

Neil Barnes  
Ofgem  
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19 May 2009

Dear Neil,

**Addressing undue discrimination – final proposals**

Thank you for the opportunity to respond to the consultation “Addressing undue discrimination – final proposals.”

ScottishPower's policy in setting tariffs is to aim for broad cost-reflectivity within a competitive context. Accordingly, the principle of licence conditions on undue discrimination, which are designed so that they avoid restricting innovation or the competitive process, is something we can accept. Nevertheless, we do consider that some residual risks to competition and innovation are bound to remain, however well the conditions are framed.

We think that the proposals set out in Ofgem's final proposals are in many respects along the right lines. However there are a few points where we think improvements need to be made – to both the licence conditions and the Guidelines – before a package is formally put to suppliers. The key elements of these are as follows:

- **Status of the Guidelines.** The rationale for maintaining Guidelines to support the draft Licence Conditions is sound and we agree that it is preferable to keep this level of detail out of the licence conditions. However, given the importance of the Guidelines, we think that it is important that they are clearly referred to in the conditions. We would suggest that both conditions A and B do this, by stating that the conditions do not come into force until Ofgem has published (after consultation with suppliers, the Council and others) Guidelines stating how it intends to interpret and enforce the condition. It would be reasonable for consultation undertaken prior to the coming into force of the condition to count for this purpose.
- **Multi-stage enforcement.** We welcome Ofgem's acceptance that multi-stage enforcement would be desirable as a means to mitigate the negative impacts of the proposed conditions. However:
  - the proposed open-ended requirement to compensate customers previously affected would prevent the mechanism from achieving its purpose of mitigating the restriction of competition and innovation inherent in the proposed Condition. Compensation should only be

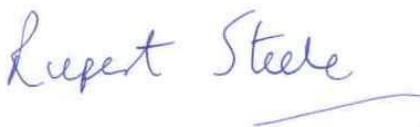
considered in relation to the time between Ofgem ruling that a practice contravenes one of the conditions and the supplier completing the task of ending it; and

- the multi stage enforcement should apply to Condition A as well as Condition B, because both proposed conditions have the potential to restrict competition and innovation in a similar way. This would be a more logical dividing line (and therefore more sustainable against future lobbying for the mechanism to apply more widely) than drawing it around Condition B alone.
- **Clarity of the Guidelines.** There are a number of areas where the Guidelines would benefit from further clarification. In some cases, this is just a matter of the drafting, but in others we consider that too much discretion is reserved to the regulator, so that companies have little idea as to what would, or would not, be treated as compliant. The concept of making products generally available needs some development to deal with the fact that some products may not be suitable for all sales channels or payment methods. Similarly, the wording on selling products below forward looking avoidable cost could give odd results where that number is above the average cost. We have in the Annex to this letter listed a number of areas where we think the Guidelines need to be improved to ensure that competition and innovation can operate properly.
- **Licence condition A.** The consultation paper suggests that this is a straight copy-out of the directive, but adds in paragraph 2 an interpretation of “terms” which is not given in the directive and arguably contradicts the directive’s annex which seems to differentiate between terms and conditions on the one hand, and prices on the other. The current wording may indeed be an over-implementation. If Ofgem are to elaborate on the terms in the directive, we think that the opportunity should be taken to recast the wording more clearly by reference to the Principal Terms and to include materiality and objective justification provisos. In any event, Condition B should exclude matters which fall to be addressed under Condition A.

I attach an Annex containing more detailed comments on the proposed conditions and Guidelines. We would like to hold further discussions with Ofgem on the important points raised in this letter and Annex prior to any formal proposal to amend the Standard Conditions.

In the meantime, please don’t hesitate to contact me, using the contact details printed on the previous page, if you wish to seek clarification or more information on this response.

Yours sincerely,



**Rupert Steele**  
Director of Regulation