



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

*Promoting choice and
value for all customers*

Direct Dial: 020 7901 7430
Email: steve.smith@ofgem.gov.uk

22 November 2004

Dear Sir,

Authority decision in relation to the appeal raised by British Gas Trading Limited (BGT) against the Master Registration Agreement (MRA) Forum decision regarding MRA Change Proposal 144 (the Change Proposal)¹

This letter sets out the decision of the Gas and Electricity Markets Authority (the Authority) in respect of the appeal raised by BGT against the decision made by the MRA Forum regarding MRA Change Proposal 144 (the details of which are discussed below) made on 29 July 2004.

Background

Before January 2004, objections in the non-domestic electricity market were permitted only where both suppliers agreed that a registration had been made in error (a 'co-operative objection') or where meter points that were related² to each other were not registered at the same time.

In December 2002, Ofgem consulted on the circumstances in which a supplier may raise an objection to a proposed customer transfer, in order to prevent such a transfer, in the non-domestic gas and electricity markets. In Ofgem's decision document³, it recommended, taking account of views expressed by customers and suppliers, that these circumstances should be specified in the contract between the supplier and customer so that they could be tailored to suit the individual circumstances of these parties rather than prescribed by regulation. MCP 135 was raised to effect this change in the electricity market and to bring the grounds for objections

¹ The decision has been made without knowledge of the opinions expressed by respondents to the consultation entitled 'Consultation regarding transfer objections under deemed contracts for non-domestic customers' dated 3 September 2004 and published on the Ofgem web-site (www.ofgem.gov.uk).

² The MRA defines meter points as related if they supply the same customer on the same site where charges for the supply are mutually conditional.

³ 'Transfer objections: stronger rights for industrial and commercial customers', available on the Ofgem web-site.



closer into line with the gas supply licence which was modified by the Authority in January 2004.

MRA Change Proposal (MCP) 135 was implemented, with the consent of the Authority, in January 2004. From that date, objections were also permitted in circumstances specified in the supply contract.

An interpretation of the effect of MCP 135 was that it permitted objections to be raised under circumstances specified in any supply contract, including a deemed contract⁴. At least one supplier therefore included terms for objections in their deemed contracts.

This issue was discussed by the industry at the Non-Domestic 'Objections & Erroneous Transfer' Working Group on 22 April 2004. At this meeting, some suppliers considered that objections should be permitted in certain circumstances under a deemed contract. Others believed that objections should only be permitted in circumstances that the customer has expressly agreed in their contract and that objections under deemed contracts, which are not expressly agreed by customers, should not be allowed.

MCP 144 was raised by Opus Energy Limited on 29 June 2004. The intention of that change proposal was to clarify the wording of Clause 16 of the MRA to prevent objections being raised under deemed contracts. At the meeting of the MRA Development Board (MDB) on 27 May 2004, four suppliers voted in favour of the Change Proposal, distribution businesses declared no interest and, of the settlement bodies, Elexon Limited voted in favour of the change proposal while Scottish Electricity Settlements Limited (SESL) cast a 'neutral' vote. Consequently, the MDB accepted the Change Proposal.

On 18 June 2004, Ofgem received notification of an appeal raised by BGT in relation to this decision of the MDB. The grounds for this appeal were debated at the MRA Forum on 29 July 2004. At that meeting, five suppliers voted in favour of the appeal and five voted against the appeal. After weighting the vote by taking into account the number of metering points supplied by each party, 73 per cent of the votes cast were in favour of the appeal. A distributor also expressed an interest and voted against the appeal. Therefore, the resolution of the MRA Forum was to uphold the decision of the MDB to accept the Change Proposal.

Clause 7.26 of the MRA provides for any MRA party to appeal a decision of the MRA Forum, for determination by the Authority, within ten working days of receiving the minutes of the relevant MRA Forum meeting. The MRA party may raise an appeal where they reasonably believe that a resolution passed by the MRA Forum will, or is likely to, unfairly prejudice their interests or cause them to be in breach of the MRA, its licence or the Electricity Act 1989. BGT lodged an appeal in accordance with Clause 7.26.

Having received the appeal, setting out BGT's reasonable belief that their interests would or were likely to be prejudiced, Ofgem, in accordance with its Procedure for Determining Disputes⁵, requested views from the industry on 3 September 2004.

⁴ As defined in Schedule 6 paragraph 3 of the Electricity Act 1989 and Schedule 2B paragraph 8 of the Gas Act 1986

Ofgem received seven initial responses and four subsequent responses following publication of the initial views. All responses are available on the Ofgem web-site. In summary, six responses (from five organisations) were in support of the appeal and five were against. The views expressed are discussed below.

Discussion

The grounds for appeal set out by the appellant were that the Change Proposal would unfairly prejudice their interests as:

- it would prevent them objecting to customer transfers where there was a “valid debt accrued” under a deemed contract. This would result in additional debt recovery costs being smeared across all customers,
- customers re-negotiating a contract following the conclusion of a previous contract period would default to a deemed contract and, without the ability to object under that contract, the supplier would be unable to prevent an erroneous transfer (ET) through initiating a customer requested objection, and
- suppliers with a larger portfolio of customers on deemed contracts would be at a greater disadvantage following the change than others.

Views expressed by respondents in favour of permitting objections under deemed contracts, and therefore in support of the appeal, concentrated mainly on the subject of debt. Respondents considered that the objections mechanism was a useful and cost-effective tool to help suppliers recover debt from customers supplied under deemed contracts. They believed that this allowed suppliers to mitigate the risk of supply and prevent the smearing of un-recoverable debt to all customers. Some suggested that without this ability suppliers may have to consider de-energising meters whenever a change of tenancy occurs in order to mitigate the risk of debt. Only the appellant considered that objections under a deemed contract should be permitted for circumstances other than where there was debt.

Other respondents expressed concerns that the ability to object under deemed contracts could have the effect of locking in customers to their deemed supplier on high deemed contract rates. They believed that this would inhibit customer choice, reduce the incentive on suppliers to expressly enter into contracts with customers on deemed contracts and act as a customer retention tool which, in the case of the appellant, could be anti-competitive due to their market position. In addition, if there was a dispute about the debt, the supplier would have little incentive to resolve it. It was also noted that suppliers were not able to object in circumstances specified in the deemed contract before January 2004 and that they must have had mechanisms to mitigate the risk of debt before that time. A question was raised about whether MCP 144 would actually result in greater costs smeared to all customers, as suggested by the appellant.

Respondents also suggested that there is no evidence to suggest that the number of customers who are supplied under deemed contracts cannot be managed down and questioned why the appellant’s interests would be unfairly prejudiced on the basis of them having a greater

⁵ 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.

proportion of customers supplied under such a contract. It was noted by one respondent that the ability to raise a customer requested objection, as permitted in the domestic market, should not be used to prevent ETs as the co-operative objection process, which requires the agreement of both suppliers, was designed to do this in the case of genuine ETs.

Ofgem views

Ofgem notes the concerns expressed by a number of respondents about the ability for a supplier to recover debt from customers supplied under a deemed contract. However, it shares the concerns of other respondents about the potential for misuse of objections where the circumstances in which they are allowed are determined unilaterally by the supplier. If this appeal were to be upheld, (based on the interpretation of the effect of the existing clause, discussed above) suppliers may continue to have the ability to insert any grounds for objection to the transfer of customers who are supplied under deemed contracts. This could have the effect that customers would be bound by deemed contracts for periods longer than those that may otherwise be appropriate. This creates a risk that a supplier may object to the transfer of customers on grounds that are not fair, reasonable or transparent. Ofgem considers that, having regard to its principal objective and statutory duties, this could be detrimental to the interests of customers as it could restrict competition. Such contracts are intended to be temporary and to permit a customer to take a supply where it has not been possible to enter into a formal contract.

In addition, the electricity distribution licence sets out the requirements and objectives of the MRA. Ofgem agrees with comments made by some respondents that the objections mechanism can, without sufficient safeguards in place, deter effective competition by unfairly preventing customers switching supplier. Ofgem therefore believes that, in upholding the appeal, it would not better facilitate the requirement that the MRA comprise matters appropriate “for the purpose of facilitating competition in electricity supply”⁶.

As noted by the appellant, suppliers are required to send copies of their deemed contracts to Ofgem and there is a supply licence obligation that their terms should not be unduly onerous. The appellant considered that proactive monitoring of deemed contracts by Ofgem would mitigate the risk of customer abuse and that the interests of customers could be safeguarded by deemed contracts being subject to approval by Ofgem. Ofgem considers that, if objections under deemed contracts were permitted and if the circumstances were not prescribed centrally, it could, for example in response to a complaint, take enforcement action in respect of each deemed contract where it considered that the terms of the deemed contract were in contravention of this licence obligation. However, Ofgem does not have a role in formally approving the terms of deemed contracts.

Ofgem notes the appellant’s reference to customer requested objections being used to prevent ETs. However, it also notes that the co-operative objections process is a mechanism designed to prevent ETs and that, where a transfer has been attempted erroneously, it can be prevented with the agreement of both parties. Such objections are already permitted in respect of all proposed transfers, including where a customer is supplied under a deemed contract. Ofgem therefore does not consider that MCP 144 should lead to an increase in ETs. If the suppliers do not agree that the proposed transfer is erroneous, the customer requested objection process should not be

⁶ Electricity distribution Standard Licence Condition 37(4)(f)

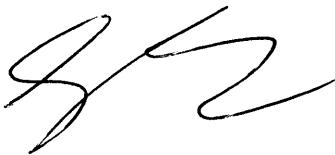
used unilaterally to circumvent the need for agreement between both suppliers. Ofgem notes the concerns from some respondents that this could be a customer retention tool.

Ofgem does not consider that the interests of the appellant would be unfairly prejudiced by MCP 144 on the grounds that they have a greater proportion of customers on deemed contracts. Ofgem believes that deemed contracts are intended to be a temporary measure and that suppliers could take steps to reduce the number of customers supplied in this way and expressly to enter into contracts with them. Ofgem therefore does not agree that the effect of MCP 144 on the appellant in this matter is unfair.

Decision

Having regard to all the circumstances, including the objectives of the MRA set out in Standard Licence Condition 37(4) of the distribution licence, its wider statutory duties and for the reasons outlined above, Ofgem determines not to uphold BGT's appeal and that the decision taken by the MRA Forum regarding MCP 144 should stand.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'S. Smith', written in a cursive style.

Steve Smith
Managing Director, Markets
for and on behalf of the Gas and Electricity Markets Authority