

Ikbal Hussain
Licensing Manager
Ofgem
9 Millbank
London
SW1P 3GE
ikbal.hussain@ofgem.gov.uk

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Your Ref: Ofgem doc 82/07

Dear Ikbal

Gas and electricity licence applications – Application Regulations and Guidance Document - consultation

energywatch welcomes the opportunity to respond to the issues raised by this consultation. This response is non-confidential and we are happy for it to be published on the Ofgem website.

We agree that greater efficiency in processing licence applications in reduced timescales minimises some of the administrative burden on applicants. However, this must be balanced against the need to ensure that appropriate scrutiny of the application takes place, with adequate protection of consumers' interests acting as the key consideration before granting of a licence.

We do not believe that Ofgem has gone far enough in protecting consumers from so called "phoenix companies" and we consider this to be a significant deficiency in the current proposal. Typically these will be companies that have exited the market in difficult circumstances but have avoided liquidation or insolvency. They may have left without fulfilling financial or other obligations to former customers. Those customers may not be in a position to take legal action to enforce their rights or it simply may not be viable for them to do so. Likewise, there may be issues about a company's ability to comply with its licence obligations, although, given the fact that it is exiting the market, Ofgem may decide not to pursue enforcement action for similar justifiable reasons. In allowing that licensee to exit the market, however, consideration of its past conduct should remain a factor when either that same company or substantially the same directors (or shadow directors) or shareholders subsequently apply for a new licence.

We believe that Ofgem should make all reasonable attempts to investigate applicants where a phoenix company has arisen out of a failed licensee or a related company is brought into being by those associated with a failed licensee. All consumers, particularly the vulnerable, are unable individually or collectively to investigate these matters satisfactorily and are very capable of being misled. Indeed, any stigma attached to a brand that had left the market and that is now seeking to reinvent itself

can easily be overcome by the fact that they were allowed to exit the market without penalty and have then been given a new licence by the very same regulator.

A key aspect of protecting the consumer must involve relying on regulatory authorities to carry out vetting of applications effectively. Ofgem has **the** critical role in this respect as the licence-granting authority. Failure to do so sends out the wrong message - that a simple restructuring exercise is the antidote to financial difficulties and a means of abrogating a licensee's obligations towards its former customers.

We believe that the credit assessment arrangements under industry codes must demonstrate that they are robust in protecting consumers. Ofgem must retain a residual power in case there are issues which the codes fail to address adequately.

While this consultation does not deal directly with licence revocation, we would like to reiterate our concerns about the circumstances in which Ofgem can revoke licences. We accept that Ofgem must observe company law when making decisions on licence revocation. However, we believe that real risks remain that, until actual legal 'triggers' are activated in the case of insolvency, licensed companies in genuine financial difficulty, which may consequently place consumers in financial distress and detriment, will continue to trade. One instance may arise where the directors of the company hold out vainly for a rescue package while continuing to incur debts. When insolvency is finally declared, the debts may have increased substantially with little prospect of recovery. If those debts are picked up by remaining licensees, the additional costs may be passed through to consumers. We believe that Ofgem should consider whether there are means within the current law to revoke a licence in these circumstances where, in all practical respects, a licensee is insolvent if not necessarily so by the legal definition.

We agree that the Application Regulations generally reflect the purpose for which they were drafted. However, we note some minor inconsistencies in the drafting:

- in the title of the electricity SI, it mentions "Modifications" but "Modification" directly below;
- in paragraph 1 of each SI, should it not state that the Regulations come into force on 29 June 2007?

Going forward, we will continue to keep these issues under review as and when they are raised, and comment as necessary on the possible impact on consumers.

If you do wish to discuss our response further please do not hesitate to contact me on 0191 2212072.

Yours sincerely

Carole Pitkeathley
Head of Regulatory Affairs

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