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Dear David,

Retail Market Review: Final Domestic Proposals

SSE has previously expressed broad support for the direction of travel of the RMR and the intended policy outcomes. This support is clearly manifest in the changes SSE introduced under our Building Trust initiative, particularly the steps taken to simplify our tariff offerings.

SSE acknowledges the areas where Ofgem has made concessions relative to October's Updated Domestic Proposals. Having said that, we are still disappointed that these do not go as far as we would have wished. Whilst we have previously expressed our disagreement with some of Ofgem's key proposals – primarily how information is displayed on bills and the prohibition of fixed-discount tracker tariffs – the principal focus of this response is on implementation and delivery. A key consideration is that if Ofgem insists on a rushed implementation, it risks compromising our ability to ensure that we treat customers fairly and minimise the disruption caused by the many changes.

SSE has serious concerns with both the drafting of the RMR licence conditions and the proposed delivery timescale. We also question whether some of the transitional arrangements affecting existing contracts are strictly necessary in achieving the policy objectives.

Licence drafting

In our response to the October consultation we raised the following points in relation to the first draft of the RMR licence conditions:

The draft licence conditions published as part of this consultation are complex. There are examples of several clauses being used to describe what a simple definition could achieve. Many of the new licence conditions require cross referencing with numerous new and existing terms of other conditions. Understanding the draft conditions is sufficiently taxing that the original policy intent is not always clear to regulation professionals with many years of experience.

It is extremely disappointing that the same criticism can be levelled at the draft licence conditions in the Final Proposals consultation. Whilst the term "plain and intelligible" is repeated many times in the current version, it is a sad irony that these words do not spring to mind when looking for suitable adjectives to describe the drafting itself.

SSE's serious concerns with the licence drafting were shared by other members of Energy UK. This led to Wragge & Co being instructed to provide an independent legal review of the RMR licence conditions which was submitted to Ofgem as part of Energy UK's response. The specific brief was to consider whether the licence conditions, as drafted, correctly capture policy intent and are capable of being properly implemented. Of particular pertinence is the question of whether the drafting is sufficiently accessible to facilitate compliance.

SSE agrees with all of the substantive points made in Wragge's report. In particular, the comment that reading the licence conditions without first being familiar with the detailed policy discussions finds "conditions that are confusing and difficult (and on occasions impossible) to follow." This matches comments made by experienced regulation professionals at SSE previously unfamiliar with the details of the RMR who were asked to comment on the legal drafting.

Several factors combine to make the draft RMR licence conditions opaque: repetition of content, complicated structure, cumbersome style with confusing cross-referencing (and overuse of parenthesis), and repetition of content.

Repetition

Taking the last of these first, we note that repetition can be used to emphasise a point and can be a useful aid. However, repetition does not generally aid understanding. It is therefore inappropriate in the context of legal drafting where it tends to obscure policy intent and leads to gratuitous length. Brevity and precision would provide greater clarity.

The exemplars of the worst types of repetition are all to be found in SLC 22D. Clause 4 has significant repetition with only minor extra details added at each iteration. Clauses 16 to 20 exactly repeat clauses 12 to 16 of SLC 22C (these clauses appear four times within the legal drafting). Similarly there is no difference between the two definitions of Relevant Cheapest Evergreen Tariff found in 22C and 22D.

Structure

Wragge's report also correctly identified the document structure as being a particular issue. There are many clauses in the draft licence which have over twenty sub-sections. One consequence of this is that when referring to a particular requirement, as is routinely necessary in the normal operation of a supply business, the sheer length of the reference may create an impression that the licence is impenetrable (e.g. clause 15(o)(iii) in Part 2 of Schedule 4 to SLC 31A). This effect is apparent regardless of how clearly expressed the relevant drafting within that clause may be.

We would urge Ofgem to consider ways to improve the readability of individual licence conditions by incorporating the definition of key terms into the body of the licence condition in which it is introduced. We recognise the usefulness of maintaining a master list of defined terms which appear in the licence but suggest that SLC 1 could more usefully point to the appropriate clauses elsewhere in the licence where readers are able to find the relevant definition. This most obviously pertains to the definitions which run to several paragraphs, the precise meaning of which is therefore most likely to be critical to the interpretation of the condition in which they are used. This approach is also likely to ensure that definitions appear in logical groupings to the great benefit of the clarity and transparency of the document as a whole.

The success of the RMR proposals is critically dependent on the degree to which suppliers are able to interpret and implement licence obligations. The current legal drafting presents a significant barrier to entry. The lack of clarity of policy intent in certain areas means that the licence fails to provide the required degree of regulatory certainty.

SSE supports the suggestion that Ofgem tackles this problem through a collaborative redrafting exercise involving industry representatives familiar with the challenges of making licence conditions accessible to operational staff. An example of alternative approaches to the drafting of SLC 22D is included in Appendix 1 to this response. We would be happy to suggest alternative drafting approaches to other complicated areas of the licence, or to participate in any wider working groups on legal drafting if that would be helpful.

Delivery timescale

The implementation timetable currently proposed apparently ignores information already provided in previous consultation responses and in cost-assessments. The logic of the sequence implied by the various elements of the RMR package is also ignored. For instance,

the requirement that dead tariffs are either terminated or maintained based on comparisons with live tariffs suggests a dependence on Supplier Cheapest Deal processes. This dependence is explicit in the drafting of SLC 22D, yet the target delivery date for both measures is 31 March 2014. Clearly there will need to be adequate time between the implementation of the cheapest deal measures and the completion of the required changes to dead tariffs.

The proposal that the tariff protection window should be implemented from Day 1 pays no heed to the difficulty of implementing a robust solution to achieve this (SLC 23.6 no longer requires customers to inform their supplier of their intention to switch in response to a price increase). In meeting this requirement suppliers will be forced to adopt ad hoc processes which are not guaranteed to provide a smooth customer experience.

The detailed requirement gathering for the IT project required to deliver the RMR changes cannot be signed off until the RMR package has been finalised. This is likely to mean that a clear picture of the length of time it will take to implement all of the required solutions will not be available for some time. Given that the timetable is ambitious, Ofgem may be faced with regular requests from suppliers for extensions to this or that deadline. Against a background where systems may be developed in haste (possibly with insufficient testing), it is likely that errors will be made and customers will be inconvenienced. This is particularly concerning given the significant changes to live systems which the RMR requires.

We would advocate a more measured approach to implementation whereby Ofgem can more reasonably expect that all suppliers are able to comply with the Standards of Conduct throughout the transition to full RMR compliance.

Disproportionate transitional proposals

In our view the requirement to modify closed fixed-term tariffs which do not expire until after 31 March 2014 effectively introduces retrospective regulation for these tariffs and as such is disproportionate. It is particularly perverse that changes to such tariffs may be to the detriment of the customers who have previously demonstrated the proactive behaviour which Ofgem hopes to encourage through the RMR.

Ofgem may be concerned that a large number of new fixed-term tariffs may be launched and subsequently closed to new customers before the new tariff rules take effect. However, there are more proportionate options available which we would urge Ofgem to consider. For instance, a cut-off date similar to that used for existing white label tariffs could be applied whereby tariffs in place prior to that date need not be modified.

We would also question whether making Dead Tariffs compliant with the new rules is proportionate in that the more important consideration is whether the tariff is *cheaper* than the cheapest live evergreen tariff. The combined effect of the improved information that will be available to customers under the RMR should ensure that customers are able to identify the best deal going forward. The requirement to unilaterally vary existing tariffs therefore introduces customer detriment for extremely marginal benefit.

Conclusion

SSE hopes to deliver the changes required by the RMR in a timely manner. We welcome the measures which can help in the ongoing work to rebuild consumer trust in energy suppliers. The concerns highlighted in this response reflect our serious misgivings that a rushed implementation based on legal drafting which lacks the clarity necessary to promote compliance risks adverse consequences for customers. This risk is particularly significant during the transition phase preceding full adoption of the RMR measures. We would urge Ofgem to consider the following mitigating steps:

- A full review and redrafting of the licence conditions which implement RMR policy



- Allowing suppliers sufficient time to implement robust and well designed solutions to meet the new obligations

We hope that this response is useful and would be happy to discuss the points raised here in more detail.

Yours sincerely,

Roger Hutcheon

Regulation Markets

Appendix 1 – Redrafting SLC 22D

This appendix presents two possible redrafts of SLC 22D – Dead Tariffs. These are presented in the spirit of demonstrating the potential benefits of a simpler approach to drafting. Whilst requiring further work to ensure they satisfactorily meet the policy requirements, we believe each represents a better starting point than the version in the current consultation (which runs to 10 pages). SLC 22D was selected as typifying the drafting issues described in this response, but we would emphasise our support for a thorough redrafting exercise for all of the new licence conditions.

Part 1 presents a version which attempts to cover the key elements of the policy covered in Ofgem’s drafting of 22D. Specifically, if a supplier is to continue to supply on a dead tariff:

- that tariff first needs to be made compliant with the RMR tariff requirements (SLC 22A & 22B, excluding 22B.1(b)), through as few changes to the existing structure/ Ts&Cs as possible
- one old tariff should lead to only one compliant dead tariff (can't split one old tariff into two or more compliant variants, e.g. based on consumption)
- the charges on the compliant structure need to be lower than the cheapest live evergreen tariff
- suppliers should inform customer of any changes to their existing tariff in a notice sent between 49 and 42 days before the change takes effect
- the customer must be made aware of options to avoid the change (choose a different tariff or switch supplier, with the usual caveats about transfer blocking for unpaid debt etc)
- if making the tariff compliant leads to increased charges or reduced discounts this notice must provide the information expected under SLC 23 for unilateral variations
- if the tariff *cannot* be amended to be compliant - or making it compliant makes it the same as a live tariff - the dead tariff should be closed and customers migrated to a Deemed Contract on the cheapest live evergreen tariff

The version in Part 2 is based on a simpler proposal which would not require that Dead Tariffs be made compliant with the new tariff rules. SSE would regard this approach as a more proportionate means of addressing the specific concern that customers who have never changed tariff or supplier are charged significantly more for their energy than more proactive customers. By removing the potential increase in costs associated with achieving RMR compliance, this approach means that customers already on a better deal than the cheapest live evergreen tariff would not have to pay an “RMR premium” in order to stay on their existing tariff.

The requirements for this version are summarised as:

- Suppliers can only continue to supply a customer on a dead tariff if that customer is better off than they would be on the cheapest live evergreen tariff
- Such customers should be advised their existing tariff is cheaper than the cheapest live evergreen tariff, and also that an annual check will be performed to ensure that the customer remains on the cheaper option for them
- Where a customer would be better off on the live tariff, the supplier must clearly inform the customer that they will be migrated to the cheapest live evergreen tariff and provide the customer with appropriate information (the principal terms of the new tariff etc)
- Such migrations may mean the customer is moved to a Deemed Contract
- Affected customers should be properly informed of any options available to them if they do not wish to be moved to the proposed live evergreen tariff

Part 1

Condition XX - Dead Tariffs (requiring RMR compliant tariffs)

General Prohibition

XX.1 Except in accordance with this Condition XX, the licensee must not supply Domestic Customers on the basis of a Dead Tariff.

Obligations to be achieved by the Effective Date

XX.2 By the Effective Date, the licensee must:

(i) for each of its Domestic Customers, undertake a review of its Domestic Supply Contracts for the purpose of identifying whether that Domestic Supply Contract includes a Dead Tariff;

(ii) for each Domestic Supply Contract that includes a Dead Tariff, the licensee must carry out a Dead Tariff Review in accordance with Condition XX.3; and

(iii) subject to Conditions XX.6, and following the Dead Tariff Review, ensure that each of its Domestic Supply Customers is supplied Gas/Electricity on the basis of the Cheapest Condition XX Tariff.

Dead Tariff Review

XX.3 To carry out a Dead Tariff Review, the licensee must:

(i) undertake a comparison of Charges for the Supply of Gas/Electricity that would be payable under the Cheapest Live Evergreen Tariff and the Charges for the Supply of Gas/Electricity that are payable under the relevant Dead Tariff; and

(ii) subject to Condition XX.4, identify which of the two tariffs offers the cheapest Charges for the Supply of Gas/Electricity (**the Cheapest Condition XX Tariff**).

XX.4 A Dead Tariff can only be the Cheapest Condition XX Tariff if the licensee has first ensured that the relevant Dead Tariff complies with Condition XX.7.

XX.5 Where following a Dead Tariff Review it is identified by the licensee that the relevant Dead Tariff is the Cheapest Condition XX Tariff, then the licensee must carry out a Dead Tariff Review annually until the relevant Dead Tariff is no longer the Cheapest Condition XX Tariff.

Dead Tariff Review Notice

XX.6 Following a Dead Tariff Review, the licensee must provide a Dead Tariff Review Notice to the relevant Domestic Customer:

(a) where the Dead Tariff has been found by the licensee to be the Cheapest Condition XX Tariff, the Dead Tariff Review Notice must contain the following information:

(i) Notice that their existing Dead Tariff is cheaper than the Cheapest Live Evergreen Tariff;

(ii) Notice that the Domestic Customer will receive an annual Dead Tariff Review to ensure that their Dead Tariff remains cheaper than the Cheapest Live Evergreen Tariff; and

(iii) advice to the Domestic Customer that the licensee shall send an annual Dead Tariff Review Notice to the Domestic Customer to advise the Domestic Customer of the outcome of the annual Dead Tariff Review.

(b) where the cheapest Evergreen Supply Contract has been found by the licensee to be the Cheapest Condition XX Tariff, the Dead Tariff Review Notice will contain the following information:

(i) Notice that their the Cheapest Live Evergreen Tariff is cheaper than the relevant Dead Tariff or where Condition XX.9 applies, Notice that the relevant Dead Tariff will be discontinued;

(ii) Notice that the Domestic Customer will be automatically placed on the Cheapest Live Evergreen Tariff without the Domestic Customer requiring to take further action;

(iii) the Principal Terms of the Contract or Deemed Contract, as applicable to the Cheapest Live Evergreen Tariff;

(iii) Notice that Contracts, with terms that may be different from the terms of the Cheapest Live Evergreen Tariff, may be available from the licensee and of how information about such Contracts may be obtained;

(iv) Notice that the Domestic Customer has the right to end the Domestic Supply Contract, by choosing to switch to another Domestic Supply Contract either with the licensee or any other Gas/Electricity Supplier, without incurring a Termination Fee, in the event that the Domestic Customer does not wish to proceed with the Cheapest Live Evergreen Tariff.

Additional Requirements for Dead Tariffs

XX.7 The additional requirements that a Dead Tariff must meet in order to be designated as the Cheapest Condition XX Tariff are as follows:

(i) the Dead Tariff must comply with the requirements of Conditions 22A and 22B, excluding Condition 22B.1(b);

(ii) if the terms and conditions of the relevant Dead Tariff require to be varied in order to comply with Condition XX.7(i) then the licensee must take all reasonable steps to ensure that the variations are minimised and must only include variations that are necessary in order to achieve compliance with Condition XX.7(i);

(iii) following any necessary variation required under Condition XX.7(ii), the relevant Dead Tariff must continue to be a single tariff and may not be sub-divided into two or more tariffs; and

(iv) the supplier must communicate any variation required to be made to the relevant Dead Tariff by sending the Domestic Customer a Notice in accordance with Condition XX.8.

XX.8 The licensee must give Notice of any variation made under Condition XX.7(ii). The Notice must:



(i) be given to the Domestic Customer and not less than 42 days, and not more than 49 days in advance of the date on which the variation has effect; and

(ii) must otherwise comply with the requirements relating to Unilateral Variations in Conditions 23.4 (under the exception of Condition 23.4(a)), 23.5 and 23.6.

XX.9 For the avoidance of doubt, if the relevant Dead Tariff does not meet the requirements of Condition XX.7, or the licensee chooses to discontinue the relevant Dead Tariff, then the relevant Dead Tariff may not be the Cheapest Condition XX Tariff and the Domestic Customer must be provided a Notice under Condition XX.6(b).

Definitions needed:

“Dead Tariff” in respect of an Evergreen Supply Contract, is a tariff which is not a Live Evergreen Tariff

“Effective Date” [Date that Ofgem wants the migration to have occurred by]

“Dead Tariff Review” a review of a Domestic Customers Dead Tariff carried out in accordance with Condition XX.3

“Cheapest Condition XX Tariff” means the cheapest evergreen tariff identified by the licensee following a Dead Tariff Review

“Dead Tariff Review Notice” means a Notice provided to a Domestic Customer following a Dead Tariff Review

Part 2

Condition XX Dead Tariffs (reflecting simplified policy)

General Prohibition

XX.1 Except in accordance with this Condition XX, the licensee must not supply Domestic Customers on the basis of a Dead Tariff.

Obligations to be achieved by the Effective Date

XX.2 By the Effective Date, the licensee must:

- (i) for each of its Domestic Customers, undertake a review of its Domestic Supply Contracts for the purpose of identifying whether that Domestic Supply Contract includes a Dead Tariff;
- (ii) for each Domestic Supply Contract that includes a Dead Tariff, the licensee must carry out a Dead Tariff Review in accordance with Condition XX.3; and
- (iii) subject to Condition XX.5, and following the Dead Tariff Review, ensure that each of its Domestic Supply Customers is supplied Gas/Electricity on the basis of the Cheapest Condition XX Tariff.

Dead Tariff Review

XX.3 To carry out a Dead Tariff Review, the licensee must:

- (i) undertake a comparison of Charges for the Supply of Gas/Electricity that would be payable under the Cheapest Live Evergreen Tariff and the Charges for the Supply of Gas/Electricity that are payable under the relevant Dead Tariff; and
- (ii) identify which of the two tariffs offers the cheapest Charges for the Supply of Gas/Electricity (**the Cheapest Condition XX Tariff**).

XX.4 Where following a Dead Tariff Review it is identified by the licensee that the relevant Dead Tariff is the Cheapest Condition XX Tariff, then the licensee must carry out a Dead Tariff Review annually until the relevant Dead Tariff is no longer the Cheapest Condition XX Tariff.

Dead Tariff Review Notice

XX.5 Following a Dead Tariff Review, the licensee must provide a Dead Tariff Review Notice to the relevant Domestic Customer:

(a) where the Dead Tariff has been found by the licensee to be the Cheapest Condition XX Tariff, the Dead Tariff Review Notice must contain the following information:

- (i) Notice that their existing Dead Tariff is cheaper than the Cheapest Live Evergreen Tariff;
- (ii) Notice that the Domestic Customer will receive an annual Dead Tariff Review to ensure that their Dead Tariff remains cheaper than the Cheapest Live Evergreen Tariff; and



(iii) advice to the Domestic Customer that the licensee shall send an annual Dead Tariff Review Notice to the Domestic Customer to advise the Domestic Customer of the outcome of the annual Dead Tariff Review.

(b) where the cheapest Evergreen Supply Contract has been found by the licensee to be the Cheapest Condition XX Tariff, the Dead Tariff Review Notice will contain the following information:

(i) Notice that their the Cheapest Live Evergreen Tariff is cheaper than the relevant Dead Tariff;

(ii) Notice that the Domestic Customer will be automatically placed on the Cheapest Live Evergreen Tariff without the Domestic Customer requiring to take further action;

(iii) the Principal Terms of the Contract or Deemed Contract, as applicable to the Cheapest Live Evergreen Tariff;

(iii) Notice that Contracts, with terms that may be different from the terms of the Cheapest Live Evergreen Tariff, may be available from the licensee and of how information about such Contracts may be obtained;

(iv) Notice that the Domestic Customer has the right to end the Domestic Supply Contract, by choosing to switch to another Domestic Supply Contract either with the licensee or any other Gas/Electricity Supplier, without incurring a Termination Fee, in the event that the Domestic Customer does not wish to proceed with the Cheapest Live Evergreen Tariff.

Definitions needed:

“Dead Tariff” in respect of an Evergreen Supply Contract, is a tariff which is not a Live Evergreen Tariff

“Effective Date” [Date that Ofgem wants the migration to have occurred by]

“Dead Tariff Review” a review of a Domestic Customers Dead Tariff carried out in accordance with Condition XX.3

“Cheapest Condition XX Tariff” means the cheapest tariff identified by the licensee following a Dead Tariff Review

“Dead Tariff Review Notice” means a Notice provided to a Domestic Customer following a Dead Tariff Review