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31 May 2016

Dear Ruth,

**Re: Consultation on further changes to all instruments of appointments**

We welcome the opportunity to respond to this consultation on the proposed further changes to companies' Instrument of Appointment (IoA) for the opening of the non-household retail market. We support Ofwat's approach to early informal consultation on these matters ahead of the formal consultation as this will mitigate the risk to market opening.

For clarity, we have structured our response through responses to the respective questions set out in the consultation document.

*Q1 Do you agree with the proposed new conditions summarised in Table 1.1? In your response, please provide comments on each of the proposed new conditions separately.*

We are happy with the principle to introduce the three additional conditions. We have a number of specific comments on the MAC condition wording which we set out under our response to question six.

*Q2 Do you agree with the proposed changes to existing conditions as summarised in Table 1.2? In your response, please provide comments on each of the proposed changes separately.*

Yes, broadly speaking and subject to the detail of our response to Q6 we support the introduction of the proposed modifications to existing conditions.

*Q3 Do you consider that derogations may be required for small companies and/or companies whose supply systems are wholly or mainly in Wales, due to their limited number of eligible customers? Please state what any such derogations should cover.*

Our view is that in order to maintain the “most level” of level playing fields derogations should not generally be applied unless there is an over-riding compelling reason to do so. In the event Ofwat proceeds with derogations, Ofwat must ensure that these are applied in a manner that does not disadvantage any specific section of stakeholders, namely wholesalers, retailers, and customers.

*Q4 Do you agree with our proposal to use a combination of ‘sunset’ and/or ‘sunrise’ clauses for the changes so that we can implement these changes ahead of the Secretary of State’s decisions on retail exit?*

We are sympathetic to the difficulty Ofwat has in accommodating the necessary IoA changes within the Defra’s timetable for market opening and for its retail exit approval decisions. Sunset/sunrise clauses are not a particularly elegant way of framing Instruments of Appointment, especially given the laudable on-going project to strive to simplify them. However, there is no technical reason why they cannot achieve their objectives, and so we are generally supportive. We would urge Ofwat to (i) continue to press Defra to make exit decisions as soon as possible; and (ii) consider removing the sunset clauses from relevant Instruments of Appointment as soon as possible following the retail exit of any undertakers.

*Q5 Do you agree with our proposal to use section 55 of the WA14 to make these changes?*

We support the proposal for Ofwat to use their powers under s55 of WA14 on the following basis:

- As discussed under our response to question 4, Ofwat is already coping with a challenging timetable;
- Ofwat’s early engagement and consultation (which is most welcome) does present an opportunity to object;
- The changes proposed affect all undertakers equally; and
- The changes proposed can fairly be said to be entirely consequential: nothing is proposed that we would consider non-consequential.

*Q6 Do you have any comments on the proposed drafting set out in the Appendices?*

Our detailed comments relate to three areas: the MAC condition, condition S and other changes.

*The MAC condition*

We support the initial obligation that “The Appointee must be a party to and comply with the [MAC]”.

Nevertheless, the obligation following it is curious to the point that we strongly feel that it is inappropriate to incorporate it. This obligation states that the Appointee must take all steps within its power to ensure that the MAC remains a document that:

- is designed to facilitate the MAC Principles; and
- conforms to the requirement the condition then sets out in paragraph 2 relating to modification of the MAC; and
- makes express provision for a list of matters the condition then sets out in paragraph 3.

This raises a number of considerations, specifically:

- Does the MAC not facilitate its own principles and contain the prescribed items already?
- The MAC can only be adapted to better facilitate the (para.2) MAC principles or (para.3) specified obligations by altering its terms, and any one undertaker is only one of many represented by only two seats on the MAC Panel; so what steps are effectively within an individual undertaker’s power?
- How far must the undertaker go to press changes it believes in, especially where Ofwat and/or other participants disagree, given “all steps” is a high standard?
- Proposals to change the terms of the MAC require Ofwat’s approval in any event;
- Ofwat is also entitled to propose a change on its own account and can also direct change in order to better accommodate the MAC principles or the prescribed obligations;
- The Panel (on which the undertaker has only indirect representation) does not appear to have the power to make a change, only to recommend it;
- Adherence of the MAC to its principles is frankly an entirely subjective matter: how then may undertakers (and their stakeholders) have any certainty whatsoever as to whether they compliant with this part of the IoA?
- Self-regulation is appropriate to an extent, but (it is submitted), this takes the principle too far.

We were interested to hear Ofwat’s rationale at the recent workshop that the reason the MAC condition differs from, say, the CPCoP condition is

because Ofwat does not “own” the MAC, but we do not believe that this is a logical reason for including the aforementioned part of the MAC condition. Ofwat also expressed concerns that undertakers are not directly obliged to comply with the MAC principles. We disagree, since an obligation to comply with the MAC is an obligation to comply with the principles contained within it. We would however not object to a simple obligation in the IoA to comply with the MAC principles, despite that being somewhat otiose.

Condition S Customer Transfer Protocol

Like Ofwat, we recognise that there are transition issues between the operation of the CTP and the WRC, and that there is no more elegant or effective way of dealing with it in the IoA than the changes proposed. At the recent workshop we (and other participants) suggested that Ofwat might produce an information notice setting out what should happen in respect of CTP applications within a period of up to 2-4 weeks prior to “Go Live”, including that no enforcement action will be taken for not progressing such applications and directing the application to the WRC.

Other changes

Anglian Water supports the other changes, which seem pragmatic and/or designed to create a “level playing field” for integrated wholesalers, exiting wholesalers, retailers and customers alike.

Next steps

I trust these comments will help to positively shape the final version of the licence modification proposals. As ever, please do not hesitate to get in contact if you wish to explore anything further.

Yours sincerely

A handwritten signature in black ink that reads "Jean Spencer". The signature is written in a cursive, slightly slanted style.

**Jean Spencer**  
**Regulation Director**