

Philip Davies
Director of GB Markets
Ofgem
9 Millbank
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6th September 2007

Dear Mr Davies

Modifying the arrangements for the use of objections for non-domestic customers

I am writing in response to your proposals on the above subject dated 27th July 2007. As you know from our previous correspondence and discussions this subject is important to us.

We welcome the fact that Ofgem proposes changes to the supply licence in order to keep the switching process neutral and to clarify the basis on which objections can be raised. However for the reasons set out in this letter we do not believe that your proposals would address the underlying issues. Indeed, we believe that your proposals would in the medium term entrench and make respectable a process that would severely damage competition and would leave the majority of customers paying higher prices than they otherwise would. We set out the reasons for this in our previous letters.

In your letter you have made a number of fundamental assertions about the objections process which we wholeheartedly support. In particular we agree that:

“Suppliers should not re-contract, or in any other way alter their commercial position towards the customer during the objection window”

“The objection window was not intended to be used for commercial negotiation to allow the outgoing supplier to retain the customer”

“The switching process (of which the objection window is a part) was intended to enable transfers to take place. As competing suppliers have no choice but to use this industry process, it needs to be an orderly process that provides certainty to all industry participants (customers and suppliers alike).”

We believe that your proposals run counter to these assertions for the following reasons:

Any impediments to a freely operating market, such as objections, should not be any wider than is necessary for the sensible operation of the market. The original underlying logic behind the objections process was to provide the opportunity for suppliers to establish whether there were any technical reasons why it would not be appropriate to transfer the customer (such as a single related MPAN when the matching MPAN was not being simultaneously transferred) and then to prevent such a transfer from proceeding. This was later extended to include erroneous transfers and debt. Much later, the concept of the right to object being defined by the provisions of the contract between the supplier and customer was introduced and the current difficulties with recontracting have arisen due to this broadening of the right to object.

Apart from the fact that many smaller customers may not properly understand the consequences of the terms of their contracts (especially given that fact that the objections process does not crop up in the vast majority of free markets) your proposal would effectively legitimise this broadening of the use of the objection process, allowing suppliers to extend it to circumstances well beyond those that would apply in a free market. This would be contrary to your statement that re-contracting of the type envisaged by your proposal "... has no bearing on the transfer process and does not interfere with the simplicity and predictability we seek to encourage".

In addition, your proposals are likely to lead to many suppliers being forced to seek redress through the courts as they seek to recover sunk costs and lost profits on contracts that they are unable to implement because the objection process has been applied in support of the existing supplier recontracting with the customer. This runs contrary to your stated rationale for previous extensions of objection rights.

Under your proposal a supplier with the form of contract that you envisage would be able to alter their "commercial position" within the objection window as they would be free to agree to a new price. Your proposal therefore allows exactly the type of behaviour that you are seeking to prevent.

Your proposal would also allow the incumbent supplier to give themselves an advantage by including provisions (which we believe will not be subject to scrutiny in many cases or if they are will not be understood) allowing them to have a last opportunity to negotiate at a time when the customer has decided to leave and has actually contracted with a new supplier. This cannot be described as "neutral" or "orderly" as clearly the incumbent has an unfair advantage over the new supplier. This runs contrary to your assertion that the process should be neutral and orderly.

For these reasons and those set out in our previous responses and meetings, we are disappointed that your proposal falls short of explicitly preventing the current supplier from recontracting with the customer during the objection window.

We believe the process of recontracting within the objection window is not in the long term interests of customers and represents an abuse of the transfer mechanism. The use of the objection window as a marketing opportunity for the existing supplier to retain the customer represents a considerable distortion to the free operation of the market. This distortion has arisen as an unintended consequence of the introduction of the broad right to object “where the old supplier is permitted to do so by the provisions of its contract with its customer”. We believe that the interests of customers and the market would best be served by limiting the opportunities for objection to those strictly necessary for the sensible operation of the market. We do not believe that suppliers should be able to extend these rights by introducing terms into their contracts. The only circumstances that meet this (your) criterion are:

- Outstanding debt
- Related MPAN
- Erroneous transfer
- That there is a contract in force that has either not run its course or has not been properly terminated by the customer

We would support licence changes which explicitly define the grounds on which an objection can be made. Such a change would not constrain suppliers’ ability to contract with customers on whatever basis was mutually acceptable, it would simply limit the use of the objection process in an enforcement context to that essential for the orderly operation of the market. A suggested form of words to implement the above is given at the end of this letter. We understand your general concerns on enforceability and on constraining suppliers’ ability to contract. We believe that limiting the opportunities and explicitly defining the grounds will ease enforcement and would not constrain suppliers’ ability to contract; only the use of the objection process would be limited. We do not share your view that suppliers should have the right to contract with customers to allow them to object for re-contracting purposes as such a right runs counter to the operation of free markets and goes well beyond the minimum necessary for the sensible operation of the market.

You have also asked for views “whether or not the new licence conditions should apply to Deemed Contracts as well as other contracts”. As a direct extension of the above reasoning we do not believe that suppliers should have any further objection rights under deemed contracts.

Suggested drafting

Replace 14.2 (a) of the current supply licence condition with the following two clauses;:

- (a) a provision of the licensee's current Contract with that customer for the supply of electricity to the premises allows the licensee to prevent the Proposed Supplier Transfer if the supply start date of the proposed transfer overlaps with the licensee's existing contract or the required notice of termination has not been given;
- (b) a provision of its Contract with that customer for the supply of electricity to the premises allows the licensee to prevent the Proposed Supplier Transfer if the customer has an outstanding debt owing to the licensee relating to the supply of electricity;

I hope you find this suggestion useful and I am happy to discuss it further with you if that would be helpful.

Yours sincerely

Peter Bennell
Chief Executive
Haven Power Ltd