



MRASCo c/o Gemserv, MRA Parties,
energywatch and Other Interested Parties

*Promoting choice and
value for all customers*

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22 November 2004

Dear Sir,

Modification to the Master Registration Agreement (MRA) – Gas and Electricity Markets Authority consent in relation to MRA Change Proposal (MCP) 144: “Clarify the scope of ‘contract’ as referenced in Clause 16.1.2.1”

Summary

On 27 May 2004, the MRA Development Board (MDB) voted that MCP 144, entitled “Clarify the scope of ‘contract’ as referenced in Clause 16.1.2.1” (the Change Proposal), should be accepted with an implementation date of 24 June 2004 (or the date that the Authority issues its consent if that date occurs after this implementation date). In accordance with Clause 9.5 of the MRA, the Change Proposal shall not take effect without the prior written consent of the Authority.

Having carefully considered the Change Proposal, the Statement of Fact¹ and the responses to a consultation² on the subject of objections under deemed contracts³ and having regard to paragraph 4 of standard licence condition 37 of the electricity distribution licence⁴ and the

¹ The Statement of Fact provided by Gemserv includes a formal request for the Authority’s consent for the MCP, a copy of the MCP including the reason(s) for the proposed change and its details and an extract from the draft minutes of the relevant MDB meeting highlighting the outcome of the vote and any views expressed by MDB representatives.

² ‘Consultation regarding transfer objections under deemed contracts for non-domestic customers’, dated 3 September 2004 and available on the Ofgem web-site (www.ofgem.gov.uk)

³ As defined in Schedule 6 paragraph 3 of the Electricity Act 1989 and Schedule 2B paragraph 8 of the Gas Act 1986

⁴ This paragraph provides:

“The Master Registration Agreement shall comprise:

- (a) terms for the provision of metering point administration services in accordance with the requirements of paragraph 3 of standard condition 14 (Provision of the Metering Point Administration Service and Compliance with the Master Registration Agreement) and the equivalent requirements in the distribution licences of all other licensed distributors;
- (b) provisions to facilitate, and procedures and practices to be followed by electricity suppliers in relation to changes of electricity supplier in respect of any premises;



Authority's wider statutory duties⁵, the Authority consents to the modification of the MRA in accordance with the Change Proposal.

This letter constitutes the Authority's written consent pursuant to Clause 9.5 of the MRA and notice by the Authority under section 49A of the Electricity Act 1989.

Background

Before 5 January 2004, the circumstances in which a non-domestic supplier was able to prevent its customers switching to other suppliers were governed by rules prescribed by regulation. In the gas market these were set out in the gas supply licence and in the electricity market they were defined in the MRA.

In the gas market, a supplier was able to raise an objection to a transfer where the customer had a debt outstanding for more than 28 days (in the case of supply under a contract expressly entered into by customers or a deemed contract), or where the customer had not given the required notice to terminate their existing contract before the transfer (only in the case of a contract expressly entered into by customers). In the electricity market, objections were only permitted in respect of any type of supply contract where both suppliers agreed that a meter point had been registered in error, or where a supplier had registered a metering point that was related to another, without also registering all related metering points.

Some customers and suppliers preferred their supplier to be able to object, while others preferred them not to have that right. As a consequence of these varying views and in order to harmonise the processes between the two markets, Ofgem proposed that the customer and supplier should be able to determine the grounds for objection between them through the supply contract and consulted the industry and customers in December 2002. With the majority of views in favour of this proposal, Ofgem published a decision document in August 2003 and a statutory consultation in October 2003 to modify the gas supply licence standard conditions. At the same time, the electricity industry approved, and the Authority granted consent to, an equivalent change to Clause 16 of the MRA⁶.

The new rules for non-domestic objections in both markets were implemented on 5 January 2004. Their effect was to permit objections in circumstances specified in the supply contract between the customer and supplier. In addition, the ability to object where both suppliers agree that the meter point has been registered in error and the requirement to notify the customer of the reasons for any objections were replicated from the electricity market into the gas supply

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- (c) a catalogue of definitions, flow and forms of such data as may require to be transferred by or to parties to the Master Registration Agreement, or as between any persons for settlement purposes or for any related purposes (the "data transfer catalogue");
 - (d) arrangements for the variation of the Master Registration Agreement following in consultation with the parties, or representatives of the parties, to that agreement;
 - (e) provisions (which shall require to be approved in advance by the Authority) by virtue of which the whole or specified parts of the Master Registration Agreement shall not be capable of variation without the prior approval of the Authority; and
 - (f) such other matters as are or may be appropriate for the development, maintenance and operation of an efficient, co-ordinated and economical system for the supply of electricity and for the purpose of facilitating competition in electricity supply."

⁵ Ofgem's statutory duties are wider than the matters that MDB must take into consideration and include a principal objective to protect the interests of consumers by promoting competition where possible.

⁶ MCP 135

licence. In the gas market, as a transitional arrangement, contracts that had been entered into before 5 January 2004 and that made no reference to circumstances for objection were permitted to continue with their original grounds for objection unchanged for the life of the contract.

Objections under a deemed contract

Concerns over the interpretation of the new wording in Clause 16 of the MRA and the intention of the change described above have focused on whether an electricity supplier may object where a non-domestic customer is supplied under a deemed contract.

In the gas market, the original grounds for objection in standard licence condition 30 permitted objections to be made where the customer was supplied under a deemed contract only in circumstances where there was a debt demanded in writing and outstanding for 28 days.

Under the revised wording for standard licence condition 30, a supplier is permitted to object in circumstances specified in the contract. The definition of the term 'contract' contained within the licence explicitly excludes a deemed contract and therefore standard licence condition 30 only permits objections to be raised with the agreement of both suppliers where a customer is being supplied under a deemed contract.

As described above, before 5 January 2004 the MRA did not permit objections in the non-domestic market, including where the customer was being supplied under a deemed contract, except in limited circumstances. However, the absence of a definition of the term 'contract' in the MRA has given rise to an interpretation of the new wording of Clause 16 which has the effect that objections may be made in circumstances specified in deemed contracts for non-domestic customers. At least one supplier has therefore included circumstances for objections within their standard deemed contract terms.

This issue was discussed in respect of both the gas and electricity markets by suppliers at the Non-Domestic 'Objections & Erroneous Transfer' Working Group on 22 April 2004. At this meeting, arguments for and against the ability to object under deemed contracts were expressed. One supplier felt that objections should be permitted under deemed contracts only in the case of an outstanding debt as had originally been permitted under the gas supply licence. They stated that the ability to object was an important tool in enabling a supplier to recover money owed to them when a customer is supplied pursuant to a deemed contract, for example on a change of tenancy, but has failed to pay. Without this ability, they believed the only method of enforcing payment is through court action which is likely to be uneconomical in most cases.

Other suppliers expressed the view that objections should only be permitted in circumstances where the customer and supplier have agreed the terms for inclusion in their contracts and therefore the ability to object under deemed contracts (which are not expressly agreed by customers) should not be allowed. They considered that:

- transfer objections under deemed contracts could have the effect of locking in customers to deemed contracts, which are only intended to be a temporary measure to enable supply, and preventing them from expressly entering into a supply contract with the supplier of their choice;

- there would be a weaker incentive on suppliers to negotiate suitable terms and expressly to enter into a supply contract with the customer; and
- there is a danger that there could be a negative impact on customers and their ability to switch supplier if suppliers were able to decide the precise circumstances in which they could object and include them in a contract that the customer had not expressly entered into.

The group however agreed that clarity was needed and that it was preferable to harmonise the rules in electricity and gas as far as possible.

The Change Proposal

The Change Proposal was raised by Opus Energy Limited (Opus Energy) on 29 April 2004 and seeks an amendment to clause 16.1.2.1 of the MRA with the effect that transfer objections could not be made under deemed contracts for non-domestic customers. The clause as amended (the proposed amendments are shown as underlined) would provide that:

- 16.1.2 the Application for Registration is in relation to a Metering Point which is associated with non-Domestic Premises and:
- 16.1.2.1 subject to Clause 16.2, where the Old Supplier is permitted to do so by the provisions of a contract (excluding a Deemed Contract) with its customer at those premises; or

In accordance with Clause 9.5 of the MRA, changes to Clause 16 shall not take effect without the consent of the Authority. The proposed implementation date for the Change Proposal is the later of 24 June 2004 or the date of the Authority's consent.

MDB

In accordance with the process in Clause 9 of the MRA, the Change Proposal was considered at a meeting of the MDB on 27 May 2004. The minutes of the meeting record views expressed by representatives opposed to the Change Proposal. Some persons present at that meeting considered that the Change Proposal pre-empted the outcome of deliberations by the Non-domestic 'Objections & Erroneous Transfer' Working Group and the results of a consultation by Ofgem which it had undertaken to conduct on the subject of objections under deemed contracts. Other persons were concerned about the ability of suppliers to recover debt from customers supplied under deemed contracts if objections were not permitted.

At the meeting, four suppliers voted in favour and three suppliers voted against the Change Proposal. The distribution businesses declared no interest. Of the Settlement Bodies, Elexon Limited voted in favour, while Scottish Electricity Settlements Limited (SESL) cast a 'neutral' vote. Consequently, the MDB accepted the Change Proposal.

Appeal to the MRA Forum

On 18 June 2004, Ofgem received notification of an appeal raised by British Gas Trading Limited (BGT) under Clause 6.45 of the MRA in relation to the decision of the MDB. The

grounds for this appeal were debated at the MRA Forum on 29 July 2004. At that meeting, the MRA Forum's resolution was to uphold the decision of the MDB to accept the Change Proposal.

Appeal to the Authority

Under Clause 7.26 of the MRA, BGT appealed the decision of the MRA Forum for determination by the Authority. Ofgem, in accordance with its procedure for determining disputes⁷, requested views from parties to the MRA and consumer groups on 3 September 2004.

The Authority dismissed the appeal. The reasons for its decision are set out in Ofgem's decision letter⁸. Accordingly, the Change Proposal was referred to Ofgem requiring the Authority's consent.

Ofgem consultation letter

Ofgem does not consider that the subject of objections under deemed contracts was given sufficient consideration during its consultation on non-domestic objections in 2002/3. Therefore to assist Ofgem in developing its view on this matter and the Change Proposal, comments were invited from gas and electricity suppliers and customer groups on three proposed options for objections arrangements. These options, set out in an Ofgem consultation letter dated 3 September 2004, are as follows:

1. suppliers in the non-domestic market, in both gas and electricity, should be permitted to object under any circumstances specified by the supplier in deemed contracts; or
2. objections where customers are being supplied under deemed contracts should be permitted only in defined circumstances specified by regulation; or
3. objections should not be permitted in any circumstance where a customer is being supplied under a deemed contract.

Ofgem received views from 14 respondents. Of these, three preferred the first option, five preferred the second and six favoured option 3.

Of the views expressed in support of option 1, one respondent considered that objections should be permitted under any circumstances in a deemed contract. Other respondents believed that, while the grounds for objection should be specified in the deemed contract, the ability to object should be limited to where there is debt or to raise customer requested objections to prevent erroneous transfers. One considered that these circumstances would best be situated in the terms of deemed contracts as copies of such contracts are sent to new customers on a change of tenancy and the terms would therefore be more visible than if the circumstances for objection were set out in the supply licence or MRA. One respondent would support such terms in deemed contracts being subject to Ofgem approval in order to reduce the risk for the objections mechanism to be misused.

⁷ included as an attachment to Ofgem's notification letter entitled 'Notice of an appeal by British Gas Trading ('BGT') against a decision of the MRA Forum regarding MCP 144', available on the Ofgem web-site.

⁸ 'Authority decision in relation to the appeal raised by British Gas Trading against the Master Registration Agreement (MRA) Forum decision regarding MRA Change Proposal 144', dated 18 November 2004 and available on the Ofgem web-site.

Five respondents favoured the second option, as long as one of the prescribed circumstances related to debt. One commented that suppliers often only become aware that a change of tenancy has occurred when the customer attempts to switch supplier. This can be a long time after the customer has started taking supply under a deemed contract and can therefore involve a large debt being accumulated. One supplier suggested that some customers may deliberately not negotiate a new contract when their existing one expires in the knowledge that they can accrue a debt under a deemed contract without their supplier being able to prevent them switching to another supplier. Respondents generally considered that including terms for objection into the licence or MRA would make them transparent and consistent and, if the grounds were limited to debt, would shift the onus to the customer to remedy the cause of the objection.

Six respondents did not consider that objections should be permitted under deemed contracts in any circumstances. They:

- stressed the importance of customer choice which would be limited if circumstances for objection were not agreed by customers;
- considered that there are other suitable routes open to recover debt, as is the case in other markets; and
- believed that there was the potential for suppliers to misuse the objections mechanism and lock customers into deemed contracts and the ability to object could reduce the incentive on suppliers expressly to enter into contracts with their customers.

One respondent also stated that objecting to customers supplied under deemed contracts would perpetuate the problem that suppliers have reported where there are large numbers of customers supplied under deemed contracts. One supplier also questioned whether debt was a significant issue as, in their experience, debt under deemed contracts was less of a problem than under contracts that had been expressly entered into by customers.

Ofgem views

Ofgem notes the views expressed by respondents, in particular the concerns surrounding the ability to recover debt accrued under deemed contracts. Ofgem is concerned that, if the circumstances in which objections are permitted are not defined in the MRA or gas supply licence, they may not be fair, reasonable and transparent. For example, if suppliers were permitted to include their own grounds for objection under deemed contracts, the definition of what constitutes a "debt" for the purpose of such an objection may be determined on a unilateral basis and could be unreasonable. This could restrict competition and therefore not be consistent with Ofgem's statutory duties.

While there is a licence obligation on suppliers that requires the terms of deemed contracts not to be unduly onerous, Ofgem does not formally approve deemed contract terms. However, it may decide to take enforcement action, for example in response to a complaint, where it considers that a contravention of this obligation has occurred.

For the purpose of determining whether to give its consent to MCP 144, Ofgem considers that not to grant consent (and thereby perpetuate the current situation described in option 1 above) would continue to pose a risk to customers supplied under a deemed contract. It does not

consider that ad-hoc approval of deemed contract terms by Ofgem would be an effective safeguard for preventing misuse of the objections mechanism.

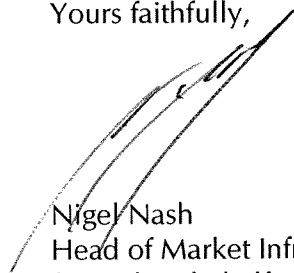
Further consideration is needed as to whether there are circumstances that should be defined in the MRA or gas supply licence in which it is appropriate for suppliers to be able to object in respect of customers supplied under a deemed contract. Until this issue is resolved, Ofgem considers that option 3, as would result from the implementation of the Change Proposal, would be appropriate. This would remove the current ambiguity concerning the use of objections and revert back to the arrangements that existed before January 2004.

Ofgem has considered the Change Proposal set out in the statement of fact, the views expressed and voting at the MDB and the MRA Forum, the discussions at the Non-domestic 'Objections and Erroneous Transfer' Working Group and responses to the consultation letter described above. Having regard to paragraph 4 of standard licence condition 37 of the electricity distribution licence and its statutory duties, Ofgem considers that the Change Proposal will better achieve the requirements of paragraph 4(f) of this licence condition for the "development, maintenance and operation of an efficient, co-ordinated and economical system for the supply of electricity and for the purpose of facilitating competition in electricity supply". Ofgem also considers that the Change Proposal will better protect the interests of customers by removing the risk of customers under deemed contracts being inappropriately bound by such contracts as a consequence of grounds for objection included by suppliers.

The Authority's decision

The Authority hereby gives its consent to the implementation of the Change Proposal. This consent and the change which is the subject of the Change Proposal will take effect on and from 1 December 2004.

Yours faithfully,



Nigel Nash
Head of Market Infrastructure
for and on behalf of the Gas and Electricity Markets Authority