

Friday, 12 September 2003

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Dear Annette

**Ofgem Consultation – Making markets work for consumers:
Ofgem's approach to securing compliance with supply licence obligations
and consumer protection legislation**

energywatch welcomes this timely and important consultation and believes that a compliance strategy which is not only clear and strong but able to be used quickly by Ofgem is essential if consumers are truly to have confidence and engage in the competitive market. This consultation takes the first steps towards this end.

Whilst energywatch is not the exclusive source of consumer intelligence available to Ofgem, we nevertheless have an important role to play in the success of the compliance agenda. There is clearly scope for improving how this can be done and I am pleased with the current work that is underway to do this. We also had a very productive discussion at the recent liaison meeting and it is self-evident that work around compliance is a candidate for energywatch and Ofgem joint working for 2004-2005.

Yours sincerely

Lesley Davies
Director, Policy & Research

energywatch response to Ofgem Consultation

– Making markets work for consumers: Ofgem's approach to securing compliance with supply licence obligations and consumer protection legislation

energywatch welcomes this timely and important consultation and firmly believes that a strategy which is not only clear and strong but able to be used quickly by Ofgem is essential if consumers are truly to have confidence and engage in the competitive market.

Rather than think in terms of a trade-off between regulation and competition, we are of the mind that regulation, and by implication compliance, is an integral part of competition and in a successful competitive market the two go hand in hand together.

The Ofgem supply compliance strategy

We note that Ofgem acknowledges that the playing field in the energy market is not a level one. While consumers do not have:

- appropriate information available to make informed decisions;
- clear understanding of the level of service that their money is buying; and
- total confidence that their consumer rights will be swiftly enforced,

then the slope in favour of suppliers will remain. We believe that this is a fundamental issue and one in which energywatch also has as important a role to play as Ofgem.

However it is primarily supplier performance that will underpin consumer confidence. For this reason we do not agree with Ofgem's statement (paragraph 4.3) that there should naturally be a trade-off between standards of performance common to all suppliers that benefit consumers, and allowing suppliers to differentiate between service offerings. At present the obligations on suppliers are at a bare minimum. In energywatch's view, these are too low and consumers are not sufficiently aware to be able to make choices in terms of quality of service as well as price. The assumption that consumers are enabled and assertive to do so, is premature at this point in the development of the open market.

We also do not agree that setting bare minimum standards will discourage new entrants into the energy supply market. This may be true from a hypothetical modelling perspective, but in reality it has not happened and is not likely to be an influencing factor on any would-be new entrant.

We also believe that Ofgem should be looking outside Great Britain for examples of effective regulatory regimes which provide consumers with real protection through rigorous enforcement processes.

energywatch considers that setting meaningful standards that require new entrants to offer a genuine consumer-centred service that is at a level above rock bottom will protect consumers right from the outset.

We believe that first and foremost the consumer must be protected by robust licence conditions until such time as suppliers can demonstrate that their levels of service are such that the conditions are effectively redundant, not the other way around, whereby licence conditions are imposed or strengthened once it is clear that consumers have suffered detriment. The history of the marketing licence condition is a clear example of this.

Consumer confidence and the Ofgem compliance strategy

We agree that consumer confidence is very much influenced by the personal experience of consumers, their families and friends and is underpinned by the expectation that arrangements exist for the provision of consumer protection measures (paragraph 4.9). For this reason, we believe that it would be appropriate for the Ofgem compliance strategy to be more broad and overt in nature. Consumer confidence is also affected by the speed with which action is taken. The compliance strategy should therefore have, as an objective, a commitment to dealing with consumer detriment as quickly as possible.

Reference is made in Section 3: the Legal Framework to the more general consumer protection powers vested in Ofgem, yet we believe that Ofgem should say more about how these will be employed, resourced and included as part of an overall enforcement strategy. Whilst we acknowledge that the power to fine can have a huge impact on suppliers as both a significant financial penalty and a deterrent to others, it is not the only weapon in the Ofgem enforcement armoury and it is not always the most appropriate one.

energywatch is very concerned at the omission from the Ofgem strategy of even the mention of the use of Stop Now Orders or Super Complaints. We believe that clear signals need to be sent out to industry that Ofgem intends to deploy the entire enforcement array at its disposal.

Likewise, voluntary or licence-obligation Codes of Practice could become effective tools of consumer protection which may not even require enforcement by Ofgem, if Ofgem were seriously to encourage or require suppliers to obtain OFT accreditation for them. Voluntary codes devised by the energy industry will only ever be set at the lowest common denominator. These can have the illusion of protecting consumer interests, but in reality may fall well short. For example, the AES Marketing Code includes compensation for forgery, but not for other serious malpractices. Moreover, industry has demonstrated no great enthusiasm to extend this willingly.

Licence conditions do not cover all aspects where protection is necessary and some conditions are outdated. Ofgem's example of suppliers' failure to bill is a prime example. In such circumstances media coverage is essential and can be the only means of alerting consumers to take steps to protect themselves and as a means of exerting pressure on companies to change. energywatch would like to see Ofgem affirm its commitment to identifying and addressing systemic market failures and either to create new regulation which it will enforce or pursue other enforcement routes.

We also note that the Ofgem remit covers not only where a licensee is contravening a licence condition but where it is likely to do so. We would like Ofgem to expand upon whether it has any intentions to follow this more pre-emptive approach and whether matters of resourcing or market intelligence are an issue. Clearly, energywatch could have an important role to play in the provision of the latter.

Overall, the impression that is given by Ofgem, rightly or wrongly, is of an approach that centres solely on compliance of licence conditions rather than a real holistic consumer protection strategy. energywatch would like Ofgem to address this perception to demonstrate to suppliers that Ofgem does have a multi-faceted, integrated enforcement policy that embraces all the dimensions of the powers conferred upon it. It should also have as an objective, a commitment to dealing with consumer detriment as quickly as possible.

Encouraging consumer protection cultures

Subject to our earlier comments about de minimis levels of obligation, we agree with the general approach of Ofgem encouraging consumer protection cultures. We agree that responsibility for compliance must rest at senior management level within supply companies and that processes should be documented to demonstrate compliance not only with licence obligations but general consumer protection legislation. It is the case that sometimes good intentions at the top are not reflected in day-to-day supplier practices.

We note that Ofgem refers to "firmly established compliance monitoring, audit and reporting" (paragraph 4.17) and would welcome clarification from Ofgem as to what it exactly means by this. In addition to supplier internal processes, we would expect robust measures by Ofgem to verify compliance and root out non-compliance, whether intentional or unintentional.

energywatch supports the encouragement of consumer protection cultures within supply businesses but believes that monitoring and auditing of compliance is essential to protect the interests of and generate confidence by consumers in the energy market.

Principles of Ofgem's compliance programme

We accept the basic principles that shape the Ofgem compliance programme, but would welcome a clearer understanding of Ofgem's definition of "triviality". Is this limited by the number of cases or incidents of a given type of activity or the impact upon the consumer? It may also be the case that publicising those investigations Ofgem deem to be "trivial" and why will aid understanding of the compliance process.

We note and fully support the Ofgem approach to transparency as set out in paragraph 4.21. We believe that an open process from the beginning of the investigation will engender consumer confidence and, should it be needed, provide further incentive for a compliant industry.

energywatch supports the principle of transparency and disclosure by Ofgem in its compliance activity and in particular the publication that an investigation is being conducted against a named company.

Supply compliance priorities

We note the prioritisation that Ofgem will apply to its compliance strategy and believe that focusing in on these fundamental broad areas to be highly appropriate. It would be helpful if Ofgem would set out how it proposes to monitor its own performance in securing compliance and when and how it will review the priorities it is setting.

We further note that a "small increase" has been made available for supply compliance and monitoring and are concerned that this will enable Ofgem to deliver an effective strategy. We are uncertain as to whether such a small increase will be perceived as "reflecting the importance of this work for consumers". It would be reassuring if Ofgem were to keep this important aspect of its statutory duty/power under periodical review to ensure that the enforcement agenda is not stifled by lack of resources.

energywatch appreciates the difficulties in prioritising areas of work involving compliance action. We would expect Ofgem to monitor not only its own effectiveness, but to keep under review the relevance of the areas which it has chosen to prioritise. Ultimately, the primary duty of Ofgem is to make the energy market work for the benefit of consumers, not suppliers.

energywatch conclusions

The energywatch view is that the culture of compliance should be something that is far more than an assertion. The perception that Ofgem has conveyed through its Consultation paper is that it's compliance strategy is a unit of work within Ofgem rather than a complete and integral part of the its function of building and developing markets in which the consumer can actively and safely engage. Viewed separately, it becomes a tool that is used too little, too late and does not support the full range of Ofgem's statutory activities. energywatch would urge Ofgem to revisit its strategy in the light of these specific and general observations and as always energywatch is happy to expand upon our views and discuss them further with Ofgem.