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to customers*

Electricity and Gas Suppliers
Energywatch
Large User Groups
Small Medium User Groups
Scottish Business User Groups

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Dear Sir,

Consultation regarding transfer objections under deemed contracts for non-domestic customers

In August 2003, following consultation with the industry and customer groups, Ofgem published a decision document entitled 'Transfer objections: stronger rights for industrial and commercial customers'. This proposed that the circumstances in which suppliers in the non-domestic electricity and gas markets are permitted to object to the proposed transfer of one of their customers should be set out in supply contracts rather than prescribed by regulation. This would permit suppliers and customers to determine grounds for objection that suit their individual circumstances. The decision document was followed by a modification to the gas supply licence and the MRA to give effect to relevant changes in the objections rules which were intended to have consistent effect across the gas and electricity markets. These new arrangements were implemented on 5 January 2004.

Subsequently, Ofgem has been informed that the changes have not been interpreted or applied consistently across the gas and electricity markets. Under the gas supply licence it is clear that transfer objections may not be made under deemed contracts¹ for non-domestic customers whereas the position under the MRA is less clear. Consequently, one supplier has raised an MRA Change Proposal² ('the Change Proposal') which, if successful, would have the effect that transfer objections could not be made under deemed contracts for non-domestic electricity customers.

¹ A contract that is deemed to be in place where a customer takes a supply of electricity and gas otherwise than under a contract that has been expressly entered into with a supplier, for example where a customer moves into a property and begins consumption without a contract in place. For a full definition, see the Electricity Act (Schedule 6) and the Gas Act (Schedule 2B).

² MCP 144

The Change Proposal was approved by the MRA Development Board (MDB) on 27 May 2004 and that decision was appealed by a supplier. This appeal was considered at the MRA Forum on 29 July 2004 where the MDB decision to accept the Change Proposal was upheld.

This decision of the MRA Forum was subsequently appealed for determination by the Gas and Electricity Markets Authority ('the Authority'). In a separate letter, Ofgem is currently seeking views on this appeal from MRA parties and customer groups in accordance with its appeal process.

Ofgem did not request views on the specific issue of deemed contract objections in the non-domestic market during its previous consultation. It is therefore, irrespective of the outcome of the decision on the appeal, seeking views from customer groups and gas and electricity suppliers to determine whether it is appropriate for suppliers to be able to object under deemed contracts in both the electricity and gas markets and, if so, under what circumstances.

In addition, if the Authority were to reject the appeal mentioned above, the Change Proposal would require the consent of the Authority before it could be implemented. Views expressed in response to this consultation may also be considered by Ofgem in its determination as to whether to grant its consent to the Change Proposal (if required).

Background

Before 5 January 2004, the circumstances in which a non-domestic supplier was able to prevent its customers switching to other suppliers were governed by rules prescribed by regulation. In the gas market these were set out in the gas supply licence, in the electricity market they were defined in the MRA.

In the gas market, a supplier was able to raise an objection to a transfer where the customer had a debt outstanding for more than 28 days, or where the customer had not given the required notice to terminate their existing contract before the transfer. In the electricity market, objections were only permitted where both suppliers agreed that a meter point had been registered in error, or where a supplier had registered a metering point that was related to another, without also registering all related metering points.

Some customers and suppliers preferred their supplier to be able to object, while others preferred them not to have that right. As a consequence of these varying views and in order to harmonise the processes between the two markets, Ofgem proposed that the customer and supplier should be able to determine the grounds for objection between them through the supply contract and consulted the industry and customers in December 2002. With the majority of views in favour of this proposal, Ofgem published a decision document in August 2003 and a statutory consultation in October 2003 to modify the gas supply licence standard conditions. At the same time, the electricity industry approved, and the Authority granted consent to, a change to Clause 16 of the MRA³.

The new rules for non-domestic objections in both markets were implemented on 5 January 2004. Their effect was to permit objections in circumstances specified in the supply contract between the customer and supplier. In addition, the ability to object where both suppliers agree that the meter point has been registered in error and the requirement to notify the customer of the reasons for any objections were replicated from the electricity market into the gas supply licence. In the gas market, as a transitional arrangement, contracts that had been entered into

³ MCP 135

before 5 January 2004 and that made no reference to circumstances for objection were permitted to continue with their original grounds for objection unchanged for the life of the contract.

Objections under a deemed contract

Concerns over the interpretation of the new wording in Clause 16 of the MRA and the intention of the change described above have focused on whether an electricity supplier may object where a non-domestic customer is supplied under a deemed contract.

In the gas market, the original grounds for objection in standard licence condition 30 permitted objections to be made where the customer was supplied under a deemed contract only in circumstances where there was a debt demanded in writing and outstanding for 28 days.

Under the revised wording for standard licence condition 30, a supplier is permitted to object in circumstances specified in the contract. The definition of the term 'contract' contained within the licence explicitly excludes a deemed contract and therefore standard licence condition 30 no longer permits objections to be raised for any reason where a customer is being supplied under a deemed contract.

As described above, before 5 January 2004 the MRA did not permit objections in the non-domestic market, including where the customer was being supplied under a deemed contract, except where both suppliers agreed that a mistake in the registration had been made or where related meter points were not registered on the same day. However, the absence of a definition of the term 'contract' in the MRA has given rise to an interpretation of the new wording of clause 16, adopted by some suppliers, which has the effect that objections may be made in circumstances specified in deemed contracts for non-domestic customers. At least one supplier has therefore included circumstances for objections within their standard deemed contract terms.

This issue was discussed in respect of both the gas and electricity markets by suppliers at the Non-Domestic 'Objections & Erroneous Transfer' Working Group on 22 April 2004. At this meeting, arguments for and against the ability to object under deemed contracts were expressed. One supplier felt that objections should be permitted under deemed contracts only in the case of an outstanding debt as had originally been permitted under the gas supply licence. They stated that the ability to object was an important tool in enabling a supplier to recover money owed to them when a customer is supplied pursuant to a deemed contract, for example on a change of tenancy, but has failed to pay. Without this ability, they believed the only method of enforcing payment is through court action which is likely to be uneconomical in most cases.

Other suppliers have expressed the view that objections should only be permitted in circumstances where the customer and supplier have agreed the terms for inclusion in their contracts and that therefore objections under deemed contracts, which are not expressly agreed by customers, should not be allowed. They considered that transfer objections under deemed contracts could have the effect of locking in customers to deemed contracts, which are only intended to be a temporary measure to enable supply, and preventing them from entering into a full supply contract with the supplier of their choice. There would also be a weaker incentive on suppliers to negotiate suitable terms and enter into a full supply contract with the customer. In addition, some suppliers held the view that there was a danger that there could be a negative impact on customers and their ability to switch supplier if suppliers were able to decide the

precise circumstances in which they could object and include them in a contract that the customer had not expressly entered into.

The group however agreed that clarity was needed and that it was preferable to harmonise the rules in electricity and gas as far as possible.

MCP 144

MRA Change Proposal 144 was raised by Opus Energy on 29 April 2004 and seeks an amendment to clause 16 of the MRA with the effect of not permitting transfer objections to be made under deemed contracts for non-domestic customers.

At the meeting of the MDB on 27 May 2004, four suppliers voted in favour and three suppliers voted against the Change Proposal. The Distribution Businesses declared no interest. Of the Settlement Bodies, Elexon voted in favour, while SESL gave a 'neutral' vote. Consequently, the MDB accepted the Change Proposal.

On 18 June 2004, Ofgem received notification of an appeal raised by British Gas Trading in relation to the decision of the MDB. The grounds for this appeal were debated at the MRA Forum on 29 July 2004. At that meeting, five suppliers voted in favour of the appeal and five suppliers voted against the appeal. After weighting this vote by taking account of the number of metering points supplied by each supplier, 73% of the votes were in favour of the appeal. One distributor declared an interest and voted against the appeal. Therefore, the MRA Forum's resolution was to uphold the decision of the MDB to accept the Change Proposal.

Changes to Clause 16 of the MRA may not take effect without the prior written consent of the Authority. Accordingly, Ofgem may consider views received in response to this consultation to determine whether there is merit in transfer objections under deemed contracts being permitted in both the gas and electricity markets for non-domestic customers and therefore whether to grant its consent to the Change Proposal (if required).

If the Authority upholds the appeal or decides not to give consent to the Change Proposal on the grounds that there is a valid requirement for transfer objections to be made under a deemed contract for non-domestic customers, Ofgem considers that a change to the gas supply licence would be required to mirror these arrangements. A further change to the MRA may also be required to clarify this position.

If objections should be allowed in particular circumstances, such circumstances would need to be specified in the gas supply licence and in the MRA. The nature of any such circumstances may be subject to further consultation. If this were the case, Ofgem considers that such circumstances should be specified, for example in the gas supply licence and the MRA or electricity supply licence, as a precursor to objections being permitted under deemed contracts.

Conversely, if the Authority determined that objections should not be permitted under deemed contracts and granted its consent to Change Proposal, no such further change would be necessary to the gas supply licence or the MRA.

Way forward

Ofgem is seeking views from customer representatives and industry participants on the suitability of the following options:

1. suppliers in the non-domestic market, in both gas and electricity, should be permitted to object under any circumstances specified by the supplier in deemed contracts; or
2. objections where customers are being supplied under deemed contracts should be permitted only in defined circumstances specified by regulation; or
3. objections should not be permitted in any circumstance where a customer is being supplied under a deemed contract.

Comments are invited on the issues raised above.

Ofgem is currently seeking views from MRA parties and customer groups as part of its appeal process and will not consider comments made under this consultation until the appeal decision has been made. In order to keep responses separate, respondents to this consultation should clearly mark their comments '*Consultation Response*'. These should be submitted, separately to any responses to Ofgem's appeal process, by 1 October 2004 to me at the above postal or e-mail address.

Please contact me if you have any questions about the consultation set out above.

Yours faithfully,

Joanne Taylor
Project Manager