



*Promoting choice and
value for all customers*

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Dear Colleague

Background

On 8 October 2009 Ofgem published its Review of protection for vulnerable customers from disconnection report and consultation¹. As part of this document Ofgem set out its findings in relation to Consumer Focus' referral of British Gas regarding energy theft (meter tampering) and undertook to publish an open letter setting out our conclusions so that they could be considered and taken on board by all suppliers. This document meets that commitment.

Open letter

Theft of electricity and gas is a serious issue. It increases the cost of energy to all customers and can also endanger lives and property. Nevertheless, there is a statutory framework within which disconnection of a customer's energy supply is permitted where meter interference or meter damage is involved. It is important that these powers are exercised responsibly and take account of the needs of vulnerable customers. The attached guidance sets out Ofgem's conclusions regarding the obligations on suppliers in relation to meter interference. This should provide suppliers with the clarity necessary should they undertake activities in this area.

Next steps

British Gas has responded in a positive manner to the issues identified in our discussions and we also welcome its efforts to develop improvements to the regulatory arrangements for handling energy theft. It is however clear that there remains work to be done across the industry.

Ofgem notes that industry-wide, agreed processes for tackling energy theft, which include a common approach to theft disconnections and ensure that customers' interests are protected, are being developed by the industry. We welcome and support these developments and we expect industry parties involved in developing these improvements to progress this work in a timely manner.

Whilst we continue to work with the industry to develop improvements², the option remains open to us to pursue legislative changes or introduce new licence conditions to address the

¹<http://www.ofgem.gov.uk/Sustainability/SocAction/Publications/Documents1/Review%20of%20vulnerable%20customer%20disconnections%20report.pdf>

² In particular Ofgem intends to publish an Impact Assessment in Q1 2011 on a number of proposals brought forward by the industry to improve the rate of theft detection as well as the treatment of theft cases.

issues we have identified if the industry proves unwilling or unable to make improvements in these areas swiftly.

Please feel free to contact me if you have any questions about the issues raised in this letter.

Yours sincerely

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Meter tampering – Guidance on best practice with disconnection powers

Ofgem recognises that theft of electricity and gas is a serious issue. It increases the cost of energy to customers and can also endanger lives and property. We consider that the industry must have in place effective arrangements for the detection, prevention and investigation of theft. We are currently working with the industry to achieve that goal. The power to disconnect a customer's energy supply is an important tool in tackling theft. However, it is likely to have a significant impact on customers and must therefore only be used in appropriate circumstances.

There is a statutory framework within which disconnection of a customer's energy supply is permitted where meter tampering³ is involved. It is important that these powers are exercised responsibly and take into account the applicable legal framework including the level of evidence required as well as the needs of vulnerable customers. This guidance⁴ is intended to provide licensed suppliers with Ofgem's views on best practice for the way in which suppliers should exercise statutory powers⁵ to disconnect⁶ customers on the grounds of meter tampering. The content of this document has the status of guidance and as such should not be treated as legally binding. Ofgem reserves the right to amend this guidance as appropriate. For the avoidance of doubt, suppliers should take their own legal advice on the matters raised in this guidance in the event that they are considering exercising their statutory powers in relation to meter tampering.

In this guidance we consider the following issues:

- The elements of Relevant Offences and the powers to disconnect
- Evidence and powers
- Suppliers' policies and procedures
- Ofgem's enforcement powers

For the avoidance of doubt, this guidance does not cover suppliers' statutory powers to disconnect on grounds which do not relate to a Relevant Offence, for example on grounds of unpaid charges.

1. The elements of Relevant Offences and the powers to disconnect

We have set out below a summary of the physical and mental elements of each Relevant Offence⁷ and the powers to disconnect. The first section below relates to electricity and gas meter damage and gas meter interference as the provisions are similar. The second section sets out the provisions relating to electricity meter interference. The third section sets out our interpretation of the meaning of culpable negligence which is a mental element of the Relevant Offences (as opposed to the physical part of the Relevant Offences).

³ In this guidance the expression 'meter tampering' is used to refer to any of the offences set out in paragraph 6(1) of schedule 6 to the Electricity Act 1989, paragraph 11(1) of schedule 7 to the Electricity Act 1989, paragraph 10(1) of schedule 2B to the Gas Act 1986.

⁴ This guidance is being published pursuant to section 35(1) of the Gas Act 1986 and section 48(1) of the Electricity Act 1989.

⁵ i.e. the statutory powers contained in paragraph 6(3) of schedule 6 to the Electricity Act 1989, paragraph 11(3) of schedule 7 to the Electricity Act 1989, paragraph 10(2) of schedule 2B to the Gas Act 1986.

⁶ In this document the expression 'disconnect' is intended to encompass the following expressions 'discontinue the supply', 'cut off the supply'.

⁷ The expression "Relevant Offence(s)" is used to refer to an offence created by one of the following statutory provisions: paragraph 6(1) of schedule 6 to the Electricity Act 1989, paragraph 11(1) of schedule 7 to the Electricity Act 1989, paragraph 10(1) of schedule 2B to the Gas Act 1986.

Electricity or gas meter damage and gas meter interference

A person commits an offence if he does one of the following physical elements:

- damages or allows to be damaged any electricity meter provided by an electricity supplier⁸; or
- injures or allows to be injured a gas meter⁹; or
- alters the index to a gas meter¹⁰; or
- prevents a gas meter from duly registering the quantity of gas conveyed or supplied¹¹; and
- that physical element was intentional or was the result of culpable negligence (the mental elements).

Committing one of these offences gives rise to a power for the supplier to disconnect premises. This power to disconnect only applies to the premises of the offender, rather than the premises where the offence was committed¹². On this basis, in order to disconnect the premises where the meter damage or interference occurred, the supplier must prove that the current occupier¹³ was the offender¹⁴.

Electricity meter interference

The physical and mental elements of this offence are made out when any person alters the register of a meter or prevents a meter from duly registering the quantity of electricity supplied and does so intentionally or by culpable negligence¹⁵. Again, committing this offence gives rise to a power for the supplier to disconnect premises. As currently drafted, the power to disconnect appears to apply to the premises at which the offence was committed irrespective of whether the occupier of those premises was the offender¹⁶.

However, as a matter of policy, Ofgem takes the view that disconnection powers in respect of this offence should be exercised in a way which is consistent with the legal framework for the other Relevant Offences discussed above, and that suppliers should endeavour to avoid disconnecting premises in circumstances where there is insufficient evidence to suggest that the current occupier or owner has committed a Relevant Offence, e.g. by culpable negligence in allowing the meter to be tampered with. As a matter of policy, Ofgem does not consider that the fact that an occupier may have benefited from meter tampering would be sufficient evidence to justify a disconnection. We would expect suppliers to develop internal policies as to how they will take into account all the relevant circumstances in order or decide whether an occupier of premises is likely to be innocent of any wrong doing.

Ofgem notes that suppliers have discretion whether or not to disconnect premises and believes that the exercise of this power needs to comply with any broader legislative provisions (see below) that could be relevant, taking account of the specific circumstances of the case.

⁸ See paragraph 6(1)(b) of schedule 6 to the Electricity Act 1989.

⁹ See paragraph 10(1)(a) of schedule 2B to the Gas Act 1986.

¹⁰ See paragraph 10(1)(b) to the Gas Act 1986.

¹¹ See paragraph 10(1)(c) of schedule 2B to the Gas Act 1986.

¹² See paragraph 6(3) of schedule 6 to the Electricity Act 1989 (which refers to "[w]here an offence has been committed...by the occupier") and paragraph 10(2) of schedule 2B to the Gas Act 1986 (which refers to "the person so offending").

¹³ Or, in the case of a meter damage offence under paragraph 6(1)(b) of Schedule 6 to the Electricity Act 1989, the owner of the premises if they are unoccupied.

¹⁴ For relevant commentary see for example *Sherlock and Morris* In The Matter Of Applications By Sherlock And Morris For Judicial Review (29 November 1996 – unreported).

¹⁵ See paragraph 11(1) of schedule 7 to the Electricity Act 1989.

¹⁶ See paragraph 11(3) of schedule 7 to the Electricity Act 1989.

We also wish to highlight that, in the event that there is evidence of widespread disconnections of customers on grounds of electricity meter interference, when there is no evidence of wrong doing and this is not addressed by the industry, Ofgem will strongly consider taking action in respect of any potential breaches of licence conditions or consumer protection legislation. Ofgem may also consider taking steps to put in place licence conditions to restrict the use of suppliers' statutory powers or alternatively seek changes to primary legislation to address the problem.

Culpable negligence

It is our view that the concept of culpable negligence, in relation to the Relevant Offences referred to in this letter, must be considered in the context of the customer having a duty of care¹⁷ linked to the physical elements¹⁸ of these Relevant Offences (e.g. a duty not to alter the index of a gas meter or alter the register of an electricity meter). Nonetheless, it is important to recognise that a breach of that duty will only occur where a supplier has proof (on the balance of probabilities) that a person intended to breach that duty or did so as a result of culpable negligence (i.e. the mental elements of a Relevant Offence). Given that the Relevant Offences refer to 'culpable' negligence, Ofgem considers that this must be something more than mere carelessness or negligence and must involve an act or omission which would deserve of punishment under the criminal law. Ofgem would therefore suggest that the concept of culpable negligence is likely to involve a high degree of negligence (i.e. gross negligence) or recklessness. Therefore, before a supplier disconnects a premises, assuming that there is evidence to prove (on the balance of probabilities) that the physical element of the Relevant Offence has actually occurred, in order for a customer to be considered to have been responsible on the basis of culpable negligence Ofgem considers that it would be necessary to have proof (on the balance of probabilities) of the following elements:

- a) that the customer must have been aware of an act or omission which took place involving a meter;
- b) there was an obvious risk that an act or omission which took place would amount to the physical element of a Relevant Offence;
- c) the customer was indifferent to such an obvious risk or failed to take reasonable steps to address that obvious risk.

Illustrative examples:

By way of illustrative examples Ofgem considers that a customer would probably be regarded as being responsible on the basis of "culpable negligence" if:

- the meter that was subject to a physical element of a Relevant Offence was located inside a secure area of the customer's premises (i.e. inside the house or flat);

¹⁷ For the purposes of the Relevant Offences, Ofgem considers that it is necessary to distinguish between other duties of care relating to a meter or associated fittings. It is noted that a customer's duty of care in respect of a meter or other associated fittings will normally arise from the common law concept of bailment and therefore there is likely to be a general duty to take reasonable care of a meter until it is returned to its owner. It is also noted that the Gas Act 1986 (see paragraph 3(1) of Schedule 2B) imposes a duty of care (i.e. to keep a meter in proper order for correctly registering the quantity of gas) on the customer in respect of gas meters (but not other gas fittings) which belong to that customer or are lent or hired to that customer and are owned by someone other than: a gas transporter or relevant gas supplier. A similar duty arises in relation to an electricity meter in circumstances where the customer provides the meter (see paragraph 10 of Schedule 7 to the Electricity Act 1989). In the case of a meter owned by a gas transporter or a relevant gas supplier, or a meter provided by an authorised electricity supplier, the Gas Act 1986 and Electricity Act 1989 impose a duty of care on these parties to keep the meter in proper order for correctly registering the quantity of gas or electricity.

¹⁸ The physical elements constitute all of the elements of the Relevant Offence other than intention or culpable negligence, for example, altering a gas meter index.

- the available evidence suggests that the customer was aware that another person was doing something to a meter;
- in light of all the circumstances the customer must have been aware that such an act could amount to the physical element of a Relevant Offence (e.g. the meter was not being repaired/replaced by an appropriate person and/or the meter subsequently stopped recording consumption); and
- the customer did not take any steps to stop the act from occurring or to report any potential problem (e.g. reporting the matter to the police or a supplier either while the act was occurring or within a reasonable period of time thereafter).

On the other hand, and in the absence of other evidence, Ofgem considers that a customer is unlikely to be responsible on the basis of culpable negligence in circumstances where:

- they have recently moved into new premises;
- there are no obvious signs that a physical element of a Relevant Offence has occurred (e.g. the meter appears to be recording consumption); and
- there is no evidence to suggest that the physical element of the Relevant Offence occurred recently or during the period when the customer became responsible for the premises.

Other offences

Ofgem notes that in respect of meter interference or damage, only the above Relevant Offences¹⁹ trigger the power to disconnect. A supplier would be unable to exercise such powers on the grounds that any other energy theft offence has been committed, e.g. the theft of gas contrary to section 1 of the Theft Act 1968, or the unlawful abstraction of electricity contrary to section 13 of the Theft Act 1968.

Disconnections on safety grounds

As we have clearly stated in this guidance, a supplier must only disconnect, or threaten to disconnect a premises where it has statutory powers to do so. We note that the above statutory powers in relation to meter tampering may coincidentally be available to suppliers in circumstances where safety issues arise (i.e. when there is sufficient evidence to satisfy the relevant conditions for exercising disconnection powers in respect of a Relevant Offence, for example, preventing the meter from duly registering the quantity of gas or electricity supplied). We further note that other statutory requirements, for example in relation to the role of persons working on equipment at premises, will place obligations on suppliers and those persons in relation to safety. However, we note that it is only gas transporters and electricity distributors, rather than electricity or gas suppliers that have broad statutory powers to disconnect premises on the basis of general safety concerns²⁰.

¹⁹ i.e. an offence created by one of the following statutory provisions: paragraph 6(1) of schedule 6 to the Electricity Act 1989, paragraph 11(1) of schedule 7 to the Electricity Act 1989, paragraph 10(1) of schedule 2B to the Gas Act 1986.

²⁰ Specifically, we note that gas suppliers do not have any statutory powers to disconnect on safety grounds under the provisions of the Gas Safety (Rights of Entry) Regulations 1996. Under these regulations only an officer authorised by a gas transporter has the power to disconnect under regulations 4 or 5 (i.e. in order to "avert danger to life or property"). However, the effect of section 48(1A) of the Gas Act 1986 is that, depending of the terms of any written authorisation given by a gas transporter, an officer of an agent may be entitled to exercise this power on behalf of a gas transporter. In electricity, suppliers do not have any powers to disconnect on safety grounds under the provisions of the Electricity Safety, Quality and Continuity Regulations 2002 (as amended). Under these regulations it is only a distributor that has the power to disconnect a customer under regulation 26 on grounds of safety. The effect of regulation 2(2) is that this power cannot be delegated to an agent, contractor or subcontractor of a distributor.

Ultimately it will be a matter for gas and electricity suppliers, gas transporters and electricity distributors to consider what obligations arise, and what action may legally be taken, in the event of safety concerns. Where parties disconnect premises they must ensure that they have a clear legal basis to do so (and therefore must satisfy all the relevant conditions which apply to the use of disconnection powers). Where suppliers (or their agents) identify potential safety concerns, then they must ensure that they have appropriate processes and procedures in place to notify relevant parties, for example gas transporters and electricity distributors if the safety issues may fall within the scope of their responsibilities.

2. ISSUES RELATING TO EVIDENCE AND POWERS

We have set out below a summary of the key principles we would expect suppliers to adhere to in meter tampering cases. The key principles are that suppliers must:

- have sufficient evidence to prove (on the balance of probabilities) that a Relevant Offence has been committed before exercising any statutory powers to disconnect (and remove a meter);
- have evidence which satisfies each of the elements of the Relevant Offence in question;
- exercise their discretion and avoid disconnecting premises where there is insufficient evidence to suggest that the Relevant Offence was committed by the current occupier (or owner). The commission of a Relevant Offence by the current owner/occupier of premises is currently an explicit pre-condition for the exercise of disconnection powers under the meter tampering provisions of the Gas Act 1986 and the meter damage provisions of the Electricity Act 1989. However, Ofgem would also expect suppliers to exercise discretion in relation to the meter interference provisions of the Electricity Act 1989;
- keep sufficient records in order to justify the exercise of the statutory powers;
- ensure that their terms and conditions (and all other documentation) properly reflect the statutory powers and do not (implicitly or expressly) provide for wider powers;
- ensure that they do not mislead customers about the scope of statutory powers to disconnect (e.g. suppliers should not imply that they have the power to disconnect premises on safety grounds where these powers do not exist; rather it should be made clear that such powers may be exercised by transporters²¹ and distributors²²);
- inform customers following a disconnection of the steps they may take to reinstate supply.

The above issues are explored in more detail below.

Evidence and proof

As all the relevant statutory powers²³ to disconnect premises and remove a meter may only be exercised “where an offence... has been committed”²⁴. In relation to each statutory power, it is the commission of a specific offence which gives rise to the supplier’s power of disconnection or meter removal. In order to ensure that suppliers act within their powers, Ofgem’s view is that a supplier must have evidence, on the balance of probabilities, to

²¹ See the Gas Safety (Rights of Entry) Regulations 1996.

²² See the Electricity Safety, Quality and Continuity Regulations 2002.

²³ i.e. the statutory powers contained in paragraph 6(3) of schedule 6 to the Electricity Act 1989, paragraph 11(3) of schedule 7 to the Electricity Act 1989, paragraph 10(2) of schedule 2B to the Gas Act 1986.

²⁴ Paragraph 6(3) of schedule 6 to the Electricity Act 1989. The other relevant provisions are drafted in a similar way.

prove all the physical and mental elements of a Relevant Offence²⁵ before these powers may be exercised.

For example, in relation to electricity meter interference, the statutory powers under sub-paragraph 11(3) of Schedule 7 to the Electricity Act 1989 only permit the supplier to exercise the powers to disconnect the premises and remove the meter where an offence has been committed under sub-paragraph 11(1). Paragraph 11(1) sets out the offence which requires a person to have altered the register of the meter or prevented the meter from duly registering the quantity of electricity supplied and to have done so intentionally or by culpable negligence. It therefore follows that *evidence* would be needed to establish each of these elements (i.e. both the physical and mental elements) in order to prove, to the requisite standard, that the offence under paragraph 11(1) has been committed.

Whilst the relevant statutory provisions do not contain an express requirement to preserve evidence²⁶, Ofgem would expect suppliers to keep appropriate records and evidence in order to justify the use of disconnection powers. In particular, we would expect that suppliers would want to be able to produce such evidence in circumstances where the matter is at issue before the courts or in the event that Ofgem is considering potential breaches of licence conditions or consumer protection legislation. Clearly, without any evidence suppliers are unlikely to be able to prove that the power to disconnect and remove the meter was exercised lawfully.

We would also highlight that the relevant case law²⁷ confirms the need for evidence of an offence, clarifies that a conviction of an offence is not a necessary precondition for the exercise of relevant disconnection powers, and confirms that the relevant standard of proof (i.e. the civil standard of proof on the balance of probabilities) requires that, before disconnection powers are exercised, the evidence available must be sufficient to establish that it was more likely than not that a relevant offence has been committed.

3. ISSUES RELATING TO SUPPLIERS' POLICIES AND PROCEDURES

We have set out below some²⁸ of the key matters that we would expect suppliers²⁹ to address in their internal policies and procedures, or in industry agreed codes of practice, relating to meter tampering:

- the circumstances in which the supplier will exercise its discretion to fit a pre-payment meter or a new meter instead of disconnecting the premises (i.e. given that where there is sufficient evidence that a Relevant Offence has been committed, the supplier has a power, rather than a duty to disconnect);
- the circumstances in which the supplier will exercise its discretion to waive charges relating to disconnection, investigation and reconnection;
- the precise elements of each Relevant Offence (i.e. both the physical and mental elements) and the type of evidence needed to prove each of those elements;

²⁵ i.e. an offence created by one of the following statutory provisions: paragraph 6(1) of schedule 6 to the Electricity Act 1989, paragraph 11(1) of schedule 7 to the Electricity Act 1989, paragraph 10(1) of schedule 2B to the Gas Act 1986.

²⁶ Other than paragraph 11(4) of schedule 7 to the Electricity Act 1989 which contains a statutory duty to keep an electricity meter unless Ofgem authorises disposal or destruction.

²⁷ R v Director General of Gas Supply & Another ex parte Smith & Another (31st July 1989 – unreported); In The Matter Of Applications By Sherlock And Morris For Judicial Review (29 November 1996 – unreported); Queen v Minister of Energy and Director General of Electricity supply ex parte Robert Guildford [1998] EWHC Admin 203 (18th February 1998); R v Ministry of Energy & Anr ex parte Robert Guildford [1998] LTA 98/5665/4 (30 July 1998).

²⁸ Note that this list is not exhaustive and the industry should consider all relevant issues for inclusion in their internal policies and procedures, or in industry agreed codes of practice.

²⁹ Whilst this guidance focuses on suppliers we note that similar matters should be addressed by electricity distributors and gas transporters when considering the exercise of their relevant statutory powers of disconnection.

- the type and amount of evidence needed before the supplier has the statutory power to disconnect;
- the circumstances in which the supplier will apply for a warrant of entry;
- the circumstances in which the supplier will report the matter to the police for investigation of any Relevant Offences or other offences (e.g. under the Theft Act 1968);
- procedures for preserving evidence and taking adequate records;
- the circumstances in which a supplier will arrange for independent testing of a meter;
- the actions that will be taken in circumstances in which premises were disconnected on the meter tampering grounds, but subsequent testing reveals that the meter was registering correctly or is defective (e.g. due to a manufacturing defect or normal wear and tear);
- the need to comply and exercise its discretion in accordance with relevant licence conditions and legislation as may apply, e.g.
 - The Supply Standard Licence Conditions;
 - Section 40 of the Administration of Justice Act 1970;
 - The Protection from Harassment Act 1997;
 - The Consumer Protection from Unfair Trading Regulations 2008;³⁰
- the conduct of staff when carrying out disconnections (e.g. with regard to making any potentially misleading statements relating to their ability to enter premises without a warrant);
- the identification and treatment of vulnerable customers;
- giving the customer clear reasons why the disconnection has been made with reference to the precise statutory or other legal grounds; and
- a detailed methodology for calculating gas and electricity consumption which has not been recorded on the meters;
- an explanation of the steps the customers must take to have supply reinstated.

4. OFGEM'S ENFORCEMENT POWERS

Ofgem considers that, depending upon the circumstances of the case, it may be able take enforcement action under Part 8 of the Enterprise Act 2002 (e.g. in relation to a potential breach of the Consumer Protection from Unfair Trading Regulations 2008) in circumstances where a supplier has insufficient proof that a Relevant Offence has been committed, but has disconnected premises and is demanding charges for disconnection, investigation, and reconnection.

Ofgem also considers that, depending on the circumstances of the case, it may be able take enforcement action under the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs) in order to deal with contractual terms which:

³⁰ It is for suppliers to take their own legal advice to ensure that they are aware of the full extent of their statutory obligations in any given situation. Note also that suppliers may wish to give consideration to the applicability of the Human Rights Act 1998.

- provide for unfair powers of disconnection (and/or rights of entry) which are wider than the statutory powers;
- hold a new owner or occupier liable for charges relating to meter tampering committed by third parties (e.g. on the basis of a high standard of care for bailment or in circumstances where there is no deemed contract);
- give suppliers the sole power to decide when the consumer is in breach and/or to interpret the terms and conditions;
- give suppliers unfair rights in relation to charges for example the sole power to levy unspecified charges that will be payable in relation to investigating meter tampering and disconnecting the premises;
- allow suppliers to recover disproportionate amounts for disconnection, investigation etc / more than a genuine pre-estimate of their losses.

If Ofgem considers it appropriate, for example in the event that there is evidence of widespread misuse of disconnection powers for domestic and non-domestic customers, Ofgem may seek to put in place new licence conditions to regulate the way statutory powers are exercised, or alternatively seek changes to primary legislation.