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value for all customers*

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

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Dear Colleague,

Authority decision in relation to the appeal raised by British Gas Trading Ltd (BGT) against the Master Registration Agreement (MRA) Forum decision upholding the MRA Executive Committee (MEC) determination dated 25 July 2006, that BGT is in breach of Clause 38.1 of the MRA

Introduction

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 that BGT is in breach of Clause 38.1 of the MRA.
2. On 19 October 2006 the Chief Executive of the Authority received an appeal from BGT, in accordance with Clause 7.26 of the Master Registration Agreement (MRA).
3. Clause 7.26 of the MRA provides for any MRA party to appeal a MRA Forum decision, within ten working days of receiving the minutes of the relevant MRA Forum meeting. The MRA party may raise an appeal where the party reasonably believes that a resolution passed by the MRA Forum will or is likely to unfairly prejudice the interests of that party, or will cause the party to be in breach of the MRA, its licence or the Electricity Act.
4. BGT were found by MEC to be in breach of the requirement in Clause 38.1 of the MRA to maintain the confidentiality of information supplied to BGT under provisions of the MRA. BGT were found to have used information provided when a customer is proposing to switch to another supplier (loss notification provided in the D0058 data flow) to contact the customer with a view to entering into a new contract for the supply of electricity.
5. The Authority has been asked to determine whether, in the circumstances, the decision of the MRA Forum to uphold the decision of the MEC to find BGT in breach of the MRA was correct.

Summary of our decision

6. As evidenced by the voting at stages in the MRA process and by the responses we received to our consultation, other suppliers do not share BGT's interpretation of the MRA. They consider that the practice of re-contracting initiated by the receipt of the loss notification (D0058) is not beneficial to the conduct of the market and,

therefore, that the market arrangements contemplated by the MRA do not permit the D0058 to be used in such a way.

7. We acknowledge that viewpoint; however, we have been asked to consider the narrow question of whether BGT could believe, on reasonable grounds that the market arrangements set out in the MRA would permit it to use the D0058 in such a way.
8. We consider that there is sufficient evidence to support the view that BGT, given the drafting of the MRA, could have reasonable grounds on which to believe that the use of the Confidential Information provided to them in the loss notification data flow could be used by them for the purposes of re-contracting and that that this was a market arrangement contemplated by the MRA. Additionally, this view could have been supported by the statements made by Ofgem in the August 2005 consultation.
9. Therefore, by virtue of MRA Clause 38.2.2, our decision is that BGT did not breach the provisions of the MRA.

Background

10. In May 2006 BizzEnergy made an allegation to the MEC that BGT was in breach of the MRA as BGT was failing to treat certain information supplied to it in accordance with the confidentiality rules in the MRA.
11. In June 2006, the MEC took external legal advice and undertook an investigation and advice on the interpretation of the MRA. The external legal advice provided to MEC concluded that the Notification of Loss data flow (the D0058) was Confidential Information and *inter alia* stated that BGT's actions arguably impede the operation of the MRA insofar as the process is designed to support the market by facilitating the customer transfer. On this basis the advice concluded that BGT's use of the information would appear to be in breach of the MRA.
12. On 21 July 2006, BGT raised a change to the MRA designed to make it clear that a supplier would be permitted to use the D0058 to contact its customers for its own purposes. During pre-assessment of this proposal, the views of other MRA parties were unanimously opposed the modification, and BGT subsequently withdrew the proposal.
13. On 25 July 2006, the MEC found BGT to be in breach of the MRA. BGT then appealed the MEC decision to the MRA Forum. On 28 September 2006, the MRA Forum upheld the MEC decision.
14. On 19 October 2006, BGT appealed the decision of the MRA Forum to the Authority.
15. Ofgem issued a consultation letter in October¹ and on 23 January, on the request of BGT, held an oral hearing at which representatives of BGT, BizzEnergy and MEC gave evidence.

The question that the Authority is being asked to consider

16. BGT's practice is to contact non-domestic customers for whom it has received notification that the customer is to switch their supply of electricity to another supplier. The notification is provided by a data flow – the D0058 – that is defined

¹ See Ofgem Website "Notice of British Gas Trading Limited's (BGT) appeal against the decision taken at the MRA Forum on 28 September 2006, upholding the MRA Executive Committee (MEC) determination dated 25 July 2006, that BGT is in breach of clause 38.1 of the MRA"

under the MRA.² The purpose of that contact is to offer the customer a further contract to continue to supply the customer. Typically, where a new contract is agreed, one of the terms of that new contract provides BGT with the right to object to a proposed transfer as set out in Clause 16.1.2.1 of the MRA. If the contract is agreed within the Objection Raising Period (as defined in the MRA to be five working days), then BGT will object to, and therefore prevent, the original proposed transfer.

17. The MEC decision was that the use by BGT of the D0058 to initiate re-contracting with a customer was a breach of the confidentiality rules set out in Clause 38 of the MRA. All parties who submitted responses in respect of this appeal agree that the information contained in the D0058 is "Confidential Information"³ for the purposes of Clause 38.1 that states:

Each party hereby undertakes with each other party that it shall preserve the confidentiality of and shall not directly or indirectly Disclose or use for its own purposes Confidential Information.

18. Accordingly, BGT must not directly or indirectly "Disclose" or "use for its own purposes" the information contained in the D0058.

19. The relevant question is whether BGT "uses" the information contained in the D0058 "for its own purposes". In using the D0058 as a trigger for re-contracting BGT does use Confidential Information for its own purposes. Again, all parties, including BGT, accept that this is the case.

20. The prohibition in Clause 38.1 of the MRA is not absolute. Clause 38.1 provides that,

The exceptions to this obligation are set out in Clause 38.2.

21. Clause 38.2.2 is the relevant gateway for the purposes of this question. This Clause provides that a party is entitled to Disclose or use Confidential Information if and to the extent that,

the party believes, on reasonable grounds, that market arrangements set out or contemplated by this Agreement require or permit it to Disclose Confidential Information to another person or to use Confidential Information to the extent of such requirement or permission.

22. The question then is: to what extent could BGT believe, on reasonable grounds, that the market arrangements contemplated by the MRA would permit the use (for its own purposes) of information contained in a D0058? In particular, to what extent (if any) does Clause 38.2.2 allow the use of D0058 information for the purposes of re-contracting with customers?

Use of the D0058

23. The MRA itself does not set out explicitly how information in a D0058 notice should be used; so this is not an issue which is "set out" by the MRA.

24. However, we do not agree with the view of the MEC that,

² The D0058 is the Notification of Termination of Supply Registration. This is the notification given on change of supplier from the MPAS provider to the old supplier under Clause 15.9 of the MRA (i.e. notification that a new supplier has won the old supplier's customer and wishes to have that customer registered).

³ "Confidential Information" is defined widely in Clause 1 of the MRA as: "in relation to a party, all data or other information supplied to that party by another party under or pursuant to the provisions of this Agreement". The D0058 is a notification given by the MPAS Provider to the Old Supplier (both of whom are parties to the MRA) under a provision (i.e. Clause 15.9) of the MRA.

The MRA is silent on the activity of re-contracting; therefore it does not contemplate such activity.

25. The fact that the MRA is silent about this activity does not necessarily mean that it is not contemplated by the MRA. If that interpretation were correct, the words "or contemplated by" in Clause 38.2.2 would be redundant; the words "set out" would be sufficient. So, the two phrases are not synonymous.
26. In the absence of explicit guidance in the MRA as to the use that BGT is entitled to make of the information provided to them on the D0058, we have considered the basis upon which the MRA is founded.

Basis of the MRA

27. Paragraph 4 of Standard Condition 37 of the Electricity Distribution Licence (SC 37) sets out the provisions which the MRA shall comprise. In particular:

28. Paragraph 4(b) of SC 37 provides that the MRA shall comprise:

...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.

29. Paragraph 4(f) of SC 37 provides that the MRA shall comprise:

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.

30. Below, we consider separately the role of the MRA to govern the customer switching process, and its role to facilitate competition in electricity supply.

Role of the MRA to support "changes of electricity supplier in respect of any premises"

31. One of the purposes of the MRA is to provide a mechanism to facilitate switching⁴. The MRA does not prescribe contractual arrangements or prescribe sales practices. Rather, it contains change of supplier mechanisms – it provides for the industry governance of the procedures and processes that enable an electricity customer to switch between suppliers.
32. Central to the customer switching process are the registration systems operated by distribution companies (the Meter Point Administration Service – MPAS) that record each supply point connected to that distributor's network. The MPAS gives each supply point a unique reference number – a Meter Point Administration Number (MPAN).
33. Clause 15 of the MRA sets out the basic principles for how the customer switching process operates. Whilst the MRA does not prescribe contractual arrangements, it does require, at Clause 15.1, that the New Supplier has a contract with the customer to supply electricity at the relevant supply point, before that New Supplier may submit a registration.
34. The circumstances in which the Old Supplier is entitled to raise an objection with the effect of preventing the proposed transfer are set out in Clause 16 of the MRA. The

⁴ See Standard Condition 37(4)(b) of the Distribution Licence

Old Supplier has five working days to raise an objection (i.e. the Objection Raising Period⁵). Where it does so, the MPAS Provider⁶ must notify the Old and New Supplier that the objection has been raised and accepted by them. If the Old Supplier objects to a transfer, it is required to notify the customer of the reason for the objection and how the customer may dispute or resolve the reason for the objection. Within the five day Objection Raising Period, the Old Supplier may withdraw its objection (i.e. where the grounds for the objection have been resolved), in which case the transfer will proceed.

35. So, the MRA contemplates objections in certain circumstances. And it envisages a procedure in which a customer is contacted by the Old Supplier (i.e. to enable to dispute or resolve the reason for the objection). But that is the extent to which the MRA speaks to the issue of customer contact; there is nothing to suggest that the MRA contemplates the supplier taking any further action in this respect i.e. there is no suggestion that the Old Supplier would use this as an opportunity to undertake marketing activity. Indeed, the entire process is geared towards ensuring a smooth switching process.
36. Given that the MRA aims to provide a technical system which will *facilitate* switching, and given that the D0058 is a key piece of information within this system, arguably, the D0058 should not be used to defeat the switch⁷ that it was generated to facilitate. The Old Supplier receives the D0058 as part of a technical process; arguably it should not exploit that technical process for its own ends, given that the wide definition of Confidential Information would appear to be intended to prevent this from happening.
37. However, this reading of the MRA is not unambiguously stated. The switching process is a result of the intentions of the customer to be supplied by their chosen supplier, and the expression of those intentions is through the contractual arrangements the customer enters into with their chosen supplier. The MRA does not necessarily preclude a customer changing its mind as regards its chosen supplier during the Objection Raising Period; and BGT may, therefore, reasonably believe that it could use the D0058 in order to contact its customers for the purposes of re-contracting.

Role of the MRA "for the purpose of facilitating competition in electricity supply"

38. BGT has argued that its use of the D0058 facilitates competition. They argue that to distinguish the receipt of the information in the D0058 as a trigger for re-contracting is an artificial distinction between, on the one hand, 'in contract saves' and on the other 'win-backs' – where the customer enters into a contract with the Old Supplier after the customer has transferred to the New Supplier.

*"There is no logical basis for a purported distinction between contracting by an Old Supplier on, say, the tenth day as opposed to the eleventh day following registration, or following notification of a desire to change."*⁸

⁵ "Objection Raising Period" is defined in Clause 1 of the MRA as "the period from and including the time that the notification to the Old Supplier pursuant to Clause 15.9 is sent from the MPAS Registration System to the relevant MPAS Provider's Gateway up to but not including 18:00 hours on the fifth Working Day thereafter".

⁶ The person whose MPAS Registration System has the Metering Point recorded on it.

⁷ Note that the D0058 can only be used to defeat a switch where it is used for the purposes of re-contracting with non-domestic customers during the Objection Raising Period. That is, where the losing supplier has used that period to re-contract with the customer on new terms that introduce the right to raise an objection and *then* to object to the proposed transfer. This is important. Arguably, the use of information contained in a D0058 to re-contract outside that period would not be contrary to the market arrangements set out or contemplated by the MRA, since it would not defeat a switch.

⁸ BGT presentation at the Ofgem oral hearing 23 January 2007

39. BGT argues that the market arrangements set out or contemplated in the MRA envisage re-contracting. It states that the MRA contemplates very rapid customer turnover: under Clause 15.5.3 a customer may transfer to a New Supplier as early as the eleventh working day following registration with its Old Supplier.
40. Arguably therefore it is contemplated that a supplier can and will attempt to retain customers. BGT argues that there is nothing in the MRA which distinguishes between Old Suppliers' rights to seek to retain such customers and New Suppliers' rights to win such customers for the first time. BGT concludes that the MRA must therefore contemplate the Old Supplier using the D0058 as a trigger for approaching the customer, otherwise the Old Supplier would be the only Supplier barred from competing for that customer, hampering effective competition.
41. Further, a supplier may re-contract during the Objection Raising Period in circumstances where it has been alerted to the customer's intention to switch by the customer himself (i.e. prior to the receipt of the D0058), rather than the D0058. The MRA does not prevent a supplier from acting in such a way in such circumstances; this would suggest that it is somewhat artificial to prevent exactly the same thing from happening, at exactly the same time, simply because of the way in which the supplier has obtained the information.
42. Clause 16.1.2.1 of the MRA permits a supplier to object to a proposed transfer *"...where the Old Supplier is permitted to do so by the provision of a contract with its customer at those premises."* The reference to 'a contract' rather than a more specific formulation (for example 'the contract in effect when the supplier receives the D0058 notification'), opens the way for an interpretation that does not limit the old supplier to relying on any particular contract. This wording does not, therefore, prevent BGT from acting as it is currently.
43. Finally, it is the customer that is exercising the option to enter into a contract with the supplier, whether they approach the supplier or the supplier approaches them.
44. Counter arguments have been put forward to suggest that BGT's use of the D0058 information can not be considered to be facilitating competition, most significantly being the effect that the approach has on the new supplier. However, the question we are considering here is whether there are reasonable grounds for BGT to have considered that the MRA could have contemplated this approach. Our view is that there is sufficient ambiguity within both the text and the basis of the MRA, that such a view can be reasonably taken.
45. BGT have also noted comments related to the interpretation of the provisions of the MRA by MEC and Ofgem.
46. Following an earlier breach investigation (where a supplier had raised objections to proposed transfers in anticipation of securing a contract with the customer to permit an objection), MEC issued advice⁹ to MRA parties in respect to non-domestic objections. This clarified that suppliers should only object to a proposed non-domestic transfer where at the time the objection was made (i.e. not at the time the D0058 was received) the supplier had a contract with the customer permitting them so to do.
47. We do not consider that the guidance provided by MEC to be conclusive in this case, but it could nevertheless have contributed to BGT forming their view as to the market arrangements contemplated by the MRA. The advice did not preclude BGT

⁹ MRA Case Study: Breach determination relating to non-domestic objections 19 July 2005

from using the D0058 to contact a customer in order to re-contract on terms which provided it with the ability to object to the transfer.

48. We also note that Ofgem, in its consultation letter of August 2005 commented on re-contracting during the objection window. Ofgem's letter asked for views as to whether clarification through further regulation in the use of objections is required. It pointed to the behaviour that is under consideration for the purposes of the current appeal:

"Under the current arrangements in both gas and electricity, the losing supplier has a number of days after receiving the loss notice in which to submit an objection. In electricity this has caused some controversy, as the losing supplier has used this time to re-contract with the customer on new terms that introduce the right to raise an objection and then object to the proposed transfer.

Some suppliers have argued that this is an improper use of the objection raising period and that the rules in the MRA and gas supplier's licence should be clarified to state that for non-domestic customers, the circumstances in the customer's contract at the time the losing supplier receives the loss notification should be relevant. Ofgem is asking for views as to whether clarification through further regulation in the use of objections is required.

49. In the section headed "Ofgem's current thinking", the letter stated that

"With regard to an old supplier's use of the objection raising period to re-negotiate a contract, Ofgem considers that it is the responsibility of the customer to determine whether or not a contract offered to them is worth signing. Consequently, it is currently Ofgem's view that restricting a customer's choice and ability to sign a contract with whomever it chooses is inappropriate. Furthermore, the contractual terms that existed at the point when an objection was raised are likely to be difficult for the industry to monitor".

50. Ofgem did not explicitly comment on the method for triggering re-contracting or on whether it would be appropriate for a supplier to use the receipt of the D0058 for initiating the sales process.
51. However, re-contracting during the Objection Raising Period is capable of having been triggered by the D0058. As explained above, this is the period which begins when the old supplier is notified by the D0058 that it is about to lose a customer.
52. Arguably, therefore, BGT could have a reasonable expectation that Ofgem was not opposed to an old supplier contacting the customer on the basis of the information contained in the D0058, with a view to re-contracting with that customer.

Conclusion

53. The question as to whether re-contracting during the objection period is an appropriate practice for the market, is a finely balanced one, and there are legitimate views for and against. During the MRA processes surrounding this matter, involving the breach investigation and BGT's proposal to modify the MRA there was a clear view from other suppliers that the practice was not appropriate. Respondents to our October consultation letter reinforced this view, including a response from energywatch, who said:

energywatch believes that other suppliers, especially smaller suppliers, are prejudiced by British Gas mis-use of an industry administration process for its own retention activities. The proper application of the MRA should not

prejudice any supplier in the transfer process yet what British Gas advocates gives the existing supplier a second chance to retain a customer who has been fairly won by another supplier through legitimate competitive engagement.

54. We acknowledge that viewpoint, but the question as to whether the MRA currently specifies the best or most appropriate market arrangements is not the question we have been asked to consider in this appeal.
55. We have been asked to consider a narrower and more specific issue. Clause 38.2.2 of the MRA entitles a supplier to use Confidential Information for its own purposes where it has reasonable grounds to believe that market arrangements contemplated by the MRA permit it to so use the information.
56. Crucially, the test set by Clause 38.2.2, is not whether the MRA contemplates the market arrangements, but whether "the party believes, on reasonable grounds, that market arrangements set out or contemplated by this Agreement..." permit the party to use Confidential Information. Taking into account the drafting of the MRA, its purpose in respect of customer switching and facilitating competition, together with other available commentary on the issue of re-contracting, including the views stated by Ofgem, we consider it reasonable for BGT to have believed that the MRA did contemplate that re-contracting triggered by the information received in the D0058 was a market arrangement contemplated by the MRA.
57. Therefore, our decision is that BGT did not breach the provisions of the MRA.
58. We will shortly be publishing a letter discussing the wider policy issues arising from this case.

Yours sincerely



Steve Smith
Managing Director, Markets