

James Crump
Ofgem
10 South Colonnade
Canary Wharf
London
E14 4PU

20 December 2018

Dear James,

Way Forward on the introduction of Supplier Guaranteed Standards of Performance for Switching, and consultation on a Statutory Instrument to bring them into force – ESB Energy Response

ESB Energy welcomes the opportunity to respond to your statutory consultation on new Guaranteed Standards on Switching.

Unfortunately, we do not believe your draft Statutory Instrument is fit for purpose. Without changes, well-meaning suppliers may be liable for payments and unscrupulous suppliers may avoid making payments in ways that don't reflect your policy intent.

The existing Guaranteed Standards are drafted to account for situations where a supplier must make payments to their customer. It's a straightforward bilateral relationship. Your proposals around erroneous transfers envisage a far more complicated set of relationships:

- Suppliers must work together in order to meet the Guaranteed Standard. The contacted supplier has additional responsibilities in terms of gathering adequate information to assess what has happened and to contact the other supplier promptly.
- Suppliers may or may not have valid payment details for the customer and might have to rely on posting out a cheque.
- Where an erroneous transfer has taken place, one of the suppliers will not have a valid contract with the consumer.

Paragraphs 8 and 9 of the Statutory Instrument cover payments to customers as well as the exceptions and limitations that may apply when making those payments. We've identified a number of potential issues for you to consider:

- Paragraph 8 refers to making payments to customers. The powers you're using to enact these regulations come from the Electricity Act 1989 and the Gas Act 1986. Both of those acts distinguish between consumers and customers. Given your intent is for suppliers to make payments to consumers that are not customers of the supplier, does your drafting need to be changed to allow for this?
- Paragraph 9(3)(e)(ii) allows for a supplier to not make a payment where the payment could not be made due to the actions of a third party, despite taking all reasonable steps to make the payment. We think this is a reasonable exception in some circumstances. For example, where the contacted supplier never informs the other supplier that a potential erroneous transfer has taken place it may be reasonable for the other supplier to not make a payment. Otherwise, they'd be making a payment for not meeting a Guaranteed Standard they weren't aware of. There may also be situations where the address to determine whether an erroneous transfer has taken place differs from the address for payment and the contacted supplier fails to provide the payment address. However, we could also see that clause being cited by unscrupulous suppliers who are unwilling to make the payment. Because consumers do not have a good sight of industry processes, they could raise disputes where the exception is being used legitimately or fail to raise disputes where it's being used illegitimately. This drafting needs to be revised.
- Paragraph 6D(4) makes specific provision for a situation where a payment to a customer is made by cheque but the customer does not cash the cheque within 10 working days. In that case, the payment is to be treated as being made when it's received at the customer's postal address. However, Section 8 makes no such provision for payments by cheque. It simply says that the payment must be made to the customer within 10 working days of a breach of the relevant Guaranteed Standard. The current drafting

appears to open up the supplier to multiple breaches and payments if a customer delays cashing or lodging their cheque. Also, there are serious flaws with the specific provision set out in paragraph 6D(4):

- If the consumer has provided an accurate and complete postal address and there is a dispute about whether payment was delivered to the address on time, the only way a supplier would be able to demonstrate on time delivery would be if the cheque was sent by recorded delivery. However, if they choose to deliver the cheque by recorded delivery and there is no one at the address to sign, the cheque will go undelivered. This will probably lead to a breach as the consumer must then collect the cheque from their local post office. So, the supplier has a choice of one approach where they will be unable to demonstrate compliance or another where they will be liable to not meet the standard for reasons outside their control.
- Paragraph 6D(4) specifies payment by cheque. However, payment by cheque is just one method whereby a supplier sends something to a consumer that allows them to subsequently redeem the payment. Your decision to specify cheques rules out other payment options like Postal Orders, which may be preferable for vulnerable consumers without bank accounts. It also rules out innovative new payment methods, such as texting a code to the customer that they can use to redeem the payment at a PayPoint outlet.

We trust that the issues we've raised make clear that a substantial overhaul of your drafting is needed before the Statutory Instrument can be enacted. We would be more than happy to help you with this. Please do not hesitate to get in touch.

Yours Sincerely,

Paul Fuller
Regulation Manager