

Ofgem's Gas Theft Proposals

Ofgem statutory consultation on tackling gas theft 26 March 2012

RWE npower's response

Introduction

RWE npower takes its responsibilities to investigate theft seriously and welcomes new measures to improve on the current arrangements. In particular, we support Ofgem's goal that revised arrangements should reduce the overall cost of theft to the ultimate benefit of honest customers. It is therefore essential that any changes are proportionate and targeted

RWE npower has actively participated in the development of the gas and electricity Theft Codes of Practice. It supports their principles and believes they will provide a standard of direction for dealing with identified theft. It supports the principle that they should apply to all industry parties.

Energy theft is a difficult and sensitive topic. It is important that arrangements strike the correct balance. On the one hand, it is important that suppliers properly evidence theft and engage fully with householders. This will avoid an escalation in justified complaints and damage to the industry's reputation. On the other hand, too lenient an approach will enhance the incentives for householders to steal, defeating Ofgem's objective.

There are two main aspects to Ofgem's proposals:

- Arrangements aimed at promoting greater theft detection: the incentive scheme and the TRAS;
- Arrangements for dealing with customers suspected of theft

We deal with each of these in turn.

Section A Arrangements to promote greater theft detection

1. Incentive Scheme

We have a number of concerns with the requirements of the incentive scheme:

1. It may not promote the end to end processing of genuine cases of gas theft as opposed to the initial incentive to detect. It is necessary to ensure that settlement is included within the process in order to reduce the impact on honest customers.
2. In general, a legal framework or agreement cannot impose penalties for not meeting standards on its signatories. If Ofgem pursues an incentive scheme then some form of liquidated damages may be more appropriate.
3. Proving theft is often difficult. This proposal offers no guidance on what is to be recorded as a genuine theft (confirmed detection) for the purposes of the scheme and how Industry Parties should manage cases where, for reasons beyond their control, there is uncertainty. Further to this, the industry would need to define what might be the 'good reasons' for not investigating theft (4.15).
4. Ofgem notes within the consultation that theft may not be proportional across supplier portfolios. However, it offers no comment on how this could be addressed within the principles of the incentive scheme. Our view is that any incentive scheme with a target based on the number of theft detections could penalise some suppliers as it is unlikely actual gas theft is split equally across all Supplier portfolios.
5. The introduction of an incentive scheme is not in line with other industry developments e.g. CERT, Back Billing Code and ECOES. We believe that an audit based scheme is more appropriate given the strength of controls that would need to be in place to deliver the proposal in a robust fashion.
6. The incentive scheme only addresses theft which is a narrow element of unallocated gas within the market.
7. The incentive scheme is not based on volume of energy identified as stolen and put back into the settlement process.

We would welcome the opportunity to discuss our reservations and potential alternatives with you before you proceed further with this aspect of your proposals.

2. Theft Risk Assessment Service (TRAS)

We also have concerns with the proposed Theft Risk Assessment Service:

1. There is no detail of any cost included within the proposal. Therefore there is no evidence to suggest that the cost of administering the proposal will be offset by detecting additional cases of theft. This additional cost can only be passed onto the honest customer as it is unlikely to be recovered from the customers who are stealing the gas.
2. The predominant use of industry data may result in this service being an expensive way for suppliers to receive back their own information.
3. Implementing a scheme such as the TRAS without conducting a reasonable feasibility study may result in additional costs to all customers.
4. Potential issues of data protection and competition could impact the effectiveness of this scheme which has been proposed without a full assessment of this impact.

We will be commenting further on this aspect of Ofgem's proposal before the revised deadline.

3. An Alternative Suggestion

In light of our comments on the schemes proposed by Ofgem we believe an alternative approach would better achieve the new supply licence conditions to detect, prevent and investigate theft of gas. The principles of the alternative are set out below:

- Clear guidelines agreed by the industry setting out the measures that suppliers would be required to take to detect theft; this would include making use of all data available to them;
- Measures to be introduced via a robust Performance Assurance Framework which could include other sources of unallocated gas in addition to theft. This would further benefit the honest customer;
- Supplier audit and liquidated damages could be introduced as necessary to ensure performance.

We believe the benefits of the alternative approach to be as follows:

- Costs would be appropriate and would not create a burden for the honest customer.
- Additional elements that the industry feels to be of benefit could be introduced though the proposed framework such as the 24 hour tip-off line and Stolen Meter Register.
- It would enable smaller suppliers to innovate affordable solutions that better suit the characteristics of their portfolio.
- This solution could be implemented quickly.

Section B Proposed requirements for the conduct of theft investigations

1. Ofgem's proposals

Ofgem is proposing that the licensee must take all reasonable steps to identify whether:

- i) the customer and/or any occupant is of pensionable age, disabled or chronically sick (12B12 (a));
- ii) the customer will have difficulty in paying all or part of the charges resulting from the theft (12B12(b));

If so, the licensee must offer payment by PPM where safe and reasonably practicable to do so instead of stopping supply.(12B12 (c));

In case (i) above, the licensee must take all reasonable steps not to disconnect in winter. (12B12(d));

In addition the proposed licence condition requires that the licensee:

- i) has sufficient evidence to establish the disconnection power (12B12 (e));
- ii) only requires payment where there is sufficient evidence that the theft occurred as a result of the customer's intentional act or culpable negligence. (12B.12(f))
- iii) explains to the customer the basis for the assessment and calculation of charges, how to dispute the findings and how to reinstate supply (12B12 (g)).

The licensee must also take all reasonable steps to put in management arrangements to comply and keep records demonstrating compliance with the above obligations - 12B.14 and 13 respectively.

This is the second aspect of Ofgem's package. It divides into two distinct components:

- Those that incorporate into the licence obligations which already apply by virtue of other legislation;
- Proposals which seek to constrain suppliers existing rights to recover the value of stolen energy.

The following sections discuss each of these in turn.

2. Incorporating existing requirements into the licence

2.1 The current legal position

Schedule 2B para 10(1) of the Gas Act 1986 provides that, where a person has intentionally or by culpable negligence interfered with the registering of the meter, the supplier may disconnect the premises of the offender. As Ofgem's guidance of 20 October 2010 notes, to disconnect the premises at which tampering occurred, it is necessary to show, on the balance of probabilities, that the current occupier was the offender.

2.2 Impact of Ofgem's proposals

The proposed clauses 12B12 (e), (f) and (g) are closely modelled on the current legal provisions of the Gas Act and consumer protection regulations. The introduction of these clauses into the licence therefore appears inconsistent with the principles of better regulation, for instance by introducing double jeopardy.

There is one important respect in which the draft licence wording fails to accurately reflect statutory powers. The statutory powers permit a supplier to take action against the premises of an **occupier** who has

interfered with a meter. Ofgem's licence condition requires evidence that the **Customer** is responsible for the theft.

This is an important distinction. It is quite possible that a supplier may be able to show that an occupier of premises has interfered with a meter without being able to show that it was the named customer. This conclusion is reinforced by sub-clause (3) of Schedule 2B para 10. In addition, one can envisage that, under Ofgem's proposals, occupants might organize their arrangements so that the "Customer" would have difficulty making restoration even if the other occupants would have no difficulty.

Plainly, the effect of Ofgem's proposal would be to markedly restrict a supplier's ability to recover amounts due.

3. Constraining suppliers' rights

3.1 The current legal position

As regards the provisions of 12B (a) to (d), these seek to materially restrict the disconnection powers which Parliament has determined should be granted to suppliers in the event of theft. In summary, the Gas Act provides that a supplier may disconnect premises if, on the balance of probabilities, the occupier has intentionally, or through culpable negligence, interfered with the registering of the meter.

Moreover, the requirement that suppliers allow customers to pay for theft over a period through a PPM would appear to conflict with rights which would apply if the supplier successfully prosecuted the occupier for theft.

3.2 Ofgem's motivation

At paragraph 2.9 of the Gas Theft Consultation (26 March 2012 – doc 2), Ofgem states that its motivation "is to make the approach on theft consistent with the other licence conditions that require Licensees to give consideration to these specific consumer groups, given the potentially higher impact on them of actions taken by suppliers." Ofgem is concerned that "an increase in theft detection activity does not have an undue impact on these customers." (para 2.27). We note that the proposed text is very similar to that of licence condition 27 relating to customers in payment difficulty.

3.3 Overview of this component of Ofgem's proposals

It is not self evident that identical provisions should apply to customers who fall into debt and households who deliberately steal gas. Despite the expectation in the BIS document – Principles for Economic Regulation April 2011 - that regulators will publish the reasoning

underpinning regulatory decisions, Ofgem fails to make the case for identical treatment.

We have concerns that Ofgem's proposals may lack legitimacy under three main heads:

- Legal basis
- Principles of better regulation
- Stakeholder support.

The sections below expand upon our concerns under each of these heads, although they are not necessarily mutually exclusive.

3.4 RWE npower's existing policies

Notwithstanding the arguments below, we wish to emphasize that npower treats its social responsibilities very seriously. We take great care to treat householders sympathetically. We take every step to understand householders' circumstances, to avoid cutting customers off, to engage social support agencies where circumstances appear to warrant that and to set repayment rates affordably. However, the threat of disconnection is an important tool in persuading customers to engage with us.

The revenue protection visit can be uncomfortable and difficult for all parties. Ofgem's proposals create a catch 22 for suppliers: they would not be able to threaten disconnection before assessing payment difficulty. But householders won't engage because they know they can't be disconnected. So suppliers won't be able to assess whether there is payment difficulty. Consequently, Ofgem's aspiration to reduce the cost of debt to suppliers (and by implication customers) will be undermined.

Before proceeding with these proposals we urge Ofgem to visit our revenue protection centre to experience the steps we take now to deal sensitively with thieves and to understand the challenges we face. We also invite you to spend a day with a revenue protection officer on the ground to obtain that perspective on how your proposals will impede theft recovery work. If Ofgem still perceives a need for a licence condition, we suggest that it should be focused on circumstances where a company unreasonably withholds supply from a household which has demonstrated a willingness to engage.

Therefore, whilst we set out below a range of detailed reasons for opposing Ofgem's licence conditions, the over-riding motivations can be summarized as:

i) we doubt that the presumption that suppliers don't do enough to treat suspected thieves sensitively is justified, at least in our case, and

ii) the effect of the proposal will be counterproductive to the goal of securing recognition by the entire community that energy should be paid for.

3.5 Legal basis concerns

3.5.1. Ofgem's statutory duties

3.5.1.1 Scope of Ofgem's powers and duties

Ofgem's statutory duties are summarized in its principal objective and are to protect the interests of consumers, especially those who are chronically sick, disabled, pensionable, on low incomes or living in rural areas. However, it is implicit in the definition of "consumer" that the individual being protected is acting legally within their capacity. For example the BIS document notes:

the role of economic regulators should be concentrated on protecting the interests of end users of infrastructure services.

The footnote clarifies that the user is a person paying for the service:

current and future consumers, and in some sectors taxpayers, who ultimately pay for the services

Similarly, section 3(2) of the CEAR Act 2007 defines a consumer as "*..a person who purchases, uses or receives, in Great Britain, goods or services which are supplied in the course of a business carried on by the person supplying or seeking to supply them.*"

It follows that the protection of those who steal gas (ie do not pay for it) is out of scope of Ofgem's duties. By way of analogy, no one would suggest that a shoplifter was a customer or acting as a consumer of a particular supermarket simply because they were stealing from that company's shop. We can see no reason why a different approach should be adopted in respect of the theft of energy.

3.5.1.2 The consumer interest

As noted above, Ofgem's principal objective is to protect consumers, especially those who are chronically sick, disabled, pensionable, on low incomes or living in rural areas. These proposals for the protection of those who steal gas will raise the costs which must be borne by paying consumers generally, including vulnerable consumers (the number in this group being much larger than the number Ofgem is seeking to protect).

Consequently, Ofgem's proposals are inconsistent with Ofgem's principal statutory objective of protecting the interests of (paying) consumers (including vulnerable consumers).

3.5.1.3 Best regulatory practice

In carrying out its duties, Ofgem must have regard to the need for best regulatory practice (Section 4AA (5A) of the Gas Act 1986) and regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.

Ofgem's proposals breach all of these requirements.

Proportionate

Ofgem's stated motivation is to offset the impact of increased theft detection activity. But, Ofgem has failed to quantify the scale of the impact. Ofgem adduces no evidence of the extent of the problems faced by thieves under the current arrangements or under its prospective requirements. No attempt has been made to understand the steps that companies already take in this area. It is important that proposals for new regulations are evidence-based, rather than "just-in-case" regulation.

By scaling up the number of cases it expects as a result of its theft detection requirements, it would have been possible to estimate the expected scale and scope of issues. As noted above, RWE npower, and we suspect, other suppliers, already exercises extensive discretion in the way it deals with vulnerable households engaged in gas theft. RWE npower uses tests consistent with those advocated by Ofgem to determine whether on the balance of probabilities the current occupier is responsible including whether the tampering is obvious and whether the tampering occurred since the occupier

moved in to the property. Ofgem made no attempt to understand our existing practices to inform its decision. We submit that had Ofgem carried out such an assessment, it would have concluded that, due to current policies, the scale of any impact arising from enhanced theft detection would be negligible. Ofgem's proposal therefore fails the proportionality test

Consistent

The motivation of Ofgem's general theft proposals is to reduce costs arising from theft (Impact Assessment (IA) para 3.1) and to provide greater deterrence to theft (IA para 3.43).

However, as explained above, these proposals will increase supplier costs and undermine deterrence effects. Because of the prescribed way in which suppliers must deal with identified theft, Ofgem does not know whether, on balance, its overall package will raise or lower supplier costs. This point was made in response to the stage 1 consultation (see para 1.13 of Appendix 2 to the statutory consultation). Paragraph 3.4 of the impact assessment notes that already suppliers spend far more in detecting theft than they recover: They spent £6.5 m investigating thefts valued at about £5m, but recovered only £2.2m. Ofgem's proposals will markedly increase the costs of investigating and processing thefts, and reduce the amounts recovered. However, no attempt has been made to quantify in the impact assessment the effects on these figures of its protection proposals. Consequently, Ofgem can have no confidence that, overall, its package delivers the purported objective, namely "to protect consumers' interests by putting in place proportionate arrangements to require suppliers to proactively tackle gas theft" (Appendix 3, para 2, page 41).

Whatever the net effect, the protection proposals are inconsistent with the prime purpose of the policy to reduce the costs arising from theft and so they fail the best regulatory practice duty on consistency grounds.

Predictable

Government has stressed the importance of predictability and stability in regulation, not least to

encourage the large scale of investment required to deliver the county's infrastructure needs (Paras 1-6 of the introduction to BIS paper April 2011 and box on predictability on page 5). This government principle for regulation is undermined if Ofgem seeks to unravel the framework for theft determined by Parliament.

Transparency

According to para 2.26:

“We intend to work with the industry and Consumer Focus to help define when disconnection [in winter] is likely to be a reasonable course of action in the proposed new Gas Theft Code of Practice and what additional action the supplier should undertake when a disconnection takes place.”

Therefore, Ofgem is introducing new requirements before specifying what they are going to be. It is unreasonable to expect suppliers to make an assessment as to whether to accept or oppose the new licence obligations before the full implications arising from the Code of Practice are known. For example, para 2.28 notes that the Code will specify: “what additional protections should be given to those customers for whom a prepayment meter is not safe or practical”. And, para 2.30 notes that Code will be used to define reporting requirements related to the proposed licence condition.

This lack of transparency violates Ofgem's best regulatory practice duty. Moreover, it is also unclear whether Ofgem would have the power to amend the code unilaterally thereby creating further regulatory uncertainty.

Targeting

Ofgem's best regulatory practice duty also includes a requirement to ensure that regulation is correctly targeted. Clause 12B.12 (b) fails this test. Whilst 12B.12 (a) requires suppliers to consider the vulnerability of other occupants than the named customer on the bill, clause 12B.12 (b) allows the company only to take into account the ability to pay of the named individual on the account. This asymmetry is an unreasonable restriction on a supplier's current

rights to seek redress. Similar comments apply to the situation noted in paragraph 2.2 above.

3.5.1.4 Safety issues

The Gas Act imposes a duty on the Authority to protect the public from dangers arising from the conveyance of gas through pipes or from the use of gas conveyed through pipes.

The requirements in these proposals to fit a PPM and not to disconnect in winter are too inflexible. They give insufficient weight to the circumstances in which a disconnection is the preferred action on wider community safety grounds. Although the consultation suggests that these circumstances will eventually be fleshed out in the code of practice, this is an inappropriate way to resolve such vital matters which must be more explicitly addressed before new regulations are introduced which otherwise increase safety risks.

3.5.2 Shortcomings in the impact assessment

We have noted (section 3.5.1.3) a number of serious shortcomings in the impact assessment associated with these proposals. There are examples of where the Courts have struck down decisions by public bodies on account of flawed impact assessments where decisions have not been supported by substantial evidence. That is particularly the case where no evidence is adduced on the impact of the proposal at all as appears to be the case here.

There is no evidence that Ofgem has considered how energy suppliers could fulfil this proposed obligation. For example, has it considered the practicalities of assessing the genuine payment difficulty of someone who is willing to steal? It seems likely that the majority will be at best reluctant to engage in an honest discussion about the extent of their means to make repayment; there could be all sorts of reasons why offenders would be unwilling to share details of their income and expenditure. The proposed obligation also raises concerns about the safety of our staff, should they seek to probe into these areas.

We have serious concerns that suppliers are being given responsibility to make judgements without the power to access the information required to inform those judgements. This is already an issue for the justice system. The Times (28 March 2012) reports that *“Judges and Magistrates would have access to tax and benefit records to thwart those who lie about their income to receive a smaller fine.”* The aim is to *“set fines that more obviously match offenders’ income and ability to pay”*. However, Ofgem’s proposals give no consideration to this issue, nor make any suggestions to alleviate it.

3.5.3 Interference with a supplier’s rights

The Human rights Act 1998 protects rights and freedoms under the European Convention on Human Rights. Article 1 of that convention protects a legal person’s right to the peaceful enjoyment of his possessions.

In restricting a supplier’s right to recover the value of gas stolen from it (see sections 2.2, 3.1 and 3.5.1.3 – Targeting), Ofgem is restricting the supplier’s right to the enjoyment of its property. Moreover, it is doing so in a way which is more restrictive than that required by the objective of the regulation. We doubt therefore that the restriction could be justified on public interest grounds as it is disproportionate and insufficiently targeted (see section 3.5.1.3 above). The shortcomings in the impact assessment are also relevant here.

3.5.4 Uncertainty

The requirement of legal certainty applies to legal rules in force in areas covered by EU law. The principle of legal certainty requires that the effect of a legal provision be clear and predictable to persons subject to it. There are two distinct ways in which the proposed rules are highly uncertain. First, as discussed elsewhere in this submission, given the challenges for companies in identifying whether an offender will have difficulty paying under this licence proposal, it is extremely uncertain what would constitute “all reasonable steps”. Second, this licence condition envisages obligations set out in a code of practice which has yet to be finalized or approved by Ofgem.

3.6 Better regulation concerns

A number of better regulation concerns have already been set out in section 3.5.1.3.

In particular, Ofgem's impact assessment does not address at all the impact of its proposals to restrict disconnection rights for theft. It makes no attempt to assess the costs to companies of:

- Taking all reasonable steps to identify those eligible for special treatment under this condition;
- The increase in theft cases arising from the reduced deterrence effect.

The lack of an impact assessment on the protection issue violates the government's expectations that regulators will follow consultation best practice in their decision making, including the use of impact assessments (BIS commitment 4). The document emphasizes (p11) that decisions must be based on robust evidence and judgement by the regulator.

3.7. Stakeholder support

3.7.1 Consistency with government policy

3.7.1.1 Government social guidance

Ofgem is required to take account of government social guidance in carrying out its duties. DECC's Social and Environmental Guidance to the Gas and Electricity Markets Authority (the guidance) was updated in January 2010. There are a number of references in the guidance which are relevant to Ofgem's theft proposals.

1. Paragraph 21 requires Ofgem to address issues which have a particular impact on low income and vulnerable consumers. As noted above, Ofgem's proposals will tend to raise supplier costs with an adverse impact on honest vulnerable customers, contrary to the requirements of this paragraph.
2. Paragraph 6 requires Ofgem to contribute to the goal of eliminating fuel poverty. By raising supplier costs, Ofgem's proposals conflict with this objective.

3. Paragraph 23 requires Ofgem to have regard to better regulation principles, using impact assessments to inform regulatory decision-making. Shortcomings in the impact assessment have been noted elsewhere.
4. Paragraph 22 states that where a measure has significant financial implications for consumers or regulatees, it would expect measures to be implemented directly by government through primary or secondary legislation, not by Ofgem. Since Ofgem has not carried out an impact assessment, it cannot know whether its proposals are likely to have a significant impact and should therefore instead be undertaken as a government measure.

We therefore conclude that Ofgem's proposal conflicts with the government's social guidance.

3.7.1.2 Other government policy pointers

In addition, Ofgem's proposals appear at odds with the general thrust of Government policy to encourage good citizenship and deter anti-social behaviour. For example:

- Judges were encouraged to set tough sentences for those found guilty of criminal offences during the riots in 2011;
- In early March 2012, the press reported that the Prime Minister's Office was in discussion with garages to use cameras linked to DVLA to spot uninsured cars and stop them from filling up (Daily Telegraph March 13, 2012)..
- Since April 2010, new "one strike" and "two strike" rules have been introduced to deduct benefits from those found guilty of benefit fraud.

By contrast, Ofgem's proposals undermine the deterrence of anti-social behaviour.

They also conflict with the pledges on crime and justice in the Coalition's programme for government (May 2010):

“We will give people greater legal protection to prevent crime and apprehend criminals.

We will introduce effective measures to tackle anti-social behaviour”

The conclusion is that Ofgem’s proposals run counter to the intentions of the DECC review of Ofgem that *“Ofgem’s actions should be coherent with the direction set by Government.”* (para 83).

3.7.1.3 The respective roles of Government and Regulator

The BIS Principles for Economic Regulation April 2011 and the DECC Ofgem Review Final Report July 2011 establish a framework for identifying the appropriate division of roles for government and regulator in the development of policy.

According to the BIS document (page 4):

roles and responsibilities between Government and economic regulators should be allocated in such a way as to ensure that regulatory decisions are taken by the body that has the legitimacy, expertise and capability to arbitrate between the required trade-offs

independent regulation needs to take place within a framework of duties and policies set by a democratically accountable Parliament and Government (page 4) and

Setting the policy direction and making politically sensitive trade-offs between objectives is likely to require democratic legitimacy and accountability and is clearly the role of Government (para 18).

Similarly, DECC’s Ofgem Review emphasized the importance of:

- *confidence that the regulator’s decisions would be aligned with the Government’s strategic policy framework (para 4).*
- *Independent regulation taking place within a framework of duties and policies set by a democratically accountable Parliament and Government and consistent with established priorities. (Box 1)*

The document states (para 70) that, through its democratic mandate, it is the role of Government to set strategy and policy for the energy sector and, where necessary, to facilitate the achievement of these policies through the use of its legislative powers.

In restricting the options for restitution against theft, Ofgem is implicitly downgrading importance of anti-social behaviour with potential repercussions beyond the confines of the energy sector. The examples cited in section 3.7.1.2 sit uneasily with Ofgem's approach. As noted above, it also has potentially significant cost implications for paying customers. There is a strong argument that the appropriate protection for offenders is a matter involving the exercise of political judgement. We do not believe that this can be characterized as a "day to day regulatory decision" which should be undertaken by the regulator (BIS page 6 Commitment 1).

By way of precedent, it is notable that the ban on disconnections in the water industry was effected through a change to primary legislation (Water Act 1999), not through a licence amendment effected by the regulator. In case there is any doubt about the potential significance of these kinds of restrictions on disconnection, written off debt rose by 65% between 1998/99 and 2004/5, with collection costs also rising markedly.

3.7.2 Customer views

Ofgem emphasizes its extensive work to understand the consumer perspective and uses this to shape policy. However, there is no evidence that Ofgem has sought customer views on this issue.

Ofgem should note that responses to the specific fraud questions in the 2008 DWP consultation paper "*No one written off: reforming welfare to reward responsibility*" broadly welcomed a stronger sanctions regime for those who seek to defraud the system. As noted above, in 2010, a new "one strike" loss of benefit was "*introduced to strengthen the deterrents and punishments that currently exist in the Department's criminal sanction regime to deter more people from committing benefit fraud in the first place.*" (DWP website).

We therefore urge Ofgem to consult its customer focus group before finalizing its proposals.

3.7.3 Supplier views - Responses to stage 1 consultation

Appendix 2 of the statutory consultation summarizes responses to the stage 1 consultation. In a number of important areas, Ofgem has failed to respond to the concerns raised with its original proposals without giving any reasons. These include:

Concerns regarding lack of clarity on the meaning of suppliers taking “all reasonable steps” in the context of keeping customers on supply in winter.

Two respondents (see para 1.15 of Appendix 2) noted that the phrase “customers that would have difficulty paying” is too vague. However, Ofgem has not clarified its intentions with regard to this phrase. These points reinforce our concerns under section 3.5.4 on uncertainty.

We would hope that Ofgem shares our view that it is poor regulatory practice to issue detailed guidance after introducing a new licence condition, and that to do so fails the transparency requirement in Ofgem’s best regulatory practice duty.

4. Conclusions

RWE npower supports Ofgem’s aim to increase the detection of and reduction in theft for the ultimate benefit of customers. However, we believe that the proposals to protect offenders in their current form have a large number of important drawbacks:

- Ofgem has not sufficiently considered how they could be operationalized;
- Little or no consideration has been given to the extensive efforts already taken to deal sensitively with offenders without undermining the deterrent effect of detection;
- In practice, the effect will be to undermine the deterrent effect of measures to increase theft detection activity.

We are keen to work with Ofgem to refine its proposals to address the shortcomings. We will be in contact to discuss the concerns raised in this paper and to offer opportunities for Ofgem to understand current practice and challenges. This should enable Ofgem to revise its proposals so that they are more firmly based on the evidence. We recommend that Ofgem defers finalizing its proposed licence conditions until these stages have been completed.