



Suppliers, consumer
representatives and other
interested parties

*Promoting choice and
value for all customers*

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Date: 18 February 2009

Dear Colleague,

Regulation of marketing to domestic customers

This letter invites views as to whether the marketing licence condition should be retained for a further two years. This letter is sent pursuant to paragraph 12 of Standard condition 25 of the gas and electricity supply licences.¹

The closing date for responses is 18 March 2009.

Background

The initial insertion of obligations relating to direct marketing into the licence condition in 1998 related to the market opening and concerns 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 tailored protection for domestic gas and electricity consumers. The licence condition was made subject to a "sunset" clause where the Authority determines that the development of competition is such that the obligations in the condition are no longer necessary.

Since 1998, renewal of the licence condition has been driven by continuing concerns about complaints received by consumer representatives and by Ofgem. During this time we have investigated a number of suppliers, resulting in undertakings that performance would improve and, in a minority of cases, taking enforcement action resulting in a financial penalty. More recent concerns include: the Npower investigation, which resulted in a financial penalty of £1.8 million being imposed in January 2009²; concerns raised in the media about other suppliers; and sales and marketing activities being identified as an area of concern in the Initial Findings Report of the Energy Supply Probe ("the Probe"), which was published in October 2008.³

The licence condition was last renewed on 22 February 2008.⁴ We decided that it was appropriate to renew the condition for a further year, not least because at that time there was considerable change underway to the arrangements for consumer representation and regulations for consumer protection. It was also considered that a clearer picture would emerge after a year as to whether specific regulation of doorstep selling through the licence condition was still required.

¹ Standard condition 25 in its current version is set out at Appendix 1.

² [Decision of GEMA, following an investigation into compliance by companies in the Npower group with Standard licence condition 25 of their gas and electricity supply licences, January 2009](#)

³ [Energy Supply Probe - Initial Findings Report, October 2008](#)

⁴ [Decision document: Regulation of marketing to domestic customers, February 2008](#)

Going forward

In considering whether to retain the marketing licence conditions, the most important factor is the proposal in the Probe report to strengthen these license conditions.

The Probe identified various issues in relation to sales and marketing activity:

- over half of switching is in response to direct sales activity, the majority of which takes place on the doorstep;
- around half of consumers that are not proactive switchers will engage with the market if approached directly by a salesperson⁵; and
- evidence of poor switching decisions by consumers in response to direct sales:
 - the vast majority of consumers (85%) who change supplier in response to such an approach do not investigate alternative deals in the market;
 - many who switch as a result of a direct sales approach do not achieve a price reduction (48% for gas, 42% for electricity) and around a third of reactive switchers inadvertently sign up to a worse deal;
 - at the same time, 82% of those who switched in response to a direct sales approach did so because the supplier that approached them claimed that they were cheaper than their current supplier; and
 - consumers may be switching on the basis of poor or partial information.

In response to these concerns we are currently considering whether the marketing licence condition should be strengthened and, if so, how. We will consult on these proposals in due course.

There are two additional elements to be considered in seeking views on whether to retain the marketing condition in its present form. These relate to: the potential for general consumer protection legislation to provide similar safeguards to the marketing licence condition; and the effectiveness of self regulation in this area.

The Consumer Protection from Unfair Trading Regulations 2008 ("CPRs") were introduced in May 2008 and apply to all sectors, including energy supply. These Regulations introduce general prohibitions on unfair commercial practices, but are not well established.⁶ The Enterprise Act 2002 allows the Authority to impose an Enforcement Order or seek undertakings in relation to the CPRs. However, it does not allow the Authority to impose a financial penalty on a company. This is thought to be a considerable weakness in relying on the CPRs exclusively to regulate sales and marketing activities in the energy sector. We have committed to produce guidance on the application of the CPRs in the energy sector and are currently drawing up some draft guidance.

In 2003, the Energy Retail Association (ERA) set up the EnergySure Code of Practice to raise consumer confidence in doorstep selling practices. The Code mirrors many of the requirements of the marketing licence condition and, in some areas, exceeds them. Since then, there has been a significant decrease in the number of complaints on doorstep sales practices in the energy sector. However, while the volume of complaints has fallen, concerns about poor switching decisions by consumers on the doorstep remain and recent

⁵ The Probe report identified that proactive switchers account for only around 17% of consumers.

⁶ The Regulations introduce a general prohibition on unfair commercial practices. They prohibit businesses from misleading consumers through specified acts or omissions; or using aggressive commercial practices such as selling techniques using harassment, coercion or undue influence. The Regulations also expressly provide for vulnerable consumers who are often the target of unscrupulous traders. The Authority is able to take enforcement action in relation to the Regulations as a designated enforcer under Part 8 of the Enterprise Act 2002.

cases and allegations of mis-selling have been well publicised. We are therefore of the view that the Code cannot be relied upon to adequately regulate suppliers' sales and marketing activity.

Conclusions on way forward

Our current view is that the marketing licence condition should be maintained in anticipation of Ofgem bringing forward proposed licence modifications later in the year.

For this reason we are minded to extend the marketing licence condition for a period of two years – the maximum available under the licence condition – until March 2011. During this time we will propose that the licence condition be modified as a result of the remedies proposed as part of the Probe. In the absence of agreement on licence modifications, we would expect to reconsider the marketing licence condition in early 2011.

Views of respondents

The closing date for responses is 18 March 2009. We would welcome respondents' views on whether it is appropriate to extend the marketing licence condition in anticipation of modifications coming out of the Energy Supply Probe process, and also on any aspect of the other issues raised in this letter.

Responses should be sent by 18 March 2009 to:

Neil Barnes
Ofgem
9 Millbank
London SW1P 3GE
(Email: neil.barnes@ofgem.gov.uk)

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

Yours sincerely,



Andrew Wright
Managing Director, Markets

APPENDIX 1: MARKETING LICENCE CONDITION

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

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 subparagraphs (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,

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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.

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 National 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 National 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.

