

Mr Will Fletcher,  
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By email at [EnergyMarket@cma.gsi.gov.uk](mailto:EnergyMarket@cma.gsi.gov.uk)

Wednesday, 08 April 2015

Dear Will,

**Energy Market Investigation: Utilita Submission on the Updated Issues Statement and Working Paper on Codes.**

Utilita has read the updated issues statement and some of the working papers. We support the objectives of the investigation and are in broadly agree with the CMA's general direction of travel.

We apologise for the delayed submission of this letter and attached document on the Updated Issues Statement/Working Paper on Codes. In view of this delay we give only limited commentary on key points on these two documents.

The key issues we highlight are set out in the summary, and relate to:

- Support for the updated theories of harm in general
- Welcoming the CMA's attention to issues arising from RMR
- Support for the CMA's examination of whether governance arrangements favour incumbents
- Resourcing issues – both in general and competition for resources

We have also, under separate cover, provided a covering letter and submission document on the Working Paper on Gas and Electricity Settlement Metering.

We would be happy to discuss any of the points raised in this letter and attached submission in more detail. Please contact Alison Russell, Regulatory Affairs Manager on 01962 874855 or [AlisonRussell@Utilita.co.uk](mailto:AlisonRussell@Utilita.co.uk).

Yours sincerely

William Bullen  
Managing Director, Utilita

# ENERGY MARKET INVESTIGATION

## Utilita Submission on the Updated Issues Statement and the Working Paper on Codes

### Key issues:

Utilita has considered the Updated Issues Statement and the working paper on codes and supports the approach taken. We believe that the CMA has correctly identified a number of the key issues which need to be addressed. These are:

- The complexity and issues associated with Gas and Electricity Settlements and Metering – our comments on that working paper are set out in our separate submission. In particular, we address smart metering issues and the impacts of approved and proposed changes on the ability of smaller participants to manage price and volume risk. This includes profiling and allocation issues, balancing prices and switching.
- Retail Market Review – we have considerable concerns about the path and impacts of RMR and we welcome the CMA's commitment to consider in detail the questions set out in the UIS<sup>1</sup>. We agree these questions should address the major concerns.
- We agree with the updated Theories of Harm, and that the broader approach in some areas will improve the investigation.
- We agree that the complexity of electricity codes is a major issue – in particular the resourcing of industry development by smaller suppliers
- We support the key issue raised in the UIS under governance on the extent to which the current industry governance and regulatory arrangements favour incumbent larger participants over new or smaller suppliers who may be able to offer innovative insights and approaches.

In addition, we support the commentary on resourcing by smaller suppliers. As noted, smaller suppliers have to prioritise scarce resource toward mandatory submissions which may prevent smaller participants engaging in development activity.

In the following sections, we expand on some of these issues. Where we are in agreement with the UIS on the issues set out above, we have not commented further.

### Resourcing of industry change:

As a smaller supplier, we agree strongly with the identified issues around the complexity of codes within the industry; the difficulty of resourcing effective engagement with industry processes; and the failure of industry processes to recognise and support adequately supplier portfolios which are non-traditional. The combined effect of these issues is that the industry change processes are usually dominated by the larger players with greater resource, when smaller suppliers might offer new and innovative insights as a result of different perspectives.

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<sup>1</sup> Paragraph 163



Unfortunately we do not believe that the changes made as part of Ofgem's Code Governance Review delivered the simpler, more accessible industry processes needed. We agree that the SCR process does not appear to have shortened timescales.

This delayed submission is a good example of the resourcing difficulty is clear, having imposed the need to limit strictly the working papers to which we could resource a response. We also draw to the CMA's attention the number<sup>2</sup> of extensive and burdensome mandatory information requests imposed on suppliers by DECC, Ofgem and Citizens Advice over the same period as the CMA requested submissions on the UIS and working papers. This does not include the usual consultation and code governance processes which also require attention. Smaller suppliers have limited regulatory resources, and mandated activity has to take precedence over elective submissions.

The CMA investigation is of fundamental importance to the future of the industry and this competition by DECC, Ofgem and CAB for scarce industry resources at such a time is regrettable. We believe that a good range of inputs from a variety of parties, not just big six players, is crucial to the CMA investigation, and has far greater importance to the future of the industry than these information requests which could have been delayed with minimal impact.

In future, we hope parties making information requests will consider impacts of this type, and what requests may be already in circulation, prior to issue of further requests to minimise regulatory burden.

#### **Regulatory Framework and Governance:**

We note CMA's updated theory of harm 5: that the broader regulatory framework, including the current system of code governance, acts as a barrier to pro-competitive innovation and change. We strongly support the inclusion of this new theory of harm and believe that carefully targeted actions and remedies should be promptly applied.

We hope that in considering this new theory of harm, CMA will examine all aspects of the broader framework not just aspects of code governance previously considered by Ofgem. We have set out above our views on resourcing and the difficulties experienced by smaller suppliers with limited resource. The CMA investigation should also consider the context in which recent decisions (e.g. RMR) have been made.

#### **Ofgem's ability to modify licences:**

In 2011, as part of the changes to implement the Third Energy Package (TEP), licensees' rights to object to changes to their licences were removed, leaving only a limited *ex-post* appeal right. While the Third Energy Package required certain decisions of the NRA to be capable of this type of implementation, the DECC decision in respect of Ofgem's licence modification powers could be considered to extend beyond the actual requirements of the third package. Ofgem's decision following the Code Governance Review to implement a Significant Code Review (SCR) process, enabled Ofgem to direct industry code modifications to support its preferred position, leaving only a limited appeal right. The effect of the changes together has been to constrain participants' ability to predict and manage regulatory risk with consequential impacts on supply competition.

#### **Principles-based regulation:**

The decisions above have also led to other decisions which in Utilita's view have not benefitted the industry. The Retail Market Review has, in our view, led to a significant reduction in innovative retail

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<sup>2</sup> Utilita has received over ten mandatory requests for submission in the period Jan-April 2015. This does not include a further number of requests which were not made under powers and hence were voluntary or any regulatory submissions specific to Utilita.

offerings and a massive increase in retail regulation such that the standard supply licence conditions are now over 430 pages.

Utilita strongly supports a move to flexible, principles-based regulation which is driven by customer benefits and outputs rather than disproportionate, inflexible, rule-based compliance with all its attendant costs.

Moving towards principles based regulation is urgent and must be addressed but it will require a step change in thinking both in Ofgem and in the industry – on regulation and compliance approach.

The process of design and development of a new principles based regime must be an inclusive one, involving all types of participants, including those less well resourced. We understand that smaller players will struggle to commit the necessary time, but a solution must be found or the resulting regime will risk perpetuating the same issues. We will commit to support such a process and believe that GB could develop a strong and flexible principles based regulatory regime.

**Conclusion:**

We do not believe that the industry governance and regulatory framework is fundamentally broken, but it does require improvement. The industry is complex and in some cases this is necessary for individual safety or system operation and balancing reasons.

However, we believe that Ofgem and the industry should primarily devote the scarce resources available to improving matters such as data, profiling and settlements along with implementing flexible principles-based regulation and proportionate code governance.