators would accede to the SEC from the outset.

ScottishPower
January 2013