

Corporate Response Form 'Ofgem Licence Modification Appeals' Consultation URN 10D/807 Open: 01/10/2010 Close: 29/10/2010	
Name:	[REDACTED]
Organisation:	International Power plc (IPR), representing First Hydro Company, Rugeley Power Ltd, Saltend Co-generation Company Ltd, Deeside Power Ltd, Indian Queens Power Ltd., IPM Energy Trading Ltd. and IPM Energy Retail Ltd.
Email:	[REDACTED]@fhc.co.uk
Phone:	[REDACTED]

Consultation Questions	
<b>What should be the scope of the appeal mechanism?</b>	
1	<p><b>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.</b></p> <p>Given the importance of price controls to network companies, we do not think it is appropriate that objections to licence modifications can only be dealt with through appeal. This will be far more costly than dealing with concerns prior to a licence modification being made. Therefore, where price control related licence changes do not fall within the scope of the Third Package, they should be subject to the current process for change.</p>

**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?**

Only for areas that require the regulator to have autonomy to meet the requirements of the Third Package.

We can understand why DECC would want a single mechanism for making changes to licences rather than one mechanism to address Third Package related changes and one to address domestic changes. However, the Impact Assessment estimates an NPV cost of between £8m and £68m over 20 years to deliver this alignment assuming perhaps one licence change is disputed per year. This is an awful lot of money for a bit of convenience.

IPR has grave concerns over whether having an appeals mechanism for domestic licence amendments is an appropriate route for a licensee to be able to object to a licence change.

Currently we have an ex-ante approach to objecting to licence changes, introducing an ex-post approach will be far more costly for industry and the regulator (whose costs are ultimately born by consumers in any case). The impact assessment assumes costs for the appellant of £175k not including any internal costs and initial legal advice prior to launching an appeal and costs of £600k for Ofgem. These are very significant sums.

One of the justifications for the single process is that it will benefit smaller licensees as currently they cannot prevent implementation of a licence change by acting alone. Costs of perhaps £175k can only really be swallowed by the vertically integrated companies, these costs would be a huge deterrent for a small company, even more so if the loser had to pay all costs. Furthermore, the cost of launching an appeal will be more likely be higher as external and expensive legal advice will be needed compared to a large organisation that has these resources in house.

We do not see how these sums can be justified purely to avoid having two different regimes. These costs could largely be avoided if the appeals process were only to apply to Third Package related changes.

We are also concerned that the new licence modification process could be used by the regulator to drive through licence changes that industry does not support with reasonable confidence that they won’t be appealed due to the cost and time of

<p>launching an appeal</p> <p>For these reasons, we believe that the current licence modification route for domestic changes should be preserved.</p>	
<b>3</b>	<p><b>Do you agree there should be a full investigative hearing for price controls?</b></p>
<p>If opposition to price controls licence modifications can only be via an appeals process then it is essential that there is a full investigative hearing.</p>	
<p><b>Grounds for appeal</b></p>	
<b>4</b>	<p><b>Do you agree with our proposal for an appeal on the merits?</b></p>
<p>Yes</p>	
<b>5</b>	<p><b>Would our proposed grounds allow for consideration of legitimate legal, factual and economic issues, without undermining regulator independence? If not, please state why.</b></p>
<p>The requirement for regulator independence only extends to the ability to take autonomous decisions with regard to the Third Package. Beyond that there does not need to be this requirement.</p>	
<p><b>What who are the affected parties who should have right of appeal?</b></p>	
<b>6</b>	<p><b>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.</b></p>
<p>We agree that consumer groups and holders of other licences could be affected by a licence change so should have the right of appeal, not just be able to submit evidence at the discretion of the appeal body. Inappropriate appeals can be 'filtered out' through the carefully defined rights of appeal, the likely costs incurred and the ability to dismiss trivial and vexatious appeals as proposed in this consultation.</p>	

<b>The appeal body</b>	
<b>7</b>	<b>Do you agree the CC is the most appropriate appeal body? Why/ why not?</b>
Yes, the CC is currently used for appeals to Ofgem code decisions so is a tried and tested appeal body.	
<b>Outcome</b>	
<b>8</b>	<b>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.</b>
It would be more effective for the appeal body to have the power to vary any Ofgem decision. If a case is remitted back to Ofgem without resolution then there is the possibility that a further appeal is necessary if Ofgem fails to address the concerns of the appellant. Having an independent body make binding recommendations ensures that an impartial decision can be made.	
<b>Time Limits for the process</b>	
<b>9</b>	<b>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?</b>
<p>Whilst we recognise that speed is necessary, allowing the appellant four weeks to lodge an appeal is not enough time. With such a short timescale, a licensee facing an unwelcome change to their licence would have to be doing preparatory work on their appeal prior to a decision being made in order to meet the four week deadline. Suggesting a four week timescale because it is consistent with the current timescale for raising objections to a licence change is not a valid comparison. The current licence modification mechanism does not require extensive legal input.</p> <p>We suggest a three month timescale to lodge an appeal would be appropriate.</p> <p>A four month timescale for hearing appeals would be sufficient but serves to highlight the time, resource and cost of an appeal and why only having this route of objection for licensees to domestic licence modification is not desirable.</p>	

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

There may be circumstances where an appeal needs to be resolved more quickly. Any proposed licence changes should take account of the possibility of an appeal being made and factor this into the timescale .i.e. they need to be raised at least 6 months before any required implementation date to allow time for the appeals process.

### **Can Ofgem's decisions be suspended?**

<b>11</b>	<b>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?</b>
-----------	---

There should be no discretion particularly for domestic licence changes. If a licence decision is appealed then the licence change should be suspended until the outcome of the appeal has been determined regardless of the circumstances and especially if it involves significant implementation expense or requires confidential information to be disclosed.

### **How will the costs be recovered?**

<b>12</b>	<b>What will be the likely costs and benefits of these changes on your organisation?</b>
-----------	--

IPR does not see any benefits of changing the current licence modification process. At the moment, a licensee can object to a modification to its licence ex-ante. Under these new proposals an objection will incur the significant costs, resources and time of launching an appeal.

The impact assessment assumes costs for the appellant of £175k not including any internal costs and initial legal advice prior to launching an appeal and costs of £600k for Ofgem giving NPV costs over a 20 year timeframe of between £8 and £68m. These are very significant sums. We do not see how these sums can be justified purely to avoid having two different regimes. These costs could largely be avoided if the appeals process were only to apply to Third Package related changes.

<p>For domestic licence changes if the new process is to apply, it would be appropriate for each side to pay their own costs. This might encourage licensees to raise appeals safe in the knowledge that they would only be faced with their own costs (which at perhaps £175k would still be sufficient to discourage any vexatious appeals).</p>	
<b>13</b>	<p><b>How do you recommend potential costs could be reduced? How could we maximise the potential benefits to the regulatory regime as a whole?</b></p>
<p>Costs could be reduced for domestic licence changes by retaining the current process for making licence changes.</p> <p>Costs could also be reduced by requiring each side to pay their own costs as suggested in Q12.</p>	

Impact Assessment Questions	
<p><b>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.</b></p>	
<b>14</b>	<p><b>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.</b></p>
<p>Given that the Third Package only requires these changes in relation to specified regulatory tasks, the Impact assessment should separate out the NPV costs of appeals related to Third Package changes as this has to happen to ensure compliance and appeal costs related to domestic licence changes. Licensees and DECC would then be able weigh up the costs and benefits of the convenience of having a single licence modification process applied to domestic licence changes.</p>	

<p><b>15</b> 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>The consultation states that for some licence changes there might be some aspects that related to the Third Package and some that relate to domestic changes and that it would be impractical to progress a licence modification that fell into both of these camps with parallel regimes.</p> <p>Without having seen these licence changes it is difficult to determine how often this might happen or to quantify the associated costs. To complete the picture, it would be helpful if DECC could expand their Impact Assessment so that the costs of the minimum implementation option can be compared to that proposed.</p> <p>Where a licence change is clearly to meet a domestic requirement then IPR would readily live with the current mechanism despite the need to have two parallel regimes as the costs of objecting to a licence change will be far lower.</p>
<p><b>Additional Comments</b></p>

