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1 May 2013

Dear Jonathon,

THE RETAIL MARKET REVIEW – FINAL NON-DOMESTIC PROPOSALS

I am writing in response to above consultation dated 22 March 2013. The consultation includes a statutory consultation on the effect of the policy proposals and the associated licence condition drafting, and also seeks views on the proposed guidance to accompany the Standards of Conduct Licence condition (as set out in Appendix 5 of the consultation).

Statutory consultation

We broadly support the final package of proposals set out in the document. We understand Ofgem's rationale for moving ahead with these proposals and we agree that the package of proposals set out within the final consultation document will provide an improved service to Micro Business Customers. The timescales for implementation, while still challenging (particularly given the parallel implementation of the domestic RMR proposals), are more achievable than those originally proposed.

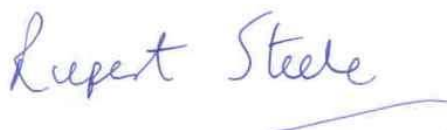
We have taken the opportunity to provide some specific drafting suggestions on the proposed Licence Conditions in Annex 1 to this letter.

Guidance on standards of conduct licence condition

We agree that Ofgem's guidance will be helpful in clarifying the interpretation of some of the more subjective terms included in the draft Licence Condition 7B. We have provided some detailed comments in Annex 2 to this letter.

I would be please to discuss further any of the points raised above or within the detailed annex and provide further information that may be required.

Yours sincerely,



Rupert Steele
Director of Regulation

**RMR NON-DOMESTIC FINAL PROPOSALS: DRAFT LICENCE CONDITIONS
SCOTTISHPOWER COMMENTS**

SLC 7A

Unless otherwise specified, the comments below apply equally to the draft Conditions within the Gas and Electricity Supply Licences.

Condition 7A.10B

Proposed drafting amendment: We suggest that Condition 7A.10B is amended as follows

7A.10B The specified information is:

(a) the date the fixed term period of a Non-Domestic Supply Contract is due to end; and

(b) where the licensee has entered into a Micro Business Consumer Contract for a fixed term period and it may, in accordance with that Micro Business Consumer Contract, be extended for a further fixed term period:

- (i) the Relevant Date (or, where applicable, such a later date as may be specified in the Micro Business Consumer Contract or, if not known at the time of calculating the Bill or statement of account, a description of how the Relevant Date will be calculated by reference to the end of the fixed term period); and
- (ii) a statement to the effect that the Micro Business Consumer may send a notification in Writing to the licensee before the Relevant Date (or, where applicable, such a later date as may be specified in the Non-Domestic Supply Contract) in order to prevent the licensee from extending the duration of the Micro Business Consumer Contract for a further fixed term period and in order to terminate the Micro Business Consumer Contract with effect from the end of any fixed term period which currently applies; ~~and~~or

(c) where the licensee has entered into a Micro Business Consumer Contract for a fixed term period and it does not have the ability to extend that contract for a further fixed term period:

- (i) the latest date the Micro Business Customer could give notice in order to terminate the Micro Business Consumer Contract with effect from the end of any fixed term period which currently applies; and
- (ii) a statement to the effect that this is the latest date the Micro Business Customer could give notice in order to terminate the Micro Business Consumer Contract with effect from the end of any fixed term period which currently applies.

Rationale for proposed drafting amendments: While likely to be rare, there may be some occasions where the supplier may not know the Relevant Date at the time at which the bill or

statement is being prepared. For example, our large non-domestic customer contract terms are managed in a separate system from the system which bills these customers. Therefore, information on the relevant contract terms, such as the Relevant Date, will have to be passed between systems. On a change of contract terms which is closely followed by a bill being issued there may be rare cases where the Relevant Date is not updated in the system in sufficient time to be provided on the bill, in which case it would be better to provide a generic statement saying how the Relevant Date is calculated.

The amendment to 7A.10B(b)(i) is therefore designed to allow an alternative presentation on the bill in any cases where the Relevant Date is yet to be confirmed.

The insertion of 'and' and replacement of 'and' with 'or' are intended to improve clarity. The numbering changes are to correct what appears to be a typographic error in the draft licence condition.

Condition 7A.13(b)

Proposed drafting amendment: We suggest that Condition 7A.13(b) is amended as follows:

7A.13 Where the licensee has entered into a Micro Business Consumer Contract for a fixed term period, it may only extend the duration of that Contract for a further fixed term period if:

- (a) it has complied with paragraphs 7A.7 and 7A.8;
- (b) the Micro Business Consumer has not sent the licensee a notification in Writing before the Relevant Date in order to prevent it from extending the duration of the Micro Business Consumer Contract for a further fixed term period ~~and~~ or in order to terminate the Micro Business Consumer Contract with effect from the end of any fixed term period which currently applies; and
- (c) the duration of the further fixed term period is 12 months or less.

Rationale for proposed drafting amendment: We think that the intention of the Condition is to allow the Micro Business Customer to opt to send either: i) a notification that they don't want to roll over onto another fixed term period (but stay with the supplier at the end of the fixed term period); or ii) a notice to terminate the contract at the end of the fixed term period. If the customer selects either of these options, the supplier should not roll them over onto a new fixed term period. However, the effect of using the word "and" instead of "or" in this Condition implies that the supplier would have to receive both forms of notification before being prevented from rolling the customer on to a new fixed term period. While this may seem like a small drafting point, we think it important to resolve this for clarity and accessibility of the Condition.

Condition 7A.14

Proposed drafting amendment: We suggest that Condition 7A.14 is amended as follows:

In the Gas Supply Licence:

7A.14 In this condition:

“Micro Business Consumer”

means a Non-Domestic Customer:

- (a) which has fewer than 10 employees (or their full time equivalent) and an annual turnover or annual balance sheet total not exceeding Euros 2 million ~~is a “relevant consumer” (in respect of premises other than domestic premises) for the purposes of in article 2(1) of The Gas and Electricity Regulated Providers (Redress Scheme) Order 2008 (S.I. 2008/2268); or~~
- (b) which has an annual consumption of gas of not more than 293,000 kWh.

“Relevant Date” means the date which is at least 30 days, and no longer than 90 days, before the date any fixed term period of a Micro Business Consumer Contract is due to end.

In the Electricity Supply Licence:

7A.14 In this condition:

“Micro Business Consumer”

means a Non-Domestic Customer:

- (~~a~~) which has fewer than 10 employees (or their full time equivalent) and an annual turnover or annual balance sheet total not exceeding Euros 2 million ~~is a “relevant consumer” (in respect of premises other than domestic premises) for the purposes of article 2(1) of The Gas and Electricity Regulated Providers (Redress Scheme) Order 2008 (S.I. 2008/2268); or~~
- (~~b~~) which has an annual consumption of electricity of not more than 100,000 kWh.

“Relevant Date” means the date which is at least 30 days, and no longer than 90 days, before the date any fixed term period of a Micro Business Consumer Contract is due to end.

Rationale for proposed drafting amendment: The definition in the draft Licence Condition refers to the Gas and Electricity Regulated Providers (Redress Scheme) Order 2008, which contains the original Micro Business definition. This reference is problematic since the definition in the Order refers to the original consumption thresholds and refers to both gas and electricity (since the Order is not fuel-specific). This means the draft definition is different from the intended amended policy approach set out in the consultation document. In particular, it results in conflicting consumption-based tests for a Micro business in the two licences:

- Gas: gas consumption $\leq 293,000\text{kWh}$ or electricity consumption $\leq 55,000\text{ kWh}$;
- Electricity: gas consumption $\leq 200,000\text{kWh}$ or electricity consumption $\leq 100,000\text{ kWh}$.

We think the intention of the definition is to apply the consumption threshold to the particular contract for supply that the supplier has with that customer. Therefore the definition should relate only to gas consumption where the Customer has a contract for the supply of gas and relate only to electricity consumption where the Customer has a contract for the supply of electricity. The effect of including a reference to the Order, which relates to both electricity

and gas, is that even where a supplier only has a contract for one fuel with the Customer, he has to in effect determine the Customer's consumption threshold on both fuels to assess whether the customer is a Micro Business Customer. We don't think that this is the intention of the policy proposal and our suggested amendment fixes this problem.

SLC 7B

Unless otherwise specified, the comments below apply equally to the draft Conditions within the Gas and Electricity Supply Licences.

Condition 7B.2

Proposed drafting amendment We suggest that Condition 7B.2 is amended as follows:

7B.2 The objective of this condition is for the licensee to ensure that ~~each Micro Business Consumer is~~ Micro Business Consumers are treated fairly ("the Customer Objective").

Rationale for proposed drafting amendment: We understand Ofgem's policy intent for the Standards of Conduct Licence Condition is to address systemic or sustained issues of customer harm rather than individual customer complaints or isolated incidents. However, the current drafting implies that individual Customer complaints could fall within the scope of the Condition, by focussing on singular customers. We do not consider that this is appropriate.

Condition 7B.3(b)

Proposed drafting amendment We suggest that Condition 7B.3(b) is amended as follows:

7B.3 For the purposes of this condition, the licensee would not be regarded as treating a Micro Business Consumer fairly if their actions or omissions:

- (a) significantly favour the interests of the licensee; and
- (b) give rise to a likelihood of undue detriment to the Micro Business Consumer.

Rationale for proposed drafting amendment: As drafted, the Licence Condition might be interpreted as preventing suppliers from undertaking genuine and necessary business practices which are not to the benefit of individual consumers. No obvious examples spring to mind within the set of 'designated activities' but the principle is well illustrated by the example we gave in the context of the domestic RMR consultation. Disconnecting customers for unpaid debt significantly favours the interests of the supplier and could be considered as clearly detrimental to the customer in question. However, where the supplier has done all it can to otherwise collect the debt, and the customer has not co-operated, disconnection is necessary as a last resort. We do not believe it is Ofgem's intention to prohibit such actions, and we suggest that this could be clarified by inserting the word "undue" in relation to the detriment to the customer. We believe this will provide a reasonable balance for suppliers without undermining the intended definition of 'fair'.

Condition 7B.4(c)(iii)

Proposed drafting amendment We suggest that Condition 7B.4(c)(iii) is amended as follows:

- (c) the licensee:

- (i) makes it easy for a Micro Business Consumer to contact the licensee,
- (ii) acts promptly to put things right when the licensee makes a mistake, and
- (iii) otherwise ensures that customer service arrangements and processes are fit for purpose ~~and transparent~~.

Rationale for proposed drafting amendment: While we agree that customer service arrangements need to be fit for purpose and accessible to customers, this is different from ensuring that they are 'transparent.' We are not clear what this means within this context, or how suppliers could demonstrate this, and we therefore consider that this wording should be deleted.

It may be Ofgem's intention that customers can easily find details of how to contact their supplier or what options customers have for doing so. However, we think that this is covered already by the reference in Condition 7B.4(c)(i) which requires the supplier to make it easy for the Customer to contact them.

Condition 7B.6

Proposed drafting amendment: Delete this paragraph.

Rationale for proposed drafting amendment: It is not clear what Ofgem's intention here is and we are concerned that the effect of this clause is to create regulatory uncertainty for suppliers in applying SLC 14.2 (relating to non-domestic customer transfer blocking). In general, we think where specific regulation and principles based regulation overlap, the specific should take precedence, while allowing the principles to affect the choices that are left open to the licensee. However, the drafting of Condition 7B.6 suggests that this might not be the case. Specifically it suggests that even where a supplier complies with SLC 14.2 (and does so with the intention of complying with the Standards of Conduct) the effect of the Standards of Conduct might mean that the supplier is in breach of its Supply Licence Obligations.

Condition 7B.7

Proposed drafting amendment: We suggest that Condition 7B.7 is amended as follows:

7B.7 ~~Apart from any matters relating to Deemed Contracts, s~~Standard condition 7B does not apply in respect of the amount or amounts of any Charges for the Supply of Gas or any other type of charge.

Rationale for proposed drafting amendment: The terms and charges of Deemed Contracts are already covered within SLC 7, which ensures that all the terms, including the Charges of a Deemed Contract, are not unduly onerous. As SLC 7 already sets standards for regulating the Charges and terms under a Deemed Contract, we do not see any need for SLC 7B to replicate this. Indeed the parallel jurisdiction between the two conditions will create uncertainty as to what is intended.

**RMR NON-DOMESTIC FINAL PROPOSALS: DRAFT STANDARDS OF CONDUCT
GUIDANCE
SCOTTISHPOWER COMMENTS**

We welcome Ofgem's proposed guidance on Standards of Conduct key terms and believe it will generally be helpful in clarifying the scope of Licence Condition 7B and Ofgem's proposed interpretation of it.

As a general point, we would note that with a licence condition such as SLC7B, which is couched in extremely general terms, the associated guidance gives Ofgem much greater scope to vary the effect of the licence condition than would be the case for a more prescriptive condition. In other words, Ofgem may be able to make changes to supplier obligations through amendments to the Standards of Conduct guidance, which might otherwise have required a formal licence modification. Ofgem is proposing that any changes to the guidance will be subject to formal consultation, which is clearly essential, but this still provides less protection than for licence modifications, where there is a right of appeal to the Competition Commission. This creates regulatory risk for suppliers, particularly in the event of political change or personnel change within Ofgem. As a minimum we would suggest that Ofgem should set out clear rules around the consultation process associated with any changes (minimum consultation period, need for impact assessment, etc).

Our comments on the draft guidance are as follows:

- Many of the concepts introduced in the draft guidance are highly subjective. Behaviour which is judged as aggressive, condescending or in poor taste by certain customers may be completely unobjectionable to others. We think it would be helpful to include an umbrella statement in the guidance that all value-based concepts are to be interpreted in an *objective* manner, i.e. based on the assessment of a reasonable person rather than the individual in question. Ofgem says it plans to use a "reasonable person" test in its bespoke enforcement approach, which seems to be consistent with this request, but we nevertheless feel it would be helpful to spell it out as part of the guidance.
- The guidance should make it clear whether the Standards of Conduct are intended to address systemic or serious concerns with supplier behaviour, or to be used as a means to resolve individual customer complaints. We understand from the consultation document that the policy intention is the former. However, the draft guidance could be read to imply the latter, for example, suggesting that an individual case of agent rudeness would be contrary to the Standards of Conduct. We cannot imagine that any supplier would tolerate agent rudeness, however by the same token, it is impossible for a supplier to control every agent's behaviour at all times.
- The guidance on transparency and honesty states that a supplier must not "whether deliberately or unconsciously" take advantage of various customer weaknesses (desperation, lack of knowledge etc). We agree that a supplier should not take advantage of a customer, whether deliberately or through a lack of care in presenting information. However, we are concerned about the implications of 'unconscious'. The word 'unconscious' implies that the supplier was not aware that they were taking advantage of the customer. Hence, if a supplier takes all steps it thinks relevant and appropriate to the case but is unaware of (or unable to identify) particular problems for a customer, it could still be in breach of the Standards of Conduct. This strikes us

as an inappropriate standard to place on suppliers, and it also seems to take behavioural requirements over and above those of a reasonable contracting party. Beyond this, it is not clear how a supplier would demonstrate that it was not unconsciously taking advantage of a customer. This would suggest a very high burden of proof on suppliers.

Finally, it is not clear to us whether Ofgem intends that a single set of guidance will apply to both SCL 7B (non-domestic) and SLC 25C (domestic) or whether it intends to provide two sets of guidance and has simply chosen to adopt the same wording for each. As Ofgem notes in the consultation document, the market problems experienced by non-domestic customers are not as pronounced and tend to be more specific than those experienced by domestic customers. Equally, behaviours which it would be proportionate to require from suppliers in respect of domestic customers may be disproportionate to require in respect of non-domestic customers. We therefore think Ofgem should provide two separate sets of guidance, tailored to domestic and non-domestic customers respectively.

For example, in explaining the meaning of ‘appropriate’, the draft guidance makes reference to customer ‘vulnerability’ and implies that it would be contrary to the SoC for a supplier to be insensitive to a range of customer vulnerabilities including financial difficulty, stress, poor IT skills, lack of access to the Internet and weak intellectual capabilities. Whilst we agree that it would be reasonable to require this level of sensitivity in respect of domestic customers, we think it would be disproportionate to impose the same requirements in respect of micro business customers, particularly where such customers have been established for commercial gain. Indeed, in its recent open letter on non-domestic debt and disconnection¹, Ofgem clarified its view that non-domestic customers do not require the same protections as domestic customers, and that the nature of the detriment in non-domestic cases is different to that of domestic customers as equivalent issues of vulnerability and fuel poverty do not exist.

ScottishPower
1 May 2013

¹ www.ofgem.gov.uk/Sustainability/Cp/Ewbc/Documents1/Non-dom%20disconnection%20openletter%2020-12-2012.pdf