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Dear Annette

Making markets work for consumers – The regulation of gas and electricity sales and market: a review of standard licence condition 48

The following is the response of RWE Innogy¹ to the above, representing the views of the licensed retail energy businesses operating under the npower name and brand.

Attached to this letter is an Appendix that provides specific responses to the views you requested on a number of matters, as set out in Section 9 of your document.

Initially, direct selling contributed significantly to customers access to the competitive market. Subsequently it has aided the evolution of the market. Whilst consumer organisations have rightly drawn attention to examples of poor sales performance, this should not be exaggerated. Nor should it detract from the efforts suppliers have made to prevent mis-selling through changes in operational practices, the AES Code of Practice and the Energysure accreditation scheme for sales agents. These have brought about genuine reductions in the level of sales complaints.

With respect to whether Standard Licence Condition 48 (SLC 48) continues beyond 31/3/04 we firmly believe that the condition should fall away at March 2004 because:

- (a) there is sufficient (and growing) general consumer legislation available;
- (b) it is unnecessary with the development of self-regulation; and,
- (c) the market should evolve to encourage service differentiation between suppliers.

Consumer Legislation

Ofgem acknowledge within the document that as a designated “enforcer” under the Enterprise Act it now has powers to address inappropriate sales performance through a range of general consumer legislation. Existing consumer protection² safeguards the rights of consumers prior to, at and following the point at which a contract is concluded, including ensuring consumers have all relevant information regarding the contract at the start, providing cooling-off periods and rights of cancellation.

¹ With effect from 1 October Innogy has been renamed RWE Innogy.

² including:

- (a) The Consumer Protection (Cancellation of Contracts away from Business Premises) Regulations 1987 and 1998,
- (b) The Consumer Protection (Distance Selling) Regulations 2000
- (c) Consumer Protection Acts 1987 Part III: Price Making Order 1999
- (d) The Control of Misleading Advertisements Regulations 1998 (as amended)

Therefore, we do not believe that the retail energy sector should retain an additional layer of consumer protection that is not evident in other goods and services markets. To do so runs counter to Ofgem's commitment to withdraw from formal regulation.

Self Regulation

It is essential that suppliers remain vigilant in identifying the worst performing agents and removing them from the sales process. The AES Code of Practice provides an adequate means of achieving this by having an Independent Code Administrator measuring specific levels of performance and outputs from the sales process i.e. compensation of £250 for proven fraud. Any failure to meet the requirements of the Code is escalated to an independent Panel of the Code and can subsequently lead to the suspension of a member from the Code, with the consequential negative publicity.

The Code also involves a regular monitoring of sales performance and addresses concerns in areas such as training and sales literature by assessing these on an ongoing basis. The Code also measures and address specific outcomes in terms of respecting the wishes and circumstances of individual consumers (particularly the more vulnerable); the nature of the contact made; the provision of information and the handling of complaints and compensation. To retain SLC 48 from April 2004 potentially undermines the development of the Code and leads to suppliers duplicating the scope, effort and resource required.

Service Differentiation

The continuation or expansion of formal regulation will detract from the ability of suppliers to differentiate on the basis of service as a means of attracting and retaining customers i.e. compensation policies, use of positive verification, etc. The danger being that regulation inhibits this by delivering standardisation, or uniform minimum levels of service as Ofgem refer to it. We believe these minima exist now and that differentiation should be allowed to occur from this point. Unduly onerous minimum levels of service will prevent service differentiation becoming a competitive area.

This appears to run counter to Ofgem's Corporate Strategy (2003-2006) and the priority to enable competition to work effectively. In its July document on securing compliance Ofgem indicated that it would not seek to regulate areas which are or will be sources of competitive differentiation.

Other Factors

We note with interest that Section 6 of the document ("The case for change") centres largely on recommendations from consumer stakeholders who have contributed to the public debate on the issue and the raising of its profile. However the scale of the problem should not be overstated to the extent of reshaping the current regulatory framework.

For example, we note Ofgem's recognition that it could not implement its proposed enforcement policy in relation to sales activity, triggered by the energywatch statistics on complaints, due to the failure of the latter to commit to an audit and quality assessment of its processes and the data used. This highlights the danger of calls for change to the scope of regulation with no accountability for the claims being made or the associated data being referenced. We raised this issue when opposing the proposal to publish details of a compliance investigation while the outcome was still unknown in your July document. Instead the principles of good regulation (consistency, transparency, accountability and proportionality) should apply.

The document also references NACAB whose super-complaint on sales activity is still under consideration. We would suggest that prior to reaching any firm conclusions on the future of SLC 48 that Ofgem await the outcome of that exercise. Not least because it will locate energy sales alongside general direct sales activity and also indicate whether general consumer law is more appropriate rather than sector specific formal regulation.

Summary

In summary we do not believe that the continuation of SLC 48 is justified in the wider context of the other powers at Ofgem's disposal, the onset of self-regulation and the potentially detrimental impact on service differentiation that expanding the scope of SLC 48 will have. To propose extending the life of the marketing licence condition and/or its scope will require a clear rationale and justification, in line with the principles of better regulation.

We hope you find the above comments helpful and trust that any further action here will be subject to full consultation and presumably the statutory modification process in respect of standard licence conditions.

Yours sincerely,

Alan Hannaway
Economic Regulation

Appendix – Responses to Views Requested

Section	View Invited	Response
7.3	Retention of requirement to review SLC 48 at regular intervals	As outlined in our response we believe this runs counter to the principles of good regulation, recognising when appropriate formal regulation should be withdrawn. To retain this requirement is too open-ended and undermines the self-regulation that the energy industry has committed itself to delivering and supplier differentiation based on service rather than price alone. If any decision was taken to retain SLC 48 in its current state, then it may be appropriate to include some form of sunset clause rather than an open-ended commitment to such formal regulation.
7.4	Conditions of SLC 48 should conform, wherever possible, as between electricity / gas licences	Agree.
7.5	Scope of licence – extension to non-domestic customers?	No rationale or evidence for why such customers require this protection. It is counter to the general thrust of licence framework in providing consumer protection primarily to domestic customers.
7.6	Specific provision for vulnerable customers?	Again no real justification for why licence should be used in this way and why energy sector should be different in this respect. In any case there are specific references in AES Code about contact with such consumers and the nature of and safeguards around that contact.
7.7	Wider scope for SLC 48?	No. We do not believe SLC 48 should continue at all beyond 31/3/04 in the context of general consumer law powers available to Ofgem and with the onset of the AES Code of Practice. To consider changing the scope of the condition is wholly inappropriate given that we believe its shelf life should be limited if continuing, via some form of sunset clause.
7.8	Coverage of all channels for consumer contact and different provisions for different media?	No. Same point as above about amending scope of SLC 48 for something that, in running in parallel with it, undermines the self-regulation being developed by the industry and the scope for service differentiation.
7.9	Balance – optimal level of protection, consistency, complexity?	The question of balance between protection, consistency and complexity is key. To persist with SLC 48 and/or consider expanding its scope fails to recognise the powers at Ofgem's disposal to address poor performance and the contribution being made by the AES Code to eradicate it and rogue agents. In addition additional obligations, based on outputs, would inhibit the evolution of the market towards service differentiation in sales and other activity rather than price alone. Extending SLC 48 beyond 4/04 adds complexity for both consumer and supplier with formal and self-regulation sitting alongside each other. It also lacks consistency with principles of good regulation, and withdrawing from more formal licence obligations and relying on general law where appropriate to do so.
7.10	Make explicit that SLC 48 covers 'win back' & 'save' activity?	No clear rationale for doing this. Suppliers' internal processes recognise this and as such this would add little or no value.

7.12	Minimum requirements for information provision?	No because it is an issue that is specifically addressed by AES Code of Practice and so exacerbates the duplication of effort and scope that will exist if SLC 48 continues.
7.15	Mandatory 14-day cancellation period?	Legislation already dictates 7 days and industry works to 14 days without such prescription. To deal with in the licence is unnecessary and confusing in context of consumer legislation.
7.23	Focus on outcomes and outputs rather than 'reasonable' measures?	No case for changing scope of SLC 48. It should conclude at 31/3/04. In addition the AES Code and its regular auditing does look at outcomes and outputs on the doorstep and/or regularly assesses issues such as training, literature, where the concern about approach based on 'reasonableness' exists. Finally such outputs and customer outcomes should be the focus of service differentiation by suppliers in their sales and customer service activities.
7.28	Positive confirmation of sales before processing?	No. The verification of sales and the throughput from any consumer dissatisfaction is reported quarterly to Ofgem. No concerns expressed by Ofgem to date and no rationale for this. Also there would need to be an assessment of the impact this would have on the sales process, delay in transfer times, etc. This is another potential area of service differentiation that should not be regulated.
7.30	Third party verification?	No for the same reasons as above. The proposals in the document potentially add to the regulatory burden for the sake of it rather than evaluating the appropriateness of what's there in the wider context of consumer law and self-regulation.
7.31	Checks in transfer process with person newly contracting for supply?	Agree with Ofgem's position.
7.33	Specific provision for compensation in SLC 48?	No need. AES Code of Practice has £250 for proven fraud and suppliers should be able to differentiate approach below that to demonstrate level of service they provide and where, in some case, they do not i.e. standardisation unhelpful.
7.38	Information made available on reporting in public domain?	This relates to the statistics reported to Ofgem on a quarterly basis. Our experience suggests there is little or no interest in this data from consumers. And so if Ofgem do pursue continuation of SLC 48 they might review this requirement and the appetite of consumers for such information.
7.39	Extension of scope of SLC 48?:	No. We believe the condition should not be extended, but if it is this should be carried forward on an "as is" basis with the addition of a sunset clause.