Reckon LLP
Data analysis | Economic regulation | Competition law

2 Dyer's Buildings
London
EC1N 2JT

James Veaney
Ofgem

Telephone: 020 7841 5858
E-mail: f20@reckon.co.uk

By email to licence.exempt@ofgem.gov.uk

Friday 11 October 2013

Dear Mr Veaney,

Peel Ports Group Limited response to Ofgem consultation on Distribution Connection Use of System Agreement (DCUSA) change proposal (DCP) 124: Third Party Network - National Terms of Connection

1. Thank you for the opportunity to comment on the above proposal to modify the National Terms of Connection. This response is submitted on behalf of Peel Ports Group Limited. It is not confidential.

On your consultation process

2. I found the documents referred to in your consultation difficult to follow. It is unfortunate that your consultation letter does not do more to help customers understand the nature and effect of this proposal.

3. Your consultation letter says that the National Terms of Connection apply (amongst other cases) when the "bilateral connection agreement cannot be found". A filing error seems a weak basis for the imposition of nearly 100 pages of complex legalese on a customer.

4. Your consultation letter does not mention the possibility that some distributors might include the National Terms of Connection by reference in the bilateral connection agreements that they impose on customers under section 21 of the Electricity Act 1989. If this has occurred, your letter might have misled customers who hold written bilateral connection agreements and who have good document filing systems into believing that this change would not affect them.

5. Your consultation letter refers to the DCP 124 working group. I see from minutes of a few of their meetings that there were very low levels of attendance; little continuity in the attendance or identity of Ofgem observers; and that at the penultimate meeting Ofgem raised a list of questions which do not seem to have been followed up.

On the DCP 124 legal text

6. I have the following comments on the proposed legal text.

7. The definition of "Third Party Customers" is too widely drawn — it would even seem to include people buying electricity that has never been transported on any licensed distribution network. Given the way in which the term is used in the draft legal text (to indemnify the licensed distributor for the consequences of theft and de-energisation), perhaps the definition should have been restricted to something like "electricity customers supplied through Embedded Metering Points in cases where there is no Metering in respect of the Connection Point". Licensed distributors have no legitimate right to compensation when there has been theft of electricity from a private network where the private network operator takes responsibility for overall consumption through Metering at the Connection Point.

8. Clause 5.6.3 is too widely drawn — it would wrongly allow the licensed distributor to de-energise an entire block of flats or an entire industrial estate, without notice, just because the licensed distributor "reasonably believes" that one customer in the block or estate has been stealing electricity. This seems disproportionate and may also be dangerous.

9. Clause 5.12 is too widely drawn — it would wrongly allow the licensed distributor to charge the private network operator for costs related to theft from the private network operator itself. It should be limited to cases of theft on private networks that do not have settlement metering at their boundaries with the licensed distributor's network. Where there is settlement metering at the boundary, the private network operator (and/or the supplier it has appointed to take responsibility for residual energy flows at the boundary) is the only victim of any theft on the private network.

10. Clause 5.13 seems onerous for the private network operator and I cannot find any justification for its need in the change report. In fact, I am not sure what claims by a third party customer against the licensed distributor the author had in mind. The failure of justification suggests that the burden imposed by clause 5.13 on the private network operator is disproportionate (since there is no legitimate objective identified for it).

11. The sentence "Where a premises is not connected to a network (for example, where it is connected to a licence exempt system), the National Terms of Connection do not apply" is opaque and unsuitable for a document that purports to place legal obligations on the general public.

12. The sentence "if the premises is a licence exempt system, section 5 will apply (this will be the case where you are not a licensed network operator and the electrical installation within your premises is used to convey electricity to other electricity customers)" seems to provide a definition of a licence exempt system which is not exactly the same as the actual definition a couple of pages later. Such inconsistent drafting is not good enough for a document that purports to place legal obligations on the general public.

13. It is unfortunate that the documentation is only available in PDF format, and that there is no document showing the differences between the existing section 3 and the proposed section 5 (i.e. the changes that are actually proposed in relation to private networks which have C/T settlement metering at their boundary with the licensed distributor). I cannot be confident that I have spotted all material changes.

On the DCP 124 change report

14. On the section of the change report which assesses the change proposal against the DCUSA objectives:

    (a) The elements of justification given for making this change apply only to private networks that do not have boundary metering. The application of the change to all private networks (rather than just to private networks with no boundary metering) is not justified, and therefore there is no satisfactory justification for the change proposal as a whole.

    (b) The text under Objective 3 seems to conflate liability for contravention of the provisions of DCUSA with liabilities under terms imposed by distributors on non-DCUSA parties under section 21 of the Electricity Act 1989.

    (c) The following text in the change report has no visible connection to the change proposal: "Licensed Distributors also have obligations to agree the import or export capacity that the PNO has requested. This CP sets out the basis for maximum capacity usage."

    (d) The following text in the change report makes assertions about efficiency and "economics" (presumably meaning economy) that are not justified in the change report: "Also because the terms that codify operational arrangements and limitations of liability that will aid efficiency and the economics of the Licensed Distributor's networks, which are currently absent."

15. I could not reconcile some of the comments in the DCP 124 change report with the legal text appended to it. For example, paragraph 5.48 of the change report refers to obligations that would only apply to a "non metered connection point", but I could not find these obligations in the legal text. As it happens, the actual legal text on rights of access seems better (less intrusive) than what the change report hints at, but I was concerned at the apparent inconsistency.

Why DCP 124 cannot be approved

16. I can see that some of the changes proposed by DCP 124 might make some sense in respect of blocks of flats with no metering at the boundary between the licensed distributor and the private network. Unfortunately, the proposed changes go further than what is necessary or appropriate to meet legitimate objectives in this area, and therefore the change proposal as a whole is unsuitable for approval.

17. The proposed changes are not necessary or appropriate in respect of customers on private networks where there is no Embedded Metering Point. In those cases the current position is the right one: the private network operator takes responsibility for its network's connection to the licensed distributor's network, and customers within the private network have a bilateral commercial relationship with the private network operator. Any theft on the private network is a matter for the private network operator (who will be paying for the stolen energy on the basis of consumption at the boundary) and none of the business of the licensed distributor.

18. Even in cases where there are Embedded Metering Points, the change as it stands risks creating an inappropriate interference by the licensed distributor in the relationship between the private network operator and its customers. For example, at a site where difference metering is used, if the DCP 124 change were to be made and if the National Terms of Connection were to become binding (e.g. because the bilateral connection agreement refers to them or has been lost), then under the proposed legal text there would be a risk that the licensed distributor could decide to de-energise the whole site on the grounds that it believes that a customer at an Embedded Metering Point was stealing electricity. This would impose unjustified liabilities on the private network operator for the failure to perform its connection and use of system agreement (and possibly other commercial agreements such as land leases) with all its customers. There would be no justification to permit such interference, because there is no risk which the licensed distributor needs to be protected against: the private network operator is already liable for misconduct by its customers (e.g. the private network operator would pay for stolen electricity through the difference metering arrangements, it would be in breach of its connection agreement if unauthorised generation was operating on its network, etc.).

19. In addition to the serious legal and practical problems outlined above, I think that deficiencies in the section of the change report about DCUSA objectives make the change proposal unsuitable for approval by Ofgem. Ofgem should protect customers by ensuring that any changes in terms and conditions unilaterally imposed on them are limited to what has been transparently demonstrated to be proportionate. The DCP 124 change report does not meet that test.

Some wider implications

20. I think that this case highlights weaknesses in the governance of the National Terms of Connection. It seems inappropriate for changes to complex and far-reaching contractual terms that would be imposed unilaterally on customers should have progressed so far with the deficiencies noted above.

21. In the light of this experience, I think that you should reconsider your "code governance review" proposals. The proposed implementation of these proposals to DCUSA (the draft DCP 170 legal text) would delete DCUSA clause 9.5. This would remove the explicit reference to the National Terms of Connection in the definition of a part 1 matter.

22. If this change to governance procedures was made, then a change to the National Terms of Connection could be made by a DCUSA party vote without the need for Ofgem approval, provided that the DCUSA Panel had determined that the change did not have a "significant impact on the interests of electricity consumers", did not have a "significant impact on competition", and a few other tests listed in clause 9.4.

23. This proposed approach to governance would not provide sufficient protection to customers, especially given the limited transparency of the DCUSA governance process.

24. When I raised this problem in an earlier Ofgem consultation about the code governance review, your colleague Lesley Nugent responded as follows (Ofgem document dated 7 June 2013):

> Concern was highlighted by one respondent that the extension of self-governance in the DCUSA might potentially include the distribution charging methodologies and National Terms of Connection (NTC) which affect customers who might not be party to DCUSA. We do not consider that modifications to the distribution charging methodologies would be eligible for self-governance. Under the CGR, we set out our view that charging methodologies have significant impacts on competition and consumers and it is therefore important that regulatory oversight is maintained in this area. In respect of the NTC Schedule to the DCUSA, any modification that is likely to have material impacts on consumers or competition would not be eligible for self-governance. Any interested party can object to the classification of a proposed modification as self-governance during the consultation process and the Authority may direct that Authority consent is required up until the DCUSA Panel approve the final modification report. We are therefore satisfied that this modification is proportionate and that appropriate safeguards are in place. We would encourage further discussion at the code level if concerns remain, to ensure that appropriate processes are in place.

25. Look back at the fact that the DCP 124 consultations were circulated to only 405 addresses when there are 1,400 EDCM sites and about 100,000 CDCM half hourly metered sites in the country, any of which could well be affected by DCP 124 (in fact non half hourly metered sites are also at risk); at the number of responses received to these consultations; and at the readability of the DCP 124 documentation for people outside the industry. Do you feel confident that, if your code governance proposals were implemented, a proposal to change the National Terms of Connection that would have a significant adverse effect on a significant minority of customers would be noticed, and that the victims would be in a position to object to any erroneous classification of such a proposal as a part 2 matter?

Yours sincerely,

Franck Latrémolière