Complaint by British Telecommunications plc against Scottish and Southern Energy plc regarding the mis-selling of fixed line telecommunications services

Ofcom case closure

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Case closure statement

Section 1

Summary

1.1 Ofcom has issued this case closure notice following an investigation into the transfer by Scottish and Southern Energy plc ("SSE") of its customers from a calls-only telephony service to a calls and line rental telephony service.

1.2 The investigation followed a complaint made by British Telecommunications plc ("BT") alleging that SSE had contravened General Condition 14.5 ("GC14.5") by failing to obtain the positive express consent of its customers prior to the transfer taking place.

1.3 SSE, via its SSE Energy Supply Limited subsidiary ("SSEESL"), had sought to transfer its calls-only telephony customers to the new calls and telephone line rental package that it was offering through the use of what Ofcom refers to as “negative opt-out letters”.¹ That is, ahead of placing orders to transfer customers away from BT’s telephone line rental service to the new SSE line rental service, SSE sent letters which advised customers that the transfer would take place unless they contacted SSE within 14 days to discuss the matter. SSE did not obtain positive express consent from its customers for the transfer.

1.4 Ofcom has concluded that the use of these negative opt-out letters contravened the requirements of the sales and marketing code of practice that SSE is obliged to establish and comply with pursuant to GC14.5.

1.5 Ofcom’s view is that the use of negative opt-out letters is likely to contravene the requirements of any valid sales and marketing code of practice established in accordance with GC14.5. In seeking to provide any consumer with a new service, Ofcom would always expect communications providers to obtain the positive express consent of that consumer before any order to transfer existing services is placed.

1.6 In this particular case, Ofcom acknowledges that SSE quickly recognised that its conduct raised regulatory concerns once contacted by Ofcom and took immediate steps to reduce the harm to consumers caused by its conduct. In particular, SSE cancelled the majority of the line transfers before they had completed. Furthermore, for those customers whose telephone lines had already transferred, SSE has attempted to make contact and seek express positive consent from them to the change in line rental service provision from BT to SSE. In each case, until such consent has been obtained, SSE has waived its line rental charges. Where no contact has been possible, SSE is transferring the lines back to BT and no charges have been applied for the duration that the line rental was supplied by SSE.

1.7 Having taken into account these actions and a set of undertakings relating to future conduct offered by SSE (together with the general representations made by both SSE and BT during this investigation), Ofcom has concluded that it is not necessary for it to issue a section 94 Notification for contravention of GC14.5 in relation to SSE’s conduct. Ofcom will, however, continue to monitor SSE’s future compliance with GC14.5 and will take action in future if appropriate.

¹ For convenience, throughout the rest of this document ‘SSE’ refers to SSE and/or SSEESL, as appropriate.
Section 2

Background

Scottish and Southern Energy

2.1 SSE is primarily an energy company and supplies electricity and gas to over seven million customers in Great Britain. SSE additionally supplies telephony services to retail customers via its SSEESL subsidiary, using the brand names Southern Electric, Scottish Hydro-Electric, SWALEC and Atlantic Electric and Gas.

2.2 SSE initially provided its telephony product through the carrier pre-selection ("CPS") wholesale arrangements with BT which meant that its customers paid SSE for their calls but paid BT for the telephone line rental.

2.3 Following the development of wholesale line rental ("WLR"), SSE took the commercial decision to seek to migrate its customer base from CPS to WLR and to stop offering CPS services. WLR allows SSE to bill its customers for both line rental and calls.

2.4 In order to migrate its customers from CPS to WLR based services, SSE sought to amend its customer contracts to change the definition of the service that it was providing its customers from the provision of calls to the provision of calls and a fixed telephone line. SSE wrote to its customers between 29 August and 4 September 2006 advising them of this change to its terms and conditions and advising them that they would be automatically transferred to this new package. Customers who did not wish to transfer their telephony line provision to SSE were advised to contact SSE within 14 days i.e. SSE customers had to negatively opt-out of having their telephone line provision switched from BT to SSE.

2.5 SSE submitted transfer orders with BT to migrate its customers from CPS to WLR between 19 September and 23 September 2006. Transfer orders take approximately 14 days to complete, with the result that the first batch of customers were due to migrate to SSE on 3 October 2006.

BT Retail’s complaint

2.6 BT submitted a complaint to Ofcom on 29 September 2006 alleging that it had received nearly 500 complaints in five days from line rental customers regarding SSE’s plans to migrate their telephone line provision from BT to SSE via a negative opt-out letter.

2.7 BT argued that the term in SSE’s customer contract that enabled it to amend its terms and conditions and the products it was offering was unfair, contrary to the Unfair Terms in Consumer Contracts Regulations 1999, and that the practice of migrating customers using negative opt-out letters amounted to slamming and was therefore a breach of GC14.5, which requires SSE to comply with its code of practice for the sales and marketing of fixed line telecommunications services.

Discussions with SSE

2.8 Following the receipt of BT’s complaint, Ofcom held a series of discussions with SSE during which it set out its concerns that SSE was using negative opt-out letters to
migrate customers and, as such, was failing to obtain customers’ express consent to transfer their service.

2.9 In light of these discussions, SSE recognised that an issue existed and requested that BT cancel the migration orders on 3 October 2006. As a result of SSE’s actions, and cancel orders placed by BT as a result of complaints that it had received from customers, just 1,014 of SSE’s customers had their telephone line rental service transferred without having provided express consent for the transfer.

2.10 During October 2006 SSE sought to contact all 1,014 of these customers by telephone to try to obtain positive express consent for the transfer. Of the 701 customers that it was able to contact, 683 provided positive consent for the transfer of their telephone line rental service.

2.11 During November and December 2006, SSE wrote to those customers that it had been unable to contact via telephone, requesting that they contact SSE to confirm consent for the transfer and warning that SSE might have to terminate the customer’s telephony service if they did not contact SSE. In January 2007, SSE used its door-step sales staff to try to contact those customers that it had still been unable to speak to.

2.12 By 9 February 2007, SSE had obtained positive express consent for the service transfer from over 900 of the 1,014 customers that had originally had their telephone line rental service transferred without express consent. Those customers that SSE had been unable to contact or who had refused to consent to the transfer were sent letters on 24 January 2007, providing them with one month’s notice that SSE intended to terminate its provision of telephony services to them and advising that unless they contacted SSE by 23 February 2007, their calls and line rental service would be transferred to BT shortly afterwards.

2.13 SSE did not levy line rental charges to any of the 1,014 customers whose telephone line rental service it transferred without their express consent until it obtained positive consent for the transfer. All 1,014 customers were provided with free line rental for at least one month.
Section 3

Legal Framework

Background

3.1 On 13 April 2005 and following public consultation, Ofcom issued a statement and notification on the effectiveness of consumer safeguards designed to protect consumers from mis-selling of fixed-line telecommunications services.

3.2 In light of the responses to the consultation, Ofcom concluded that mis-selling of fixed-line telecommunications services was and had been a problem, and that additional regulatory safeguards were needed. Accordingly, with effect from 26 May 2005, GC14.5 has required Communications Providers who provide fixed-line telecommunications services and engage in sales and marketing activity, to establish, and comply with, a Code of Practice for Sales and Marketing which is in accordance with Ofcom’s published guidelines in respect of the content of such codes.

3.3 GC14 was further amended following consultation by the Notification of Modification to a General Condition “Providing citizens and consumers with improved information about Number Translation Services and Premium Rate Services” published by Ofcom on 19 April 2006, which entered into force on 19 June 2006.2

3.4 On 27 May 2005, Ofcom opened an investigation to monitor compliance by providers of fixed-line telecommunications services with the amended GC14.5.3 Ofcom has been monitoring allegations of mis-selling from consumers in order to identify companies who are engaged in mis-selling, so that Ofcom can take action to protect the interests of consumers.

General Condition 14.5

3.5 General Condition 14.5 states:

“During the Relevant Period, those Communications Providers who provide Fixed-line Telecommunications Services or the Wholesale Inputs to Fixed-line Telecommunications Services, shall:

(a) establish and thereafter maintain a Code of Practice for Sales and Marketing for dealing with its Domestic and Small Business Customers, which conforms with the Guidelines set out in Annex 3 to this Condition; and

(b) comply with the provisions of the Code of Practice for Sales and Marketing established according to Condition 14.5(a) above.”

2 See http://www.ofcom.org.uk/consult/condocs/nts_info/statement/statement. This consultation renumbered GC14.3 to GC14.5. The obligations relating to Codes of Practice for Sales and Marketing pursuant to GC14.3 are now imposed by GC14.5. The obligations have not changed, only the numbering in GC14.

3 Own-initiative investigation: Monitoring and enforcement of the requirements regarding Codes of Practice for Sales and Marketing. Case Reference: CW/00838/05/05.
3.6 Therefore, when assessing compliance with GC4.5, Ofcom must consider whether SSE:

(a) is a Communications Provider (as defined in GC14);

(b) provides fixed-line telecommunications services or the wholesale inputs to such services; and

(c) has established and maintained a Code of Practice for Sales and Marketing for its domestic and small business customers which conforms to the Guidelines; and

(d) has complied with the provisions of that Code of Practice.

(a) Communications Provider

3.7 The term “Communications Provider” is defined in GC14.8(b) as meaning “a person who provides Public Electronic Communication Services to Domestic and Small Business Customers”.

3.8 There is no definition of “Public Electronic Communications Services” (“PECS”) in GC14. However, PECS is defined in Part 1 of the General Conditions, which states:

“Public Electronic Communications Service’ means any Electronic Communications Service that is provided so as to be available for use by members of the public;”

3.9 The term “Electronic Communications Service” (“ECS”) is defined in Part 1 of the General Conditions which states:

“Electronic Communications Service’ means any service consisting in, or having as its principal feature, the conveyance by means of an Electronic Communications Network of Signals, except in so far as it is a Content Service;”

3.10 The term “Electronic Communications Network” (“ECN”) is also defined in Part 1 of the General Conditions and means:

“…

(a) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of Signals of any description; and

(b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the Signals –

(i) apparatus comprised in the system;

(ii) apparatus used for the switching or routing of the Signals; and

(iii) software and stored data.”

3.11 “Signal” is defined in Part 1 of the General Conditions and includes –
“…

(a) anything comprising speech, music, sounds, visual images or communications or data of any description; and

(b) signals serving for the impartation of anything between persons, between a person and a thing or between things, or for the actuation or control of any apparatus.”

3.12 SSE purchases wholesale telephone access line and calls services from BT called WLR and CPS. SSE then uses those services to enable it to offer retail line rental and call services to customers.

3.13 WLR is a facility by which BT provides other Communications Providers (in this case, SSE) with the ability to offer monthly line rental and associated services (such as fault repair) over the BT network. Providers such as SSE may provide those services directly to (end-user) customers (as in the current case), or offer those services for onward sale by other providers.

3.14 CPS is a facility which allows a customer who is connected to the BT network to choose one of a number of companies, including BT itself, to be that customer’s preferred provider of calls. When a specified type of call is made from a line with CPS (for example, ‘international calls’ or ‘all calls’), BT conveys that call to the customer’s nominated preferred provider’s electronic communications network so that provider can complete that call.

3.15 Taken together, WLR and CPS allow Communications Providers other than BT to provide an integrated telephony service comprising calls and access on comparable terms and conditions as those supplied by BT’s own retail business and billed on a single monthly bill covering both service elements. In this case SSE is using WLR and CPS to provide retail services to its customers.

3.16 SSE, therefore, provides a service which consists of the conveyance of signals (i.e. speech) by way of BT’s ECN. This falls within the definition of ECS contained in Part 1 of the General Conditions.

3.17 However, to fall within the definition of PECS, the ECS provided must be “provided so as to be available for use by members of the public”. “Public” is not defined in GC14, the General Conditions, or the Communications Act 2003 (“the Act”). However, Oftel stated in the context of “public electronic communications networks” that:

“Oftel’s understanding has been that a publicly available service is one that is available to anyone who is both willing to pay for it and abide by applicable terms and conditions. A publicly available service is distinguishable from a bespoke service restricted to a limited group of individual and identifiable customers.

It is also to be understood that the term members of the public requires a broad interpretation – it is not to be read as residential or small business customers. A service that because of its scale, such as a virtual private network service, is only likely to attract corporate

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4 In this section ‘BT’ refers to divisions of BT including both Openreach and/or BT Wholesale, as appropriate.
customers is still considered to be available to members of the public."\(^5\)

3.18 Oftel took a broad interpretation of the term “available to the public”. In fact, it suggested that this was not to be construed so narrowly as to limit the interpretation to Domestic and Small Business Customers. Therefore, it would be quite clear that by offering its telephony services to consumers, SSE would be providing an ECS that is available for use by the public.

3.19 Ofcom further stated in the Regulation of VoIP Services: Statement and further consultation, dated 22 February 2006, that:

“In Ofcom’s view, a publicly available service is one that is available to anyone who is both willing to pay for it and to abide by the applicable terms and conditions. The provider will not have imposed an upper limit on the class of potential customers other than those that arise from technical or capacity constraints. A publicly available service is distinguishable from a bespoke service restricted to a limited group of individual and identifiable customers.”\(^6\)

3.20 As long as a potential customer were willing to pay and abide by any terms and conditions, SSE would have been likely to provide the service. Therefore this further supports the proposition that SSE provided a publicly available service.

3.21 Furthermore, the Competition Appeal Tribunal stated in Media Marketing & Promotions v Office of Communications [2006] CAT 12 at 241 that:

“...a service which is primarily aimed at a section of the public, such as business customers or customers in a particular industry sector, is, in our judgment, nevertheless a service made available to the public.”

3.22 Ofcom therefore considers that the mere fact SSE’s customers are in a particular section of the public, i.e. existing gas and/or electricity customers, would not preclude the service from being a service made available to the public as its gas and electricity services are also available to the public. Therefore the ECS that SSE provides would fall within the definition of PECS and if provided to “Domestic and Small Business Customers”, then SSE will fall within the definition of “Communications Provider” in GC14.

3.23 The term “Domestic and Small Business Customer” is defined in GC14.8(g) as meaning “in relation to a Communications Provider, a Customer of that Provider who is neither-

(i) himself a Communications Provider; nor

(ii) a person who is such a Customer in respect of an undertaking carried on by him for which more than ten individuals work (whether as employees or volunteers or otherwise).”

3.24 “Customers” is defined in Part 1 of the General Conditions, which states:


“Customers,’ in relation to a Communications Provider, means the following (including any of them whose use or potential use of the network or service is for the purposes of, or in connection with, a business):

(a) the persons to whom the network or service is provided in the course of any business carried on as such by the Communications Provider;

(b) the persons to whom the Communications Provider is seeking to secure that the network or service is so provided;

(c) the persons who wish to be so provided with the network or service, or who are likely to seek to become persons to whom the network or service is so provided;”

3.25 SSE provides its services to its customers in the course of its business. Therefore its customers fall into the definition of “Customer” for the purpose of Part 1 of the General Conditions. These customers however, must also fall within the definition of a Domestic and Small Business Customer.

3.26 SSE’s customers are consumers. Ofcom is not aware that any of these respondents are Communications Providers.

3.27 Therefore SSE’s customers fall within the definition of Domestic and Small Business Customers.

3.28 In summary, as SSE provides PECS to Domestic and Small Business Customers, it falls within the definition of Communications Provider for the purposes of GC14.5.

b) Fixed-Line Telecommunications Services

3.29 In addition to falling within the definition of Communications Provider for the purposes of GC14.5, SSE must also provide “Fixed-line Telecommunications Services” or the wholesale inputs to the same.

3.30 The term “Fixed-line Telecommunications Services” is defined in GC14.8(h) as meaning “narrowband calls and lines services provided to Domestic and Small Business Customers by means of Indirect Access, Carrier-Pre Selection, Wholesale Line Rental or Wholesale Calls”.

3.31 As discussed above, SSE provides a service comprising telephone calls and line rental to consumers, by means of CPS and WLR.

3.32 In summary, SSE provides telephone and line rental services to Small Business Customers by way of CPS and WLR and therefore falls within the definition of providing “Fixed-line Telecommunications Services”.

c) Code of Practice

3.33 GC14.5(a) requires Communications Providers who provide Fixed-line Telecommunications Services or the Wholesale Inputs into such services to establish
and thereafter maintain a Code of Practice for Sales and Marketing for dealing with its Domestic and Small Business Customers. To meet this requirement, the Code of Practice must conform to guidelines established by Ofcom.\textsuperscript{8}

3.34 On 9 November 2006, Ofcom wrote to SSE, serving a notice under section 135 of the Act requesting, amongst other things, a copy of its Code of Practice for Sales and Marketing.\textsuperscript{9} SSE submitted copies of the Codes of Practice for Sales and Marketing (the “Code”) used by its four brands to Ofcom on 16 November 2006, which are available on their respective websites.\textsuperscript{10}

3.35 GC14.5(b) further requires that those communications providers comply with the provisions of the Code established for the purposes of GC14.5(a).

\textsuperscript{8} A copy of Ofcom’s guidelines is included in Annex 1 below.
\textsuperscript{9} A copy of the section 135 notice sent to SSE is included in Annex 3 below.
\textsuperscript{10} With the exception of the brand names, the wording used in the Codes of Practice are identical and have been treated by Ofcom as being one code. A copy of the Code of Practice used by SSE’s Southern Electric brand is included in Annex 2 below.
Section 4

The investigation

The complaint

4.1 Ofcom opened an investigation into SSE on 20 October 2006, following receipt of a complaint from BT. BT’s complaint alleged that:

(a) the term in SSE’s customer contract that enabled it to amend its terms and conditions and the products it was providing to customers was unfair, contrary to the Unfair Terms in Consumer Contracts Regulations 1999; and

(b) the practice of migrating customers using negative opt-out letters was a breach of GC14.5.

4.2 In light of the fact that the attempted mass migration of its customer base was a one-off, with the result that SSE’s use of its contract terms in the manner complained about by BT was unlikely to recur, Ofcom focussed its investigation on whether SSE’s actions complied with GC14.5.

Evidence obtained

4.3 As part of its investigation, Ofcom sought information from SSE pursuant to its powers under section 135 of the Act. On 9 November 2006, Ofcom wrote to SSE, serving notices under section 135 of the Act and section 225 of the Enterprise Act 2002 (the “Notices”). Ofcom requested information including:

- the size of SSE’s telephony customer base;
- the number of customers that SSE that had their telephone line transferred to SSE and the number of ‘Cancel Own’ orders that it placed;
- the number of SSE’s customers that it obtained express consent from before submitting transfer orders;
- details of the status of those customers that had their line transferred and what action SSE intended to take in relation to these customers; and
- details of the number of complaints that SSE had received from its customers in relation to the line transfer.

4.4 SSE responded to the Notices on 16 November 2006 (“the Response”). In addition to the information obtained from SSE under formal powers, SSE also provided regular updates to Ofcom in relation to the status of those customers that it migrated without first obtaining express consent from.

11 The two notices contained identical information requests. Notices were issued under the Act and the Enterprise Act 2002 to enable the responses to be used when considering compliance with both GC14 and the Unfair Terms in Consumer Contracts Regulations.
SSE’s Code of Practice

4.5 As set out at paragraphs 3.5 to 3.35 above, GC14.5(b) requires SSE to comply with the provisions of its Code established according to GC14.5(a). Ofcom is satisfied that SSE has established and maintained a Code pursuant to GC14.5(a).

4.6 SSE’s Code states that:

“We may approach customers through various means e.g. by television, radio or press advertising, promotions in shops or shopping centres, post, fax, electronic mail, telephone or in person. Regardless of the way in which sales and marketing activities are conducted, we will act responsibly and compliantly.

[...]

Our sales agents will ensure that customers entering into contracts understand and intend them.

[...]

We will contact customers to confirm that they understand that they have entered into an agreement, are happy to proceed and are content with the sales activity.”

4.7 In order to comply with the provisions of its Code set out above, SSE must ensure when conducting sales and marketing activities that its customers (i) intend to enter into a contract, (ii) understand the terms of that contract, and (iii) that SSE has contacted its customers to confirm that this is the case. In order to fulfil these three criteria, Ofcom believes that SSE needs to obtain the positive express consent of its customers before transferring their telephone lines. Unless positive express consent is obtained, SSE cannot be satisfied that its customers understand that they are entering into a contract and that they intend to enter into a contract.

SSE’s marketing of telephone line rental services

4.8 SSE advised Ofcom in the Response that it carried out its sales and marketing activity in relation to its telephone line rental product by post. SSE sent letters to its existing calls-only customers between 29 August 2006 and 4 September 2006, advising them of the changes that SSE had made to its phone service and the fact that they had 14 days to object if they did not wish their line rental to be transferred to SSE.

4.9 Ofcom considers that the provision of telephone line rental services was a new service being marketed to SSE’s customers and SSE should have complied with its Code when carrying out this marketing. SSE has recognised this point in its letter to Ofcom of 16 February 2007, accepting that when planning the migration SSE “should have obtained each customer’s positive and express consent before transferring

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12 See Annex 2 for a copy of SSE’s code of practice for the sales and marketing of fixed line telephony services.

13 A copy of the letter sent by SSE to its customers is included in Annex 4 below.
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"them from CPS to WLR-based wholesale arrangements, in accordance with General Condition 14.5 and our Code of Practice."

4.10 SSE failed to obtain positive and express consent from each customer before transferring their telephone line rental service. The letters did not seek the consent from customers for the transfer of their telephone line, but rather advised that the transfer would take place unless the customer objected. Customers were not therefore providing express positive consent. In addition, any customer who failed to receive the letter, or who received the letter but failed to read it, would not even have been aware that their telephone line was going to be transferred to SSE. Merely advising customers to contact SSE if they did not wish the transfer to take place is not sufficient to obtain their positive express consent to the transfer.

4.11 On the basis that express positive consent was not obtained before SSE sought to transfer customers, Ofcom has reasonable grounds to believe that SSE has failed to comply with its Code and, consequently, GC14.5(b).

4.12 In light of SSE’s contravention of GC14.5(b), Ofcom has considered whether it is appropriate for it to issue a notification to SSE under section 94 of the Act. In considering whether or not to issue a section 94 notification, Ofcom sought representations from both SSE and BT as to the merits of issuing a notification.

4.13 SSE argued that in light of the immediate action it had taken to limit the adverse effects of its conduct after Ofcom raised its concerns with SSE, and the action that it subsequently took to remedy the consequences of its contravention, it would not be appropriate or proportionate for Ofcom to issue SSE with a section 94 Notification. SSE further offered to provide undertakings to Ofcom in relation to its future conduct in this regard.

4.14 Following further discussions, SSE offered Ofcom the following undertakings:

(a) in line with our Code of Practice, that we will not transfer any of our customers between products without obtaining positive and express consent beforehand from the customers for that transfer;

(b) that it will comply with each commitment set out in this letter, including specifically those commitments in relation to customers;

(c) that it will comply promptly and fully with any reasonable request by Ofcom for information regarding the performance of those commitments; and

(d) that the contents of this letter are not confidential to SSEESL.”

4.15 BT responded that whatever action Ofcom took in the current case, the key factor was that “it is made clear to industry that negative migrations are not an acceptable

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14 A copy of SSE’s letter of 16 February 2007 can be found in Annex 7 below.
15 A copy of SSE’s representations can be found in Annex 5 below.
16 A copy of SSE’s letter is included in Annex 7 below.
form of behaviour” and that “Ofcom must provide unambiguous guidance to industry that negative opt outs are unacceptable in the context of GC14.5”.¹⁷

4.16 In performing its duties Ofcom must have regard to the principle of proportionality and its regulatory activities must be targeted only at cases in which action is needed.¹⁸ In deciding what action, if any, to take in respect of SSE’s failure to obtain positive express consent from its customers before transferring their telephone line rental service, Ofcom has taken into consideration:

(a) SSE’s acknowledgement that it should have obtained positive express consent before transferring its customers and the circumstances of the case;

(b) SSE’s prompt action to take steps to ensure that the number of transfer orders that actually took place was limited; and

(c) The follow up action taken by SSE to obtain positive express consent from those customers that were transferred for that transfer.

4.17 In particular, Ofcom has taken into account the rapid action taken by SSE once Ofcom raised concerns about the transfer of customers to cease as many of the transfers as possible, thereby lessening the impact of its actions. The result of this was that only 1,014 customers were transferred without their consent, rather than all [>9] of SSE’s customers. SSE sought to obtain express positive consent (albeit after the event) from the transferred customers for the migration and did not charge those customers for their line rental until it had obtained that consent. Where consent has not been obtained, SSE has transferred the customers’ telephone lines back to BT.¹⁹

4.18 As a result of these actions, SSE has sought to cease its contravention of GC14.5 and to remedy the consequences of its contravention as it has either obtained positive consent to the transfer or it has transferred the customers back to their original telephone line provider. In addition, we note SSE’s decision not to charge its customers for the telephone line rental service until positive express consent was obtained.

4.19 Ofcom considers that SSE’s contravention of GC14.5 is somewhat different to the contraventions of GC14.5 that it has investigated previously in that it is based on a one-off event rather than a pattern of mis-selling or slamming that has taken place over a period of time. As such, the fact that SSE has recognised that its actions were not compliant with GC14.5 and provided undertakings that it will obtain positive express consent in future before transferring customers to its telephony services has eased Ofcom’s concerns about the likelihood of future contravention by SSE.

4.20 Ofcom is therefore satisfied that it is not appropriate to issue a notification in this case at this time. For the reasons set out above, Ofcom has decided to close its investigation. Should SSE fail to comply with its undertakings, or there is evidence of any other form of contravening of Ofcom’s rules in relation to customer transfer and consent, Ofcom will review this position.

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¹⁷ Details of BT’s representations can be found in Annex 6 below.
¹⁸ See section 3(3)(a) of the Act.
¹⁹ As SSE is no longer providing new calls-only services, it has also transferred these customers’ call services to BT.
Conclusions

4.21 Ofcom has reasonable grounds for believing that SSE has contravened GC14.5(b) by failing to comply with the provisions of its Code of Practice for Sales and Marketing. Specifically, SSE failed to obtain the positive express consent of its customers before transferring their telephone line rental service and so failed to ensure that its customers understood and intended to enter into a contract with SSE in relation to telephone line rental services.

4.22 Having taken into account the circumstances of the contravention, the undertakings provided by SSE and the actions it has taken to cease its contravention and remedy the consequences of its contravention, Ofcom has decided not to issue a section 94 Notification to SSE at this time.
Annex 1

Ofcom’s guidelines for Codes of Practice

Guidelines for sales and marketing codes of practice for Fixed-line Telecommunications Services
1. **Introduction and overview**

1.1 Key objectives to be outlined:

- To ensure that Communications Providers ("Providers") provide their Domestic and Small Business Customers ("Customers") with standards of protection over and above those provided by the law (see table below for examples).

- To ensure good practice and responsible selling in the marketing of Fixed-line Telecommunications Services, and to help Customers understand the service and behaviour to be expected;

- To provide a clear framework within which responsible Providers should be working, providing reassurance to Customers and consumer representatives as to what constitutes good practice in the sales and marketing of Fixed-line Telecommunications Services.

1.2 The focus to be sales and marketing of Fixed-line Telecoms Services to Customers, dealing primarily with issues arising before, during and at the point of sale, with particular emphasis on the avoidance of mis-selling and misrepresentation, and ensuring customer understanding of the services offered and the key terms of any contracts they are entering into.

1.3 Procedures to be in place for sales and marketing staff, and agents, to be informed of the Codes of Practice for Sales and Marketing ("the Code") and its contents, and for monitoring their compliance with it.

1.4 Procedures to be in place, and fully documented, for Customers and advice agencies to be made aware of the Code and its contents such as, for example, making reference to the Code in sales and marketing literature, as part of the Providers’ ‘notification of transfer’ letter (referred to in paragraphs 6.11 and 6.12), and by making available on Providers’ public websites.

1.5 Codes to be drafted in plain English which is easy to understand, and copies of it to be provided on request, and free of charge, to Customers.

1.6 Providers’ accountability to be visible in the form of a named person, responsible for compliance, with relevant contact details, including an e-mail address.

2. **Status of code**

2.1 All Providers who engage in sales and marketing for Fixed-line Telecoms Services are required under General Condition 14.3 to establish the Code in accordance with these Guidelines, and comply with the provisions of the Code.

2.2 Compliance with the Code does not guarantee compliance with any legal requirement.

2.3 Non-compliance with the Code does not affect the validity of any contract between the company and the consumer, unless otherwise provided by law.
3. **Sales, marketing advertising and promotion**

3.1 Customer approaches may occur in a wide range of ways e.g. by TV, radio or press advertising, promotions in shops or shopping centres, post, fax, electronic mail, telephone or in person. Regardless of the way in which sales and marketing activities are conducted, providers to act responsibly and complianly.

3.2 Customers’ legal rights and wishes to be respected where they have registered with any relevant preference service, including the Mailing Preference Service, the Telephone Preference Service, the Fax Preference Service and the E-mail Preference Service.

3.3 Advertising and promotion to comply with the British Codes of Advertising and Sales Promotion and all other applicable advertising codes. In addition, advertising and promotional literature to be clear, unambiguous, accurate and fair, containing no false or misleading information about price, value or service and, in particular, must not denigrate other providers.

4. **Recruitment and sales training**

4.1 Appropriate procedures to be set up for the selection of staff involved with direct contact with customers for the purposes of sales and marketing activity.

4.2 Providers to be responsible for ensuring that sub-contractors (third party agencies) also set up equivalent selection procedures. For the avoidance of doubt, third party agencies shall not include resellers to whom telephony services are sold on a wholesale basis.

4.3 Whilst operating within current employment legislation, recruitment of sales staff to have regard to:

- behaviour and appearance, recognising that the sales person may be seen as the ‘public face’ of the industry;
- security – references and relevant convictions for criminal offences to be checked and taken into account;
- evidence of mis-selling or lack of integrity in any previous selling employment.

4.4 The following requirements related to sales staff based in the UK to be observed:

- the applicant must provide proof of National Insurance number, proof of address and two references;
- referees cannot be related to the applicant;
- business referees must not both be from the same company;
- if a sales person leaves for any reason a copy of his or her sales records (including all recordings and notes on sales) will be retained for a minimum period of six months;

- reasonable endeavours to be made to retrieve the identification badges of staff leaving the company.

4.5 For sales-staff not based in the UK, equivalent procedures to be applied, and documented.

4.6 Providers to satisfy themselves that they have taken reasonable steps to ensure that every such person is trained so as to have a sufficient understanding that any relevant advice given by such person is not misleading. Topics covered to include:

- arrangements for competition in the supply of telecommunications in the UK;

- the different telephone options provided by the company and how these differ from other competitive telecoms products (which may or may not be offered by the company); for example, Indirect Access, Carrier-Pre Selection, Wholesale Line Rental or Wholesale Calls;

- the process for ordering the telephone service;

- the relevant principles of consumer protection law;

- the prices charged by the employing company and its other terms and conditions of service and, in particular, methods of payment, duration of contract and any termination fees;

- the nature, and cost, of any additional services on offer;

- the process for cancelling the contract both during the cooling-off period and at any time following commencement of the service; and

- the existence of the sales and marketing code of practice and the benefits provided;

- the procedure for handling customer complaints.

4.7 Responsibility for compliance with the Code by representatives, and any sales agency acting on their behalf, to lie with the Provider. The Provider to identify the title of the person accountable for ensuring that the company and its agents observe the Code, and the title of the person responsible for handling complaints relevant to the code.

4.8 Remuneration systems, to be documented, and not to be such as to encourage misleading or exploitative sales practices. The Provider to be kept informed of incentive schemes used by any agencies it employs for sales and marketing.
5. **Customer contact**

5.1 Discretion to be used when visiting consumers' homes, particularly during the hours of darkness. No face to face contact to be made outside the hours of 08.00 to 20.00, and no telephone calls to be made outside the hours of 08.00 to 21.00, unless at the customer's request.

5.2 Representatives involved in face-to-face sales and marketing to be issued with identity badges that clearly display the name of the Provider they represent and a unique identification number for that representative. The identity badge to also display the representative's name, a photograph of the representative and an expiry date for validity of the card. The information on the card to be presented in such a way that does not require close examination. Identity cards must also be made available with key information in Braille, on request.

5.3 All representatives to immediately identify themselves, the company they represent and the purpose of the call and the expected call duration. If visiting or meeting in person, they should draw the Customers' attention to their identity card.

5.4 Reasonable steps to be taken to keep informed of local authority initiatives, password schemes etc. such as the Local Distraction Burglary Initiative.

5.5 All representatives to be courteous, use appropriate language and offer clear and straightforward explanations. All information should be factual and accurate. Representatives should not misrepresent the services being offered nor those of other Providers. Representatives should also check that Customers entering into contracts understand, and intend, them.

5.6 Representatives to cease contact with any person who indicates that the contact is inconvenient, unwelcome, inappropriate or too long. If the Customer requests it, the discussion to be ended immediately and, if making a doorstep call, the premises to be left immediately.

5.7 Representatives not to abuse the trust of vulnerable Customers e.g. those who are elderly or whose first language is not English, or who have special needs. Providers should have a policy regarding such Customers, including that their representatives do not pursue sales presentations to Customers whom they believe may be vulnerable.

5.8 Where there is sheltered housing, nursing homes or residential care facilities contact to be made with the warden or other person in authority before any approach is made to the Customer.

5.9 No sales or marketing activity to be conducted that is directed to those who are under the legal age for entering into contracts.

5.10 Sales and marketing campaign records to be maintained for six months, including the date and the approximate time of the contact with the Customer. Records to be such as to allow subsequent identification of the salesperson(s) involved and to assist in dealing with any complaint or query.
6. **Entering into a contract – information, order forms and contracts**

6.1 All reasonable steps to be taken to ensure that the person entering into a contract is authorised to enter into the contract for the Fixed-line Telecommunications Services/bills at the premises.

6.2 Order forms and contract forms to be designed such that the contractual nature of the document is clear to the Customer, and it contains a statement of the contractual nature of the document immediately adjacent to where the Customer signs the document so the statement cannot easily be obscured or concealed\(^1\). Customers to sign over the word “contract”

6.3 Where a direct approach to the Customer takes place, the Customer to be given the information set out in this paragraph, in writing, in a clear and comprehensible manner

- essential information including the identity of the company, its address, telephone, fax and e-mail contact details, as appropriate;

- a description of the telephone service sufficient to enable the customer to understand the option that the customer has chosen, and how it works;

- information about the major elements of the service, including the cost of any standing charges, the payment terms, line rental, key call types and details of “protected or special support” arrangements;

- the arrangements for provision of the service, including the order process and, as accurately as possible, the likely date of provision. Where there may be significant delay in the likely date of provision, the Customer to be informed;

- the existence of a right of cancellation and the process for exercising it;

- the period for which the charges remain valid; and

- the minimum period of contract, and minimum contract charges, if any.

6.4 Customers to be made aware of the existence of the Code, and preferably provided with a summary. Copies of it to be provided on request, and free of charge, to Customers.

6.5 At the Customers request, full written information about tariffs to be made available.

\(^1\) This is in order to minimise cases where order forms are misrepresented as confirmations of the sales person’s visit. This is likely to be an offence under the Trades Descriptions Acts.
6.6 If a Customer signs an order form following face to face contact, or enters into a written contract, the customer must be given a copy of the order form or contract, as well as the following details in writing either at the same time or within 5 working days, unless previously supplied in writing prior to contract:

- information about any after-sales services or guarantees; and
- arrangements for the termination of the contract.

6.7 Orders placed by distance selling means to comply with Distance Selling Regulations, which are set out in the table below.

6.8 In the case of internet orders, a well sign-posted hyperlink to this information which is easily visible to the web site visitor to be prominently displayed with the information being capable of being easily downloaded and printed.

6.9 During the switchover period there should be 'no cost' cancellation for Customers where they change their mind. Customers to be made aware that they have the right to change their mind during the switchover period.

6.10 Customers to be permitted to cancel orders and terminate contracts by telephone, in writing, by fax or by e-mail.

6.11 Providers to send a mandatory letter in accordance with the industry-agreed process informing the customer of the details of the transfer, and the following to be clearly communicated:

- date of notification;
- CLI(s) affected;
- list of services affected/unaffected, e.g. IA call barring;
- date of switchover;
- the sender’s contacts details for any queries.

6.12 The notification will be by letter although may be sent electronically where Customers have initiated contact by applying online, and have confirmed online that they wish all future correspondence to be sent electronically. Otherwise Customers would need to positively request by written correspondence that information be sent electronically.

6.13 Providers to keep under review the procedures by which contracts are agreed and to take appropriate steps to prevent recurrence of any problem identified.

6.14 In all cases, Customers to be contacted along similar timescales to the industry-agreed process described in paragraph 6.11 to confirm that the Customer understands that they have entered into an agreement, are happy to proceed with the agreement and are content with the way in which the sales and marketing activity was conducted.

6.15 Such Customer contact to be either part of the mandatory Customer 'notification of transfer' letter referred to in paragraph 6.11 or through a separate process. This contact to be made by a person not engaged directly in activities leading to the promotion of sales contracts.
6.16 If it is found that the contract was not understood or intended, or if the order matured before the expiry of the switchover period, and the Customer wishes to cancel, Providers to terminate the contract without charge or other penalty to the Customer.

7. **Consumer protection and other legal requirements**

7.1 Procedures to comply with all applicable legislation and appropriate amendments (see table below for examples).

8. **Audit**

8.1 Providers to carry out regular audits of systems, procedures and documentation to ensure that they are acting compliantly with all aspects of the Code.

9. **Customer complaints procedure**

9.1 Providers’ internal procedures for handling Customer complaints to also include those relating to their sales and marketing activities. Providers to ensure that all their staff and representatives who deal directly with Customers are made aware of this procedure, and that they should inform Customers of the existence of their complaints procedure in accordance with their current obligations.

9.2 The complaints procedure to set out how Customers may complain about the company’s sales and marketing activity and what further steps are available if they believe their complaint has not been dealt with satisfactorily.

9.3 In addition, Customers also to be made aware of any dispute resolution arrangements as recognised by Ofcom. Currently Ofcom has approved two schemes: the Office of the Telecommunications Ombudsman (‘Otelo’) and the Communications and Internet Services Adjudication Scheme (‘CISAS’).

9.4 Providers to liaise regularly with Ofcom and the relevant consumer groups to monitor the number and nature of complaints under its code.

10. **Distributing the code: creating awareness**

10.1 The Code to be available to Customers on request, free of charge and in a reasonable range of formats.

10.2 The head office of the Citizens Advice (address: Myddleton House, 115-123 Pentonville Road, London, N1 9LZ) plus other head offices of relevant major advice agencies normally to be sent copies of the code and any subsequent update. Providers with restricted operations such as those operating only in specific regions to circulate copies to advice agencies as appropriate.
Legislation of particular relevance to sales and marketing of particular telephony products

Particular attention is drawn to the following regulations (as amended, where appropriate), in addition to all other appropriate consumer protection law and advertising Codes of Practice

<table>
<thead>
<tr>
<th>Title</th>
<th>Comment</th>
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| 1. The Unfair Terms in Consumer Contracts Regulations 1999 SI 1999 No 2083 | • introduces controls over unfair standard terms in contracts with consumers  
• requires written contracts with consumers to be in plain, intelligible language |
| 2. The Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987 SI 1987 No 2117 | • requires that written notice of cancellation rights (min 7 days) in prescribed form is given to consumers entering into contracts at their homes or in other places (e.g. shopping precincts) |
| 3. The Consumer Protection (Distance Selling) Regulations 2000 SI 2000 No 2934 | • requires extensive information to consumers before and after consumers enter into contracts using channels of marketing such as direct response press or TV adverts, telemarketing, mail order, etc  
• requires cancellation rights (min 7 working days) to be given to consumers, starting from the date of delivery of prescribed information  
• provides that making demands for payment for services not ordered by consumer is a criminal offence |
| 4. Telecommunications (Open Network Provision)(Voice Telephony) Regulations 1998 SI 1999 No. 1580 | Extensive requirements for system-less resellers and operators of systems licensed by DTI to  
• offer written contracts to consumers complying with the regulations;  
• to publish their terms and conditions and tariffs by placing copies in every major office for public inspection during prescribed hours |
<p>| 5. Various Misleading Advertising Regulations                             |                                                                                                                                          |</p>
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<tr>
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<th>Consumer Protection Act 1987 (Part III)</th>
<th>Civil responsibilities</th>
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<td>Consumer protection legislation</td>
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**Civil responsibilities**

- Misrepresentation Act 1967
- Unfair Contract Terms 1977
- Sale of Goods Act
- Supply of Goods and Services Act 1982
- Consumer Protection 1987
- Sale and Supply of Goods Act 1994
- Control of Misleading Advertising Regulations 1988 SI 1988 No 915
- Consumer Protection (Cancellation of Contracts concluded away from Business Premises) Regulations 1987 SI 1987 No 2117
- Unfair Terms in Consumer Contracts Regulation SI 1999 No 2083

**Criminal liabilities**

- Trade Descriptions Acts 1968
- Administration of Justice Act 1970
- Fair Trading Act 1973
- Price Act 1974
- Consumer Protection Act 1987 (Parts II, III, IV and V)
- Consumer Protection (Cancellation of Contracts concluded away from Business Premises) Regulations 1987 SI 1987 No 2117
- Consumer Protection (Distance Selling) Regulations 2000 SI No 2334
Annex 2

SSE’s Code of Practice

Our code of practice for the sales and marketing of fixed line telephone services
Case closure statement

Background

UK consumers benefit from a competitive market for fixed-line telephone services. After consultation, the industry regulator, Ofcom, decided in April 2005 that additional regulatory safeguards should be introduced in order to protect consumers and small businesses from mis-selling of fixed-line telephone services. It therefore introduced a requirement under general condition 14.3, for providers of fixed-line telephone services to these customers, from 26 May 2005, to establish and comply with a code of practice for sales and marketing in accordance with published guidelines.

The code of practice applies where customers transfer their telephone call services over ordinary fixed telephone lines and not over cable or broadband-enabled lines.

Introduction

Against this background, this code of practice (the code) sets out the framework within which we will conduct the sales and marketing of our fixed-line telephone services. We aim to promote customer confidence in our sales and marketing practices.

As well as setting out the standards of behaviour you can expect from us whenever we contact you for sales or marketing purposes, the code also describes some of our procedures regarding the recruitment and training of our sales people, including agents who work on our behalf.

Please note that compliance with this code does not guarantee compliance with any legal requirement. Non-compliance with the code does not affect the validity of any contract between Southern Electric and the consumer, unless otherwise provided by law.

Copies of the code are available on our website: www.southern-electric.co.uk. We will also send a copy free of charge in response to a request.

Sales and marketing advertising and promotion

We may approach customers through various means e.g. by television, radio or press advertising, promotions in shops or shopping centres, post, fax, electronic mail, telephone or in person. Regardless of the way in which sales and marketing activities are conducted, we will act responsibly and compliantly.

We will respect customers' legal rights and wishes where they have registered with any relevant preference service.

Our advertising and promotion will comply with regulations set or determined by the Advertising Standards Authority and all other applicable advertising codes. In addition, all advertising and promotional material will be clear, unambiguous, accurate and fair, containing no false or misleading information about price, value or service and will not denigrate other providers.
Recruitment and training

Recruitment policy

The knowledge, skills and attitude required for our sales team are identified in our sales procedures. We will also apply the same criteria to sales and marketing agencies undertaking sales activity on our behalf.

We operate within current employment legislation and recruit sales staff with due regard to:

- Behaviour and appearance, recognising that the sales person is the ‘public face’ of the company;
- Security – we check references and relevant convictions for criminal offences; and
- Any evidence of mis-selling or lack of integrity in any previous employment.

Recruitment requirements

- The applicant must provide proof of National Insurance number, proof of address and appropriate references.
- The referees must not be related to the applicant.
- Business referees must not both be from the same company.
- When a sales person leaves, a copy of his or her sales records will be retained for a minimum period of six months.
- We endeavour to retrieve the identification badges of staff leaving the company.

Training

We take reasonable steps to ensure that every sales person is trained so they have sufficient understanding of the telecommunications market so that they do not give misleading advice. Topics covered include:

- Arrangements for competition in the UK
- The different telephone options we offer and how they differ from other competitive telecoms products
- The process for ordering the telephone service
- The relevant principles of consumer protection law
- Our prices and terms and conditions and, in particular, methods of payment, duration of contract and any termination fees
Case closure statement

- The nature and cost of any additional services on offer
- The cancellation process
- The existence of this sales and marketing code of practice and the benefits provided
- The procedure for handling customer complaints.

We will provide updates and refresher sessions for sales staff as necessary. These cover a range of issues relevant to their role.

Responsibility

We are responsible for ensuring that by all representatives working on our behalf comply with this code.

Our Head of Sales is responsible for ensuring the company and its agents observe this code.

Our Customer Liaison Manager is responsible for handling complaints relevant to the code.

If you need to contact them, the address is:

Talk with Southern Electric
200 Dunkeld Road
PERTH
PH1 3AQ
Phone: 0800 117 116

Remuneration systems

Our remuneration systems are documented by our Human Resources Department and are designed not to encourage misleading or exploitative sales practices.

Agencies will inform us of any incentive schemes used for sales and marketing.

Customer contact

Face-to-face sales agents will only call on customers between 8am and 8pm and telesales activity will only take place between 8am and 9pm unless at the customer's request.

Sales agents will, as soon as possible on making contact, identify themselves, the company they represent, the purpose of the call and the expected call duration. For face-to-face agents an identity card will be produced without prompting, which clearly displays the company's name, the sales agent's name and photograph and an expiry date for validity of the card.

We will take reasonable steps to keep informed of local authority initiatives.
All Sales agents must be courteous, use appropriate language and offer clear explanations. All information should be factual and accurate and will not misrepresent the services being offered or those of other providers.

Our sales agents will ensure that customers entering into contracts understand and intend them.

Our sales agents will end the discussion immediately at the customer’s request and, if a doorstep call, leave the premises immediately.

Our sales agents will not exploit a person’s inexperience, vulnerability or loyalties e.g. those who are elderly or whose first language is not English, or who have special needs.

In the case of face-to-face sales to those in sheltered housing, nursing homes or residential care facilities, our sales agents will contact the warden or other person in authority before any approach is made to the customer.

We will not direct sales or marketing activity to those who are under the legal age for entering into contracts.

We will keep sales and marketing records, including the date and approximate time of contact (if available), for a suitable period to allow subsequent identification of any sales agent involved in an enquiry or complaint.

**Entering into a contract**

We will take reasonable steps to ensure the person entering into a contract is authorised to do so.

Order forms and contracts are designed so the contractual nature of the document is clear to the customer. Customers will sign over the word ‘Contract’.

Our sales agents will give customers entering into a contract the following information:

- the identity of the company, address, telephone, fax and e-mail contact details
- a description of the telephone service sufficient to enable the customer to understand the option they have chosen
- the major elements of the service, including cost of standing charges, payment terms, line rental etc
- arrangements for provision of the service, including the order process and the likely date of provision. If a significant delay is expected the customer will be informed
- the right of cancellation and process for exercising this right
- the period for which charges remain valid
- the minimum period of contract and minimum contract charges, if any.
Case closure statement

Customers will be made aware of the existence of this code and will be provided with a copy free of charge on request.

At the customer’s request, full written information about tariffs will be made available.

When a customer signs an order form or contract following face-to-face contact, they will be given a copy of the form or contract, as well as the following details in writing either at the same time or within 5 working days, unless supplied in writing prior to the contract:

- information about any after-sales service or guarantees; and
- arrangements for the termination of the contract.

Orders placed by Distance Selling means will comply with Distance Selling Regulations.

During the switchover period there is a ‘no cost’ cancellation for customers where they change their mind. Customers are made aware that they have the right to change their mind during the switchover period.

Customers may cancel orders and terminate contracts by telephone, in writing, by fax or by e-mail.

We will send a letter in accordance with the industry-agreed process informing the customer of the details of the transfer. This letter may be sent electronically where customers have indicated they wish future correspondence to be sent electronically.

We will review the procedures by which contracts are agreed and take appropriate steps to prevent recurrence of any problem identified.

We will contact customers to confirm they understand they have entered into an agreement, are happy to proceed and are content with the sales activity.

If we find that the contract was not understood or intended and the customer wishes to cancel, we will terminate the contract without imposing a charge or penalty to the customer for that termination.

Consumer protection and other legal requirements

SSE, our agencies / contractors and Sales Agents will comply with all applicable legislative obligations.

Audit

We will carry out regular audits of systems, procedures and documentation to ensure compliance with all aspects of this code.
Complaints handling

Complaints procedure

All complaints about Southern Electric or our approved agents are subjected to the companywide complaints procedure.

The complaints procedure is available to all customers and ensures that we respond in an appropriate way to any complaints we receive, such that we provide a satisfactory explanation, an apology or some form of redress, as appropriate.

All our staff representatives are aware of the complaints procedure.

Sales activity complaints procedure

If the customer phones us with a sales complaint we aim to resolve the complaint promptly. We will send written confirmation of what we have agreed if the customer wants it. If we cannot resolve the complaint while the customer is on the phone, we will look into the issue and get back to the customer with a substantive reply within 10 working days.

If a customer complains in writing, we investigate and give a substantive reply within 10 working days either by phone or letter.

If a customer is still unhappy, they should ask to speak to a manager or write in to explain why they are unhappy.

We are a member of the Telecommunications Ombudsman Service. This is an independent dispute resolution service approved by the industry regulator. If a customer is still unhappy three months after they raised the complaint with us, they have the right to refer the matter to the Office of the Telecommunications Ombudsman (OtelO).

Their contact details are:

OtelO
PO Box 730
Warrington
WA4 6WU

Phone: 0845 050 1614
Textphone: 0845 051 1513
Fax: 0845 050 1615
E-mail: enquiries@otelo.org.uk
Website: www.otelo.org.uk
Case closure statement

Annex 3

SSE section 135 Notice

CW/00924/10/06

9 November 2006

Mr Rob McDonald
Director of Regulation
Scottish & Southern Energy
Inveralmond House
200 Dunkeld Road
Perth
PH1 3AQ

Dear Mr McDonald

BT complaint about WLR transfer orders placed by Scottish & Southern Energy

1st Notice requiring the provision of specified information under Section 135 of the Communications Act 2003

This is a formal notice under Section 135 of the Communications Act 2003 ("the Act") addressed to Mr Rob McDonald, Director of Regulation at Scottish & Southern Energy PLC ("SSE"), company reference number SC117119.

This notice requires you to provide the information set out below, in the manner and form specified, for the purpose of ascertaining whether SSE has contravened or is contravening General Condition 14.5(b)¹ and/or General Condition 9.3.

Background to the investigation

Ofcom has opened an investigation to consider whether SSE has contravened General Condition 14.5(b), which requires Communications Providers to comply with the provisions of their Code of Practice for sales and marketing activity. Ofcom is also considering whether SSE has contravened General Condition 9.3, which requires Communications Providers to take certain steps when intending to modify a condition in a contract.

Provision of specified information

You are required to provide Ofcom with the information specified or described in the attached Annex in the manner and form specified by sending it to Martin Hill or giving it to him in person at: Ofcom, Competition Group, 2a Southwark Bridge Road London SE1 9HA.

¹ On 19 June 2006 a modification to General Condition 14 came into force, which, inter alia, amended the numbering for General Condition 14.3(b) to be General Condition 14.5(b). No other changes were made to General Condition 14.3(b).
The information requested in the Annex must reach him by no later than 5pm on 16 November 2006. Please e-mail your response to martin.hill@ofcom.org.uk.

Confidentiality

In the response please set out in a separate annex marked “confidential information” any document or information which you consider to be confidential and supply a written explanation as to why it should be treated as such.

Ofcom will take into consideration any representations you make when determining which information it considers to be confidential.

Offences

I draw your attention to Sections 138 to 144 of the Act (available at http://www.opsi.gov.uk/acts/acts2003/20030021.htm) which set out, among other things, the offences created by the Act in connection with a failure to comply with a requirement under Section 135. Given the seriousness of the potential penalties and offences involved, you may want to seek your own independent legal advice about the contents of this notice.

Yours sincerely

David Stewart

Director of Investigations
Annex

1. What was the exact size of SSE’s CPS customer base at the time that SSE submitted transfer orders for these customers on the WLR gateway in September 2006? Please identify how many customers were sold through each of the following SSE Energy Supply Limited brands:
   (a) Southern Electric;
   (b) Scottish Hydro Electric;
   (c) SWALEC;
   (d) Atlantic Electricity and Gas;
   (e) Other (please specify)

2. How many of SSE’s CPS customer base actually had their lines transferred to SSE?

3. How many of SSE’s CPS customers did SSE obtain express consent to enter into a contract for line rental before submitting a transfer order on the WLR Gateway in September 2006?

4. Please provide an update as to how many of the customers identified in Question 2:
   (a) SSE has subsequently obtained express consent from in order to provide them with line rental;
   (b) have refused to provide consent to the line transfer; and
   (c) SSE has been unable to contact so far by telephone.

5. Please provide a copy of the letter that SSE intends to send to the customers identified in Question 2 that it has been unable to speak to.

6. Please advise what action SSE has taken or intends to take in relation to customers identified in Question 2 that it has been unable to contact and who do not respond to correspondence from SSE.

7. Please advise what action SSE has taken or intends to take in relation to customers identified in Question 2 that have refused to provide consent to the line transfer.

8. How many objections did SSE receive from its customers in relation to the transfer of their lines from BT to SSE? Where possible please identify how many customers objected following:
   (a) the receipt of the letter “Important Changes to Your Phone Service” that was sent to customers in late August / early September advising them of SSE’s intention to automatically transfer their line rental to SSE;
(b) the receipt of letters from BT advising of the transfer of their line from BT to SSE; and

(c) the transfer of their line from BT to SSE.

9. How many ‘Cancel Own’ orders were placed by SSE as a result of objections identified in Question 8(b) and (c)?

10. Please identify the dates between which SSE sent out the “Important Changes to Your Phone Service” letters and the number of letters sent out on each day during this period.

11. Please identify the dates between which SSE placed transfer orders for its CPS customers on the WLR gateway and the number of transfer orders that were placed on each day during this period.

12. Please provide a copy of the Codes of Practice for Sales and Marketing that each of the SSE subsidiaries identified in Question 1 have established pursuant to General Condition 14.5(a) and which were in place in August and September 2006.

13. Please describe the decision making process by which SSE concluded that it was acceptable for it to alter the service that it was providing customers from calls to calls and line rental and then to action this by transferring its CPS customer base to WLR without first obtaining the express consent of these customers.

14. What consideration did SSE give to Ofcom’s previous decision on the use of negative opt-out clauses and their compatibility with the Unfair Terms in Consumer Contracts Regulations 1999 when taking the decision transfer its CPS customer base to WLR without obtaining the express consent of these customers?

15. Was the decision to transfer SSE’s CPS customer base to WLR without obtaining the express consent of those customers approved by SSE’s Board?
Annex 4

SSE letter to customers

Mrs Sample  
1 Sample Street  
Sample Town  
Sampleshire  
SA1 2BC>

Dear <Mrs Sample>

IMPORTANT CHANGES TO YOUR PHONE SERVICE

Great news! We're now able to combine your telephone calls and line rental into an all-inclusive, single bill service for you. Line rental, as part of talk, is only £10.49 a month - that's cheaper than BT's monthly charge of £11 and we'll provide you with the call features and line security that you have now.

... and some other changes we'd like you to know about.

We're changing the way we calculate your bills from 1st October 2006. Our new price plans are similar to those now operated by BT so the good news is that the savings with your talk service are easier to work out.

From the table describing the new price packages on the back of this letter you'll see that we are still cheaper than BT. We have presented our new prices and shown the BT equivalents that will also be in operation from 1st October.

We are reducing the monthly charges of our talk packages. talk evening and weekend will be reduced to £2.95 and talk anytime to £9.95 a month.

The minimum call charge of 5p on talk calls will be replaced with a call set up fee of 3p. The talk a little 5.2p call charge for all evening/weekend calls up to 70 minutes stays the same and we've retained the free up to 70 minutes inclusive calls in talk evening and weekend and talk anytime. We've also kept the 5p per minute rate on our 'Top 20' international destinations.

We have simplified our charges for calls to mobiles across the three talk packages. You can find out about these and our move to charging per minute rather than per second in the table of prices on the back of the letter.

What's next?

We'll automatically transfer you to our new <package name> package which includes line rental. We will write to you to confirm the exact date of the transfer.

- There will be no break in service.
- We'll send you a single bill for the complete service.
- Your new bills from 1st October will be at the new rates.
- Your existing call features will continue - caller display, ring back, call diversion etc.
- We'll handle any faults promptly – simply dial 151 or call <0845 678 0051>.

And remember, once you have received your final bill from BT, to contact your bank to cancel your direct debit with BT.

If for any reason you don't wish to take advantage of the new and cheaper line rental arrangements, you must contact us within 14 days of the date of this letter and we will advise you of your options.

Your updated terms and conditions are enclosed. Details of the specific changes resulting from the transfer of line rental, are contained overleaf. If you need any further advice or information about your talk service we'll be happy to help, just call us on <0845 678 0051>.

Yours sincerely,

Carole Reeds  
Customer Services Manager
Annex 5

SSE representations

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Date: 17 January 2007

Dear Martin

BT Complaint about WLR transfer orders placed by Scottish and Southern Energy

We spoke with you on Friday last week and had a useful discussion about your consideration of the above case. We understand that you are considering issuing a section 94 notification under the Communications Act (the Act) in relation to the matter and we are obviously very disappointed about this. SSE is a large company, which takes its regulatory obligations and relationships in the markets in which it operates very seriously. In our view, we have cooperated with Ofcom from the outset and sought to remedy the specific areas where Ofcom had concerns at considerable cost to SSE. A section 94 notification would give us reputational issues in the markets in which we operate, out of all proportion to the issues raised, particularly since there has been no detriment to customers arising from our actions. We also believe that the proposed notification is not actually necessary given the actions we have taken, those we propose to take and the availability of other routes for Ofcom to set out its views on the relevant policy matters.

As discussed on Friday, we felt it would be useful if we wrote with further representations in relation to the case and our reasons for considering that Ofcom’s proposed action in issuing a notification would be disproportionate. You indicated at the meeting that this would be helpful and that you would be able to consider a further letter from us at this stage. I should note that, as set out in our response to your earlier information request, the company within the SSE group which provides the telephony service to customers is SSE Energy Supply Ltd (SSEESL).

The rest of this letter set out as follows:

Section 1: Brief summary of the circumstances around the complaint;
Section 2: Summary of action we have taken to address Ofcom’s concerns;
Section 3: SSEESL’s intentions going forward;
Section 4: Discussion of why we consider a notification would be disproportionate in this case.
Section 5: Discussion of next steps.

Section 1: Summary of the Circumstances of the Case
Over the summer of 2006, SSEESL planned a migration of its telephony customers from a “calls only” service based on carrier pre-selection (CPS) arrangements to a “calls plus line rental” service based on wholesale line rental (WLR) arrangements, which had recently become available in a commercially feasible form. This move entailed a change in wholesale provider such that SSEESL would no longer be in a position to offer a “calls only” product. Customers were contacted in late August to explain the migration and the migration orders began to mature in early October. This prompted a complaint from BT Retail and Ofcom began an enquiry into the matter.

Following discussions with Ofcom, we recognised that Ofcom had concerns with the migration approach we had adopted with respect to the aspect of obtaining positive consent from the customers for the change in their service. We took action to address those concerns, whilst reserving our position on the legality of our previous approach. The actions we took are summarised in the next section.

Section 2: Action taken by SSEESL to address Ofcom’s concerns
A. At the outset, we took steps to abort the planned migrations and approximately [\*] of them were stopped by Openreach at our request. Some others had already been stopped by BT Retail using the Cancel Other mechanism. In the event, the migration orders for [\*] customers could not be stopped and these customers were actually transferred over to SSEESL’s WLR-based calls plus line rental product.

B. We outlined to Ofcom our intention to seek retrospective consent from the [\*] customers and believed that Ofcom were content with our proposals in this respect. The sequence of events undertaken in the effort to obtain positive consent from these customers was as follows.

[details of contacts with customers removed as we regard this as confidential between ourselves and Ofcom]

C. For the [\*] whose migrations were stopped by Openreach or BT Retail, we began a programme in October, in parallel with that for the [\*] transferred customers, to obtain positive consent before these customers were transferred to the WLR-based product.

[summary categorisation of originally transferred customers removed as the confidentiality of this follows from that of the overall number]

Indications are that at least [\*] more customers have provided us with positive consent as a result of the further activity that took place since our discussion on Friday. We expect that, come the start of next week, there will remain some [\*] or so customers who have not been contacted (“U customers”) and a small number of customers who have indicated that they were not happy to transfer to SSEESL’s WLR-based product but have not taken steps to choose new service providers and are still with us (“N customers”).
To date, we have been reluctant to take the route of using industry processes to send customers back to BT Retail for line rental and calls, given that the customers had previously made the choice to move away from BT Retail (or some other provider) to SSEESL’s CPS-based service and they would pay more for their telephone service if we did this. However, in order to bring matters to a conclusion, and following further discussion with Ofgem, we have resolved on the following course of action. For the remaining “U customers”, we intend to send a letter on Monday which provides formal 28 day notice of termination of our service and explains that if we do not hear from them by close of business on [21] February, we will take steps to transfer their telephone service to BT Retail shortly after that date and will confirm the actual date of transfer to them in a further letter at that time. A similar letter will be sent to the “N customers” – the existing group of customers in this category can be transferred more quickly as they have already been given formal notice of termination. [removal of a comment that relates to the material removed in section 2B above]

Thus, depending on the time that BT Retail takes to operate its Cancel Other facility for these customers (which we understand can be as short as 3 working days), we should be in the situation, shortly after 21 February, that there are no customers from the originally migrated [6] taking the WLR-based service from SSEESL, who have not given positive consent to do so. The “N and U customers” will have been transferred to BT Retail for line rental plus calls. [removal of a comment that relates to the material removed in section 2B above]

Section 3: SSEESL’s intentions going forward

As discussed in our conversation on Friday, I am happy to provide an undertaking that SSEESL will not, in the future, attempt to move telephony customers from CPS-based “calls only” arrangements to the WLR-based “calls plus line rental” arrangements on the basis of negative resolution i.e. without obtaining positive agreement from the customer for the transfer.

The planned migration of customers was a “one-off” event in relation to each customer. The vast majority had the migration cancelled once Ofgem had made us aware of their concerns. For those whose migration had already matured, we have been taking the steps summarised in section 2 above. For those whose migration was cancelled, we have a programme in place to obtain each customer’s positive consent, as for a new product offering, before they would be transferred over to the WLR-based product.

We have not made a decision on any termination of our CPS-based arrangements that are still hosting the customers who have not transferred over to the WLR-based product. If we do decide to cease those wholesale arrangements, we would then write to the remaining customers to notify them of the termination, in a similar manner to the letter we will send next week discussed above. If the customers take no action, our understanding is that their calls would automatically revert to BT Retail’s service provision once our CPS service terminates.

Section 4: Ofgem’s actions in respect of this complaint

As discussed, we consider that it would be disproportionate for Ofgem to issue any notification under section 94 of the Act in this case. We consider that the following factors are relevant.
• SSE’s good faith in seeking to develop its retail telephone service arrangements in line with the available wholesale arrangements;
• SSE’s co-operation in taking action once Ofcom raised its concerns with us;
• The relevant legal requirements surrounding section 94 notifications and consistency with previous decisions; and
• Other options available to Ofcom.

We discuss each of these in turn.

4.1 SSE's initial approach
At our meeting, you recognised that SSE was not seeking to mis-sell to customers. With SSE’s primary retail market being energy products, SSEESL’s telephony customers are, for the most part, also energy customers, which means that SSEESL already has another ongoing relationship with its telephony customers which we are keen to maintain. There is therefore no suggestion that we would seek to damage that long-standing relationship by deliberately “slamming” other products.

As a relatively new entrant to the telephony market, SSEESL took a view on the options for migration and sought to effect a transition of wholesale telephony arrangements that would provide minimal disruption to its established customer base. We took pains to ensure that we communicated with customers well in advance of the migration and, as we explained in our submission, many of the telephony customers would have been expecting us to move to WLR-based arrangements in due course. No customer would have been in doubt about who to contact if they had any concerns over the migration. We believe that our approach has been very far from intentional, ongoing conduct that is leading to customer harm, which is the sort of behaviour that Ofcom’s draft enforcement guidelines signal as meriting priority in terms of opening investigations.

4.2 SSE’s cooperation with Ofcom’s enquiry and investigation
Once Ofcom contacted us with their concerns about the migration, we have taken a large number of steps to address those concerns, as you recognised in Friday’s discussion. We cooperated fully with Ofcom during the enquiry stage, carrying out actions to address Ofcom’s concerns, such as asking Openreach to cancel the transfers for the migrating customers, where this was possible. We have also been proactive in providing Ofcom with updates on our activity and progress in making contact with the customers who, despite the cancellations undertaken by Openreach and also by BT Retail, had actually been transferred to our calls plus line rental service. [removal of a comment that relates to the material removed in section 2B above]

4.3 Legal Requirements and consistency with previous decisions
We note that the Act is not prescriptive in requiring Ofcom to issue a notification where it considers that there are reasonable grounds for believing that a person has contravened a General Condition. We do not believe that we have acted against any of the detail of our sales and marketing code of practice, although we recognise that Ofcom considers that there has been a contravention of this code and therefore of general Condition 14.5. Section 94(1) of the Act states that Ofcom “may give [a person] a notification under this section” in that case. However, we also believe Ofcom’s duties set out in section 3 of the Act are relevant, particularly the effect of section 3(3), which requires Ofcom to have regard, in all cases to “the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases where action is needed.” In this case, we
do not believe that regulatory action is needed as SSEESL has already taken steps to cancel the migration, ensured that customers have not been adversely affected and undertaken to ensure that the situation does not arise again (i.e. to obtain positive consent in future). For those customers who were migrated, we believe that they have suffered no detriment and have been proactively seeking to achieve the customers’ positive consent.

Due to the final actions we are taking in respect of the customers who have not given positive consent, as outlined above in section 2, we believe that by the time Ofcom were to issue any notification, there will be no customers on SSEESL’s WLR-based service, who have not given positive consent for the change in their telephone service to include line rental. **Taken together with our undertaking above in respect of the customers who remain on CPS-based arrangements, we do not believe that there would be anything further that Ofcom could reasonably require SSEESL to do in relation to the matter of the migrations that would not already have effectively been carried out.**

We understand that one of Ofcom’s considerations, in respect of issuing a notification, is consistency with the approach taken in previous cases. We are aware that Ofcom has previously issued section 94 notifications in respect of a company’s past actions. However, these cases seem largely to relate to activities that continued during Ofcom’s investigation (e.g. the CPS and WLR Save notifications issued to BT) of the relevant issue. In contrast, SSEESL took the actions required by Ofcom as soon as the issue was raised with us.

We note also, that in a recent case, Ofcom has not issued a notification in relation to a company’s activity that gave some cause for concern. This was the complaint by Carphone Warehouse Group plc against BT regarding verification calls. In the case closure document that Ofcom issued in December 2006, the statement is made in the summary that “although the requirements for establishing a contravention of General Condition 1.2 have been met, in the circumstances of the case, and specifically in the light of actions taken by BT to rectify its conduct and prevent repetition, it is appropriate and proportionate for Ofcom to take no further action in relation to this matter at this time.” It would appear to us that the prompt initial and ongoing actions taken by SSEESL in our own case, as discussed above, should lead to the application of similar reasoning by Ofcom. [removal of a comment that we regard as confidential between ourselves and Ofcom and which relates to the material removed in section 2B above]

4.4 Other options available to Ofcom

We are aware that Ofcom wishes to highlight to communication providers and interested parties that migrating telephone customers from a CPS to WLR based service without obtaining positive consent is not acceptable, so that this policy is clear going forward. We support Ofcom’s desire for clarity as this policy had not been apparent to us before we planned our migration exercise. However, we believe that Ofcom could achieve this clarity by means of a “case closure” update or document and/or a regulatory statement rather than only by means of a notification to SSEESL. It may even be appropriate to consider the issue in a wider context in relation to a review of the sales and marketing aspects of General Condition 14, which we understand that Ofcom is planning as this provision approaches its “sunset” date.

4.5 Conclusion

In conclusion, therefore, while we do not agree that SSEESL has contravened General Condition 4.5, we recognise Ofcom’s clear policy intention with respect to obtaining a
customer’s positive consent for the transfer of telephone service from CPS to WLR-based arrangements. We understand that Ofcom would want to ensure that the industry aware of this. However, for all the reasons set out in this section, we do not believe that it is proportionate for Ofcom to issue a notification to SSESL in this case, when Ofcom has other means of communicating this policy intention to interested parties.

Section 5: Next Steps
We understand that you have been drafting a notification and that the case is due to be considered by your Investigations Management Group in a few weeks time. [removal of a comment that we regard as confidential between ourselves and Ofcom]

Yours sincerely

Rob McDonald
Director of Regulation
Annex 6

BT representations

[³<]
Dear Martin

BT Complaint about WLR transfer orders placed by Scottish and Southern Energy

As you are aware from our previous discussions and correspondence, SSE’s retail supply subsidiary, SSEESL, planned its October migration of telephony customers from CPS-based arrangements to WLR-based arrangements on the basis of negative resolution i.e., without obtaining a customer’s positive and express consent prior to the transfer. We planned this course of action in order to minimise the disruption to our established customer base with whom, for the most part, we had an existing energy retail relationship. We hoped to achieve a smooth transition for the customers and, in good faith, believed we were acting in the customers’ best interests.

SSEESL accepts responsibility for its actions

Over the course of Ofcom’s enquiry and then investigation into BT’s complaint about the matter, we have developed a greater understanding of the emphasis within the telephony market on the separate nature of the calls and the line rental products. The marketing of the telephone line rental service to our customers should therefore have been carried out in accordance with our sales and marketing Code of Practice. SSEESL accepts that, in planning this migration, it should have obtained each customer’s positive and express consent before transferring them from CPS to WLR-based wholesale arrangements, in accordance with General Condition 14.5 and our Code of Practice. We regret and apologise for any disruption that has been caused to any party as a result of our conduct.

Subsequent actions taken by SSEESL

As Ofcom is aware, following discussions with Ofcom, almost all of the planned migrations were stopped. For the remaining 1014 customers who were transferred without their consent, our letter of 17 January summarises the actions that we took to contact the customers affected.
In most cases, we subsequently informed customers of the migration and customers have indicated that they are prepared to become customers of SSEESL for telephone line rental. While SSEESL considers that contacting the customers after the event helped reduce the impact on customers of our migration, we accept that any consent obtained from those customers after the event does not change the requirement under General Condition 14.5 and our Code of Practice to obtain positive and express consent prior to the transfer being initiated.

Those customers who have not given us their positive and express consent for the transfer will be provided with line rental by their original provider in the near future (i.e. the transfer will be reversed), leaving no customers from the originally migrated 1014 with us for telephone line rental that have not now provided their positive and express consent for that transfer. For those transferred without having provided positive and express consent, we have not charged for line rental for the period until they either left us or we obtained their positive consent.

We hope that our actions in this case have demonstrated our commitment to address regulatory concerns and gives Ofcom comfort that, were any future issues raised with us by Ofcom, we would be prepared to demonstrate similar commitment. Remedying the consequences of our conduct after the event is inevitably more costly than avoiding the situation in the first place and we would argue that SSEESL therefore has a firm financial incentive to ensure that our actions do not cause any future regulatory concerns. However, we also acknowledge Ofcom’s intention to take strong action in response to such conduct in future.

**Undertaking to Ofcom**

SSEESL undertakes:

(a) in line with our Code of Practice, that we will not transfer any of our customers between products without obtaining positive and express consent beforehand from the customers for that transfer;

(b) that we will comply with each commitment set out in this letter, including specifically those commitments in relation to customers;

(c) that we will comply promptly and fully with any reasonable request by Ofcom for information regarding the performance of those commitments; and

(d) that the contents of this letter are not confidential to SSEESL.

Yours sincerely

Rob McDonald
Director of Regulation