

Paul Fuller
Smarter Markets
Ofgem
9 Millbank
London
SW1P 3GE

3 August 2012

Dear Paul,

**Supporting effective switching for domestic customers with smart meters:
additional statutory consultation and notice**

EDF Energy is one of the UK's largest energy companies with activities throughout the energy chain. Our interests include nuclear, coal and gas-fired electricity generation, renewables, and energy supply to end users. We have over five million electricity and gas customer accounts in the UK, including residential and business users.

EDF Energy acknowledges the reasons why Ofgem has removed, from the proposed Supply Licence Condition, the requirement (paragraph (25B.1 b) to retain all historic consumption information on the Electronic Consumption Data Display (ECDD) and the Advanced Domestic Meter (ADM) on change of supplier.

However, we do not agree that this action sufficiently addresses our concerns in respect of protecting consumer's privacy. We would like to reiterate our views that the interoperable remote clearing or disabling of personal data held on smart metering systems is unlikely to be fully technically feasible until the DCC and SMETS2 are available to support this, on the assumption this functionality is built into SMETS2 and the DCC service provision arrangements. We believe the removal of this Licence Condition requirement has created further issues for which the root cause of the problem is technical non-interoperability. As Smart Metering System Operators (SMSO) during the Foundation Stage are not required to offer a minimum set of functionality, they will not be able to support interoperability, thereby necessitating new suppliers to operate ADMs in dumb mode and hence not have the capability of remotely deleting or disabling historical consumption information.

We have a number of concerns, which are explained in more detail within the attachment to this letter, with regards to the implications on the Data Protection Act. These are:

- Data ownership; who owns the data on the meter and do suppliers have any rights to delete consumer owned data on change of supplier?
- The ability of suppliers to delete or disable historic consumption information on change of supplier, especially when meter is operated in dumb mode.
- The Identity of the Data Controller and whether a new supplier is deemed to be the Data Controller for the information between the ECDD and ADM in the home, when operated in dumb mode.
- ECDD ownership and Functionality – who owns the ECDD and what level of personal information is it likely to display.

- Data retained within the home – is data that is retained in the home and not remotely processed or extracted by the supplier subject to DPA?

When having to operate an ADM in dumb mode i.e. no remote capability, we believe there are only two clear solutions that fully protect customer's data, and hence comply with our data protection obligations:

1. The new supplier would be forced to exchange the ADM, as it would be unable to clear down the relevant consumer data on site, because current ADMs, including SMETS1 when available, do not have this capability. This will result in additional costs that will ultimately be borne by the customer. The Installing Supplier is also not able to disable the Home Area Network (HAN) with current ADMs.
2. Ensure that customers, when moving out of a premise, were made fully aware of the consequences of leaving their data available on the ECDD. This consent would have to be formally recorded and customers that were not comfortable with this approach would have to be offered a home visit to exchange the ADM.

Either way, EDF Energy believes both outcomes will be expensive to provide in order to ensure compliance with the DPA. Furthermore, we believe that a successful and cost effective smart metering roll-out programme will only be achieved if consumers are engaged in the programme and educated as to the benefits of actively participating. We believe that any solution that would require further costly site visits, including the replacement of meters, as outlined above is likely to lead to significant consumer dissatisfaction and negatively impact the required consumer trust and buy in into the smart metering programme. This reinforces our strong opposition to large scale roll-out before the DCC is available. Ultimately a supplier that has installed non-interoperable equipment will impose a cost burden on a new supplier, if that supplier is then unable to operate the ADM in smart mode resulting in the need for site visits. We believe this to be unfair and unless a mechanism for the recharging of these costs to an installing supplier is provided, the gaining supplier will be subject to additional risks triggered by an early mover. This conflicts with DECC's previous policy statement that early movers do so entirely at their own commercial risk.

Additionally, EDF Energy believes that any proposed solution must be fully trialled prior to these licence obligations coming into force. Time needs to be given to this testing, due to the level of uncertainty that exists. Failure to provide some certainty could be counter productive and leave the programme exposed to poor public perception. It could discourage customers from switching and also leave suppliers in a position that they would be unable to ensure compliance without implementing expensive measures. This could also be further mitigated if the numbers of non-interoperable meters were heavily restricted prior to the DCC being available.

The significant issues identified above, reinforces EDF Energy's position of not supporting the development of interim arrangements but alternatively focusing on the development of the enduring Data Communications Company (DCC) solution to avoid these and many other issues.

Should you wish to discuss any of the issues raised in our response or have any queries, please contact my colleague Ashley Pocock on 07875 112854, or myself.

I can confirm that this letter may be published on Ofgem's website and we have also copied it to DECC and the ICO for their views and clarification.

Yours sincerely,

A handwritten signature in blue ink, reading "Paul Delamare".

Paul Delamare
Head of Downstream Policy and Regulation

CC: DECC & ICO

Attachment

1. WHO OWNS THE DATA?

DECC have concluded that the consumer owns their personal data on the meter, and therefore, we believe suppliers have no right to delete any of this data from their ADM or ECDD on change of supplier, without their expressed and written consent.

DECC published statements from their July 2010 Prospectus, which to date have not been refuted:

2.18 - *"The customer shall choose in which way consumption data shall be used and by whom, with the exception of data required to fulfil regulatory duties."*

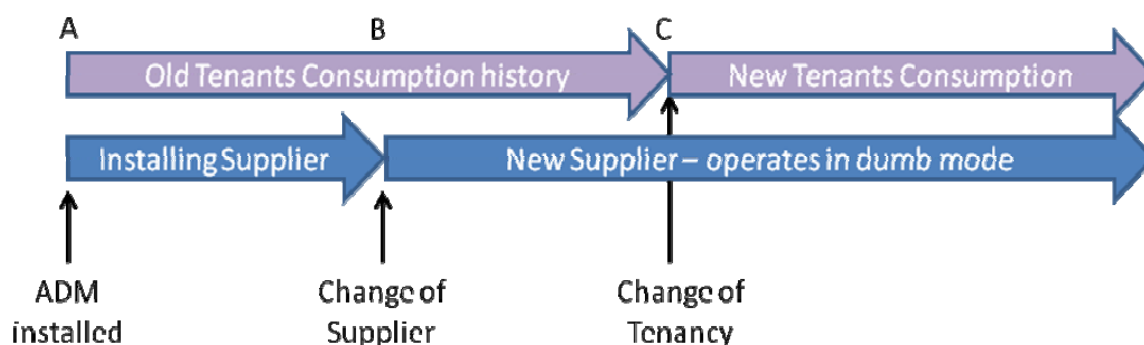
2.19. *'This reflects the important principle that data control rests with the customer, while recognising that there are a range of instances when third parties will have a legitimate need to access that data, for example for suppliers to bill customers.'*

DECC's Prospectus refers to third parties having a legitimate need to access data e.g. to allow suppliers to bill customers. We are not aware of any references to a suppliers' right to delete consumer data, even though we are deemed the Data Controller for the period of time we are the customer's supplier. Therefore, the only viable action a supplier could take, if they are able to do so, would be to disable the viewing of that data prior to the customer moving to another supplier. This will depend on whether they have remote capability, or not.

2. CONSUMER'S / TENANTS'S CONSUMPTION HISTORY

Ofgem is suggesting that suppliers should delete the consumer's historic consumption data prior to losing the consumer. Even if this were possible, this is not a solution to the underlying issue that the consumer will still build up historical consumption data with the new supplier up to the point that they move out of the property. See diagram below:

Scenario 1



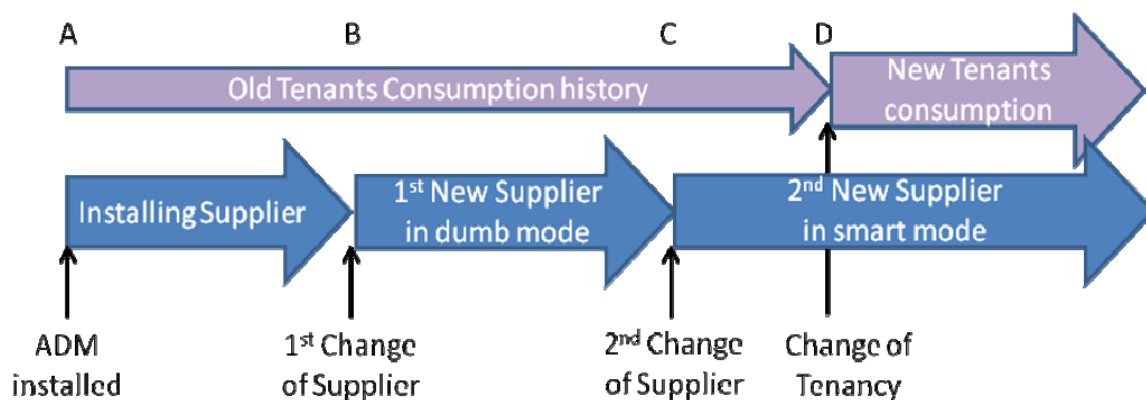
In this scenario the Installing Supplier may only be able to disable consumption history from being viewed on the ECDD up to the point they lost the consumer (A to B), which in our view is the period the Installing Supplier is considered to be the Data Controller.

Therefore, the existing consumer will still build up consumption history from that point forward until they move out of the property (B to C). The new supplier, when operating in dumb mode, has no means to disable the old tenant's consumption history, nor are they able to send anyone to the premise to manually disable this data.

EDF Energy's own internal view of the DPA is that the level of data available to the new tenant will not allow them to determine any meaningful relationship to the previous tenant and their movements. Nor will they be able to use this to monitor their movements and use that data to their advantage e.g. to determine when the premise is probably empty, as the previous customer has now moved out. However, the risk is of bad publicity that could impact the overall DECC programme and the potential breach of DPA

EDF Energy only intends to roll-out small volumes of ADMs for trial purposes and will not deploy in large volumes until there is a fully specified Smart Metering System, including HAN, WAN and security and sufficient smart meters that have been developed and deployed to the market in volume, to that specification. As a result, we are more likely to be the supplier operating the ADM in dumb mode without any remote capability to disable the previous tenant's consumption history. Also, we are unable to send anyone to site to reconfigure the meter, to prevent the viewing of such data by the new tenant.

Scenario 2



In this scenario the Installing Supplier may only be able to disable consumption history from being viewed, up to the point they lost the consumer (A to B). However, as the 1st New Supplier is operating the ADM in dumb mode, they will not be able to disable consumption history for the period they were the supplier (B to C). The existing consumer will then build up consumption history from that point forward until they move out of the property and the 2nd New Supplier in this chain may be able to disable the old tenants consumption history (from point C to D), as they are operating the ADM in smart mode. However, because the 1st New Supplier operated in dumb mode and was unable to disable the data for the period they were the supplier (B to C), will this data still be visible to the new tenant (from point D onwards)?

Overall, the ultimate impact for both scenarios will be on the consumer who initially changes supplier, in that the Installing supplier, or any subsequent supplier will be forced to disable the historic consumption history for the period they were the supplier, providing they are able to, thereby removing all of the comparative consumption information from the view of the customer who is still resident at the premise. This will clearly have an impact on the DECC Impact Assessment (IA) relating to the benefits of the customer being educated on the use of their energy, in order for them to be more energy efficient. Also the additional costs for any site visits to exchange ADMs will also impact the DECC IA.

On top of the above, there could be a number of circumstances and arrangements the consumer, or previous supplier, has set up within the home that will be outside the control of the new supplier, operating the ADM in either smart or dumb mode. These arrangements could involve for example technology that allows data to be transferred to a third party to analyse and provide information in a variety of ways. If the consumer or the old supplier fails to cease these arrangements, EDF Energy believes the new supplier cannot be held responsible for the flow of this erroneous data should it continue after a Change of Tenancy and fall into another persons hands.

3. DATA CONTROLLER

EDF Energy does not agree with the conclusion Ofgem has implied, whereby Ofgem consider it is likely that the previous supplier would be considered to be the Data Controller under Data Protection Act 1998 (DPA) and would therefore continue to have responsibility for protecting the information related to the previous tenant.

The ICO have published a Legal Guidance document for the DPA and EDF Energy's interpretation of this is as follows:

Section 2.5 of this guidance document states the definition of a data controller is “.. a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed”.

Section 2.5 goes on to say ‘According to the definition in the Act, a data controller or data controllers, **must decide the purposes** for which personal data are, or will be, processed **and the way** in which personal data are, or will be, processed. The Commissioner’s view is that the determination of the purposes for which personal data are to be processed is paramount in deciding whether or not a person is a data controller and that when a person determines the purposes for which personal data are to be processed, a decision as to the manner in which those data are to be processed is often inherent in that decision.’

EDF Energy believes that when a supplier is operating an ADM in dumb mode, they will not be able to decide the **purposes** for which personal data is, or will be, processed within the home and will also not be able to decide the **way** in which personal data is, or will be, processed within the home between the ECDD and the ADM – equipment that the new supplier has not installed.

Section 2.5 also states '*It is important to establish whether or not someone is a data controller because it is data controllers who are required to comply with the Data Protection Principles. Section 4(4) of the Act provides that:-*

"... it shall be the duty of a data controller to comply with the Data Protection Principles in relation to all personal data with respect to which he is the data controller".

The eight principles of the DPA are as follows;

Principle	Principle description	EDF Energy view
First	Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless – <ul style="list-style-type: none"> at least one of the conditions in Schedule 2 is met; and in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met. 	If operating an ADM in dumb mode, a supplier will not be remotely processing data from the ADM or ECDD, nor have any control over any interaction, instead periodically a meter reader will be sent to the premise and meter readings will be taken in order to bill the customer
Second	Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes	If operating an ADM in dumb mode, a supplier is unable to remotely interact with the ECDD and ADM, but instead will periodically obtain a reading for billing.
Third	Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed	If operating an ADM in dumb mode, a supplier will not be processing any of the data displayed on the ECDD.
Fourth	Personal data shall be accurate and, where necessary, kept up to date	If operating an ADM in dumb mode, a supplier is unable to ensure personal data is kept up to date in the home, as they have no way to control this
Fifth	Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes	If operating an ADM in dumb mode, a supplier would only be processing or keeping data for any period of time relating to manual meter readings that have been taken
Sixth	Personal data shall be processed in accordance with the rights of data subjects under this Act	If operating an ADM in dumb mode, a supplier will not be processing data displayed on the ECDD
Seventh	Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data	If operating an ADM in dumb mode, a supplier will not be processing, storing or in control of the data on the ECDD that could be subject to accidental loss, destruction or damage

Eighth	Personal data shall not be transferred to a country or territory outside the European Economic Area, unless that country or territory ensures an adequate level of protection of the rights and freedoms of data subjects in relation to the processing of personal data	If operating an ADM in dumb mode, a supplier will not store or process personal data displayed on the ECDD, thereby they could not transfer it to a country or territory outside the European Economic Area
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Hence, EDF Energy believe we cannot comply with any of these principles as we do not extract, process, have any interaction with the data on the customer's ECDD, nor have any means to remotely or by site visit to disable the HAN, whilst we are their supplier operating their ADM/ECDD in dumb mode. In dumb mode we will send a meter reader around periodically to take a meter reading to bill the customer. Therefore, in our opinion we can only be considered the data controller in this scenario, for the data that we extract, process and store within our systems and not for the data interaction between the ADM and ECDD installed by other parties within the consumer's home.

This view has been ratified by David Reynolds at the ICO who agrees with our analysis and has stated in recent correspondence to us the following:

'I agree with your analysis, it has to be the supplier that fitted the device that collected the data that retains responsibility for the data even if they no longer have a direct relationship with that consumer. The supplier who installed the device determined the purposes for how and what would be collected and that role of data controller would only pass to EDF Energy, if you decided to capitalise on the data somehow and determine further purposes for processing the residual data.'

The table below shows a matrix of industry parties, their operation of the ADM's and ECDDs installed and their role under the DPA. This scenario is for a single customer who has changed supplier multiple times and the role as Data Controller only refers to the interaction of data within the home between the ADM and ECDD.

Industry Party	Operation of ADM / ECDD	Data Controller (ADM/ECDD)
Installing ADM/ECDD Supplier	Remote smart mode	Yes
New gaining Supplier	Dumb mode – no remote access	No
New gaining Supplier	Remote smart mode	Yes
New gaining Supplier	Dumb mode – no remote access	No

In the scenario above, two suppliers have operated the ADM/ECDD in remote smart mode, and therefore should be considered to be the Data Controller for the interaction of data between the ADM/ECDD. For those suppliers operating the ADM/ECDD in dumb mode, they cannot be considered to be the Data Controller for the interaction of data

between the ADM and ECDD nor can they be held responsible for protecting the information related to the previous tenant, should a subsequent supplier gain the consumer.

4. ECDD OWNERSHIP AND FUNCTIONALITY

The ECDD is a consumable which will be provided to and owned by the consumer, even though the supplier will have a duty of warranty for the first year. Therefore, should an outgoing consumer/tenant decide to leave their device at the premises when they move out, the device could continue to display personal data to subsequent consumers/tenants. We are likely to explain this to the customer within our terms and conditions; however, ultimately the decision to leave the device will be with the customer.

The level of personal data that will be available and could identify an individual will be dependant on the level of functionality on the ECDD. On early ADMs and for the minimum specified SMETS1 meter, no half hourly interval data will be displayed on the ECDD. Only cumulative day, week and month information is available, together with comparative day, week and month information. Although this may still be considered personal data, on its own it would not allow a third party to identify that individual or determine the movements of that individual. This appears to be the main concern, but in this scenario the individual is no longer residing in that premise and hence we believe the risk of DPA breach to be very minimal.

5. DATA RETAINED WITHIN THE HOME

Clarification is required as to whether personal data that is retained within the home and is not remotely extracted and processed by the supplier operating the ADM in dumb mode is subject to the DPA? If the consumer owns the ECDD, then the retention of this device in the home after they have moved out of the property is their choice and suppliers will need to ensure that consumers are aware of the consequences of this. This letter has been copied to the ICO for their clarification and comment on this and other points.

Amendment required to the draft Gas Licence Conditions

Within the draft licence conditions for Gas, on pages 8 and 9 of the latest consultation, there are references that should quote 'Gas' but currently quote 'Electricity, as follows:

25B.1 Where the licensee is the Relevant **Electricity** Supplier to a Domestic Customer with an Advanced Domestic Meter and that Domestic Customer intends to change their **Electricity** Supplier and continue to use that Advanced Domestic Meter at the Domestic Premises, the licensee must take (and ensure that any Representative takes) all reasonable steps to ensure that, as from the date another supplier becomes the Relevant **Electricity** Supplier for those premises, no misleading or inaccurate information relating to Charges for the Supply of **Electricity** will be provided to the Domestic Customer via an Electronic Consumption Data Display and the Advanced Domestic Meter which relates to, or arises from, the Domestic Supply Contract previously entered into between the licensee and the Domestic Customer.

25B.10 The Installation Licensee is not required to comply with paragraph 9 where it-

(a) supplies **electricity** to fewer than 250,000 Domestic Customers; or

Hence, where **electricity** is highlighted this should be amended to Gas.

EDF Energy
August 2012