



Suppliers, customer
representatives and other
interested parties

*Promoting choice and
value for all customers*

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Date: 3 December 2007

Dear Colleague,

Regulation of marketing to domestic customers

This letter invites views (pursuant to paragraph 25.12 of Standard condition 25 of the gas and electricity supply licences) as to whether the marketing licence condition that governs the conduct of face-to-face sales¹ with domestic customers should be retained for a further period of time. Appendix 1 of this letter sets out the current version of the licence condition.

The closing date for responses is 25 January 2008.

Background

Obligations relating to direct marketing were introduced in 1998, in response to concern that poor performance by suppliers in managing doorstep selling would discourage customers from participating in the market. The obligations supplemented general consumer protection legislation and provided Ofgem with powers to take action against unfair marketing behaviour by suppliers and their agents. The licence condition was made subject to a sunset clause where the Authority has determined that the development of competition is such that the obligations in the condition are no longer necessary.

Since then, renewal of the licence condition has been driven by continuing concerns about the level of complaints received by energywatch about direct selling (at the end of 1999, these were running at over 1,000 complaints a month). Ofgem had investigated a number of suppliers, in some cases requiring undertakings that performance would improve and in one case, taking enforcement action resulting in a financial penalty.

The licence conditions were last renewed in March 2006². At that time, we decided that it was appropriate to renew the licence conditions for a further two years in respect of face-to-face marketing. However, in recognition of the improved performance by the industry and the introduction of the Distance Selling Regulations, we removed the application of the licence condition to telesales. We considered that the development of the Distance Selling

¹ Such sales may occur at a customer's premises (door step selling), or in a public place.

² <http://www.ofgem.gov.uk/Markets/RetMkts/Compl/DirectMktng/Documents1/13475-5406.pdf>

Regulations meant that the lifting of the licence conditions from applying to telesales did not result in the loss of necessary consumer protection and was in line with our commitment to Better Regulation.³

The marketing licence conditions were further simplified as part of our review of the supply licence conditions in August 2007, where reporting requirements were removed.

Current position

Direct selling complaints to energywatch concerning marketing have continued to fall (see Appendix 2). Doorstep selling continues to be an effective marketing channel for suppliers, with some suppliers indicating that around 60% of sales are made through face-to-face marketing. Between July and September 2007, complaints to energywatch on direct sales totalled 103. In that same period 2.1m gas and electricity domestic customers switched supplier.

This performance reflects the strides the industry has made in developing self-governance arrangements for face-to-face selling activities. The six major supply companies have continued to develop the EnergySure Code⁴ and remain committed to it. The EnergySure Code mirrors many of the requirements of the marketing licence conditions, and in some areas (notably on the training and vetting of sales agents), exceeds them.

Since September 2007, the Energy Supply Ombudsman has been enabled to deal with selling disputes.

Looking forward

In considering whether to retain the marketing licence conditions, we will also consider the changes that are planned for consumer representation in the energy market and the introduction of new consumer protection regulations that will apply to all sectors, including energy supply.

The Consumers, Estate Agents and Redress (CEAR) Act 2007 will see energywatch - the current energy consumer body - replaced with a single point of contact for consumers covering all markets for information and advice (Consumer Direct), the introduction of a customer redress scheme or schemes into the statutory framework which will cover all types of energy complaints, and a new consumer advocacy body (the new National Consumers Council). These changes are due to be introduced on 1 October 2008⁵.

As part of the new arrangements for consumer representation, Ofgem is also required to set complaint handling standards which all energy suppliers will have to comply with. We are currently consulting on our proposals in this area⁶.

In April 2008, BERR are introducing the 'Consumer Protection from Unfair Trading Regulations' to implement the EU Unfair Commercial Practices Directive that harmonises unfair trading laws in all EU Member States. The Regulations introduce a general prohibition on traders not to treat consumers unfairly. The Regulations will oblige businesses not to mislead consumers through acts or omissions; or subject them to aggressive commercial practices such as high pressure selling techniques. The Directive also provides additional protections for vulnerable consumers who are often the target of unscrupulous traders. We

³ Better Regulation is integral to all our major policy decisions. Further information may be found on our website at: <http://www.ofgem.gov.uk/About%20us/BetterReg/Pages/BetterReg.aspx>

⁴ The EnergySure Code is managed through the Energy Retail Association. It was previously titled the Association of Energy Suppliers Energy Selling Code of Practice (AES Code). Details of the EnergySure code may be found on the ERA website at: <http://www.energy-retail.org.uk/salespractice.html>

⁵ Approval of Redress Schemes in the Energy Sector - 247/07
<http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?file=Consultation%20criteria%20for%20approval%20of%20redress%20schemes%2024707.pdf&refer=Markets/RetMkts/Compl/ConsRep>

⁶ Complaint Handling Standards Consultation - 272/07
<http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?file=Complaint%20Handling%20Standards%20Consultation.pdf&refer=Markets/RetMkts/Compl/ConsRep>

expect that Ofgem will be able to take enforcement action in relation to the Directive as a designated enforcer under Part 8 of the Enterprise Act 2002⁷.

Do the marketing conditions need to be retained?

In 2006, we were not sufficiently confident that self-regulation by the industry provided a viable alternative to maintaining obligations in the supply licence. We indicated that our view may change if the EnergySure Code were to be enhanced to closely meet the requirements of the OFT Consumer Codes Approval Scheme. The examples we gave included; improving transparency over how breaches of the EnergySure Code are dealt with, increasing the involvement of consumer bodies, building brand awareness of the EnergySure Code and attracting signatories beyond the big six major suppliers.

The EnergySure Code has made progress in some of these areas. For example, there is information on the requirements of the Code published on member's websites and the Code's annual report is available on the ERA website. We welcome the views of respondents on the development of the Code.

Looking forward, we consider that the 'Consumer Protection from Unfair Trading Regulations' that BERR are planning to introduce next April can be expected to provide an arguably more extensive level of protection for energy customers as the marketing licence conditions. However, these new regulations are not in place yet, and there may be merit in allowing these new regulations to be firmly established before relying on them to replace the marketing licence conditions.

There may also be risks associated with removing the marketing conditions during a period of substantial change to the arrangements for consumer representation. Ofgem is currently consulting on the arrangements for redress schemes⁸ in the new statutory framework and complaint handling standards⁹ for suppliers.

Proposed way forward

Our current view is that there is evidence to suggest that the industry's performance in managing face-to-face marketing has continued to improve. With the introduction of the Consumer Protection from Unfair Trading Regulations and complaint handling standards, together with arrangements to provide redress schemes covering all suppliers, we would expect that sector specific regulation of marketing is no longer be required. However, until these arrangements are introduced and well established, it may be appropriate to maintain the licence conditions.

We are therefore minded to extend the marketing licence conditions for a period of one year, with a view to consulting on removing them early in 2009.

Views of respondents

The closing date for responses is 25 January 2008. We would welcome respondents views on any aspect of the issues raised in this letter, but in particular on the following questions:

Do you agree with the proposal to extend the marketing conditions until March 2009?

Alternatively, do you consider that industry self-governance arrangements, including the EnergySure Code are sufficiently effective that the marketing conditions can be removed in April 2008?

⁷ SI 2003 No 1399

⁸ Approval of Redress Schemes in the Energy Sector - 247/07
<http://www.ofgem.gov.uk/Markets/RetMkts/Compl/ConsRep/Documents1/Consultation%20criteria%20for%20approval%20of%20redress%20schemes%2024707.pdf>

⁹ Complaint Handling Standards Consultation - 272/07
<http://www.ofgem.gov.uk/Markets/RetMkts/Compl/ConsRep/Documents1/Complaint%20Handling%20Standards%20Consultation.pdf>

Responses should be sent by 25 January 2008 to:

Nigel Nash
Ofgem
9 Millbank
London SW1P 3GE
(Email nigel.nash@ofgem.gov.uk)

Responses to this consultation letter will be placed on the Ofgem website unless they are marked as confidential.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'P. Davies', with a long horizontal line extending to the right from the end of the signature.

Philip Davies
Director, GB Markets

Appendix 1: Marketing licence condition

Note that the gas version of the licence condition places the same obligations on suppliers.

Condition 25. Marketing electricity to Domestic Customers

Staff selection and training

25.1 The licensee must:

- (a) set up appropriate procedures for the selection of staff employed or engaged in roles the principal duties of which involve oral communication with Domestic Customers for the purpose of its Marketing Activities;
- (b) take all reasonable steps to ensure that each such person is trained so as to have a sufficient understanding of:
 - (i) the arrangements for competition in the supply of electricity to Domestic Premises in Great Britain; and
 - (ii) the Principal Terms of Domestic Supply Contracts made available by the licensee,such that any relevant advice given by him to Domestic Customers is not misleading;
- (c) take all reasonable steps to ensure that:
 - (i) a Domestic Customer may readily identify the licensee whenever he is contacted by a Representative of the licensee;
 - (ii) if the Domestic Customer enters into an agreement, he will readily understand that he has done so; and
 - (iii) any unsolicited contact made on behalf of the licensee with any Domestic Customer takes place at a reasonable time; and
- (d) take all reasonable steps to ensure that each agent and sub-contractor of the licensee sets up procedures and takes steps equivalent to those set out at sub-paragraphs (a) to (c).

Contact with Domestic Customers after Contract

- 25.2 The licensee must comply with the requirements of paragraphs 25.3, 25.4 and 25.5 where a Domestic Supply Contract has been entered into by a Domestic Customer in the course of:
- (a) a visit to that customer's premises by a Representative of the licensee; or
 - (b) a conversation, in a place to which the public have access, between a Representative of the licensee and a Domestic Customer.
- 25.3 Where a Domestic Supply Contract is entered into as a result of a visit or conversation of the kind mentioned in paragraph 25.2, the licensee must within a period of between 24 hours and 14 days after entering into the Domestic Supply Contract take all reasonable steps to contact the Domestic Customer, through a Representative of the licensee who is not engaged in activities leading to the making

of Domestic Supply Contracts between the licensee and Domestic Customers, by telephone or in Writing to seek confirmation that the Domestic Customer:

- (a) understands that he has entered into a Domestic Supply Contract;
- (b) is content to have entered into that contract; and
- (c) is content with the way in which the Marketing Activities of the licensee were conducted.

25.4 Where, in the course of telephone contact or within a reasonable period after contact in Writing as required by paragraph 25.3, the Domestic Customer indicates that he is not content to have entered into the Domestic Supply Contract and wishes to end it, the licensee must take all reasonable steps to ensure:

- (a) that the Domestic Supply Contract is ended; and
- (b) where reasonably practicable, that the licensee does not begin a supply of electricity to the customer.

25.5 Where the response of a Domestic Customer, or the response of Domestic Customers generally, to contact as required by paragraph 25.3 suggests weaknesses in the methods, systems or personnel employed or engaged by the licensee or its agents or sub-contractors for the purpose of its Marketing Activities, the licensee must ensure that all reasonable steps to remedy the matter are taken.

25.6 Where, under any Domestic Supply Contract, electricity supply to the premises is to start at least 60 days after the date on which the contract is entered into, the licensee must take all reasonable steps between entering into the contract and beginning the supply to keep the Domestic Customer informed that he has entered into a Domestic Supply Contract with the licensee.

Compensation under complaint procedure

25.7 The complaint handling procedure required to be produced by the licensee under paragraph 4 of standard condition 31 (General information for Domestic Customers) must provide, in appropriate cases, for the payment of compensation to Domestic Customers adversely affected by the failure of the licensee to comply with its obligations under this condition.

Prohibition of advance payments

25.8 The licensee must neither enter into any commercial relations connected with the supply of electricity to Domestic Premises with any person who has sought payment in advance (other than a Security Deposit) from any Domestic Customer with a view to arranging a supply of electricity nor enter into a Domestic Supply Contract for the supply of electricity to any such customer made through the agency (either for the licensee or for any customer) of such a person.

25.9 Paragraph 25.8 does not apply where any payment in advance of the kind mentioned in that paragraph is sought wholly or mainly for a service, other than the service of arranging the supply of energy, and the Authority has approved of the disapplication of that paragraph.

Management arrangements

25.10 The licensee must take all reasonable steps:

- (a) to establish management arrangements that facilitate the licensee's compliance with its obligations under paragraphs 25.2 to 25.6; and

- (b) to ensure that any agents and sub-contractors of the licensee take steps to establish equivalent arrangements.

Termination of condition

- 25.11 This condition will cease to have effect on 31 March 2008 (for this condition only, the "termination date") or on such later date (for this condition only, the "new termination date") as the Authority may specify in a Notice issued under paragraph 25.13.
- 25.12 The Authority may set a new termination date in relation to all or part of this condition where:
- (a) the Authority has consulted with all Electricity Suppliers in whose licences Section B of the standard conditions is effective, the Consumer Council and such other persons as the Authority considers are likely to be affected;
 - (b) the Authority has determined that the development of competition in the supply of electricity is such as to require the continuation of the condition, in whole or in part; and
 - (c) the new termination date is no more than two years after the termination date.
- 25.13 Where the Authority decides to set a new termination date, whether in relation to all or part of this condition, it must specify that date in a Notice which:
- (a) is published in such manner as the Authority thinks appropriate for the purpose of bringing it to the attention of persons likely to be affected; and
 - (b) is copied to all Electricity Suppliers in whose licences Section B of the standard conditions is effective, the Consumer Council and the Secretary of State.
- 25.14 The Authority may set a new termination date on more than one occasion and, where it does so, such part of this condition as may be specified by it will apply as if the termination date was the last new termination date set by the Authority.

Appendix 2 – energywatch marketing complaint data

The table below illustrates the fall in monthly complaints to energywatch per 1,000 customer transfers from November 2003 to July 2007.

Direct Sales

