

The Retail Market Review – Final non-domestic proposals.

RWE npower's response

This note is RWE npower's response to Ofgem's invitation to interested parties to make representations in respect of the proposed modifications to the gas and electricity supply licences intended to implement the non-domestic Retail Market Review.

Summary

Overall, Ofgem's proposals for Retail Market Review are on the face of it relatively straightforward and should improve customers' experience of energy supply by introducing greater clarity and transparency into the market. In addition, Ofgem's decision to amend the present definition of Micro Business rather than introduce another term is a welcome change from the interim proposals and should avoid some confusion amongst customers. However, the proposals raise some concerns (some of which we have raised previously) about the nature of the implementation and the approach that Ofgem is taking, including in respect of the guidance for Standards of Conduct and proposals for enforcement. A more detailed consideration follows.

Micro business proposals

Contract end dates – general

We support the extension of existing licence protections to a larger population of customers.

However, we do not believe that putting contract end dates on bills will have the impact you expect, as often the person paying the bill will not be responsible for procurement; this is especially the case in larger companies, more of whom will be covered by the new definition of micro businesses. This element of the proposals is therefore counter intuitive.

Sometimes the contract end date may not be known at the start of the contract, or may change during its term. In such circumstances, due to billing cycles, customers could well receive a letter and a bill that show different dates, which will be confusing. Ofgem also notes in its Impact Assessment that many small businesses do not scrutinise their bills too closely. Indeed, some customers such as deemed and former tariff customers do not have contract end dates, which will further complicate any system developments. In such cases the requirements of the proposed licence may also confuse customers rather than simplify matters.

As suppliers already give relevant micro business customers details in writing of when their contracts will end and when they may be terminated, as part of the

acquisition and renewal process, and given Ofgem's observation that customers do not scrutinise their bills too closely, we believe that the present practice has at least as much impact as adding more information to an already busy bill.

It is worth noting also in this context that npower customers have always been able to give notice to terminate their contracts at any time before the Relevant Date.

Contract end dates – system development

The requirement to put contract end dates on bills will need changes to our three separate, and different, business systems and processes; this will be complex and costly and will take considerable time.

When Ofgem first suggested this some months ago there were elements that remained unclear. Although we were aware of the nature of the proposals, they were not detailed enough to start changes to our systems. Following the publication of the final proposals we have now re-examined the changes that will be needed. Unfortunately, early indications suggest that the implementation dates set out are very challenging and may not be achieved without considerable disruption and cost. Part of this is due to other regulatory changes under way and part due to planned changes to improve our service to customers. There will be resource constraints which we are not able to control fully.

It would not be unreasonable to allow suppliers more time to implement the changes for standard licence condition 7A, Micro Business Protections, where there are genuine reasons for this. For npower some time in spring 2014 would give time to incorporate the changes in a more efficient and cost effective way. Given that our customers already know when their contracts end, there would be no customer detriment caused by extending the implementation. One method to allow this would be to grant a derogation to companies against the standard licence condition, for a period to be agreed between Ofgem and the supplier, where suppliers were able to support the need with adequate evidence.

It would be unhelpful if we were forced to contest your final decision simply due to an issue of timing. We would therefore welcome a dialogue in advance of your final decision with a view to reaching an accommodation on timing that both sides are comfortable with.

Standards of Conduct

We are very supportive of the suggestion that suppliers should treat micro-business customers fairly. For example, you will be aware that we have already responded positively to a number of suggestions advanced by Ofgem in the area of LC7A even though we don't think they are strictly required by the licence. However, we do have several concerns about the drafting of the Standards of Conduct Licence Condition.

Contrasting needs between business and domestic customers

We agree that the needs of business and domestic customers are different and require different approaches. We note the guidance on definitions in Appendix 5 is the same for both customer segments, which is not appropriate. A Business to Business environment is characterised by good service and products that meet customers' requirements whilst enabling them to add value to their own products. So, for example, the definition of the term "appropriate" refers to vulnerability and stress, which are not terms generally used for business to business customers. There are other similar examples in the guidance.

There are examples in other industries of companies applying standards that are adapted to the needs of their customers; thus avoiding the risk of customers becoming alienated because suppliers are perceived as patronising. Whilst therefore we see it as potentially helpful, the guidance should be appropriate and tailored to the needs of businesses. At the same time it should still allow suppliers to interpret the requirements rather than being too prescriptive. Our conclusion is that Ofgem should undertake a radical review of the guidance before issuing it again.

Definition of Fairness

In our response to the domestic consultation we made the following statement:

"25C.3 states:

For the purposes of this condition, the licensee or any Representative would not be regarded as treating a Domestic Customer fairly if their actions or omissions:

- (a) significantly favour the interests of the licensee; and
- (b) give rise to a likelihood of detriment to the Domestic Customer"

(a) should read "unduly favour the interest of the licensee.". Ofgem's formulation would capture a situation where the licensee disconnects a customer who persistently thieves energy. It is therefore unreasonable.

(b) The fact of a likelihood of detriment is not the same as actual detriment. One carries an umbrella because of the "likelihood" of rain but that doesn't mean it is raining! The condition should talk of "actual detriment" rather than the likelihood of detriment which is too ambiguous.

The wording in the non domestic standards of conduct licence condition is identical and the same objections apply. Whilst the example we cited in relation to the domestic standards does not apply because of the restricted extent (Designated Activities) of the condition 7B, there are comparable examples. Consider a situation where the licensee refuses to release a customer to a new supplier who is offering cheaper terms because the customer is still in contract. Such conduct would clearly significantly favour the interests of the supplier compared to letting the customer go. And it would give rise to a customer detriment compared to being allowed to join the cheaper supplier. However, such conduct clearly does not **unduly** favour the interests of the supplier

Precedence

A second issue which is specific to the non-domestic consultation is the issue of precedence.

7B.6 states; “In the event of a conflict between this condition and paragraph 14.2 of standard condition 14, this condition will prevail.”

14.2 sets out the conditions under which we can object to a transfer and is very specific. Continuing with the example of where a supplier objects to a customer transfer where the customer is in contract, 14.2 would support the supplier’s right to block the transfer whereas clause 7B.6 (allied to the current wording of 7B.3 discussed above) raises the possibility that the supplier might nonetheless be found in breach of the standards of conduct for holding the customer to their contract.

It is entirely unsatisfactory that a vague, high level condition can take precedence over a specific condition where they cover the same ground. It creates significant regulatory risk. We propose an alternative clause 7B.6 as follows:

“In any case where an issue is covered by a specific licence condition or sub-clause, the specific wording will take precedence.”

Enforcement

We wish to raise three other issues about the way Ofgem plans to enforce the requirements. We expect that Ofgem will not publish its Enforcement Guidelines until after the proposed licence conditions have come into force. This introduces risk, as we will be changing our business to comply with the new principles but without the clarity and transparency of how Ofgem plans to enforce them. Again, it would be more appropriate for Ofgem to delay implementation until it had completed the work on the enforcement guidelines so both measures are aligned.

The second point we would like to reiterate is that interpreting and recognising the concept of “fairness” is largely subjective and relies on a range of variable factors. We believe that the principal arbiters of it will be our customers. Sadly, it appears that Ofgem’s route for enforcement relies on a group of Authority members and Ofgem-appointed experts.

However well meaning their intentions, such an arrangement is not independent. Members and employees have a principal duty to their employers not to customers and there could be circumstances where the Authority could be viewed as not being impartial. We think that Ofgem should use other means to evaluate whether suppliers are treating their customers fairly. We will write on this in more detail as part of our reply to the enforcement consultation.

A related point is that there is still no effective route to appeal against the enforcement of Standards of Conduct. Given the subjective nature of assessing fairness, suppliers should have recourse to an independent body to discuss and challenge decisions made by the Authority. Otherwise, the Authority and Ofgem will directly (or using its delegated powers) set standards, investigate and determine potential breaches and take enforcement action. The separation of powers is not sufficiently robust to meet best regulatory practice. We recognize that Ofgem

proposes to establish an Enforcement Decision Panel of specialist decision makers, recruited to Ofgem to decide Enforcement cases. This may improve the separation of roles to an extent depending on the selection criteria for recruiting to the Panel. However, as Ofgem's open letter of 28 March 2013 explains, the Panel would still be accountable to Ofgem's Executive and to the Authority. We conclude that there remains a powerful case for independent review of Ofgem enforcement decisions, especially given the introduction of the broad discretionary powers that Standards will introduce and the reinforcing effect of a role in awarding redress.

Naturally, we would be willing to discuss any aspect of our representations with you in further detail; in particular we would welcome discussion about the time challenges of introducing changes to our bills.