

17 January 2022

Neil Kenward
Director, Retail Price Regulation
Ofgem
10 South Colonnade
London E14 4PU

Email: Alisonrussell@utilita.co.uk

Dear Neil,

RE: Statutory Consultation on strengthening milestone assessments and additional reporting requirements

Thank you for the opportunity to respond to the above document.

Milestone Assessments

We are generally supportive of the principle of Milestone Assessments, however we consider that these should be based on the requirement to show that the supplier has appropriate policies and procedures in place to manage its planned growth. In line with this approach, and on the basis of providing a level playing field, we consider that all obligations applicable by licence, code or regulation should apply consistently no matter the size of the supplier. We are disappointed that Ofgem has once again failed to address this issue.

We consider that this revision to the approach on obligations would better protect customers who may be vulnerable. At present, for example, while all customers (including those who may be in difficulty) under the price cap contribute to the costs of Warm Home Discount, only those customers of participating supplier will have the opportunity to receive the discount. Relieving smaller suppliers of such obligations only encourages reliance on unsustainable pricing practices and business models which do not require certain obligations to be met.

We therefore consider that if the principle of Milestone Assessments is to be extended, this should include provisions such as the previous licence application processes where suppliers were required to demonstrate preparedness to meet obligations.

We also support the approach that suppliers should be able to request assessments which may be about to fall due at convenient times to avoid forcing a hiatus on suppliers just when growth improves.

As a final point under this section, we consider that there is no one 'true' way to demonstrate a viable and stable business. Ofgem should, therefore, be open to a range of options. There is also a critical difference between a supplier being poorly financed or a supplier simply struggling to make a reasonable profit due to Ofgem's failure to allow recovery of efficiently incurred costs under the price cap.

Significant Commercial Developments & Personnel Changes

We are generally not supportive of the approach as currently stated. The information available as to how such assessments will be carried out lacks detail and yet goes significantly further than the current provisions.

Ofgem has not presented evidence that customers have experienced detriment as a result of commercial developments of this type or individual appointments, yet the approach set out would have potentially significant impacts on parties' reasonable commercial arrangements.

There are currently provisions in licence in this area, and it is not clear that the current arrangements have been tested and found wanting prior to further powers being sought by Ofgem. Unfortunately, there have been a number of recent developments where Ofgem has sought additional powers without having fully exercised those powers it already has.

We believe it is reasonable that a party should be required to notify Ofgem of a commercial transaction prior to contractual completion. However, a requirement to do so, and submit the transaction for detailed assessment by Ofgem up to two months in advance, including follow up actions appears excessive and impractical. There is no indication of the types of actions and constraints envisaged and in the absence of such detail it is not possible to respond effectively to the consultation other than to oppose the proposals on the basis of a lack of transparency.

Moving to personnel changes, we also oppose the requirement to submit such proposals to Ofgem, again up to two months in advance. This suggests that Ofgem is an appropriate party to vet individually licensees' appointments of senior employees. This goes far beyond a reasonable and proportionate approach.

We consider that a more realistic way forward would be to continue with an approach more similar to the SEC, which requires suppliers to have in place suitable arrangements with respect to vetting etc. It is reasonable to require suppliers to be able to demonstrate that they have in place appropriate arrangements with respect to ensuring that persons able to exercise significant managerial influence or responsibility are fit and proper persons. It is not clear that it is necessary or appropriate for Ofgem to 'clear' such appointments in advance.

In addition, as before, the detail of the proposals and guidance are not available to consider but will come into effect 56 days from being published. We cannot support this approach as we would be agreeing to a highly interventionist policy without even having sight of the provisions in advance. If Ofgem can show clear evidence that they have tried to use existing licence conditions and they have been inadequate, then this should be provided, along with the detailed proposed guidance to allow parties to properly assess the proposals.

Quality of consultation and Impact Assessment

Finally, we set out our concern on the quality of the consultation and impact assessment. Ofgem has provided only an outline consultation on the proposals, has sought to use a compressed impact assessment and has not provided any detail of the associated essential guidance to proposals which would be highly interventionist.

Suppliers cannot be expected to make proper representations on guidance which is unseen, but which will come into effect 56 days from being published.

Ofgem has not consulted previously on the extension to existing powers but has moved straight to statutory consultation. The proposals would constrain legitimate business activity for up to two months, would be entirely dependent on Ofgem's decision-making on the basis of proposals which have not been published prior to an 'in principle' implementation. We believe that this is not acceptable consultation practice, and we oppose the approach.

I hope that this submission has been helpful, and I would, of course, be happy to discuss any points in more detail.

Kind regards

By email

Alison Russell
Director of Policy & Regulatory Affairs