Strategy & Regulation

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Supplementary Guidance Consultation
Retail Market Opening Programme
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Dear Sir/ Madam

CONSULTATION ON SUPPLEMENTARY GUIDANCE: ASSESSING WHETHER NON-HOUSEHOLD CUSTOMERS IN ENGLAND AND WALES ARE ELIGIBLE TO SWITCH THEIR WATER AND WASTEWATER RETAILER

Thank you for the opportunity to comment on Ofwat's supplementary guidance on assessing whether customers in England and Wales are eligible to switch their water and wastewater retailer. We note that the Updated Eligibility Guidance that Ofwat published on 4 April 2016 makes significant changes to the eligibility guidance that Ofwat provided in August 2015. We therefore have not had time to undertake a detailed cross-examination between the supplementary guidance and the Updated Eligibility Guidance. We present our comments on the supplementary guidance here. We will provide detailed comments on the drafting of Ofwat's Updated Eligibility Guidance in line with the 2 May 2016 deadline.

For ease of reference, we have structured our response under the three questions posed in Ofwat's consultation. Before that, however, we have included some general observations.

General observations

In most cases, it will be obvious whether a given premises is, or is not eligible to change supplier. In some cases, however, the issue will be harder to determine. It is in these "borderline" circumstances that Ofwat's guidance will be of most value. It is important therefore, that the guidance addresses the "borderline" cases overtly, and that it is clear on what the relevant position is. This, in turn, requires that the terminology and language used in the guidance are also clear.

To support this, we have three comments on the current draft.

First, we note that the current draft does not provide a glossary or list of defined terms, and that, as a consequence, a given term may be used with different meanings at different points in the guidance. For example, in some places, the

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terms "premises" and "property" appear to be used interchangeably (e.g. page 13, paragraph 4 and Section 1.4.13), whereas in most other places "premises" is given a more specific meaning that does not appear to be synonymous with "property". We also note that different terms appear to be used for the same meaning in different places. For example, in some places the document refers to "premises" and in others it refers to a "set of premises". It was not clear to us whether a set of premises is a single premises or a collection of them. We propose, therefore, that Ofwat introduces a standard glossary of terms to be used for all of its documents relating to premises and eligibility.

Second, it is important that the language used is clear. In many places, the language is somewhat caveated, using terms such as "generally" etc. This point is illustrated by the two paragraphs on page 14 that discuss allotments. The first paragraph states "*The principal use of an allotment is not as a home and so such premises should be included in the non-household market*". This is a clear and unambiguous statement. However, the second paragraph states "*Allotment societies or association that operates multiple allotments on behalf of their members should* ***generally*** *be eligible to participate in the non-household market*" [our emphasis]. In this case, the use of the term "generally" creates ambiguity, and leads the reader to want further guidance from Ofwat on what these exceptions to the rule might be. It would be helpful, therefore, if the use of ambiguous terms could be reviewed with the intention of either removing them or providing further detailed guidance on the exceptions, as appropriate. (If it is intended that undertakers will have reasonable jurisdiction to determine the status of the premises in specific circumstances, then it would be helpful if the guidance stated this explicitly in relation to those circumstances.)

Third, we recognise that Ofwat has undertaken significant work to set out clear eligibility guidelines for the industry. There is, however, more to do. Given the tight timeline leading to market opening in April 2017, we would encourage Ofwat to consider including a general rule that, where there is significant uncertainty surrounding the eligibility of a premises, or where Ofwat has not provided guidance on whether it should be eligible, that the premises is <u>not</u> included in the market at this stage. The inclusion of such a principle would reduce the time and cost associated with debate over a small number of borderline cases. In addition, such a rule would mean that there is less confusion and disruption for end customers, some of which may move in and out of the market as the specific details of the guidance change. We would envisage that once the market has opened in April 2017 work could begin on identifying any excluded premises and moving them into the market in a controlled manner.

1. Issues encountered which are not currently reflected in the guidance

Whilst this draft addresses a range of issues encountered, there are further cases that have not yet been included. In particular, we hope the next iteration of the draft guidance will provide further guidance on:

- circumstances where several independent properties are served by a shared supply;
- the English Welsh boundary definition;
- how erroneous classifications as either household or non-household can be corrected; and
- the extent to which data for smaller sites need to be uploaded to MOSL.

We provide more detail on each of these in turn.

Circumstances where several independent properties are served by a shared supply

We note the definition on page 9 states that "*in cases where a company supplies several properties through a single supply point – for example, because they are connected to a private network – these properties should be defined as a single set of premises*". This would mean, for example, that where there were several independently owned properties, each billed separately, that were supplied through a single supply point, they would be regarded as a single premises. One example of this type of arrangement might be two adjacent properties with a shared supply, one of which was commercial, and the other was residential. In these circumstances, it was not clear to us how this would work in practice. Does it mean that it would be necessary for both properties comprising the "premises" to switch, even if they were independently owned, and billed separately at present (albeit that they may have a shared supply)?

The English Welsh boundary definition

It would be helpful for current market participants and new entrants if further eligibility guidance was given on the overlap between different water and wastewater undertakers, particularly with respect to the English-Welsh Border. (This is relevant to Thames Water, as we have a boundary with Albion Water, which we understand is currently mainly in Wales by virtue of its Shotton Paper site.) For example, does a company have to be either "wholly or mainly" in Wales or "wholly or mainly" in England for both services, or can a single company be "wholly or mainly" in Wales for one service (e.g. water) and at the same time be "wholly or mainly" in England for the other service (e.g. sewerage)?

Managing erroneous classifications

We would like to understand how Ofwat will view erroneous classification of households and non-households.

At the MOSL workshop in December 2015, Ofwat suggested that in marginal cases it may be better to put a customer in the market than to leave the customer out. We agree that it would be sensible and pragmatic for there to be a default

position for marginal cases set out in the guidance. As we set out above we believe that in order to facilitate a smooth and efficient market opening it would be sensible if the general rule was that such marginal customers were not included in the market.

It would also be helpful if the guidance provided assurance that, where a premises has been incorrectly classified, companies will be given a reasonable period of time to rectify the situation before enforcement action can be taken.

Data for smaller sites

We note that the last paragraph of section 1.3.1 of the guidance states that the eligibility guidance may result in some very small sites becoming eligible but "*...that priority in the identification of eligibility and uploading of data should be guided by those sites that have the greatest potential to benefit from competition*". This implies that the data upload does not need to include very small sites. It would be helpful if the guidance confirmed this point explicitly.

2. Potential inconsistencies between Ofwat's draft supplementary guidance and the relevant legislation

We have identified a number of areas where there may be potential inconsistencies between Ofwat's draft supplementary guidance and the relevant legislation. These include:

- the treatment of vacant premises; and
- the eligibility of cross-border sites.

Treatment of vacant premises

WIA91, section 17C(1), defines household premises as "*...premises ... in which, or in any part of which, a person has his home*".

Section 17C(2) sets out the "principal use" test. Our reading of section 17C(2) is that, in order for it to apply, the premises must first have met the condition that it is one "*in which, or in any part of which, a person has his home*".

We note that page 16 of the guidance states that "*As vacant properties will, in the majority of cases, still be liable for either Council Tax or business rates (or both), we consider that such liability would be a reasonable approximation of principal use*". It was not clear to us, however, that the "principal use" test in section 17C(2) is relevant if the premises is not one "*in which, or in any part of which, a person has his home*" by virtue of it being vacant. The guidance may, therefore, be inconsistent with the legislation in this respect.

Eligibility of cross-border sites

WIA91, section 17A, appears to allow WSSL licences to be granted to supply a subset of non-household premises – namely those that are connected to "*the supply system*" of an undertaker. It does not appear to allow retailers to access customers connected to parts of the network that fall outside the definition of "supply system".

As amended by the Water Act 2014, "Supply system" will be defined in WIA91 section 17B as assets "*developed or maintained by the water undertaker for the purpose of complying with its duty under section 37*", and the duty under Section 37 relates only to "*supply within its area*". It appears, therefore, that section 17B does not allow cross-border premises to be eligible to switch, as cross-border assets fall outside the definition of "supply system". It would be helpful if the guidance clarified whether or not the WIA91 will permit a WSSL licensee to acquire cross boarder customers.

(For the avoidance of doubt, we note that there is a rider in section 66A that states for "*the purposes of this section and sections 66AA to 66C ... premises which are outside a water undertaker's area are to be treated as being within that area if they are supplied with water using the undertaker's supply system*". Section 66AA to section 66C set out the wholesale supply duties. One interpretation of this is that, to the extent that a WSSL licensee has acquired cross-border customers via retail exit, then the undertaker is obliged to provide wholesale services but, as the rider does not seem to encompass section 17A, it does not appear to permit a WSSL licensee to obtain a licence that will allow it to acquire cross-border customers.)

3. Proposals in Ofwat's supplementary guidance which may be unreasonable

In our view, the proposals in Ofwat's supplementary guidance are reasonable.

Other comments

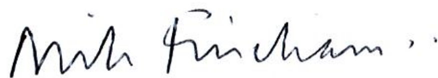
We note that the "hierarchy of considerations" set out on page 8 of the draft supplementary guidance states that the second consideration should be "determine the principal use of the premises" and the third consideration should be to use "liability for business rates or council tax", but only where the second consideration was not "readily apparent". It would be more efficient if companies were allowed use "liability for business rates or council tax" as the main proxy for determining the principal use of the premises, and we would be grateful if Ofwat could amend the "hierarchy of considerations" accordingly.

Finally, we interpret section 1.4.1 on university accommodation to mean that some university accommodation will be eligible (where food and wider services are provided) and some will not be eligible (self-contained/self-catering). This

distinction requires knowledge of the internal configuration of a building and of the contractual arrangements between the university and the students. For example an accommodation block may provide a mix of accommodation types and those that have only a room may be provided with meals or catering facilities in a different building. Indeed, in some university accommodation, students are able to elect at the beginning of each term whether to be self-catering or not. To enter into dialogue with the university, accommodation landlord, and/or individual students is likely to be time consuming and costly. We advocate reverting to the earlier position, i.e. to use the dependency principle and make these eligible for market opening.

I hope the above comments are helpful, please feel free to contact us if you would like to discuss any of these points further.

Yours sincerely,



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