

**DECISION RELATING TO THE DISTRIBUTION EXEMPTION HOLDER ON THE LEASED NETWORK AT HEATHROW AIRPORT**

**Re-determination by the Gas and Electricity Markets Authority ("Authority"<sup>1</sup>) of a dispute referred to it by Heathrow Airports Limited ("HAL") under section 44B of the Electricity Act 1989 (the "Act") in relation to the exempt distribution system at Heathrow Airport and obligations arising under Schedule 2ZA of the Act.**

**Decision**

**Introduction**

1. On 14 May 2012 HAL formally requested that we make a determination on the identity of the distribution exemption holder in respect of the electricity distribution system connecting certain high voltage customers at Heathrow Airport to the local host distribution network operator ("**DNO**") network operated by Scottish and Southern Electricity ("**SSE**"). We determined that we had jurisdiction to determine this dispute as an "Article 37 dispute" by reference to section 44B of the Act (as amended). This refers to the requirement placed on Member States by Article 37 of Directive 2009/72 (the "**Directive**") obliging them to confer upon relevant Authorities the power to resolve disputes and complaints concerning, inter alia, rights of third party access to distribution systems provided for by the Directive.
2. By reference to the initial documentation submitted by the parties, the dispute was defined as:

*"Whether the duties imposed by Schedule 2ZA of the Electricity Act 1989 on distribution exemption holders apply to UKPNS in the context of requests to take a supply of electricity from third party supplier by customers of HAL that are connected to the portion of the distribution network at Heathrow Airport that has been leased to UKPNS."*
3. The dispute was framed in this way, asking whether the duties imposed by Schedule 2ZA of the Electricity Act 1989 (giving effect in domestic law to the obligations contained in the Directive) fall on UK Power Network Services (Contracting) Limited ("**UKPNS**") because the dispute was submitted by HAL. But it could equally well have been framed the other way round had the request for dispute resolution been made by UKPNS, asking whether the duties imposed by the Schedule apply to HAL. In answering the dispute, we considered the position of both UKPNS and HAL.
4. A process was put in place whereby each of UKPNS and HAL provided us with evidence and submissions (in writing and in the course of an oral hearing).
5. We issued a Determination on 31 March 2014 and it was made public on 12 May 2014 (the "**Original Determination**").

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<sup>1</sup> The terms 'the Authority', 'Ofgem' and 'we' are used interchangeably in this document. Ofgem is the Office of the Gas and Electricity Markets Authority.

6. In the Original Determination, we concluded that the duties imposed by Schedule 2ZA of the Act to facilitate third party access applied to UKPNS. This was in the context of requests to take a supply of electricity from third party suppliers by customers of HAL that are connected to the portion of the licence exempt distribution system at Heathrow airport leased by HAL to UKPNS (the "**Leased Network**").
7. UKPNS subsequently sought judicial review of the Determination, which claim was heard by the Administrative Court in a rolled up hearing over 13 and 14 October 2014.
8. By way of the judgment of the Court handed down on 7 November 2014 and reported under neutral citation [2014] EWHC 3678 (Admin) (the "**Judgment**"), the Court concluded that the Determination was, in certain respects, vitiated by errors of law. The Court proceeded to give detailed guidance on the way in which we ought to proceed to discharge the regulatory duties with which we have been tasked by the relatively recent amendments to the Act introduced to give effect to the Directive. The Court quashed the Original Determination and remitted the matter to us for reconsideration. None of the parties (HAL, UKPNS and the Authority) sought permission to appeal from the Judgment.

#### **Subsequent correspondence with the parties**

9. After the Court handed down its Judgment, we wrote to UKPNS and HAL by way of a letter dated 2 December 2014. In this letter, we set out the way in which we proposed to proceed. We explained that we intended to determine the question submitted by HAL (the "**Reference Question**") in accordance with the guidance contained in the Judgment. In particular, we set out our view that we were potentially in a position to determine two threshold questions which would answer the Reference Question relatively simply and quickly (and without further evidence). The first question was the identification of the relevant system, applying the legal test propounded at paragraph 115 of the Judgment. The second question was the identity of the relevant DEH or DEHs in relation to that system, applying the guidance contained in the Judgment, in particular at paragraph 133.
10. We noted that the question of which specific obligations apply to each of the DEHs (if more than one) in relation to third party access might potentially arise thereafter but we did not need, and nor would it be appropriate, to seek comprehensively to delineate the respective responsibilities between the parties, should we find there to be more than one DEH. We expected that in a case of joint responsibility the parties were to seek to resolve any issues around the practical facilitation of third party access between themselves by discussion and cooperation.
11. This approach is consistent with the terms and effect of the Judgment, in particular paragraphs 130 and 133 which provide (in material part) as follows:

*"130 ...the duty to secure third party access is self-certifying. In principle it only requires regulatory intervention if a problem arises. If the position is that more than one person is responsible then in a case such as the present, the Distribution Agreement already provides a contractual framework for third party access to occur. Under the legislative scheme it is the primary duty of those with joint responsibility to guarantee third party access. Provided the "result" is ensured precisely how it is ensured is secondary. It is essentially because the Authority has concluded that only one of HAL or UKPNS may amount to a DEH that the process of resolving*

*which of the two companies is to acquire that status has taken over two years."*

and:

*"133 The jurisdiction of the Authority is broad and can be used flexibly and proportionately: In conclusion under the Directive and Schedule 2ZA any person with any degree of responsibility for the relevant functions becomes a DEH and there is no need for the Authority to act first for this to be so. Where there is joint responsibility the DEH must co-operate to ensure the "result" of quick and easy third party access. In the event of a dispute the Authority has jurisdiction over all those with any degree of responsibility for the conveyance of electricity between the supplier and the customer. The Authority may if called upon apply the obligation to secure access in a proportionate manner which reflects the level of responsibility of each person for the conveyance or carriage of that electricity. The Authority may exercise its (formal and informal) powers in any manner that it properly sees fit to secure the objective of timeous third party access. How it achieves the objective of securing timeous third party access would be a matter for it based upon the facts of each case before it. It seems to me consistent with the Directive that the Authority would have a good deal of flexibility in this respect."*

12. Following receipt of written responses to our letter from UKPNS and HAL on, respectively, 8 December 2014 and 9 December 2014, we wrote to the parties again by way of a letter of 17 December 2014.

13. In that letter we addressed the particular issues raised in UKPNS' letter of 8 December 2014. In particular, we stated that:

- a. We did not consider there to be any need to depart from or rephrase the Reference Question remitted to us in order lawfully to determine the dispute in accordance with the Court's guidance. However, we indicated that we would in principle be prepared to entertain a second Reference Question (which had previously been suggested by UKPNS) if desired, and if the relevant customers to which it related were properly identified. In the event, UKPNS subsequently indicated that they did not require its suggested question to be determined: paragraph 15.c below.
- b. In accordance with the legal definition of the relevant "system" contained in the Judgment, the relevant system was not confined to the Leased Network but also extended to any *"infrastructure and equipment which must be used to ensure the transport or delivery of current between a third party"* and those high voltage customers like [REDACTED] (whose expression of interest (although not subsequently pursued) in taking a supply of electricity from a third party supplier was the genesis of the dispute between HAL and UKPNS) connected to the Leased Network.
- c. The second question which we proposed to proceed to determine, namely the identity of the DEH or DEHs in respect of the relevant system, must be answered by reference to the responsibilities of those potential DEHs in respect of the system. Furthermore, that this was a *threshold* rather than an *exhaustive* enquiry and did not require us (for the purpose of identifying which party or parties are DEHs), and nor would it be appropriate, comprehensively to determine the total balance of responsibilities between any DEHs found to have any degree of responsibility for the carriage of current between the DNO and the customer.

- d. It would not be consistent with the primary consumer interest nor a proportionate regulatory approach for us to seek to engage in an exhaustive enquiry as to the respective responsibilities of the potential DEHs rather than determining the identity of the DEH or DEHs. We noted that the responsibility to ensure third party access rights are effective rests primarily with those with joint responsibility to guarantee third party access.
  - e. Both parties were invited to confirm whether they accepted that they are a DEH of the relevant system (as defined above) and if not to explain why. In particular, we noted, first, that UKPNS had already accepted that it is a DEH of the Leased Network (which indisputably forms a part of the relevant system) and, secondly, that it had been common ground between the parties that certain relevant metering functions sit within the power/responsibility of HAL.
  - f. Should UKPNS and HAL both accept or be found to be DEHs of the relevant system it would be for them to determine the exact balance of responsibilities and operational tasks to be undertaken between the two companies in respect of any particular request for third party access.
14. By way of a letter dated 23 December 2014 HAL welcomed our proposed approach and stated, "*HAL accepts that it is a DEH for the non-leased part of the 'relevant system'*".
15. By way of a letter dated 22 December 2014, UKPNS made certain points which we summarise and respond to here:
- a. First, UKPNS stated, "*the question of whether a party is a DEH is by no means determinative of whether they owe third party access obligations.*" UKPNS continued that it accepts that it is a DEH but denies that it operates or has control of the relevant system(s) so as to have responsibility for third party access:
    - i. In response, we do not consider that the question which we put to the parties ought reasonably to have led to any terminological confusion in respect of what is meant by a party being a "DEH" of the relevant system. At paragraph 45 of the Judgment, the Court held "*[a] second question of law that an Authority must address is as to the person or persons who have responsibility for securing third party access. Under the domestic regime implementing the Directive the relevant person is the 'distribution exemption holder' or 'DEH.'*" We also refer to paragraph 7 of the Judgment where the Court described our Original Determination in the following terms, "*[i]n the Decision the Authority finds UKPNS to be subject to the duty to secure that access. It is therefore the 'distribution exemption holder' or 'DEH.'*"
    - ii. In response to UKPNS' contention that it does not have operation or control of the relevant system so as to have any responsibility for third party access, as set out below we have been able to reach a clear conclusion on that issue by reference to the material already before us and the Court. The consumer interest, therefore, compels that we answer the question as to the identification of the DEH or DEHs and confirm that decision as soon as possible so that customers and third party suppliers are able to exercise their rights to request connection and access in the proper functioning of a competitive market.

- b. Second, UKPNS responded to our explanation why we considered it appropriate to proceed quickly and without further evidence to determine the question of the identity of the relevant system and the DEH or DEHs of that system without seeking comprehensively to determine the exact balance of responsibilities, if there was joint overall responsibility between UKPNS and HAL. UKPNS stated that it considered this fell into a trap of considering responsibility in a purely physical sense. UKPNS referred to paragraph 119 of the Judgment and contended that we needed to *"trac[e] through the steps that need to be taken in order to facilitate third party access and identify... which of UKPNS or HAL needs to take each of them."* UKPNS also contended that it would be proportionate to resolve disputes as to the balance of responsibilities now rather than allow these to be stored up for the future:
- i. In response, we do not agree with UKPNS that, where more than one party is found to satisfy the threshold test of having some degree of responsibility for facilitating third party access (and is thus a DEH), the Judgment requires us to proceed to determine the exact balance of responsibilities between the parties. Nor do we consider that it would be appropriate for us to do so. This is not now challenged by UKPNS (see paragraph 16.a below). As the Court noted at paragraph 11 of its Judgment, it is for us to ask ourselves *"who has any responsibility"* (emphasis added) for ensuring the carriage or transport of current from a third party supplier to [REDACTED] or a similarly situated high voltage customer at Heathrow. Nor do we consider that paragraph 119 of the Judgment supports UKPNS' argument. In that paragraph the Court noted that *"[t]he Authority might well be entitled to conclude that the primary or even predominant responsibility lies with UKPNS. However, there is sufficient evidence before me to suggest, at the least, that there might be some level of responsibility which falls also upon HAL. This might arise because HAL has responsibility for its own (non-leased) network and this needs to be used to secure third party access; but also because it has some degree of responsibility for the Leased Network."* As the Court emphasised at paragraph 7 of the Judgment, the third party access duties falling on DEHs are essentially self-certifying and for competition truly to thrive *"the switching process must be highly expeditious: days not even months. Super-tight timetables are therefore set out in the Schedule..."*.
  - ii. It would not be consistent with the primary interest of consumers at Heathrow for us to seek comprehensively to determine the exact balance of responsibilities in circumstances where we can safely conduct a threshold enquiry to determine the identify of the DEHs (thereby answering the Reference Question and identifying for suppliers and customers the appropriate respondents for third party access requests).
- c. Third, in respect of the Reference Question, UKPNS stated that it had *"no particular objection to the Authority determining the question as referred by HAL, provided that the Authority correctly and fairly applies the true legal principles derived from the Directive and the Act. Like the Judge, we do not consider that the question referred by HAL lends itself to balanced and even-handed decision making, but we are content to reserve our position in this respect pending production of a new Determination...."*
- i. In response, and for the reasons previously set out to the parties in correspondence, we will therefore proceed to determine the

Reference Question in the form referred to by HAL. We do not consider that the question, read with the guidance contained in the Judgment, in any way pre-judges the outcome. Furthermore, UKPNS' suggested alternative question (which, in its letter of 23 February 2015 referred to below, UKPNS states that it no longer presses us to entertain and determine) is not viable in its current wording as it fails to identify the relevant customers to which it relates. The identification of the relevant customers is necessary in order to define the relevant system, because the relevant system is that which sits between the licensed supplier/DNO and the identified customer or similarly situated customers.

16. On 9 February 2015, we provided the parties with our decision in "minded-to" form and invited any comments in writing by 23 February 2015. UKPNS and HAL both responded by way of letters dated 23 February 2015 in which each endorsed our general approach, whilst making certain comments on points of detail. In particular:

- a. UKPNS stated at paragraphs 1-2, *"We are content to accept the key finding that the Authority is minded to make, namely that both UKPNS and HAL bear responsibility for facilitating third party supplier access to high voltage electricity customers at Heathrow Airport. We are also content to accept the Authority's finding that it would not be "appropriate" for the Authority "to determine the exact balance of responsibilities between the parties"..."*
- b. HAL stated, *"In terms of the substantive issues we do not accept that HAL satisfies the test of operation and control for the leased electricity network although we do note that HAL has a "marginal" role to play in supporting UKPNS in fulfilling their duties under Schedule 2ZA of the Electricity Act 1989... Notwithstanding the above point, we are generally comfortable with the approach Ofgem has taken with the new determination as it confirms that the obligations set out under Schedule 2ZA of the Electricity Act 1989 apply to the Heathrow network and that UKPNS has the "main responsibility" for compliance in respect of the leased portion of the network."*

17. Having considered the comments raised by UKPNS and HAL, we now set out by way of final decision the fresh determination which we make in this matter on remission. This decision should be read with the Judgment and, for context as to the background, our Original Determination.

#### **Court's guidance on correct approach**

18. In its Judgment, the Court stated that we were correct to look to the Directive in determining the Article 37 dispute referred. The Court held that Schedule 2ZA of the Act, the domestic implementing measure, was capable of being construed so as to give effect to the European legal obligations contained in the Directive.

19. By way of recapitulation, paragraph 1(1) of Schedule 2ZA of the Act, on the duties of Distribution Exemption Holders, provides as follows:

*"Third party access*

*1. (1) This paragraph applies where—*

*(a) a customer owns or occupies premises which are connected to an exempt distribution system;*

*(b) the customer is taking a supply of electricity through that system from*

- (i) the distribution exemption holder that operates or has control of the system, or*
- (ii) a person related to the distribution exemption holder; and*
- (c) the customer–*
  - (i) has served on the distribution exemption holder a notice expressing the customer’s interest in taking a supply of electricity from a third party supplier through that system; and*
  - (ii) has provided with the notice evidence that at least one third party supplier would be willing to supply the customer with electricity through that system, and has identified any such third party supplier in the notice.”*

20. The Court observed that the Directive is silent and neutral as to the number of persons responsible for facilitating third party access in respect of any particular system and that nothing precluded joint responsibility (Judgment, paragraph 86(d)). The Court stated that we (and other national regulatory authorities) are empowered to regulate every person who *“in any way has responsibility for the carriage or delivery of electricity from a supplier to a customer. There can be no regulatory lacuna or black holes.”* (Judgment, paragraph 86(e)).

### **Our decision**

21. On the basis of the evidence and submissions that have already been made to us and provided in the course of the Administrative Court proceedings, and in light of the Judgment of the Court, we consider that we are in possession of all material necessary to determine the following questions, which are the only questions necessary to determine the Reference Question:
- a. What is the relevant system in respect of the subject of this Determination; and
  - b. What is the identity of the DEH or DEHs in respect of that system bearing responsibility for facilitating third party access.
22. The evidence that has been gathered to date has been focused primarily on the Leased Network, and its operation and control. There is no reason why that evidence cannot be used. However, we recognise that it may not represent the totality of evidence which could have been adduced in respect of responsibility for the relevant system as defined in accordance with the Judgment (see paragraph 13.b above). We consider that the evidence before us is amply sufficient to allow us to reach the conclusions set out in this decision and neither UKPNS nor HAL have suggested to the contrary in their respective comments of 23 February 2015.
23. The questions identified in paragraph 21 above were identified as the relevant questions in the Judgment. The Court held that in determining the party or parties which are the subject of third party access obligations in any particular case, we should consider which system or systems are used in carrying current from a third party supplier to a customer and who has any responsibility for ensuring the carriage or transport of that current (Judgment, paragraph 11).

## Relevant system

24. The Court provided the following legal definition of the relevant system (by reference to Articles 2(6) and 32 of the Directive; see Judgment, paragraph 86(c)) at paragraph 115 of the Judgment:

*"What is the relevant system? It follows from my analysis of the law that the relevant system is all that infrastructure and equipment which must be used to ensure the transport or delivery of current between a third party supplier and a customer (I should, for the avoidance of doubt, clarify that I am referring here only to exempt distribution systems and not infrastructure and equipment on upstream licensed distribution systems)."*

25. In respect of the specific system in the present case, by reference to the evidence adduced and submissions made to both us and the Court, the Court described the Heathrow electricity network as follows (in material part) at paragraphs 18 - 25 of the Judgment:

*"18 The electricity network at Heathrow is owned by HAL. It comprises all the cables, ducts and other infrastructure, equipment and kit necessary for the conveyance of electricity. It serves the multiplicity of functions that go on at the airport.*

*19 ... The Heathrow electricity distribution network has three bulk supply points ("BSPs") which may also be known as "host DNO entry points". These are the points at which the electricity enters the Heathrow distribution network from SSE's local public network.*

*20 A contractual arrangement exists (a "connection agreement") between HAL and SSE regarding the connection between the Heathrow network and the local public network operated by SSE. HAL does not, however, purchase electricity from SSE; instead it acquires electricity from ██████ pursuant to a supply contract between HAL and ██████ Meters which are placed at the incoming BSP measure the amount of electricity taken out of the SSE local public network on to the Heathrow network and acquired by HAL from ██████*

*...*

*22 The supply of electricity going from SSE's local public network that has been acquired by HAL from ██████ is provided at the high voltage of 33 kilovolts ("kV") onto the Heathrow network high voltage switchgear, from which the supply transfers via cables at the Heathrow electricity distribution network. The electricity is then transformed down to 11 kV.*

*23 ...The remainder of the electricity transported through the Leased Network leaves it at a number of "exit points". Electricity leaving the network at an exit point in this way is metered by an electricity meter owned and operated by HAL.*

*24 ... There are two types of exit point. First, exit points from the Leased Network on to HAL's low voltage network. This supplies the vast majority of HAL's customers amounting to approximately 3,000 airport occupants such as shops, restaurants and other outlets. In practical terms the electricity is transported from the Leased Network on to a low voltage switchboard; these are leased by UKPNS from HAL as part of the Leased Network. However the switchboard and the outgoing switches are owned and operated by HAL and are not part of the Leased Network. The electricity enters the network owned and operated by HAL by passing through HAL's switchboard. Secondly, exit points directly from the high voltage Leased Network to approximately 45 customers of HAL acquiring high voltage*

supplies. Until recently, these included █████ who, as I have already explained above, now acquires its electricity from a third party source. Other high voltage customers include the likes of █████.

25 The Leased Network is one part of the overall network at Heathrow comprising the entirety of the high voltage network and a small part of the low voltage network. UKPNS has specified contractual responsibilities as a result of its agreements with HAL to maintain, operate, repair, replace and reinstate the Leased Network. Unless HAL requires otherwise, UKPNS does not have the power to change or develop the Leased Network but is expected to maintain the existing network in good condition."

26. Applying the legal test contained in paragraph 115 of the Judgment, we therefore find as a fact that the relevant system in respect of █████ and other similarly situated high voltage tenants connected to the Leased Network at Heathrow is made up of:
- a. the entry point meters where the host DNO network connects to the Heathrow network;
  - b. the Leased Network;
  - c. the exit point meters where █████ and the other similarly situated high voltage customers connect to the Leased Network; and
  - d. any relevant non-leased apparatus between the entry point meters and the exit point meters referred to in paragraphs 26 a and c above.

#### Identification of DEH or DEHs

27. Having identified the relevant system, it falls to determine the DEH or DEHs with responsibility for facilitating third party access in respect of that system. The Court provided the following guidance on the approach to that second question, as follows:
- a. At the outset the Court stated that we were correct to conclude that the phrase "*operation and control*" in Schedule 2ZA has to be construed consistently with the Directive and, specifically, Article 32 (Judgment, paragraph 145).
  - b. The test in the Directive was one of "*responsibility*" for operation, maintenance, ensuring interconnection, development of the system and stability of demand, i.e. the matters set out at Articles 2(6) and 32 of the Directive (Judgment, paragraphs 146 and 148).
  - c. In respect of control, "*A person who has control over such tasks as operation, maintenance, the securing of interconnections, development, and matching of supply and demand, can be said also to have "responsibility" for such matters.*" (Judgment, paragraph 147).
  - d. In respect of operation, "*Operation is the other part of the test. As a term it is referred to in Article 2(6) alongside maintenance, development, securing interconnections, and, stability of demand. If operation is given a meaning sufficient to encompass all of these things then Paragraph 1(1) Schedule 2ZA may be read consistently with the Directive. So, for example, operating the system in a wide sense might be said to include maintaining it, or securing interconnection of electricity between the*

*different parts of the system. It can even be broad enough to embrace being responsible for developing the system in a given area and ensuring the long-term ability of the system to meet reasonable demand.*" (Judgment, paragraph 148).

28. Although the Court did not seek to answer the applied factual question of responsibility for the relevant system at Heathrow, the Court made certain observations which reflect the evidence as to UKPNS' responsibility for the Leased Network and the possibility that HAL bore responsibility for other elements forming part of a broader "relevant system" and some responsibility for the Leased Network. Without making findings of fact, the Court considered the question of operation and control (understood as responsibility) should be remitted to us as there was material before the Court which suggested that HAL might also be found to be a DEH of the relevant system as well as UKPNS. In particular:

- a. At paragraph 152, the Court stated, "*[f]or the reasons that I have already given it is not evident from the Decision that the Leased Network comprises the entirety of the infrastructure or equipment over which current must pass in order to connect a supplier to a customer. It also follows from my prior conclusions that a person who operates or controls only a very small part of the system between a third party supplier and a customer may also satisfy the test of "operation or control" .*"
- b. At paragraph 87, the Court held, "*[t]he present case illustrates how contractual arrangements can arise in which two undertakings may, to a greater or lesser degree, share responsibility for the carriage of electricity between the vendor and the customer. It is possible to take the present facts and to modulate them to imagine a situation where the responsibility was far more evenly spread than the Authority found to be the case in the Distribution Agreement between UKPNS and HAL. [REDACTED] QC for the Defendant accepted that it was the substance of the contractual relationship that arose between the parties that really counted. If one imagines a hypothetical agreement between HAL and UKPNS of relatively short duration, with HAL having substantial veto rights over important decisions relating to the Leased Network, and UKPNS having extensive obligations to consult with HAL on operational and technical matters and HAL reserving the right to take all decisions about network development, then the logical conclusion would be that both clearly have "responsibility" for distribution.*"
- c. At paragraph 119, the Court held, "*I have made no findings as to the relative responsibilities for connecting a supplier to a customer as between HAL and UKPNS and therefore as to whether HAL's network should also be treated as part of the relevant "system" . The Authority might well be entitled to conclude that the primary or even predominant responsibility lies with UKPNS. However, there is sufficient evidence before me to suggest, at the least, that there might be some level of responsibility which falls also upon HAL. This might arise because HAL has responsibility for its own (non-leased) network and this needs to be used to secure third party access; but also because it has some degree of responsibility for the Leased Network. The analytical exercise conducted by the Authority in relation to operation or control did not answer the relevant question because it was confined to the Leased Network and, even then, only to determine which out of HAL or UKPNS met the operation or control test. The Authority did not ask itself whether the conveyance or transport of current from a supplier to a customer involved only the Leased Network*"

*or, to some greater or lesser degree, also the residual network operated by HAL."*

- d. At paragraph 125, the Court noted, *"I agree that even if it be the case that HAL's involvement is relatively minor this is not a reason for concluding that it falls outside the scope of the obligation to secure third party access. Schedule 2ZA must be construed in this light."*
  - e. Finally, at paragraph 158, the Court held, *"[t]ake the present case, a requirement upon HAL and UKPNS jointly to secure third party access can be largely achieved under the present Distribution Agreement. On this premise there is no reason why that should be substantially renegotiated so as to impose increased obligations and powers on UKPNS and commensurately decreased obligations and powers on HAL. Proportionate regulation would require the two parties simply to co-operate in whatever manner they saw fit to ensure third party access."*
29. As a matter of the evidence and submissions placed before us and the Court, we consider that it is clear that both UKPNS and HAL are DEHs with at least some degree of responsibility for the carriage of current between the host DNO and [REDACTED] and the customers connected directly to the Leased Network.
30. In respect of UKPNS, we have reached a clear conclusion that UKPNS satisfies the test of operation and control in the sense of responsibility for at least some of the matters identified in Articles 2(6) and 32 of the Directive. We reach that conclusion as follows:
- a. In UKPNS' submissions to us dated 11 March 2013 (paragraph 23(5)(f)) it stated, *"UKPNS agreed under certain conditions to operate (with permission from BAA's control authority which has day to day control of the system), maintain, repair and when appropriate replace the leased assets (ie the leased part of the distribution system) for a period of 90 years"*. This acknowledgement reflects the terms of clause 6 of the Distribution Agreement between UKPNS and HAL which provides, *"[s]ubject to the terms and upon the conditions of this Agreement, as set out in clause 13 of the Master Agreement, at all times during the term EDFs shall maintain, operate, repair and replace and (where appropriate) reinstate the Distribution System..."* This is consonant with clause 4.1 of the Distribution Agreement which provides that UKPNS is to accept electricity at each entry point and distribute electricity to each exit point. We consider that this means that UKPNS is "operating" and "maintaining" the Leased Network, which forms a part of the relevant system.
  - b. The facts underlying these conclusions are set out in more detail at paragraphs 27 - 31 of the Judgment.
31. In respect of HAL, on the evidence which we have seen (which, as set out at paragraph 22 above, may not be the totality of the relevant evidence) the position is more marginal, in that the bulk of the relevant system is made up of the Leased Network in respect of which we have concluded that UKPNS has the main responsibility. However, as a matter both of the contractual restrictions on UKPNS' powers to operate the Leased Network and as a matter of HAL's control of meters on the boundaries between (1) the Host DNO network and the Leased Network and (2) the Leased Network and [REDACTED] and other similarly situated high voltage customers, we conclude that HAL also satisfies the test of operation and control in the sense of responsibility for at least some of the matters identified in Articles 2(6) and 32 of the Directive. We reach that conclusion in reliance in particular upon the following -

- a. In respect of the Leased Network, HAL has certain rights in respect of UKPNS' operation and maintenance of the network. In particular, (i) under clauses 3.1, 5.2 and 5.5 of the Distribution Agreement, HAL has certain rights to energisation and deenergisation of entry /exit points and (ii) under clause 8.2 HAL has rights to veto UKPNS' maintenance plans. We therefore consider that it also has some degree of responsibility for operation and maintenance of the relevant system.
- b. In respect of metering, although clauses 14.3 and 22.5 of the Distribution Agreement places HAL under an obligation to provide UKPNS with data in its possession from metering equipment at entry points, it is under no contractual obligation (and UKPNS has no independent right of access) to metering data at exit points. We therefore conclude that HAL also has responsibility for the operation of the system in at least this respect.

32. In essence, we are satisfied that the duty to facilitate third party access falls on both UKPNS and HAL. We conclude and find as a fact that there is a joint responsibility between UKPNS and HAL and that as a matter of the factual position, the Court was correct to observe at paragraph 158 of the Judgment that in *"...the present case, a requirement upon HAL and UKPNS jointly to secure third party access can be largely achieved under the present Distribution Agreement. On this premise there is no reason why that should be substantially renegotiated so as to impose increased obligations and powers on UKPNS and commensurately decreased obligations and powers on HAL. Proportionate regulation would require the two parties simply to co-operate in whatever manner they saw fit to ensure third party access."*

## Conclusion

33. We have now answered the Reference Question. For the avoidance of doubt, by reference to the specific language of Schedule 2ZA, we conclude that both UKPNS and HAL are physically supplying electricity to high voltage customers connected to the Leased Network similarly situated to ██████<sup>2</sup>. This is consistent with the Court's findings as to the appropriate construction of "supply" as contained in Schedule 2ZA, which connotes *physical* supply and applies to all persons with any degree of responsibility for the operation and control of the relevant system. Every person with some degree of responsibility for the operation and control of the system is, consistent with the Directive, participating in the supply of customers with electricity from the third party supplier from the point at which that current leaves the Host DNO's network.
34. For the reasons already set out in correspondence with the parties and summarised above, we do not consider that it is necessary or proportionate to seek to determine any further question of the exact balance of responsibilities between UKPNS and HAL in respect of the facilitation of third party access on the relevant system at this stage. Not only is such an enquiry unnecessary to answer the Reference Question (or indeed the proposed reformulation of the Reference Question initially suggested by UKPNS), but to do so would be contrary to the primary consumer interest emphasised at paragraphs 74, 75, 77 and 99 of the Judgment. This is because to seek to answer more than is necessary to answer the Reference Question would further delay the point at which customers and suppliers are able to exercise their third party access rights. As the Court observed at paragraph 7 of the Judgment, for competition truly to thrive the switching process must be *"highly expeditious"*. We consider that the approach

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<sup>2</sup> Save that as previously set out in the Original Determination and the Judgment ██████ has now disconnected from the relevant system.

set out in this decision to be consistent with the principles guiding our exercise of our regulatory powers set out in particular at paragraph 133 of the Judgment. We do not anticipate that any further problems in the facilitation of third party access in respect of the relevant system at Heathrow should arise, given that the obligation is now (consistent with paragraph 130 of the Judgment) on UKPNS and HAL to work together cooperatively to discharge their joint responsibility to customers and third party suppliers. If any insoluble problems of implementation arise, they ought to be the subject of separate notification and consideration by us in the exercise of our dispute resolution or enforcement powers.



**Andy Burgess (21/04/2015)**  
**Associate Partner, Transmission and Distribution Policy**  
**Duly authorised on behalf of the Gas and Electricity Markets Authority**