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GNI (UK) Ltd.

Ms. Roisin McLaughlin
Utility Regulator
Queens House
14 Queens Street
Belfast BT1 6ER

9 April 2018

Re: Response to UR Consultation – Revisions to Enforcement Procedure and Financial Penalties Policy

Dear Roisin,

GNI (UK) Limited ("**GNI (UK)**") welcomes the opportunity to respond to the Consultation on revising your Enforcement Procedure and Financial Penalties Policy (the "**Consultation**"), which was published by the Utility Regulator (the "**UR**") on 28 February 2018. Our feedback to this Consultation is provided below.

a. The clarity of the annexed documents

Legislative Basis

As noted in the Consultation paper, the enforcement procedure does not have a specific legislative basis. Article 43 of the Energy Order 2003 (the "**2003 Order**") sets out the procedural requirements applicable to the making of a final order or confirming of a provisional order by the UR. In the event of any inconsistency, the 2003 Order and the Water and Sewerage Services Order 2006 (the "**2006 Order**") Order would have to prevail.

Timelines of Investigation

We note that the timelines of an investigation will be considered on a case-by-case basis. A more structured timeline may prove useful to give bodies under investigation an indication of the likely timelines which may apply. In particular:

GNI (UK) would welcome further clarity on the application of Clause 3.3 of Annex 1 which refers to disapplication of the process outlined in the Enforcement Procedure in certain circumstances. We understand Clause 3.3 to mean that, in certain circumstances of urgency, the timetable for enforcement may be overridden but not the principles applicable to enforcement. It is imperative that the process be followed insofar as is possible to ensure that principles of natural justice are adhered to.

The process should only be disapplied (and to the least extent possible) in order to prevent serious damage/loss. If the damage/loss has already occurred and is not continuing, the process should be followed even where the contravention is serious. The imposition of an enforcement where the process has not been followed in full should only occur in exceptional circumstances and be subject to a high threshold of proof.

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GNI (UK) would also welcome clarity on Clause 3.5 of Annex 1 regarding the expected time period for the company to respond to a notice served under Article 51 of the 2003 Order and Article 261 of the 2006 Order. We acknowledge that it could depend on the complexity of the issue, but it should state a minimum lead time.

GNI (UK) would also welcome clarity on Clause 3.54 of Annex 1. Wenote that the UR may wish to accelerate the response time for a statement of case, but would suggest that there should be a minimum lead time set out in the proposals.

Independence of Enforcement Committee

GNI (UK) would welcome clarity on Clause 3.26 of Annex 1, as the practical implications of this are not clear. We would assume that senior management in the UR would form part of the investigation team. If settlement discussions subsequently break down and a fresh committee is called, it is unclear how this could be fully independent if senior personnel / board members within the UR have already been involved in initial discussions. We note, in particular, Clause 4 where potentially all the board members could be appointed to an enforcement committee.

b. The aim of the revised enforcement procedure

We agree in principle with the aim of the enforcement procedure. However, we note the importance of balancing the newly incorporated deterrent factor and the desire to incentivise other companies to comply with best practices generally with principles of natural justice and the rights of a company under investigation (especially where an investigation is ongoing).

The UR's use of a deterrent factor in the context of the enforcement procedure must be proportionate and fair.

c. The concept of alternative resolution and how it fits into the procedure

It is unclear from the proposals whether a body under investigation can break off from the alternative resolution discussions and, subsequently, opt to defend the investigation. If it is the case that a company can break off from the process, then this raises the question of whether the process should be carried out on a 'without prejudice' basis. We would suggest therefore that it should be carried out on a 'without prejudice' basis as is the case with the settlement discussions.

d. The concept of settlement and how it fits into the procedure

We are in agreement with the ability of companies under investigation to settle at different stages of the process. However, we do not see any reason why a company has to admit to all alleged breaches to avail of a settlement. A company should be able to benefit from admitting a breach without having to admit others (which may not have occurred) and give up its right to appeal the findings / amount of the penalty. It is not clear that companies will know the amount of the financial penalty when it agrees to settle. Can this be clarified? It is imperative that this be known by companies to ensure that they have all the pertinent facts to aid a settlement decision.

e. The proposed settlement windows and discounts

A discount for (early) settlement is a practical approach from the UR but GNI(UK) would advocate higher discounts on the basis that there is a clear risk for the UR in taking on a full enforcement, the costs of which will have to be fully borne by NI gas customers. An upfront settlement will minimise the indirect cost exposure for gas customers. Therefore, we suggest that consideration should be given to a discount of **50%** in the first window and **30%** in the second window. As set out at d. above, a company would need to know the potential penalty before a decision can be made in relation to settlement.

f. Our proposals with respect to publication.

We note that Article 7(2) of the 2003 Order provides that *"in publishing advice or information under this Article the* *<u>Authority shall have regard to the need for excluding</u>*, *so far as that is practicable,* *<u>any matter which relates to the affairs of a particular individual or body of persons</u>* *(corporate or unincorporate), where publication of that matter would or might, in the opinion of the Authority,* *<u>seriously and prejudicially affect the interests of that individual or body</u>"* [emphasis added]. We note that Article 259 of the 2006 Order has a similar provision.

The scope of the Authority's power to publish information is therefore limited in legislation by the requirement in the 2003 Order to have regard to whether the interests of an individual or body involved would or might be seriously and prejudicially affected. We do not believe that information in respect of ongoing publications should be published on the basis that publication in such circumstances would be likely to seriously and prejudicially affect the interests of the parties involved.

We would suggest that investigations and their details should not be published until they are completed. If the UR thinks it necessary in certain circumstances, it could provide facts of an ongoing investigation on an anonymised basis. This would meet the UR's requirement that the investigations have a preventative measure without having a disproportionate impact on the company being investigated against which nothing has been proven.

If the UR decides to publish information throughout the investigation and before a determination has been made, it needs to undertake to make a clear and unequivocal statement after the fact in circumstances where no finding of a breach has been made against the company in question.

Notwithstanding the above, we also note the following in respect of the publication of information:

Section 2.7 of Annex 1 outlines that "*where practical we [the Authority] will inform the company concerned that we [the Authority] intend to publish information about their case on our website. We [the Authority] will do this one day in advance of publication*". This period is too short and does not give a company sufficient time to seek an injunction, if necessary. There needs to be an element of procedural fairness to any publication that will likely prove detrimental to a company. In practical terms, to undertake such an exercise in a complex case would take more than one day to complete. We would suggest that a company gets at a minimum two clear days' notice of the UR's intention to publish information.

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GNI (UK) would further welcome clarity on each of the following matters:

Section 3.17 (publication of alternative resolution)

- what lead time will be provided to the company in terms of the UR publishing the resolution on its website?
- will there be a minimum period to allow the company to review accordingly?

Section 3.33 (publication of alternative resolution)

- what lead time will be provided to the company in terms of the UR publishing the resolution on its website?
- will there be a minimum period to allow the company to review accordingly?

Section 3.42 (publication that a case is closed following alternative resolution)

- what lead time will be provided to the company in terms of the UR publishing the resolution on its website?
- will there be a minimum period to allow the company to review accordingly?

g. Financial penalties

The calculation of the financial penalties seems to be generally in keeping with the legislative framework as set out at 1.1 and 1.3 of Annex 3. However, we note that the policy is looking to *"ensure that customers receive appropriate redress where* they *have suffered loss, damage, inconvenience, or any other adverse impact as a consequence of the contravention"*.

Article 45(10) of the 2003 Order states that *"any sums received by the Authority by way of penalty under this Article shall be paid into the Consolidated Fund."* We note that Article 35(8) of the 2006 Order contains a similar provision. In the previous enforcement procedure consultation published in 2016 it was noted that the UR *"are under a legal obligation [to pay financial penalties to the Consolidated Fund] and so it is not be [sic] possible for sums paid as a financial penalty to [the UR] to be paid directly to customers."*

We would therefore welcome clarity on the reference to the customer redress in the context of a calculation of a financial penalty.

Please do not hesitate to contact me if you require any further information.

Yours sincerely,

Celine Hayes
Regulatory & European Affairs Manager
Gas Networks Ireland on behalf of GNI (UK) Limited