



Franck Neel  
Chair, Gas Forum  
10 Fenchurch Street  
London  
EC3M 3BE

**Legal & Regulatory**

Lakeside West  
30 The Causeway  
Staines  
Middlesex  
TW18 3BY  
t: 01784 494 000  
f: 01784 878 719

11<sup>th</sup> November 2010

Dear Franck

**RE: National Revenue Protection Service (NRPS) Proposal**

1. Although we have long argued against the effectiveness of the proposed National Revenue Protection Service (NRPS) proposal which the Gas Forum is currently developing under the NRPS Working Group, we have actively engaged in the Gas Forum debate with the aim of developing the proposal to a point where it is fit for purpose.
2. We have some concerns about the legality of the proposal in its current form however, and are writing to you now to seek clarity on the steps the Gas Forum has taken, or the plans it has in place, in order to mitigate these issues and indemnify itself against future action. As a Gas Forum member we are concerned that any work done by the Forum should comply with all relevant legal requirements, and believe that failure to do so will reflect badly on both us and the wider membership.
3. Specifically, we are concerned that the NRPS proposal, and the process used to procure the service, conflict with both competition and data protection legislation. Our concerns are provided in more detail within Appendix One below, but in summary:
  - a. **Competition Act.** We believe that the current NRPS procurement process may lead to issues under the Competition Act, in that it involves Suppliers with existing Revenue Protection services of their own receiving sensitive confidential information from other Revenue Protection service providers in the market. We believe that this may have the effect of distorting the market, regardless of whether this was the intent or not.
  - b. **Data Protection Law.** We believe that the data protection considerations have not been adequately addressed within the

current proposal. Indeed, there is only one reference to such matters. We understand that the NRPS Working group are proceeding on the assumption that Suppliers may rely on an Data Protection Act exemption in order to share all their customer data with the NRPS, but we believe this to be too simplistic. We are also concerned at the potential public policy concerns a new national database holding sensitive personal information may have at this time.

4. We would like reassurances from the Gas Forum that the NRPS proposal and the process used to procure the NRPS service is compliant with all relevant legislation, and to either receive details of any independent analysis which has been completed to establish that, or details about how the NRPS Working Group will address these issues.
5. More widely, and in response to Ofgem's recent open letter on theft, we have been considering how the industry can better share its expertise on theft detection and would therefore like to propose a Gas Forum hosted seminar where best practice can be shared between both members and the wider gas Supplier community. We would be happy to provide a facilitator and presenters for this. We will seek to table this offer formally at the next Gas Forum Executive meeting.
6. If you would like to discuss any of the issues raised by this letter with me, please feel free to contact me 07789 570501.

Yours sincerely



 David Watson  
Regulatory Manager, British Gas

cc. Collette Baldwin, e.On, Chair of NRPS Working Group

## **Appendix One – Legal Concerns with Procurement Process and NRPS Proposal**

### Competition Act concerns with the procurement process

7. We have some concerns that the current process for developing and procuring a National Revenue Protection Service (NRPS) under the Gas Forum fails to take account of some important competition law principles, and that as such, may undermine the NRPS project and cause issues for both the Gas Forum and those parties represented in the NRPS Working Group.
8. We are specifically concerned by the fact that Suppliers who carry out their own Revenue Protection services, whether their focus be predominantly gas or electricity, will be able to view the confidential responses to both the Request for Information and Tender submissions, despite the fact that these submissions will contain sensitive commercial information provided by their competitors in the Revenue Protection market.
9. We believe that this may distort competition in the market for provision of revenue protection services and would like to understand what legal advice the Gas Forum have taken on this matter, including what steps the Gas Forum has taken, and is planning to take, to mitigate the risks of future legal action.

### Data Protection Act concerns with the proposal

10. We also have a number of concerns about potential conflicts between the current NRPS proposal being developed by the Gas Forum and the Data Protection Act (1998) (DPA). The DPA requires, amongst other things, that personal data is used both fairly and lawfully. In part, this involves telling individuals about how their data will be used. The National Revenue Protection Service (NRPS) proposal appears to work on the basis that Suppliers are already allowed to pass the required information for all of their customers to the NRPS so that this information can be combined with the equivalent records for the the customers of all other suppliers; we believe this is too simplistic an assumption.
11. The personal data involved is already held by Suppliers and is already subject to the constraints of both the DPA and Privacy Notices provided to the customer by each of those Suppliers. For these Suppliers to be able to provide the relevant data to the NRPS, they need to be satisfied that their current Privacy Notices are sufficiently broad to allow the disclosure of all relevant information for the specified purpose. We have seen no analysis to validate this assumption, nor do we believe that the current NRPS project plan allows for this analysis.
12. Work therefore needs to be undertaken, initially by the NRPS Working Group, but ultimately by each Supplier to assess whether their Privacy Notices allow for the proposed uses of customers information. In the event that current Privacy Notices do not, we note that Suppliers may require individual

customer consent (see below) before passing details to the NRPS for the proposed purpose.

13. A further requirement of the 1<sup>st</sup> principle is that one or more “*conditions for processing*” are met, as set out in Schedules 2 & 3 of the Act. Whilst these can be met with relative ease for “*personal data*”, this is not necessarily the case for “*sensitive personal data*”. Consideration needs to be given as to whether any relevant conditions for processing data under Schedule 3 of the DPA can be met by a Supplier (for the disclosure of data) and by the NRPS (for the holding and continued use of the data). If conditions cannot be met, consent from individual customers is likely to be needed before the data can be transferred.
14. Furthermore, all Suppliers will need to agree consistent information about the NRPS with which to provide to customers. Even if the current Privacy Notices are sufficient to allow the disclosure of data, an updated Privacy Notice should be provided by each Supplier to their customers to clarify uses of the data involved. Finally, the NRPS’ working instructions on how it will detect theft will need to be carefully defined before inception in order to ensure data uses are fair and lawful.
15. The second principle of the DPA covers secondary and new uses of personal information. Where such secondary or new uses of data are proposed, they must not be “*incompatible*” with the uses of personal data set out in the existing Privacy Notice. If new uses of data are incompatible with what is contained with the current Privacy Notice and are significantly beyond what a customer would expect, the new use of data is likely to require prior individual customer consent. It should be noted that this consent normally would need to be positive, opt-in, consent as opposed to a passive, opt-out, process.
16. Depending on the content of current Supplier Privacy Notices therefore, it may be that the disclosure of *all* customer records to the NRPS could be regarded as being incompatible with current uses of customer data. The NRPS Working Group should seek to clarify this point with all Suppliers to whom the NRPS will act as agent as soon as possible.
17. It has been noted by some in the NRPS Working Group that there is an exemption within section 29 of the DPA which allows data to be shared where its use is for fraud and crime purposes, with the belief this allows for *all* the necessary data held by Suppliers for *all* customers to be provided to the NRPS regardless of whether existing Privacy Notices are adequate to allow for this disclosure.
18. Information Commissioner’s Office (ICO) (the data protection regulator) guidance, in addition to case law in this area<sup>1</sup> from 2003, indicates that the section 29 phrase “*in any case*” should be read as “*in any particular case*” and that “*would be likely to prejudice*” should be applied on a case by case basis. It therefore seems clear that section 29 of the DPA does not provide a blanket

---

<sup>1</sup> (see for example R (Lord) v Secretary of State for the Home Department [2003] EWHC 2073 (Admin))

exemption on sharing data for the purposes of detecting or preventing crime, in turn meaning that the disclosure of Supplier's customer data is unlikely to be possible on the basis of this exemption alone. The NRPS Working Group should consider how this can be overcome as soon as possible, for example by how the NRPS may operate by requesting data on individual customer records as and when required or by enabling Suppliers to send records to the NRPS as and when fraud is suspect in individual cases.

19. We also consider that there are a number of oversights within the current NRPS Working Group project plan. The DPA has requirements on both how much and what personal information can be held by an organisation. In particular, the data held must be adequate, relevant and not excessive to achieve the stated purposes of that organisation. It must also be accurate and kept up to date, and only be retained for as long as necessary. The NRPS Working Group will need to give careful consideration to use of data in this regard and document both the NRPS' stated purpose, why retention and use of such a volume of data is required and why that purpose cannot be achieved through some other means, for example by Suppliers retaining control of theft detection activities. Individuals also have certain rights, including a right of access and a right to have inaccurate data corrected. Again, little consideration appears on the impact of these issues to date, and the project plan does not envisage this piece of work.
20. In addition to the oversight above, there is no analysis of the security or governance controls which will be required for the NRPS in handling this data. Both are needed to protect the data and ensure compliance with the DPA and other laws. As we consider the data in question to be "*sensitive*" under the DPA, it requires higher than normal standards of control and security, including (but not exclusive to) strong encryption, access controls, data handling procedures, training and auditing. Arrangements need to be considered within the NRPS creation process, and certainly form part of any tender requirements.
21. We also have concerns that the NRPS Working Group have failed to consider the public policy concerns associated with this proposal. The creation of an NRPS in its current form is in effect a proposal for a new national database holding sensitive personal data on every gas, and potentially electricity, customer within the UK with the intent of analysing that information for theft detection purposes. When establishing this sort of system, the ICO will need to be engaged, but it is not clear to us that this has happened to date. In particular, it is important for the NRPS Working Group to be clear to the ICO why this national database is required and why alternative, less intrusive ways to tackle energy theft, are not viable.
22. We also believe the Gas Forum should carefully consider the public policy concerns which may exist about the creation of a national database such as this. Current Government policy on large databases appears to run contrary to this proposal. The Coalition Government for example has already closed down databases such as the ID cards database and Children's database. A proposal for a similar database containing details of all communications by

telecoms customers was abandoned last year because of privacy concerns and we note that they instead turned to an approach where telecoms service providers held the data rather than it being passed to a national database. Furthermore, the proposed NRPS database appears to contradict the proposed approach for Smart Metering where it the proposal is for a narrow Data Communications Company with tight rules on privacy and data collection. Whereas Ofgem have the power to implement a new database such as this, wider political considerations should be considered carefully.

23. Finally, we believe that the NRPS Working group has failed to appreciate how their work may conflict with the Human Rights Act (HRA). Article 8 of the HRA includes the right to a private, home and family life and interference with this right needs to be justified for one of a number of reasons. Although compliance with this Act is a matter for Ofgem, the NRPS Working Group should consider the extent to which centrally held sensitive personal data conflicts with the HRA before referring the matter to Ofgem. Again, consideration should be given as to Ofgem's need to assess whether theft reform can be achieved through alternative routes which avoid such use of data. We note that even holding personal data involves interference with the HRA, so recommend that the NRPS Working Group complete a detailed assessment on this point as soon as possible.
24. Consideration also needs to be given to the process through which the Police and other enforcement authorities can access the NRPS. It would likely be of keen interest to these agencies.