

NPOWER TWO TIER TARIFFS – DECISION BY OFGEM TO CLOSE CASE

Ofgem announced on 13 February 2009 that it was closing its investigation in relation to Condition 44 of Npower's gas supply licence in the light of payments to be made by Npower to consumers who had been adversely affected by changes. This note describes the nature of the investigation and the basis for Ofgem's decision to close the case.

Background

On 7 March 2008, Energywatch referred a complaint to Ofgem, making reference to compliance with Condition 23 of the gas supplier licence. There was a range of subsequent media coverage of the issues, which centred on changes made to tariffs during 2007. Some individual cases were referred to the Energy Ombudsman and there was also a civil case brought by one Npower customer. We also received some direct correspondence from individual consumers.

At the time Npower had 2.2m domestic gas customers on two tier tariffs – for example, "Gas Guardian". Under such two tier tariffs, the first 4572 kWh of usage per year were charged at a higher "Primary Block" rate, with this overall annual total apportioned on a seasonal / monthly basis.

With effect from 1 May 2007, Npower made a number of changes to its pricing structure. The first change was a revision of the seasonal pricing profile to facilitate system changes. The annual threshold was apportioned going forwards on a flat rate basis and at the same time Npower started a new "tariff year". In the short term this change had the effect of increasing bills for some customers (who were now paying the higher "Primary Block" tariff rate on more units than they would have done had the changes not occurred). The second change was a reduction in the price of the follow on units. At the same time, Npower also increased their monthly direct debit dual fuel discount. Npower advised Ofgem that it considered these changes together and looked forward at the effect on customers over the subsequent 12 month period, on the basis that annual consumption and savings comparisons were a natural approach to such analysis and commonplace in the energy industry. Moreover, Npower considered that applying other bases for analysis of affected customers would not adequately identify affected customers. As a result, Npower had concluded that no customers would be worse off and that no notification requirement under Condition 44 was triggered.

For any cases where customers faced a net increase, there was an obligation to notify them of the effect of the change and their right to seek a transfer to a different tariff or supplier under Standard Licence Condition 44(6), which was in force at 1 May 2007 (similar obligations were contained in the new Condition 23 introduced on 1 August 2007). Failure to notify could constitute a licence breach if the change, "varies any term to the significant disadvantage of the domestic customer or raises the charges". Ofgem therefore decided to open an investigation into Npower's compliance with this licence obligation.

The seasonal profile was re-introduced with effect from 1 November 2007 and again Npower started a new tariff year. It appears that customers were correctly notified of this change.

The relevant licence condition (SLC44(6))

“Except in such cases or classes of cases as may be approved by the Authority, where a domestic supply contract allows for unilateral variation (in any respect) by the licensee and pursuant thereto the licensee varies any term to the significant disadvantage of the domestic customer or raises the charges, the licensee shall within 10 days of the variation give the customer written notice:

- (a) of the variation;
- (b) of the domestic customer’s right to terminate the contract; and
- (c) of the effect of paragraph 7.

7. Where the domestic customer gives to the licensee a valid notice of termination within 14 days of receiving the notice under paragraph 6, the licensee shall treat the variation as ineffective and shall neither enforce nor take advantage of it.”

Information requests

Ofgem issued several information requests of Npower. These were in April, June and September 2008. The areas covered are included in the annex to this document.

Npower first responded on 14 May 2008. It stated that in its view the detrimental effect of changes on 1 May 2007 at lower consumption levels was to be offset by a reduction in prices at the higher level, together with the introduction for relevant customers of an increase in Npower’s annual dual fuel discount for monthly direct debit paying customers, and no customers were disadvantaged over the next year. It considered that this would therefore obviate the need to issue SLC44(6) notifications. It also stated that it had applied the concept of a “tariff year” (i.e. that the accumulation of consumption towards the 4572 threshold stops/restarts whenever a tariff change occurs).

On 2 July 2008, Npower provided further information and confirmed that there was no definition of “tariff year” given to customers.

On 17 September 2008, Npower responded with further information about single and dual fuel customers comparing a “no change” position to the May 2007 changes and provided details of seasonal consumption. It also stated that a new tariff year began on the change in charging structure. It provided a table showing the breakdown of the effect on customers for the “tariff year” 1 May 2007 to 30 April 2008.

Ofgem’s consideration of the case

The investigation focused on whether Npower should have notified customers of changes to its two tier tariffs.

In Ofgem’s view, in considering whether the change led to an increase in charges it is appropriate to look at the overall impact of the changes that were made at that time.

While Npower’s position was that no customers were disadvantaged, Ofgem’s analysis showed that some customers would have been disadvantaged by the tariff changes. Ofgem considered that Npower should have looked at these cases. In Ofgem’s view, it

was apparent that customers with consumptions marginally above the new “Primary Block” thresholds might not benefit fully from the offsetting effect of the price reductions at the upper consumption level. Npower has acknowledged this analysis in correspondence. However, Npower maintained and continues to maintain that it had complied with Condition 44.

The extent of the impact appeared to depend on the consumption levels of individual consumers and the time period over which the assessment was made. For most customers, the net effect would have been a reduction in charges. However, Ofgem’s investigation team reached a provisional view that as some customers would have been adversely affected by the changes in two tier tariffs on 1 May 2007, Npower should have notified them, so that the customer had the opportunity to terminate the contract.

Enforcement options

Compliance with licence obligations

Ofgem’s investigation considered whether there had been a past breach of Condition 44 of the gas supply licence. In such circumstances, Ofgem has the power to impose a financial penalty, but not to award compensation to those affected. Its ability to impose a financial penalty is subject to statutory time limits. Given that the issue of failure to provide proper notification inevitably occurred a significant time before Ofgem received the referral from Energywatch, the Ofgem investigation team considered that the Authority would be unable to impose a penalty in this case if it concluded there had been a licence breach.

Consumer protection legislation

Ofgem also considered whether its powers under the Enterprise Act 2002 to enforce consumer protection legislation could be used in this case. These powers require Ofgem to give a company the opportunity to address a failure to comply with the legislation. If the company does not do so, Ofgem may apply to the court for an order requiring action by the company. If the company subsequently fails to comply with an order, the court can take action, including levying a fine.

Ofgem examined in particular whether there was adequate notification of the meaning of the phrase “tariff year”. Ofgem was concerned that consumers would not have been aware in May 2007 that a new tariff year could be started.

Npower said that it did not give customers any definition of the phrase “tariff year”. In the context of customer literature, Npower commented, “Since we believe that it is understood that a tariff year in these communications refers to the year ahead of the communication, and that the amount of detail that this information can carry is limited, then further definition is not made.”.

Npower subsequently wrote to Ofgem, stating that it had revised the nature of such information provided to its customers, including in particular changes in its tariff leaflets and in the website version of its terms and conditions to say, “The primary rate applies to a maximum of 4572 kWh (units) of gas and 728 kWh (units) of electricity that you may use throughout any continuous period of 12 months”. More generally, Npower has taken several steps to improve information provided such as publishing a leaflet called

“How to work out your gas bill” and improvements to its tariff leaflets, customer welcome letter, internet site, terms and conditions, Frequently Asked Questions, price change letters and information on the back of bills. Ofgem also took into account the fact that Npower had notified customers of changes which took place in November 2007. Moreover, it has subsequently ceased to apply the principle of restarting a tariff year.

This action meant that there would be no grounds for enforcing consumer protection legislation on the basis set out above as the company had taken action to explain terms going forwards and there was no ongoing issue.

For the avoidance of doubt, at no time has Ofgem formed a view on whether there may have been a breach of contract between Npower and individual customers. Ofgem’s position on this matter does not preclude individual customers pursuing cases with Npower or subsequently with the energy ombudsman or a court if appropriate.

Discussions with Npower

Ofgem’s powers do not extend to requiring compensation for customers. A number of discussions were held with Npower about action it might take. In the light of Ofgem’s arguments relating to the impact on customers with low consumption, Npower subsequently proposed to make this good.

Following discussions, Npower improved its offer with the effect that total payments were estimated at around £1.2m to the customers identified who had been adversely affected by the overall effect of the May 2007 changes in tariff. It agreed to do this without customers having to apply and it would make payments to both existing customers and to those who had switched supplier in the meantime.

Decision

Ofgem considered Npower’s suggestion to make payments to individual consumers totalling around £1.2m and decided to close the investigation on administrative priority grounds.

Ofgem’s decision was based on the following factors –

- The fact that the issue related to notification to customers in May 2007 and the past nature of the issue.
- Ofgem’s investigation team’s view that the Authority would be unable to impose a financial penalty in this case.
- Npower’s position on compliance and the consequent need to follow the full administrative procedure for consideration of a breach without the option of imposing a penalty.
- The inability to take enforcement action under consumer protection legislation, and Npower’s subsequent action.
- Ofgem’s understanding that £1.2m would be paid to those affected.

Furthermore, Ofgem noted that the wider question of suppliers providing clear and accurate information to consumers in future was an issue highlighted in its energy retail probe. Ofgem is considering what action should be taken to address this.

Ofgem also noted that any individual consumers who were unhappy with the way Npower dealt with their individual cases would be invited by Npower to contact them.

Office of Gas and Electricity Markets

April 2009

Information requests to Npower by Ofgem

April

- Copies of relevant contract terms
- Details of tariffs affected and action taken to notify customers of changes
- Relevant customer numbers
- Details of any compensation awarded to customers (e.g. the "Gas Guardian" group) whose contracts provided for a fixed price for a specified period.

June

- A detailed schedule of relevant tariffs / customer numbers / prices.
- Copies of tariff statements or other contractual terms defining "tariff year".
- A detailed statement of estimated financial impact on a range of customers.
- A report on civil proceedings for recovery of perceived overcharge.

September

- A comparison of monthly bill calculations for different consumption bands
- A table showing assumptions on seasonal consumption patterns of gas used in calculations, giving an average percentage of the annual gas used in each month of the year.
- Information showing how many of npower's customers in each of the consumption bands were eligible for the Monthly Direct Debit Dual Fuel Discount for the period between 1 May 2007 and 31 October 2007 and how many customers' tariff years started in each month between October 2006 and April 2007.
- A table showing how many customers were adversely affected by the 1 May 2007 price changes from that date up to 31 October 2007, (and not taking into account any charges that occurred or would have occurred after 31 October 2007).