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“Future of the Ban on Acquisition-only Tariffs post-March 2024” – So Energy Response

Dear Dan,

So Energy is a leading energy supplier providing great value renewable electricity to homes across England, Wales and Scotland. We have consistently been recognised by our customers and the wider industry for our outstanding customer service since we were founded in 2015, including being a Which? Recommended Provider and have topped the Citizens Advice’s Supplier League Table. So Energy is one of the early adopters of the EUK Vulnerability Commitment launched in 2020, helping create a better customer experience for vulnerable customers year on year. In August 2021, So Energy merged with ESB Energy, and our combined business now supplies around 330,000 domestic customers. As one of the last challenger suppliers left in the market and one that is backed by ESB’s resources and expertise, So Energy is able to provide a unique view of today’s energy market.

So Energy is supportive of retaining the Ban on Acquisition-only Tariffs (BAT) permanently for the following key reasons:

1. When the Competition and Markets Authority recommended a removal of the BAT, it did so explicitly on the basis that that price discrimination between existing and new customers would not emerge in the market. The CMA identified this price discrimination as a risk to competition but considered that it had mitigated this risk through the comprehensive package of measures it was introducing to replace the BAT. To be clear, the CMA did not consider price discrimination between existing and new customers to be desirable¹.
2. A supply market that operates with price discrimination destroys trust as customers are hidden the best tariffs when receiving a price change notification or coming to the end of their contract. To get the best tariff they are forced to call up the supplier to haggle for the exclusive tariff that the same supplier has for new customers only, or to switch to an alternative supplier. Both of these add increased search/acquisition costs, operational costs from switching, and, most importantly, destroys trust in the energy sector as a whole. Price discrimination also favours active switchers, with those disengaged customers losing out. This disengaged customer base has been consistently shown to be more likely to be those who are vulnerable.
3. Following the removal of the BAT in 2018, price discrimination between existing and new customers did re-emerge, and it damaged the market in terms of competition, trust and financial resilience. The lack of a BAT contributed to the selling of sub-margin tariffs and tariffs that did not allow suppliers to recover their long-run average cost. The lack of a BAT contributed to and exacerbated the energy crisis.
4. Ofgem is now in the same position as the CMA was but it is not proposing any measures to prevent price discrimination from re-emerging. At times, the call for evidence appears to present price discrimination as a positive feature, rather than an issue.
5. We also present our response here alongside our report on the cost of the Loyalty Penalty from 2021, which provides further analysis and insight into the issues the removal of the

¹ The CMA’s rationale for removing the BAT is set out in paragraph 5.388 onwards:
https://assets.publishing.service.gov.uk/media/56efe79040f0b60385000016/EMI_provisional_decision_on_remedies.pdf

BAT created for the market. Among other things, the report highlights the broader trend towards controlling for price discrimination between new and existing customers. For example, the Financial Conduct Authority has put in place controls on the pricing of insurance to ensure that loyal customers are not charged more than new customers.

6. The BAT has played and can continue to play a role in providing additional certainty around hedging decisions in volatile markets. Continually introducing and removing the BAT as the market as the market rises and falls creates unwelcome uncertainty for suppliers.

Our response to each of your questions is set out below.

1. Do you consider there is merit in keeping the BAT in place post March 2024, after the discontinuation of the MSC?

Yes.

It is instructive to re-visit the CMA's rationale for removing the BAT in the first place², the risks highlighted at the time and what subsequently happened in the market.

It cited the following rationale:

...we consider that this restriction has the potential to dampen competition between suppliers. We also consider that removing this restriction would be effective in allowing suppliers to innovate more.

Note, the CMA did not identify a specific product or service the BAT prevented from being offered but held a more general concern about the impact the BAT might have on the market.

The CMA acknowledged that removing the BAT came with risks – it was foreseen that

“...removing this restriction may risk the unintended consequence of resulting in harm to inactive customers by removing a constraint which active customers impose on suppliers' pricing”.

It also identified that existing customers may not be able to switch to tariffs that are available to new customers only or even see that such tariffs were available through Cheapest Tariff Messaging. However, it predicted that, following the implementation of their package of remedies suppliers would continue to offer all of their tariffs for the following reasons:

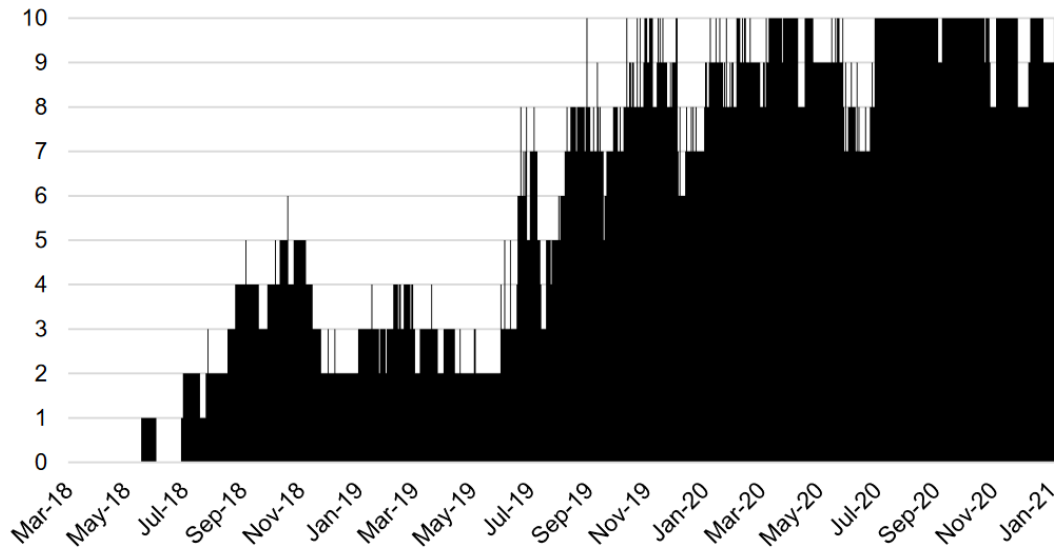
1. The CMA's information remedies would give disengaged consumers overall visibility of energy deals available in the market. Overall increased levels of competition as a result of their package of remedies would constrain suppliers ability to apply price discrimination to the detriment of their existing customers. In other words, suppliers would be forced to offer their best tariffs to their existing customers in order to retain those customers.
2. CMA noted that prior to the Retail Market Review, suppliers made all tariffs available to new and existing customers and would presumably do so again in the future.

Things did not work out as the CMA intended. The proposed information remedies were never implemented and instead the price cap was introduced to protect disengaged customers. Suppliers did apply price discrimination, reserving their cheapest tariffs for new customers only. This can be seen from the growth in 'Exclusive Tariffs' (tariffs that are only available to new customers and are available for sale through a single price comparison website) from the time the BAT was removed:

² CMA provisional decision on remedies, para 5.388 – 5.392

https://assets.publishing.service.gov.uk/media/56efe79040f0b60385000016/EMI_provisional_decision_on_remedies.pdf

Exclusive Tariffs in top 10 uSwitch 2018 - 2021³



There are a number of important conclusions to draw from this:

1. The CMA did not see price discrimination between new and existing customers as a positive outcome. It explicitly flagged such an outcome as a risk that would be detrimental to consumers and the market but it believed that it had put sufficient controls in place to avoid such an outcome. It only removed the BAT because they assumed that existing customers would have access to the same tariffs as new customers.
2. The market clearly moved towards a pattern of price discrimination between new and existing customers following the lifting of the BAT. Whether the cause of this was the failure to fully implement the CMA's package of remedies or whether the remedies were not sufficient to prevent this outcome is not exactly clear, but most importantly, the outcome was completely different to what the CMA had intended. It is worth noting that this new market dynamic constrained suppliers' ability to price fairly. So Energy used to offer a single fixed tariff to both new and existing customers. This meant a consistent and trust-worthy approach to pricing for all loyal customers. However, almost all other suppliers had moved to a model where there was a cheaper/discounted rate for new customers and a more expensive tariff for loyal customers. So Energy, in order to maintain a competitive position in line with the rest of the market, therefore had to abandon this policy in June 2020 and offer Exclusive Tariffs.

Ofgem now finds itself in a similar place to the CMA during their energy market investigation. The BAT is in place and Ofgem must consider whether it's in the interest of consumers and the market to remove it⁴. However, circumstances have moved on since then, with the imposition of the price cap, Covid-19 and the energy crisis, which led to the failure of more than half the remaining suppliers in the market.

A key lesson to be drawn from these past events, is the strength of the correlation between suppliers who offered the cheapest exclusive tariffs and the suppliers that subsequently failed:

³ Source: our Loyalty Penalty paper, provided alongside this response.

⁴ We note that as the BAT has an end date it will cease to have effect if Ofgem does not take action. But inaction in this circumstance still amounts to Ofgem deciding to remove the BAT.

5 Cheapest Suppliers in the market each month - suppliers highlighted in red subsequently failed⁵

	1	2	3	4	5
Jan-18	Tonik Energy	Breeze Energy	Avro Energy	Bulb	Igloo Energy
Feb-18	Tonik Energy	People's Energy	Avro Energy	Breeze Energy	Bulb
Mar-18	Tonik Energy	Iresa Limited	Avro Energy	Igloo Energy	People's Energy
Apr-18	Economy Energy	Iresa Limited	Avro Energy	Tonik Energy	Powershop
May-18	Utility Point	Economy Energy	Breeze Energy	Bulb	Powershop
Jun-18	Utility Point	Powershop	Igloo Energy	People's Energy	Pure Planet Energy
Jul-18	Utility Point	Avro Energy	Nabuh Energy	People's Energy	Powershop
Aug-18	Powershop	Avro Energy	Eversmart Energy	Pure Planet Energy	Nabuh Energy
Sep-18	Pure Planet Energy	Octopus Energy	People's Energy	Powershop	Robin Hood Energy
Oct-18	Snowdrop Energy	Powershop	People's Energy	Pure Planet Energy	Eversmart Energy
Nov-18	Snowdrop Energy	Avro Energy	Powershop	Pure Planet Energy	Co-operative Energy
Dec-18	Avro Energy	People's Energy	Powershop	Pure Planet Energy	Utility Point
Jan-19	Gulf Gas & Power	Utility Point	Green Network	Avro Energy	People's Energy
Feb-19	Avro Energy	Powershop	Pure Planet Energy	Orbit Energy	People's Energy
Mar-19	Avro Energy	isupplyenergy	Powershop	Utility Point	People's Energy
Apr-19	Utility Point	Yorkshire Energy	Avro Energy	People's Energy	Powershop
May-19	Utility Point	Eversmart Energy	Avro Energy	Yorkshire Energy	Breeze Energy
Jun-19	Eversmart Energy	Breeze Energy	Avro Energy	Utility Point	Yorkshire Energy
Jul-19	Orbit Energy	Breeze Energy	Avro Energy	Nabuh Energy	People's Energy
Aug-19	Orbit Energy	Avro Energy	Breeze Energy	Green	Igloo Energy
Sep-19	Green	Avro Energy	Breeze Energy	Igloo Energy	Nabuh Energy
Oct-19	Green	Avro Energy	Nabuh Energy	Breeze Energy	E.ON
Nov-19	Green	British Gas	E.ON	ScottishPower	Utility Point
Dec-19	Green	People's Energy	Avro Energy	SSE	Utility Point
Jan-20	Utility Point	Green	People's Energy	Yorkshire Energy	Gulf Gas & Power UK
Feb-20	Outfox the Market	Avro Energy	People's Energy	Yorkshire Energy	E.ON
Mar-20	Outfox the Market	Yorkshire Energy	Gulf Gas & Power	Avro Energy	Orbit Energy
Apr-20	Outfox the Market	Yorkshire Energy	Avro Energy	Orbit Energy	People's Energy
May-20	Outfox the Market	Tonik Energy	Avro Energy	Together Energy	Green Network Energy
Jun-20	Outfox the Market	Tonik Energy	Avro Energy	Together Energy	Green Network Energy
Jul-20	Outfox the Market	Avro Energy	Green	Igloo Energy	E.ON
Aug-20	Outfox the Market	Green	Avro Energy	E.ON	Igloo Energy
Sep-20	Outfox the Market	Green	Simplicity Energy	Avro Energy	E.ON
Oct-20	Green	Simplicity Energy	Outfox the Market	Avro Energy	NEO Energy
Nov-20	Outfox the Market	Green	PFP Energy	Powershop	NEO Energy
Dec-20	Green	Outfox the Market	British Gas	NEO Energy	Utility Point
Jan-21	British Gas	Outfox the Market	Simplicity Energy	NEO Energy	Green
Feb-21	Avro Energy	E.ON	goto.energy	EDF Energy	Entice Energy
Mar-21	Green	Hub Energy	Avro Energy	Outfox the Market	EDF Energy
Apr-21	Green	EDF Energy	Entice Energy	goto.energy	NEO Energy
May-21	PFP Energy	Green	Pure Planet Energy	Avro Energy	EDF Energy
Jun-21	Pure Planet Energy	Outfox the Market	Green	Avro Energy	EDF Energy
Jul-21	Pure Planet Energy	EDF Energy	Avro Energy	Green	Lumo Energy
Aug-21	Utility Warehouse	Avro Energy	Green	Shell Energy	Igloo Energy

⁵ Based on data provided by My Utility Genius. Where a supplier offered more than one of the 5 cheapest tariffs in a given month, they were only counted once in this analysis.

The real world data demonstrates that the absence of the BAT encouraged sub-margin pricing and left suppliers more exposed when the energy crisis swept the market. This unsustainable pricing was identified as one of the key causes of the energy crisis, as summarised by Ofgem in their Financial Resilience decision⁶.

Now that Ofgem finds itself in a similar position to the CMA, it must consider what new outcomes the removal of the BAT could generate in terms of price discrimination between existing and new customers. Unlike the CMA, which was relying on a comprehensive package of measures to prevent price discrimination from becoming a significant feature in the market, Ofgem is simply planning to remove the BAT. Arguably, this makes analysis of what is likely to happen should the BAT be removed, more straightforward. We foresee 3 new price discrimination scenarios that could arise from the removal of the BAT:

- Scenario A - Suppliers charge existing customers an appropriate amount but sell sub-margin tariffs to new customers, thereby eroding their financial resilience.
 - This scenario is most likely to be observed with the price cap in place, especially if the cap is set at an aggressively low level. It is the most likely scenario to arise in the current market conditions.
 - This scenario most closely aligns with the pre-crisis pricing behaviour exhibited by suppliers between the removal of the BAT and the energy crisis.
 - In terms of other controls, Ofgem would be putting an incredible amount of strain on its financial monitoring function in order to mitigate the risk of supplier failures. How many sub-margin tariff sales is Ofgem willing to tolerate at a given supplier? What is an acceptable gross margin for an acquisition tariff? These and other difficult questions become far more relevant, should the BAT be removed. The lessons drawn out from the Oxera report are extremely relevant here⁷.
 - In terms of competition and fairness, existing customers miss out on the cheapest tariffs and then must contribute to the cost of supplier failures, paying all over again. Based on what happened in 2018-2021, suppliers will likely be compelled to enter into an 'Exclusive Tariff' business model in order to remain competitive.
 - In terms of financial resilience, suppliers are driven towards offering below cost and near below cost acquisition tariffs, bleeding capital out of the market and increasing the likelihood and magnitude of supplier failure.
 - In terms of certainty and stability, the BAT may need to be re-introduced in the future should the market spike upwards once again.
- Scenario B - Suppliers overcharging existing customers in order to fund below-cost selling to new customers.
 - This is most likely to be observed if the price cap is removed.
 - It is exactly the scenario the CMA identified as a risk but expected enhanced competition and information remedies to mitigate. The CMA did not consider this type of price discrimination to be desirable.
 - In terms of competition and fairness, existing customers end up paying more than they would have done should the BAT had been in place. A false economy of

⁶ <https://www.ofgem.gov.uk/sites/default/files/2023-04/Decision%20on%20Strengthening%20Financial%20Resilience.pdf>

⁷ https://www.ofgem.gov.uk/sites/default/files/2022-05/Review%20of%20Ofgems%20regulation%20of%20the%20energy%20supply%20market_May%202022.pdf

switching is created, costing customers an additional operating/search costs of £55 per year on average⁸.

- In terms of certainty and stability, the BAT may need to be re-introduced in the future should the market spike upwards once again.
- Scenario C – Suppliers drawing on external funding or raising capital in order to acquire market share by selling to new customers at an operational loss.
 - This is by far the least likely scenario given the current level of capitalisation and underlying profitability in the energy retail market. It is frankly theoretical in the current context.
 - In terms of competition and fairness, existing suppliers are excluded from the cheapest available deals in the market. This was not an outcome the CMA desired to see when the BAT was originally removed.

None of these scenarios are appealing in terms of fairness, competition or financial stability. Based on the clear evidence of events which occurred after the last time the BAT was removed in 2018, we can expect these scenarios to arise again, to the detriment of consumers. The case is clear for retaining the BAT.

2(i). Can you provide your thoughts on/evidence of the impact of the BAT to date in terms of market stability?

In general terms having the BAT in place aided market stability in a falling market. The BAT has incentivised suppliers to focus on de-risking their hedging position by moving their existing engaged customers from default tariffs onto fixed acquisition tariffs. Internal switching of this nature is less risky and less costly to the market than switching between suppliers. It has also helped preserve trust at a time where consumer confidence in the integrity of energy suppliers could be further eroded.

2(ii). Can you provide your thoughts on/evidence of the BAT's likely impact on market stability, if it was retained post March 2024 as a standalone measure?

It would aid stability in the market. Having the BAT in place as a permanent measure is preferable to the BAT not being in place, only for Ofgem to be compelled to re-introduce it every time the market is threatened by large falls in price.

3(i). What impact would the BAT's existence post-March 2024 have on market competition for a) existing suppliers and b) new suppliers seeking to enter the market?

The removal of the BAT would mean that price discrimination would likely re-emerge between new and existing customers. As set out in our response to question 1, there are a number of different price discrimination scenarios but all have negative impacts on competition, fairness and financial resilience.

Ofgem states in its call for evidence:

Whilst the BAT may have had a dampening effect on competition by reducing switching to and within incumbent suppliers, it may also favour new market entrants on the basis that they are more able than existing suppliers to offer attractive deals to win customers. This is because new market entrants, unlike incumbent suppliers, do not have any (or many) existing customers to whom they would also have to offer potentially low margin acquisition type tariffs.

It was never the intent of the CMA when they removed the BAT that incumbent suppliers should

⁸ See our Loyalty Penalty paper, provided alongside this response.

be able to engage in price discrimination between existing and new customers in order to defend their position against new entrants. The CMA's expectation was that incumbent suppliers would offer all of their tariffs to both new and existing suppliers.

Inflating the level of switching by denying customers access to the best available deals from their existing supplier does not improve competition. As set out in Ofgem's draft Competition Framework⁹, switching is supposed to "discipline the behaviour of suppliers", but if the switching is being driven by price discrimination, then it is actually eroding competition in the market by eroding competitive pressure in the non-switcher segment. Finally, we note that this additional switching carries a cost, which we have estimated to be £55 per customer.

3(ii). What impact do you consider the extension of the BAT would have on a) active and b) inactive consumers (i.e. less likely to switch), in terms of realising the benefits of any competition?

Leaving the BAT in place will protect the market from falling into the price discrimination scenarios we have set out in question 1. In the absence of the CMA's information remedies or another mechanism to protect the market in the absence of the BAT, it is highly likely that this discrimination will re-emerge, as was observed in the 2018 to 2021 period.

Ofgem states in its call for evidence:

Whilst an increase in market competition through the removal of the BAT could lead to consumer benefits, our analysis of the disbenefits of reduced price competition owing to the BAT also suggest that where competition could occur, these benefits would be felt more by active and engaged rather than inactive consumers.

The CMA explicitly highlighted this as a risk when they removed the BAT, but believed that their other measures would protect the market from price discrimination between existing and new customers. As it turned out, such price discrimination did emerge, to the detriment of competition, consumer choice and financial resilience. There is no compelling reason to believe history won't repeat itself, should Ofgem decide to remove the BAT once again.

Ofgem also states:

This, however, would be accompanied by a corresponding negative effect for active switchers, who are likely to see less choice as a result of suppliers with a large existing customer base being less willing to offer cheaper tariffs.

Again, the CMA's intent was that active switchers and customers who decide to remain with their suppliers would have access to the same tariffs. The CMA considered the price discrimination between existing and new customers to be a risk, not a benefit, to the market.

Lastly, if the BAT were to be removed, the customer type most likely to benefit would be those active switchers who access Price Comparison Websites (PCWs). The customers who would lose out would be those who are less able to access PCWs online. These are digitally excluded customers and much more likely to be old or vulnerable and living in fuel poverty. Citizens Advice research shows that "customers in vulnerable situations are disproportionately stung by the [loyalty] penalty"¹⁰.

3(iii). What are your thoughts on the BAT's role in making discounted deals available to a supplier's existing customers, and are you able to provide evidence to support

⁹ https://www.ofgem.gov.uk/sites/default/files/2023-08/Competition%20Framework%20Final%20for%20Publication_10-08-23.pdf

¹⁰ <https://www.citizensadvice.org.uk/cymraeg/amdanom-ni/our-work/policy/policy-research-topics/consumer-policy-research/consumer-policy-research/excessive-prices-for-disengaged-consumers-a-super-complaint-to-the-competition-and-markets-authority/>

this? Do you consider that there is benefit in having the BAT in place to provide this function while the price cap is also in place?

Ofgem must be cautious in drawing conclusions from the tariff offerings provided by suppliers since the Energy Price Guarantee was set to zero in July 2023. The price cap has had a massive impact on the fixed tariff market in that period with suppliers only able to offer modest savings vs the cap in Q3 and have struggled to offer any savings at all in Q4. To the extent that suppliers have offered fixed retention tariffs, these deals also did not offer substantial savings versus the price cap. We note that as retention tariffs do not include acquisition costs, they are potentially more capable at being priced at a lower level than tariffs for new customers. So Energy has offered its fixed tariff to both new and existing customers throughout that period.

In a counter-factual where the BAT did not exist, any acquisition tariff that would have offered material savings versus the price cap would have been priced sub-margin in Q3 and Q4. In other words the market could have fallen into Scenario A, as detailed in our response to question 1. The BAT has helped protect the financial resilience of the market by not allowing it to fall into price discrimination Scenario A.

Ultimately, it is the level of the price cap, not the existence of the BAT that is limiting the availability of responsibly priced fixed tariffs to new customers.

3(iv). What are your thoughts on the existing policy and process for market-wide derogations for fixed retention tariffs?

The market wide derogation for fixed retention tariffs should remain in place. As set out in our response to question 1, the market as seen in 2018-2021 delivered poor outcomes for consumers in terms of competition, choice and financial resilience. This was driven by exclusive tariffs available to new customers only. The same risks are not in play when it comes to retention tariffs.

We also note that retaining the derogation better aligns the BAT with the remedies the FCA has set out to address pricing, competition and fairness issues in the insurance market. A cap has been placed to ensure renewing customers aren't charged more than new customers but not the reverse. Further details on the FCA's investigation into insurance pricing and the lessons Ofgem could draw from it are set out in our Loyalty Penalty report.

4(i). Can you provide your thoughts on/evidence of the BAT's likely impact on supplier tariff offerings?

Ofgem has set out a position that all tariffs should be offered through all sales channels. This has come about as a result of an interpretation of a combination of SLC 0, 22B and 25. This does have an impact on tariff offerings as some sales channels are more expensive to operate than others. We can foresee that complex, innovative tariffs may best be sold over the phone or in person in order to ensure the customer fully understands what they're signing up to, however the 'all tariffs must be sold through all channels' interpretation of the licence constrains suppliers ability to sell through higher cost channels while remaining competitive on lower cost channels.

The issue with Ofgem's interpretation actually centres around SLC 25, not SLC 22B. When they introduced SLC 25, Ofgem made clear that suppliers should not present tariffs for which the customer is ineligible¹¹, thereby affirming that suppliers have control over what tariffs are offered through what channel. However, Ofgem subsequently changed their position, stating customers should not be presented with a different tariff offering based solely on the method they use to enquire about tariff options, thereby compelling suppliers to offer all tariffs through all channels.

¹¹ See 'Way forward and rationale' [slc_25_decision_document_0.pdf \(ofgem.gov.uk\)](#)

Thankfully, Ofgem can resolve this issue by reverting to the original position set out in their decision document.

Ofgem states in the call for evidence:

...we have seen instances where the BAT may be restricting tariff innovation and development, including possible low carbon technology tariffs (LCT) tariffs and business models supporting the transition to net zero

Provided the issue with sales channels issue is resolved and the fixed retention tariff derogation remains, we cannot think of a scenario whereby the act of also making a tariff available to existing customers would impact a suppliers ability to offer an LCT tariff or any other type of net zero offering. We would welcome some examples to the converse so that the impact of the BAT may be considered.

4(ii). What are your thoughts on whether changes should be made to the BAT in order to make it a more effective policy to encourage competition (rather than as a policy to support market stability)?

Provided the issue with sales channels issue is resolved and the fixed retention tariff derogation remains, we believe the BAT is well placed to facilitate healthy competition in the market. For the sake of clarity, it may be beneficial to codify the fixed retention tariff exemption directly into the licence condition, rather than relying on the derogation process.

Yours Sincerely,

Paul Fuller
Head of Regulation

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ENERGY