

Direct Dial: 020 7901 7254
Email: Joanne.tackley@ofgem.gov.uk
6 January 2006

Dear stakeholder,

The regulation of gas and electricity sales to domestic customers: notice of the proposed modification of standard licence conditions 48 (marketing conditions) and consultation on their continuation

Standard licence condition 48 (Marketing of Gas to Domestic Customers) of the gas suppliers licence and standard licence condition 48 (Marketing of Electricity to Domestic Customers) of the electricity supply licence (the marketing conditions) are due to expire on 31 March 2006. The objectives of the marketing conditions are to protect customers from unfair sales activity, to promote public confidence in the competitive process and to ensure that unfair sales activities do not distort competition in the energy retail markets.

The purpose of this letter is for the Authority to give notice pursuant to section 11A(3) of the Electricity Act 1989 and section 23(3) of the Gas Act 1986 of the modification of the marketing conditions; and to consult pursuant to paragraph 12 of the marketing licence conditions about whether the development of competition in electricity supply is such as to require the continuation of any part of the marketing conditions for a further period of time.

1. Background to the marketing conditions

The marketing conditions were introduced to supplement general consumer protection legislation and to provide Ofgem with powers to take action against unfair marketing behaviour by suppliers and their agents. The conditions apply to “marketing activities”¹ of the licensee in respect of the supply or the proposed supply of electricity or gas to domestic customers. Such sales may occur at a customer’s premises (door step selling), in a public place or through a telephone conversation (telesales).

The conditions were introduced in 2002 for a 2 year period with the option for continuation at the Authority’s discretion if the development of competition is such as to require it. When the arrangements were introduced it was recognised that as electricity and gas retail markets develop, the marketing conditions may cease to be necessary both in terms of customer protection and in creating a level playing field for retail competition. The marketing conditions were extended for 2 years in March 2004 following a consultation exercise² that revealed that customer confidence in the competitive market, and hence the development of competition, would suffer if the marketing conditions were allowed to lapse.

¹As defined in paragraph 13 of the marketing conditions

² Ofgem Consultation Document 179/03 “Making markets work for consumers. The regulation of gas and electricity sales and marketing: proposals for the amendment of standard licence condition 48” 19 December 2003

Since the extension of the marketing conditions major domestic suppliers have introduced a code of practice on “face to face” marketing (the AES Energy Selling Code of Practice) which has recently been upgraded through the introduction of sanctions and the appointment of a Code Manager and an independent Code Auditor³.

The overall rate of complaints to energywatch about marketing activities has fallen significantly since the marketing conditions were first introduced as can be seen from Appendix 1. This may be as a result of both investigations undertaken by Ofgem and improvements in self regulation by suppliers. However, as further detailed in this letter, Ofgem still has concerns regarding the face to face marketing activities of some suppliers and the impact these may have on consumer welfare and on the development of retail competition.

2. Ofgem’s considerations about the future of the marketing conditions

The marketing conditions are due to expire on 31 March 2006 and Ofgem has considered what course of action to take. Along with our primary duty to protect gas and electricity consumers, a key factor in Ofgem’s deliberations has been its commitment to Better Regulation⁴ and to reducing the burden of regulation where appropriate. One element of Better Regulation is to ensure that licence conditions do not duplicate requirements placed on licensees by general legislation. Our commitment to Better Regulation also entails promoting, where appropriate, greater reliance upon self regulation to protect consumer interests and to encourage fair competition.

There have been a number of important developments that relate to whether the conditions remain necessary against a Better Regulation test. These are:

- general consumer law in relation to telesales has been enhanced since the introduction of the marketing conditions;
- the EC Unfair Commercial Practices Directive has been adopted and is due to be transposed into domestic law by 12 December 2007. This Directive addresses unfair marketing activities and other misleading or aggressive commercial practices used by businesses when entering into contracts with consumers;
- major domestic suppliers have introduced and have been making improvements to the AES Code.

These developments and their impact on our consideration of the future of the marketing conditions are discussed below.

3. Proposed modification of the marketing conditions

General consumer law in relation to telesales has been enhanced since the introduction of the marketing conditions. In particular, the Consumer Protection (Distance Selling) Regulations 2000 deal with contracts made exclusively by means of “distance communication including by mail order, telephone, radio, the internet, fax or television”.⁵ They overlap to a certain extent with the marketing conditions in that:

- the consumer must be given certain, specified information about the goods or services offered (for example, the supplier’s business name and address, a description of the goods or services, and information about price). This information must be provided in a clear and understandable manner, in good time prior to the conclusion of the contract;
- after making a purchase, the supplier must provide to the consumer written confirmation of the information referred to above; the confirmation must also include information on the conditions and procedures relating to the exercise of the right to cancel the contract; and
- the consumer has a cooling off period during which he has the unconditional right to cancel the contract.

³ More details on the AES code can be found at <http://www.energy-retail.org.uk>

⁴ More details on Better Regulation can be found at <http://www.brtf.gov>

⁵ Details of the regulations can be found at <http://www.dti.gov.uk/ccp/topics1/guide/distsell.htm>.

While the Distance Selling Regulations achieve some of the same outcomes of the marketing conditions (for example, properly informed consumers with a right to cancel the contract), overall they provide less protection for consumers than the marketing conditions. For example, they do not contain provisions relating to recruitment processes (SLC 48(2)(a)) or training requirements (SLC 48(2)(b) or the 14-day contact requirements (SLC 48(4)). Further, unlike the marketing conditions, the Distance Selling Regulations do not require unsolicited contact to take place at a reasonable time (SLC 48(2)(c)(iii)) or require the licensee to provide compensation to customers adversely affected by non-compliance (SLC 48(6)).

The effect of the modification of the marketing conditions would be to reduce electricity and gas telesales protection to the level currently received in relation to other products to which the Distance Selling Regulations apply. Ofgem is not aware of any arguments for providing greater protection in respect of gas and electricity telesales than is provided in respect of telesales generally. Ofgem also understands that energywatch receives fewer telesales complaints and these do not appear to be activities that cause particular consumer concern.

Accordingly, it is Ofgem's view that the Distance Selling Regulations provide adequate protection against unfair telesales activities. For this reason the Authority proposes to remove the application of the marketing conditions to telesales.

The proposed modifications to the marketing conditions are set out in Appendices 2 and 3, and would entail removing paragraph 3(c) which refers to a telephone conversation between a representative of the licensee and a domestic customer and amending the definition of "marketing activities" in paragraph 13 to exclude telesales.

3.1 Process for modifying the marketing conditions

If the marketing conditions are continued passed 31 March 2006 (as discussed below), the Authority proposes, shortly after that continuation, to modify the conditions as set out in Appendices 2 and 3 of this document under the Electricity Act 1989 and the Gas Act 1986. According to these Acts⁶ the Authority may make modifications to standard licence conditions (even if there are objections from suppliers) where it is satisfied that:

- the effect of the standard conditions is such as to impose a burden affecting relevant licence holders in the carrying on of activities to which the modifications relate;
- the modifications would remove or reduce the burden without removing any necessary protection; and
- the modifications are such that no holder of a licence of the type in question would be unduly disadvantaged in competing with the other holders of such licences.

Having consulted informally on this matter, it is Ofgem's view that these tests have been met in that the amendment would:

- reduce the burden on licence holders since they would no longer have to comply with both the marketing conditions in respect of telesales and the Distance Selling Regulations. The risk that both the marketing conditions in respect of telesales and the Distance Selling Regulations could both be enforced against a non-compliant licence holder would also be removed;
- only remove protection that is in excess of that currently provided in all other sectors governed by the Distance Selling Regulations;
- not unduly disadvantage any licence holder, for example by leaving a licence holder with abnormal stranded costs or by interfering in other ways with their ability to compete in the retail markets.

4. Continuation and future review of the marketing conditions

Although there has been a marked reduction in the number of marketing related complaints to energywatch, Ofgem still has concerns about the face to face marketing activities of some suppliers.

⁶ Section 23(7)(c) and (10) of the Gas Act 1986 and section 11A (6)(c) and (8) of the Electricity Act 1989

For example, Ofgem has recently been called upon to investigate the face to face marketing activities of a major supplier and there is continued media concern around unfair marketing activities. While this is the case Ofgem believes that some customers will be reluctant to exercise their choice over energy supplier and that some customers and suppliers will look to Ofgem to protect them against unfair face to face marketing activities.

At the same time the industry has made significant steps towards preventing unfair marketing activities and it is possibly only a matter of time before self regulation provides a viable alternative to the marketing conditions. To get to this point the AES Code would need to be enhanced to meet more closely OFT Consumer Codes Approval Scheme⁷ requirements, including by:

- improving transparency over how breaches of the AES Code are investigated and increased reporting on what sanctions have been applied;
- increasing the involvement of consumer bodies in reviewing and revising the AES Code;
- increasing brand awareness of the AES Code and/or taking other measures to deter a signatory from choosing to exit the AES Code rather than comply with it;
- attracting signatories beyond the six major suppliers.

Significant improvements in the AES Code over the next year could mean that there is a case for removing the marketing conditions prior to the end of March 2008.

Taking these matters into account, Ofgem's view is that the development of competition is such as to require the continuation of the marketing conditions for a further 2 year period (ending on 31 March 2008). However, it proposes to keep this and legislative developments (including the transposing of the Unfair Commercial Practices Directive) under review. If the Authority considers that the development of competition is such that the continuation of the marketing conditions is no longer required, it may direct that the conditions shall cease to have effect from an earlier date.

4.1 Process for continuing the marketing conditions

In accordance with paragraph 12 of the marketing licence conditions, after consulting, the Authority may give notice that it considers that the development of competition is such as to require the continuation of any part of the marketing conditions for up to a further 2 year period.

If the Authority does not give that notice, the marketing conditions shall cease to have effect on and from 31 March 2006.

5 Responses

Ofgem invites responses to this document as detailed below.

5.1 Proposed modification of the marketing conditions

Representations and or objections may be made with respect to the proposed modifications to the marketing conditions set out in Appendices 2 and 3 of this letter by Friday 3rd February 2006.

5.2 Continuation and future review of the marketing conditions

The Authority seeks responses to the proposal to continue the marketing conditions until 31 March 2008 or such earlier date that it may direct if the development of competition is such that the continuation of those conditions is no longer required. In particular, it seeks views about whether the development of competition in electricity and gas supply is such as to require the continuation of the marketing conditions for that period,

- and if not, what is the evidence that the licence conditions are no longer required;

⁷ More details can be found on <http://www.ofg.gov.uk>

- and if so, what arrangements (for example legislative, self regulatory, competitive) should Ofgem be monitoring with a view to removing the licence conditions, either before or at the end of March 2008?

Responses to this consultation letter are due by Friday 3rd February 2006.

Representations and objections with respect to the proposed modifications to the marketing conditions and responses to the consultation about the continuation of those conditions should be sent to **Joanne Tackley** on the above contact details.

Where possible, we would prefer responses in electronic format. We will treat as confidential all information so marked. Otherwise responses to the above questions will be published by placing them in Ofgem's library and on Ofgem's website.

Yours sincerely,

Joanne Tackley

Appendix 1

Direct Selling complaints received by energywatch

