

By e-mail and by post:

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Our ref

Dear Ruth

Response to "Proposals to modify Instruments of Appointment under section 55: a consultation" (15 July 2016)

This letter sets out our comments on Ofwat's proposals to modify all existing Instruments of Appointment to introduce three new conditions and amend some of the existing conditions, in advance of the expanded retail market for business customers which is opening in April 2017.

The nature of the consultation

1. We recognise the time restraints that Ofwat finds itself bound by and accordingly:
 - 1.1. We are satisfied that the use of section 55 of the Water Act 2014 ("WA14"), rather than section 13 of the Water Industry Act 1991, is appropriate in this case because:
 - 1.1.1. the broad thrust of the alterations are "necessary in consequence of provision made by or under Part 1 of WA14" (although particular alterations might not be, in our view – see *below*); or, the alterations are at least expedient in consequence of such;
 - 1.1.2. the alterations affect all appointees equally; and
 - 1.1.3. we agree that section 55's use is proportionate in respect of the proposed alterations.

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Proposed New Condition: the MAC Condition

2. In our letter of 31 May 2016, given in response to "Retail Market Opening – Further Changes to All Instruments of Appointment: A Consultation" (May 2016), we said the following of the proposed MAC Condition:

"The initial obligation "The Appointee must be a party to and comply with the [MAC]" can be supported.

Nevertheless, the obligation following it is curious to the point that Anglian Water strongly feels 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 does not seem to make sense on a number of levels:

- 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. Anglian Water disagrees, since an obligation to comply with the MAC is an obligation to comply with the principles contained within it; but we would not object to a simple obligation in the IoA to comply with the MAC principles...."

3. The current consultation suggests [*page 10, top*] that consultees previously raised a concern to the effect that they might be required to undertake duties beyond their control. That does not accurately characterise the point that we were trying to make. Rather, we felt that in respect of MAC Condition (1)(b), appointees had so little control that the inclusion of it, and MAC Conditions (2) and (3) were largely meaningless. Moreover, we consider that it will be extremely difficult to ascertain whether we are compliant with Condition (1)(b).
4. By way of example, assume that we conclude that the MAC has shortcomings in relation to the application of the MAC principles. Is it enough for us to propose a modification of the MAC to the Panel? Are we expected to lobby other appointees? Are we expected to lobby WSSL holders, or Ofwat itself? It is not clear what would constitute "reasonable" steps in this context given that all of the steps listed above are ones which are "within our power". We are aware that our directors are required periodically to give assurance to Ofwat to the effect that Anglian Water is compliant with its Instrument of Appointment. That being the case, it is essential that directors can be sure that we have complied with MAC Condition. For the reasons set out above, we anticipate that directors may be reluctant to provide an unqualified assurance.
5. The consultation also appears to say [*page 10, bottom*] that MAC change restrictions are incorporated into the MAC Condition so that appointees cannot alter the MAC before Ofwat has the opportunity to exercise its veto. We cannot see how this is even a theoretical possibility if MAC Condition (1)(a) forms part of the IoA (to which we have no objection): the MAC is an existing document (whatever its form) and Anglian Water's compliance with it will be a condition of its IoA, including the change process already set out in it. It might therefore be preferable to define the "Market Arrangements Code" in

Condition A as being the Code that currently stands or any alteration for the time being made in accordance with its terms.

6. In short, we feel that the provisions set out in MAC Condition (1)(b), (2) and (3) are already covered by MAC Condition (1)(a), and thus effectively set out twice. This duplication seems to be inconsistent with the aims of the current project to simplify the wording of IoAs.

Proposed New Condition: the Stapling Condition and CPCoP Condition

7. Although Anglian Water Services has not yet finalised its application to exit the non-household retail market in accordance with the Water and Sewerage Undertakers (Exit from Non-household Retail Market) Regulations 2016, we intend to do so with effect from Market Opening. The Stapling Condition and CPCoP Condition are therefore unlikely to be directly relevant to us. Nevertheless, we agree that it is important for these conditions to be included in order to ensure the application of a level playing-field.

Other

8. We welcome generally the improvements in drafting.
9. We have no objection to the publication of this response on Ofwat's website.

Yours sincerely

Claire Russell
Group Legal Director