Determination by the Gas and Electricity Markets Authority of a dispute referred to it under section 23 of the Electricity Act 1989 concerning Application Fees levied by [redacted].

1 Introduction

1 1 [redacted] ("the Customers' Agent"), representing [redacted] (formally known as [redacted]) [redacted] (collectively "the Customers"), has referred two disputes to the Gas and Electricity Markets Authority (the "Authority") for determination The disputes referred are as follows

- [redacted] ("Customer A") and [redacted] ("the Company") regarding Application Fees paid to the Company for the provision of an electricity connection offer for the proposed [redacted] wind farm development
- [redacted] ("Customer B") and the Company regarding Application Fees paid to the Company for the provision of an electricity connection offer for the proposed [redacted] wind farm development

1 2 The disputes were referred to the Authority for determination under section 23 of the Electricity Act 1989 (the "Act") on 24 March 2011 Where a case falls within section 23, the Authority is required to determine a dispute once a customer has requested that it do so

1 3 The facts submitted by the Customers' Agent and the Company in relation to this dispute can be found at the appendix to this determination

2 Statutory obligations

2 1 Section 16 of the Act places an obligation on the Company to connect any premises to its distribution system if the owner or occupier (or an authorised supplier acting on his behalf) requests it

2 2 Section 16A of the Act sets out the procedure that should be followed when a connection is requested It dictates that the person requiring the connection to be made in pursuance of section 16(1) shall give the distributor a notice requiring him to offer terms for making a connection It also dictates that as soon as practicable after receiving that notice (and any other information reasonably requested by the licensee) the licensee must give the person requiring the connection a notice-

a) stating the extent (if any) to which his proposals are acceptable to the distributor and specifying any counterproposals

b) specifying any payment which that person will be required to make under section 19

c) specifying any security which that person will be required to give under section 20

d) stating any other terms which that person will be required to accept under section 21

2 3 Under section 19(1) of the Act, an electricity distributor may – where electric line or electrical plant is provided – require any expenses reasonably incurred in providing it to be defrayed by the person requiring the connection to such an extent as is reasonable in all the circumstances

2 4 Any dispute arising under section 16 to 21 of the Act, between an electricity distributor and a person requiring a connection may be referred to the Authority under section 23 of the Act for determination

3 Licence obligations

3 1 Licence obligations detailed here are those in force at the time the disputed Application Fees were charged (July 2007)

3 2 Standard Licence Condition 4B(1) (SLC 4B(1)) required the licensee, from April 2005, to have in place a Charging Methodology approved by the Authority It also required the licensee to comply with that Charging Methodology

3 3 SLC 4B(2) required the licensee to review its Connection Charging Methodology at least once every year and make modifications (if any) of the Connection Charging Methodology as were necessary for the purpose of better achieving the relevant objectives The relevant objectives were set out at SLC 4B(3) and included an objective to ensure that compliance with the Connection Charging Methodology facilitated the discharge by the licensee of the obligations imposed on it under the Act and by the licence

4 Facts of the case

4 1 Below is a summary of what the Authority considers to be the main facts of this case The full submissions made by the Company and the Customers' Agent, subject to redactions for reasons of confidentiality, are available at the appendix to this determination

4 2 Customer A sought a connection offer from the Company on 27 July 2007 for a proposed 54MVA wind farm development The Company explained that, in order for an offer of connection to be made, it required an application fee of £20,000 (exc VAT) This fee was paid by the Customer The Customer received a connection offer from the Company on 31 January 2008 The Connection offer was not accepted by the Customer due to the costs which would be involved in making the connection

4 3 Customer B sought a connection offer from the Company on 27 July 2007 for a proposed 24MVA wind farm development The Company explained that, in order for an offer of connection to be made, it required an application fee of £7,500 (exc VAT) This fee was paid by the Customer The Customer received a connection offer from the Company on 31 January 2008 The Connection offer was not accepted by the Customer due to the costs which would be involved in making the connection

4 4 On 14 August 2008 Ofgem published an open letter[1] on its website setting out its view that

- the practice of upfront charging for Assessment and design ("A&D") work as a pre-condition of providing a section 16A(5) connection offer is not consistent with the Act
- A&D fees cannot be recovered unless the full and formal connection offer (the section 16A(5) notice) is accepted by the customer
- If that notice is accepted, A&D fees may fall within section 19(1) of the Act – as they are expenses incurred in respect of making the connection (ie, where any electric line or plant is provided) – as long as they are reasonably incurred, as required by that section

[1] http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=271&refer=Networks/Connectns/CompinConn

- DNOs that levy upfront A&D charges as a pre-condition of providing section 16 connection offers should amend their charging methodologies to remove upfront charging for A&D work

4 5 On 17 November 2010, Ofgem published a second open letter to clarify its position regarding upfront charges[2] The purpose of that letter was to remind DNOs that whilst the 14 August 2008 letter specifically referred to A&D fees, DNOs should refrain from levying any upfront fees in respect of section 16 connection offers, including offers being produced for Distributed Generation ("DG") connections

4 6 Having read Ofgem's 17 November 2010 letter the Customers' Agent wrote to the Company (on 28 January 2011) requesting that the Application Fees paid by the customers in July 2007 be refunded He quoted from Ofgem's letter stating 'DNOs should not charge customers fees for Statement of Works or design studies as a pre-condition to providing a connection offer "

4 7 On 15 February 2011 the Company responded to the Customers' Agent's letter stating that

- The Application Fees levied in 2007 in respect of the two projects concerned were in accordance with the Company's published charging statement current at the time, the form of which was subject to approval by the Gas and Electricity Markets Authority
- The fees were designed so that as far as reasonably possible, the costs of preparing connection offers were recovered from the applicants concerned
- The Company would have been in breach of its licence and subject to potential regulatory penalties had it not applied Application Fees in accordance with its published charging statement

4 8 The Company stated that they were not in a position to repay the disputed Application Fees They highlighted that Ofgem's November 2010 letter stated that 'DNOs should not currently impose any charges as a pre-condition to meeting their duty under section 16A(5) of the Act to give a formal notice ' They explained that prior to August 2008 they were not aware of opposition from Ofgem to the principle of charging Application Fees and that those fees were charged in good faith

4 9 The Customers' Agent, acting on behalf of the Customers, requested that the Authority determine the dispute and that it also consider whether the Company should pay the Customers' expenses and lost interest

5 Discussions and conclusions

5 1 The Authority considers that it has been asked to determine

- whether the Application Fees charged to the Customers by the Company were lawful
- whether the Company should refund the Application Fees paid by the Customers, and
- whether the Company should pay the Customers' expenses and lost interest associated with this dispute

The Authority has not, however, been asked to investigate the manner in which the Application Fees were calculated, or to determine any issue of degree as to the level of the fees such as whether they were reasonable in all the circumstances As set out

[2] http //www ofgem gov uk/Pages/MoreInformation aspx?docid=297&refer=Networks/Connectns/CompinConn

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above, the issues between the Customers and the Company relate to the fact that Application Fees were charged at all

Ofgem's power to determine this dispute

5 2 The Company, while not challenging the Authority's vires to determine this dispute, has in its submission and at the oral hearing held in front of the decision-maker questioned in general terms whether the Authority should be determining a dispute so long after the connection offer was made

5 3 The Company argues that, while the provisions in section 23(1)(c) of the Act are silent in relation to customers who have not accepted their quote, they set a time-limit in relation to situations where a connection is made such disputes must be brought to the Authority within 12 months The Company says that it considers it surprising that customers who have not accepted an offer have more rights (ie, a longer timeframe) to bring a determination to the Authority, than those who have

5 4 Whilst the Authority notes the points made by the Company, it is bound to determine in line with the provisions in the Act Since the Act sets an explicit time limit, and provides that it will run from the making of a connection, it is not open to the Authority to create an additional time limit for which the statute does not provide Further, the Authority would like to highlight that its ability to determine disputes where the connection has not been made, while not time-bound, is not wholly unlimited, section 23(1) of the Act provides that section 23 only applies where a dispute arises under sections 16 to 21 between an electricity distributor and a person requiring a connection In other words, where the person who requested the connection no longer requires it, he cannot refer his dispute to the Authority

5 5 In this case, while the Customers did not accept the connection offers provided by the Company, due to the costs of the proposed connections, they have continued to lobby (through their Agent) for those costs to be reduced The Customers' Agent has contacted Ofgem and written to the Minister of State for the Department of Energy and Climate Change to lobby the Government to alter how costs of connection are recovered The Customers' Agent considers that the current policy results in charges that are "completely outside of the range of individual or small developers which skews the market in favour of major generators and electricity suppliers" The Authority considers that the Customers' actions suggest that, despite rejecting the Company's connection offers on cost grounds, the Customers in this dispute are still interested in the connections which were the subject of their original requests, or in very similar connections, and therefore remain "persons requiring a connection" for the purposes of section 23 Because of this, the Authority considers that it has vires under section 23 to determine this dispute [redacted] confirmed at the oral hearing that it does not challenge the Authority's vires in this case

Whether Application Fees charged by the Company were lawful

The Authority's view of the statutory scheme

5 6 It is the Authority's view that the statutory scheme provided by sections 16 to 21 of the Act places a statutory duty on DNOs to connect any premises or distribution system of another authorised distributor to their own distribution system under section 16(1) of the Act It considers that such a request may be made by the owner or occupier of the premises or an authorised distributor by way of a notice given under section 16A(1) of the Act Further, it is the Authority's view that as soon as practicable after receiving the notice, and any additional information requested (under section 16A(3)), a DNO is required to make a formal connection offer, given by way of notice under section 16A(5) of the Act

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5 7 It is the Authority's view that the notice must contain, amongst other things, details of the payment required under section 19(1) of the Act – which allows the recovery of expenditure reasonably incurred in providing the connection (by way of electrical line or plant) – and any other terms (which are reasonable under the circumstances) which the applicant will be required to accept under section 21 of the Act

Whether Application Fees are permissible by the Act

5 8 Given the Authority's view of the statutory scheme detailed above, it considers that there is nothing in section 16, nor in the procedure provided for in section 16A, that permits a DNO to impose any charges as a pre-condition to its meeting the duty under section 16A(5) to give a formal offer notice setting out its full terms to connect

5 9 The Authority considers that all stages leading up to the point that a formal offer is provided (as provided for by sections 16(1)-(4)) deal with the provision of information necessary or a distributor to issue a formal offer notice Further, it considers that the giving of that notice is the first stage at which any terms/payments are open to acceptance or non-acceptance by an applicant Therefore, it is the Authority's view that if the applicant does not accept the terms of the offer, then there is no basis in the Act for any charge to be levied

Whether the Company acted lawfully in charging the Customers Application Fees as a pre-condition to providing a connection offer

5 10 The Authority notes the Company's argument that in charging the Customers Application Fees it was complying with the Connection Charging Methodology it had in place at the time and that had it not charged the Customers Application Fees it would have been in breach of its Licence [3] However, the Authority also notes the obligation placed on the Company (by SLC 4B(3) at the relevant time) to ensure that compliance with its Connection Charging Methodology facilitated the discharge of the obligations imposed on it under the Act

5 11 Whilst the Authority considers that the Company was under an obligation to comply with its Licence, it does not consider that that obligation surpasses the Company's obligation to comply with its duties under the Electricity Act Further, the Authority notes that the Company's licence (SLC 4(12) did give it the opportunity to apply for derogation from complying with its Charging Methodology Given that the Authority considers that there is nothing in the Act that allowed the Company to recover its costs ahead of connection offers being accepted by the Customers, it does not consider that the Application Fees charged by the Company were lawful

Whether the Company should refund the Application Fees paid by the Customers in this dispute

5 12 Whilst, as discussed above, the Authority does not consider that the Company was entitled to require that Application Fees be paid as a condition precedent to making a connection offer, it considers the question of whether the fees should now be refunded a separate issue

5 13 If, in 2007, the Customers had refused to pay the Application Fees requested by the Company, the Company would not have been entitled to refuse to make a connection offer on that basis, and the Customers could have required them to make one Nevertheless, that did not happen in these cases The Customers in these cases agreed as a matter of contract to pay the Application Fees requested by the

[3] SLC 4B(1) – required the Company to have in place a Connection Charging Methodology and to charge customers in line with that methodology

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Company, in other words, the Company asked for them to be paid, and the Customers agreed to pay them

5 14 Moreover, in relation to both of the connection offers, both of the parties performed their obligations under the contracts, the Customers in fact paid the fees and the Company in fact provided the Connection Offers as required

5 15 The Customers now request that the Application Fees they paid should be refunded The question is therefore whether the fact that the Company requested in the past that Application Fees be paid should give rise to a refund now

5 16 Although the Customers have raised no clear legal grounds on which they base their claim for a refund, the Authority has endeavoured to consider some of the potential legal avenues by which such a refund might arguably be available These include

- Whether the Customers were induced to enter into a contract by a false statement made by the Company and whether such a statement was negligent or innocent
- Whether the Company has been unjustly enriched at the expense of the Customers and whether it would be inequitable for the Company to be required to refund the Application Fees

Whether the Customers were induced to enter into a contract by a false statement made by the Company and whether such a statement was negligent or innocent

5 17 The Authority considers that the Company, in setting out its policy of recovering Application Fees in its Charging Methodology and requiring the Customers' to pay the fees as a pre-condition to a connection offer being provided, implicitly represented that it was lawfully entitled to require that those fees be paid Given that the Authority considers that the Act gave the Company no powers to recover its costs from customers in this way, it considers that in doing so the Company misrepresented its ability to charge these fees

5 18 However, in considering the law of misrepresentation the Authority also regards it important to determine, whether any misrepresentation by the Company was negligent or innocent, ie did the Company have reasonable grounds to consider that they were entitled to charge the fees

5 19 The Customers have not alleged that the Company charged Application fees despite knowing that they were unlawful, or that they acted negligently by charging those fees The Authority understands that it could be argued that, had the Company properly considered the Act, it would have concluded that it had no power to charge Application Fees However, the Authority notes that the practice of charging Application Fees was widespread throughout the industry until its letter of 14 August 2008, and that before that point, the Authority had itself approved the Company's Charging Methodology which set out its policy of charging Application Fees

5 20 The Authority considers that, in light of industry practice and the fact that the Authority approved the methodology submitted to it, there is no reason to believe that the Company fell below the standard of care to be expected of a reasonable network operator in charging Application Fees Therefore, if the Customers pursued a refund on the grounds of misrepresentation, the Authority would consider that any misrepresentation by the Company of its ability to recover Application Fees was innocent

5 21 The Authority notes that, were the Customers induced to enter the relevant contracts by an innocent misrepresentation, they might be entitled to rescind the contract It also notes that the right to rescind a contract can be lost where, for instance, it is not possible to restore the parties to their original positions (*Erlanger v New Sombrero*

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Phospate Co (1878) 3 App Cas 1218), or a long period of time has elapsed (*Leaf v International Galleries* [1950] 2 KB 86) In this case, the Company has fully performed the services it was required to perform under the contracts (by providing connection offers), it is not possible to "undo" that work, or to unpick the Company's commercial arrangements for 2007 so as to determine how it might otherwise have been funded In any event, several years have passed since the fees were paid For those reasons, the Authority would consider that the contracts can no longer be rescinded

Whether the Company has been unjustly enriched at the expense of the Customers and whether it would be inequitable for the Company to be required to refund the Application Fees

5 22 The Authority has considered whether, in light of the fact that the Company received money from the Customers as a result of a mistake as to its legal right to charge Application Fees, the Customers might be able to argue that the Company has been unjustly enriched at their expense, such that the money might be recovered by way of a restitutionary claim (*Kleinwort Benson Ltd v Lincoln City Council and Others* [1999] 2 AC 349, *Goff & Jones on the Law of Restitution*, 7th edition, 2007, chapter 5)

5 23 In that regard, it notes that the purpose of the Company charging Application Fees to the Customers was to recover expenses incurred in preparing the Customers' connection offers The fees it received were not simply windfalls but were directly linked to work done at the request of the payers [4]

5 24 The Authority further notes that the fees which are the subject of this dispute were paid under contracts entered into by the Customers under which the Customers were to receive services (i e connection offers), and that those services were in fact delivered

5 25 If, therefore, the Customers in this dispute pursued a refund on the grounds of unjust enrichment, the Authority would consider that it would be inequitable to require the Company to refund the Application Fees in dispute

Consideration of the Customers' costs and lost interest

5 26 The Authority is aware that the Customers' Agent has requested that it consider whether the Company should pay costs incurred by the Customers in bringing this dispute as well as interest lost by the Customers on Application Fees paid

5 27 In terms of interest, given that the Authority does not consider that the Application Fees paid by the Customers' should be refunded, it does not consider it appropriate to consider whether the Company should pay the Customers' lost interest

5 28 In terms of costs, the Authority recognises that section 23(5) of the Act gives it some ability to require costs to be paid as it considers appropriate It also recognises that in exercising this ability it should have regard to the conduct of the parties and any other relevant circumstances The Authority does not award costs as a general principle in making determinations In this dispute, the Authority does not consider that either party has acted in a way that has caused the other to incur costs above those it may reasonably expect to incur in the determination process Therefore, the Authority considers that it would not be appropriate to award costs to either party

[4] Since the Authority has not been asked to determine the reasonableness of the level of Application Fees charged by the Company, this view is necessarily based on general principles rather than on detailed factual analysis

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6 Determination

6 1 To summarise, the Authority has determined whether the Application Fees charged by the Company were lawful, whether they should be refunded to the customers and whether any costs or interest lost should be awarded

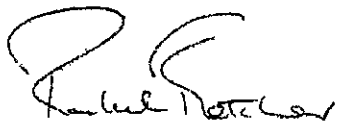
6 2 In reference to whether the Application Fees were lawful, the Authority considers that whilst the Company was acting in line with its Connection Charging Methodology, the charges were not allowed for by the Act Therefore, the Authority considers that the Application Fees should not have been charged to the customers as a pre-condition to providing a connection offer

6 3 The Authority considers, however, that the question of whether those Application Fees should now be refunded is a different question It has considered the avenues by which it might be argued that the Application Fees should be refunded In doing so, it has determined that

(1) were the Customers to argue for a refund on the grounds of misrepresentation, it would conclude that any misrepresentation by the Company of its ability to recover costs as a pre-condition to providing a connection offer was innocent, and that it is not now possible to rescind the contract, and

(2) were the Customers to argue for a refund on the grounds of unjust enrichment, it would conclude that it would be inequitable to require the Company to refund the Application Fees paid

6 4 Finally, the Authority has determined that in this dispute it would not be appropriate for it to award costs to either party or to require the Company to pay the Customers' in respect of interest lost



Rachel Fletcher 14 October 2011
Senior Partner, Smarter Grids and Governance Distribution
Duly authorised on behalf of the Gas and Electricity Markets Authority

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Appendix one – Submissions made by the Customers' Agent and the Company

24 March 2011 – Facts of the dispute submitted by the Customers' Agent when requesting the determination

An explanation of what is in dispute

[redacted] had identified two potential wind turbine projects for construction on land owned by our clients [redacted] One of the areas of land, part owned by [redacted] and part by [redacted], was considered suitable for the development of 18 turbines with a total planned generation capacity of 54 MW The other area of land, wholly owned by [redacted], was considered suitable for the installation of 8 turbines with a total planned generation capacity of 24 MW We were advised by the local authority that, in order for a planning application to be considered for approval, or consultation in respect of an application made to DECC, an application for electrical connection would need to be submitted to the appropriate DNO in respect of both potential sites We held discussions with [redacted], the relevant DNO and they advised that in order for an offer of connection to be made, appropriate fees would need to be paid to them within the relevant category of fees defined by [redacted] We were advised that the defined fees for the 54 MW wind farm fell with the category "up to 100 MW" with fees of £20,000 plus VAT, a total sum of £23,500 For the 24 MW wind farm, this fell into [redacted] category of "up to 30 MW", with fees of £7,500 plus VAT, a total sum of £8,812 50 This information is in accordance with that provided to [redacted] of [redacted] in my letter dated 28th January 2011 where a request was made for reimbursement to be made of the above sums, as they had been demanded without regard to the charges not being in accordance with current legislation (as we understand)

Therefore, based on the above, we request that Ofgem determine, on behalf of our clients, that the sums paid by them to [redacted] be returned to the relevant persons, as shown in the above mentioned letter to [redacted] dated 28th January 2011

A description of the circumstances in which the charges were requested and paid

The request for connection was made in accordance with the "Connection Pack" supplied by [redacted], which is attached for your consideration You will see that the Pack includes a schedule of charges payable on application, based on the capacity of each project These fees are the ones paid (see above) that we now wish to dispute

Also attached are the two offers from [redacted], one for the 54MW project, the other for the 24MW project

As I have previously said (and as I had written to Lord Hunt - then the Minister of State at DECC), neither of the offers were taken up, as the sums required to be paid "up-front" and continuing for 5 years (more than £5 million) were completely outside of the range of individual or small developers, which completely skews the market in favour of major generators and electricity suppliers who have huge inflows of cash, from which they can disburse funds for development, even if it is many years before any income materialises (I realise that these comments are not part of the current basis of the dispute)

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31 May 2011 – Customers' Agent response to questions posed by Ofgem

Ofgem Q1 - An overview of each of the two sites including

- the site name
- address details
- site owner
- proposed capacity
- date of application
- how the connection offer was requested (i e was S22 or S16 of the Electricity Act discussed or was a connection simply requested)
- the application fee paid to the Company
- date offer was received
- whether the offer provided by the Company was made under S16 or S22 of the Electricity Act or whether this was not clear/stated
- whether the offer for connection was accepted
- any other information you consider relevant

RE [redacted]

The site name
The site (wind farm) name, as included in the Section 36 planning application, is abbreviated to [redacted], meaning [redacted] The site is situated in [redacted], some 3 miles north east of the village of [redacted]

Address details
The site does not have an address, as such, because it simply occupies an area of open ground defined within maps included in the Section 36 planning application Any correspondence relating to the [redacted] site should be addressed to [redacted]

Site Owner
The land on which the site stands is owned by [redacted], and represented by their company [redacted] a company completely within their control

Proposed Capacity
The electrical capacity, at the time of application for electrical connection, was 54 MVA planned as 18 wind turbines each with a capacity of 3 MW

Date of Application (for electrical connection)
The application for electrical connection of the above site was made to [redacted] on or about 27 July 2007, acknowledged by them in a letter [redacted] dated 4 September 2007, signed on behalf of [redacted]

How the connection offer was requested
A connection offer was simply requested following telephone discussion with representatives of [redacted], following which application documents were supplied by them for completion (copy already provided to you) No discussions took place regarding the Sections of the Electricity Act that applied when making a connection application

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The application fee paid to the Company (i e [redacted])
The fee paid to [redacted] was £20,000 plus VAT (17 5% at that time)
(i e a total paid of £23,500)

Date offer was received
The offer, in response to the application, was dated 31 January 2008 and received at about that time

Whether the offer provided was made under S16 or S22 of the Electricity Act or whether this was not clear/stated
We were not aware that the application for an offer of connection was being made under any specific Section of the Electricity Act and the only mention of Section 22 of the Act was made in regard to the eventual Agreement (which was not entered into) as they said in their letter [redacted] dated 31 January 2008 attaching their connection offer, a copy of which has already been provided to you in my email dated 24 March 2011

Whether the offer for connection was accepted
The offer for connection was not accepted for the reasons stated in "Appendix I Customer's facts of the dispute", under the heading "A description of the circumstances in which the charges were requested and paid"

Any other information you consider relevant
We are not aware at this time that there is any more information that is relevant to our case However, we presume that, in the event that [redacted] produce documents or make statements that we either wish to provide additional information relating to or to contest, then we will be given the opportunity to provide such further information that may support our case

RE [redacted]

The site name
The site is known as [redacted]. It has been the subject of detailed evaluation and layout design but a planning application has not yet been submitted Being less than 50 MW capacity, the application would be submitted for consideration and approval by the local planning authority, [redacted] (as compared with DECC for the above [redacted] site) The [redacted] site is situated in the general area of the [redacted] site but some 1 mile north of it, the ground it occupies is not contiguous with [redacted] and as a result cannot be regarded as part of an overall development, in accordance with current planning regulations

Address details
The site does not have an address, as such, because it simply occupies an area of open ground defined within maps prepared for evaluation of the project and its eventual submission for planning consideration Any correspondence relating to the [redacted] site should be addressed to [redacted]

Site Owner
The land on which the site stands is owned by [redacted]

Proposed Capacity
The electrical capacity, at the time of application for electrical connection, was 24 MVA planned as 8 wind turbines each with a capacity of 3 MW

Date of Application (for electrical connection)
The application for electrical connection of the above site was made to [redacted] on or about 27 July 2007, acknowledged by them in a letter ([redacted]

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[redacted] dated 4 September 2007, signed on behalf of [redacted]

How the connection offer was requested
A connection offer was simply requested following telephone discussion with representatives of [redacted], following which application documents were supplied by them for completion (copy already provided to you) No discussions took place regarding the Sections of the Electricity Act that applied when making a connection application

The application fee paid to the Company [redacted])
The fee paid to [redacted] was £7,500 plus VAT (17 5% at that time) (i e a total paid of £8,812 50)

Date offer was received
The offer, in response to the application, was dated 31 January 2008 and received at about that time

Whether the offer provided was made under S16 or S22 of the Electricity Act or whether this was not clear/stated
We were not aware that the application for an offer of connection was being made under any specific Section of the Electricity Act and the only mention of Section 22 of the Act was made in regard to the eventual Agreement (which was not entered into) as they said in their letter [redacted] dated 31 January 2008 attaching their connection offer, a copy of which has already been provided to you in my email dated 24 March 2011

Whether the offer for connection was accepted
The offer for connection was not accepted for the reasons stated in "Appendix I Customer's facts of the dispute", under the heading "A description of the circumstances in which the charges were requested and paid"

Any other information you consider relevant
We are not aware at this time that there is any more information that is relevant to our case However, we presume that, in the event that [redacted] produce documents or make statements that we either wish to provide additional information relating to or to contest, then we will be given the opportunity to provide such further information that may support our case

Ofgem Q2 - An explanation as to why you consider the Company should refund the Application Fees in question, ie why you consider the charges not to be "in accordance with current legislation"

We say that at the time of application to [redacted] for electrical connection in respect of the two above-mentioned sites and in discussions with [redacted] officials, we were required by them to make payments, in accordance with a price list supplied by them (a copy of which has already been supplied to you) as a pre-condition to requesting a quote for electrical connection As far as we and our clients were concerned, there was not an option available to pay nothing at the time of application for connection and we believed that the payments were requested in accordance with legislation current at the time In Ogem's open letter to Electricity Network Operators, signed by Rachel Fletcher, dated 17 November 2010, following consideration in the letter of the legal position regarding application of charges by DNO's, it states in the penultimate paragraph that "Therefore, DNOs should not currently impose any charges as a pre-condition to meeting their duty under section 16A(5) of the Act to give a formal offer notice " It is based on this statement and the supporting information given in the letter, and to Ofgem's previous advice dating back to 2008, that we submit that the claim for payments by [redacted], as a pre-condition for electrical connection, is not in accordance with current legislation (i e at the time of the applications or at any time to 17 November 2010 (Ofgem's letter), or to date)

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Ofgem Q3 - Please also provide letters of Authority from

- [redacted] authorising you to seek this determination on their behalf
- [redacted] authorising you to seek this determination on his behalf

Signed documents will be provided

Ofgem Q4 - Any other information you have not already provided that you consider relevant to your request for a determination

We do not consider that there is any other relevant information regarding our request for determination, however, as stated above, in the event that [redacted] provide information, statements or comments which we would wish to contest or comment on, then we would expect to be able to submit further information or make statements as appropriate in support of our case If you are aware that some information already provided is deficient, or has evidently been omitted, then would you please advise us and we will endeavour to provide it quickly

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17 June Submission – Company's response to the facts submitted by the Customer and questions posed by Ofgem

1 The accepted regime covering A&D fees in 2007

At the time of the requests for connection quotations in 2007, and prior to Ofgem's letter of 14 August 2008, a number of DNOs as well as [redacted] included provision for upfront A&D Fees in their statements of connection charging methodology, all of which required a non-veto decision by the Authority Companies believed – and had no reason to doubt that Ofgem also believed – that appropriate A&D fees were consistent with the relevant objectives set out in the licence, including that

" compliance with the connection charging methodology results in charges which reflect, as far as is reasonably practicable (taking account of implementation costs) the costs incurred by the licensee in its distribution business "[5]

We have no record of any statement by Ofgem or the Authority prior to 14 August 2008 that stated or implied that upfront A&D fees should not be applied

2 Consistency with charging methodology statements

The distribution licence requires the licensee to comply with the connection charging methodology as modified from time to time in accordance with the relevant licence provisions (Condition 4B/13) Accordingly, if for some reason, [redacted] had not applied the upfront A&D fees set out in its charging methodology statement, it would have been at risk of enforcement action

However, as explained above, there was no reason for [redacted] (or any other DNO) to question the principle of applying the fees set out in its charging statement at the time

3 Non-Retrospection

The letter of 14 August 2008[6] advised DNOs of Ofgem's view that upfront A & D fees were not permissible under section 16A of the Electricity Act and asked them to review their Charging Methodology statements accordingly However, neither at that time or subsequently did Ofgem indicate that DNOs should repay A&D fees received prior to August 2008 We note that the Customer quotes from Rachel Fletcher's letter of 17 November 2010, and we repeat the relevant extract below (our emphasis)

"Therefore, DNOs should not *currently* impose any charges as a pre-condition to meeting their duty under section 16A(5) of the Act to give a formal offer notice "[7]

We have had no indication from Ofgem hitherto that repayment of charges previously applied in good faith and in accordance with licence obligations might be required

4 The status of the connection offers provided

We note that the Customer was asked to state whether the offers provided were made under S16 or S22 of the Act In each case, the offer letters, dated 31 January 2008,

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[5] Distribution Licence Condition 4B (now Condition 13)

[6] Assessment and Design (A&D) fees levied by Electricity Distribution Network Operators – open letter from Roger Morgan, Ofgem 14/8/08 (http://www.ofgem.gov.uk/Networks/Connectns/ComplnConn/Documents1/A%20and%20D%20fees%20consultation.pdf)

[7] Upfront charges levied by electricity Distribution Network Operators (DNOs) – open letter from Rachel Fletcher dated 17 November 2010 (http://www.ofgem.gov.uk/Networks/Connectns/ComplnConn/Documents1/upfront%20charges%20letter%20final%20Nov%202010.pdf)

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included on the first page a clear statement that agreement to the offer would take effect as a Section 22 Agreement under the Act The Customer's right to a determination, prior to acceptance, was set out in each offer letter (see extract below)

"If you wish to discuss any of these terms and conditions please contact me If we cannot resolve your enquiry you have the right, prior to acceptance of these terms and conditions to apply to the Office of Gas and Electricity Markets, 9 Millbank, London, SW1P 3GE for the determination of any dispute arising out of these terms and conditions "

Although we have set out below why we thought it appropriate in these two cases to provide section 22 offers we would emphasise our understanding that this determination solely relates to upfront A&D fees charged to customers that did not accept offers and not to customers' rights to seek determination after an offer has been accepted

In the detailed response set out in the attachment we explain that these offers were produced in the context of a large number of DG applications received during 2007 in the [redacted] part of [redacted] area The sheer scale of the projects and their location led [redacted] to work on these with [redacted] as a coordinated programme rather than deal with each customer's project in isolation The "[redacted]" programme has been discussed with Ofgem at a number of levels since 2007 The 2 projects that are the subject of this determination were considered as part of this programme in order that [redacted] could meet its statutory and licence requirements in relation to the connections concerned

Due to the interrelationships with other schemes in the [redacted] programme, and the long-lived nature of the projects, we believe that provision of an offer by reference to S22 of the Act was fully justified

5 Request for an Oral Hearing

We note the reference to Oral Hearings in your letter We would like to request an Oral Hearing We do not intend this to be an opportunity for new information to be provided but to reinforce the points in our submission and to ensure that our case is fully taken into account It is our position that the Act is not entirely clear on several points as set out in our submissions, including the correct procedure for charging A&D fees and we feel that a hearing would be the appropriate forum to discuss this It should also be noted that were the Authority to determine that the A&D fees in dispute should be repaid, [redacted] and other DNOs will be exposed to significant costs in the event of claims from other customers who paid such fees but did not accept the subsequent connection offers

6 Confidentiality

Would you please note that a number of the attachments setting out details of other applications within the [redacted] programme, as further described in the detailed response are commercially confidential and should not be disclosed outside Ofgem

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Ofgem Q1 - Please provide a description of what is in dispute attaching any relevant paperwork

This dispute relates to Application Fees paid by [redacted] in respect of connection offers made by [redacted] in relation to the following developments

- [redacted] (25 3MVA) wind farm
- [redacted] (57MVA) wind farm

These fees covered the expenses incurred by [redacted] in preparing the connection offers and were made in accordance with the (Ofgem approved) "Methodology Statement Detailing the basis of Charges for Connection to [redacted] Electricity Distribution System", dated 1st December 2006 (a copy of this Statement is included with this submission)

Schedule 1 of that statement includes a section headed "Connection Application" and states that an application fee, which acts as an advance payment of Engineering Charges and other expenses involved in preparing an offer of terms, is payable to [redacted] at the time of each application The schedule of charges is based on capacity and the highest voltage at the point of common coupling

For the [redacted] project (up to 30 MW, 33 kV voltage at PCC) a fee of £7,500 was payable and for the [redacted] project (up to 100 MW, 132 kV voltage at PCC) a fee of £20,000 was payable We do not dispute the Customer's account of how these fees were notified to the Customer's clients

Ofgem Q2 - Please provide details of the Application Fees paid by the customer for each site and the circumstances in which the fees were requested Please indicate whether you agree with the amounts, dates and circumstances provided in the customer's submission

The Application Fees paid by [redacted] were as follows

- [redacted] (25 3MVA) wind farm - £7,500 plus VAT
- [redacted] (57MVA) wind farm - £20,000 plus VAT

Circumstances and Dates

Two connection applications were received from Mr. Watkins on or around 27 July 2007 in respect of the 25 3MVA [redacted] and 57MVA [redacted] wind farms These applications were made in respect of connections into the proposed [redacted], a joint [redacted] and [redacted] initiative accommodating both transmission and distribution electricity infrastructure of 400kv and 132KV

In total 12 applications were received, on or around the same time, for distribution connected wind farms in [redacted] The timing of these applications was not accidental and only followed extensive dialogue by [redacted] with key stakeholders, including [redacted], the [redacted], Ofgem and developers of renewable generation to ensure that a coordinated approach for connecting wide scale generation in the area could be achieved

The complexities of this major construction development and the effort leading up to the submission of connection applications by developers and connection offers ultimately being made by [redacted] should not be underestimated We do not think it is reflective therefore for the customer to state

"A connection offer was simply requested following telephone discussion with representatives of [redacted]*"*

This statement considerably underplays the significant time, effort and resource expended up to this point, and ignores the challenges faced by [redacted] to issue multiple interdependent offers thereafter

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Regarding the customer's responses under "Date of Application" and "Date offer was received", we would highlight that Ofgem granted to [redacted] an extension of the normal (no greater than) 3 month licence timescales for processing these applications This extension was granted in recognition of

- the challenges faced and resource employed by [redacted] in designing optimum network and connection arrangements to accommodate each and all [redacted] applicant(s),
- the complexities involved in managing the formulation of multiple inter-dependent connection offers, and
- the dependencies upon [redacted] (and contractual arrangements required) for the construction of extensive transmission system works

We consider the [redacted] development to be a perfect example of an occasion in which it is entirely appropriate and reasonable for [redacted] to make Section 22 Offers In this circumstance, and due to the complexities of this development, it was necessary to make each of the 12 connection offers issued conditional upon the others being accepted This conditionality was required to ensure that [redacted] (and [redacted]) had the flexibility to revise connection and infrastructure designs, programmes, etc depending upon the actual level of capacity take-up Additionally, this conditionality facilitated potential future changes made necessary by subsequent applications or terminations This inbuilt flexibility is designed to ensure that developers reap the benefits of connecting to the most fit for purpose, economic and efficient network design ultimately being designed and built

It is also worth highlighting that, following the date of issue of connection offers and in advance of the date by which they were required to be accepted (30th April 2008), [redacted] hosted a workshop with all developers to explain/reiterate

- an overview of the background to the [redacted] development highlighting the discussions that had taken place with the [redacted] and [redacted] (as early as 2005),
- a reiteration of the rationale behind the process adopted by [redacted] for these connection applications and the nature of the connection offers, an explanation of the infrastructure and connection design proposals,
- environmental planning works carried out to date (commencing in 2005) and planned,
- an explanation of the cost apportionment rules applied and the basis of the staged milestone payments,
- an explanation of the reason and basis upon which [redacted] securities have been applied, and the proposed process going forward post offer acceptances

Further details on the [redacted] project are set out below under Question 4

Ofgem Q3 - Please provide an explanation as to why you disagree with the customer's view that you should refund the Application Fees in question, i e the legal framework that allowed you to charge these Application Fees as a pre-condition of providing a connection offer

The Customer submitted his applications in July 2007, a little over a year before Ofgem issued its guidance in relation to the status of Assessment and Design fees in August 2008

[redacted] was (and is) required to respond to requests for connection in accordance with its statutory and licence obligations A copy of the distribution licence condition (Condition 4D – "Requirement to Offer Terms for Use of System and Connection") in force at the time relating to offers of connection is attached to this submission That condition also refers to Condition 4B ("Connection Charging Methodology") that is also attached

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Condition 4D says that the licensee in responding to a request for a connection must set out (amongst other matters) the charges to be paid in respect of the services required, which are (unless manifestly inappropriate)

> (i) to be set in compliance with the requirements of standard condition 4B (Connection Charging Methodology), and
>
> (ii) to be presented in such a way as to be referable to the statement prepared in accordance with paragraph 4 of standard condition 4B (Connection Charging Methodology) or any revision thereof,

The relevant charging statement at the time of the applications was dated November 2006 (copy attached) That charging statement, in accordance with condition 4B, was subject to non-veto by the Authority Schedule 1 of that statement set out Application Fees that customers would be required to pay in advance based on the highest voltage of works and capacity of the connection The statement made clear that this fee " acts as an advance payment of Engineering Charges and other expenses involved in preparing an offer of terms"

Ofgem's Support for Application Fees

Prior to August 2008 Ofgem had been supportive in principle of assessment and design fees levied in advance Charging methodology statements for a number of DNOs at the time (as well as [redacted]) provided for upfront charges to be made in respect of the costs of preparing a design and associated connection offer These were all subject to non-veto by the Authority in respect of the form of the statements concerned We are not aware of any comment prior to August 2008 from Ofgem or the Authority questioning the principle of such upfront fees being levied

The Ofgem open letter of 14 August 2008[8] expressly supported the principle of A&D fees, and a relevant extract is reproduced below

"The practice of upfront charging has been a feature of how the market operates for sometime We consider this practice to be reasonable and efficient by directly charging parties who impose costs on the DNO
Recovering these costs protects consumers generally from bearing the costs of speculative connection requests and provides some protection against abuse of the obligation on DNOs to provide an offer of connection to their networks on request (this obligation does not distinguish between contestable and non-contestable elements of connection) "

Up to the point where Ofgem came to the view that it was not permissible for an upfront charge to be made, the above position, in our view, characterised the approach that it had taken towards upfront A&D fees for some years

In this connection it should be borne in mind that our experience in the absence of upfront A&D fees is that a higher proportion of EHV offers issued are now not accepted The table below illustrates the position for EHV DG connection offers issued across [redacted] and [redacted] licence areas combined in 2010 and the small percentage of these that were actually accepted (the figures exclude offers that were withdrawn or accepted offers that were terminated)

DG Connection Enquiries	DG Connection Offers issued	DG Connection Offers accepted	Percentage accepted
January to December 2010	60	16	27%

[8] Connections Assessment and Design (A&D) fees levied by Electricity Distribution Network Operators (DNOs) open letter from Roger Morgan Ofgem 14 August 2008 (http://www.ofgem.gov.uk/Networks/Connectns/ComplnConn/Documents1/A%20and%20D%20fees%20consultation.pdf)

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Ofgem's previous position on past application of A&D fees

In the August 2008 letter referred to above, although Ofgem stated its view that upfront A&D charges were not permissible, and urged DNOs to review their methodology statements and make necessary changes, there is no suggestion that they should consider reimbursing customers who had previously paid

A subsequent letter from Rachel Fletcher dated 17 November 2010 stated that DNOs should not currently (our emphasis) levy upfront charges as a precondition of receiving a connection offer [9] Again there was no indication that DNOs should consider reimbursing A&D fees previously received

Ofgem Q4 - Please provide any other information you consider relevant to your case

(i) Lack of clarity in Sections 16 to 23 of the Act

Further to the above it is apparent to us that there are several unclear aspects to Sections 16 to 23 of the Act, including

- the correct procedure for charging A&D fees,
- the scope for a decision under Section 23 to be retrospective in nature in relation to A&D fees, and
- the time period during which customers are entitled to refer disputes on non-accepted offers

We note in this context that the Customer's clients did not raise a dispute at the time regarding either the Application Fees charged or the terms of the January 2008 connection offers

(ii)The projects and the [redacted] programme

The [redacted] programme was developed in order to manage a number of generation connection projects in the [redacted] area, which required a coordinated approach to reinforcement and the close involvement of [redacted]

By the end of July 2007, 12 applications had been received totalling approximately 710 MW [redacted] requested and received a derogation of the licence requirement to provide a connection offer within 3 months due to the inter-dependent nature of the applications and the need to coordinate with [redacted] Offers were sent to applicants, including the Customer's clients, in January 2008

The attachment entitled "Attachment 3 - [redacted]" sets out the technical context of these two projects in the [redacted] programme and provides In summary, the [redacted] and [redacted] wind farms were two of a tranche of twelve concurrent connection applications totalling 710MW that were received for connection within [redacted] in July 2007 This tranche of concurrent applications came as a result of the [redacted] planning guidance "[redacted]" document (commonly referred to as [redacted]) from three of the defined "[redacted]" areas in [redacted], i e Area B, Area C and Area D These connection applications triggered a connection application by [redacted] to [redacted] for a new 400/132kV Supergrid Substation in [redacted] The resultant connection offer received from [redacted] incorporated two new Supergrid Substations

[9] Upfront charges levied by electricity Distribution Network Operators (DNOs) – open letter from Rachel Fletcher dated 17 November 2010 (http //www ofgem.gov.uk/Networks/Connectns/ComplnConn/Documents1/upfront%20charges%20letter%20final%20Nov%202010 pdf)

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The [redacted] Scope of Works included modifications to their existing 400kV substation at [redacted], a new 400kV double circuit tower line (approx 50km long) from a point between [redacted] and two new Supergrid Substation in [redacted] (referred to as [redacted] and [redacted]) [redacted] contained 3x460MVA Supergrid transformers and [redacted] contained 2x240MVA Supergrid transformers

Please note that Attachment 3contains details of third party connection projects and should not be disclosed outside Ofgem

The table below sets out a summary of the timeline in relation to the [redacted] programme and the projects that are the subject of this dispute

Time line for the [redacted] Offer process.

5 September 2007 [redacted] letter to Mr R Morgan, Senior Manager, Connections Policy Ofgem, requesting consent to an extension to the 3 month period prescribed in license condition 4D until the end of January 2008 for a number of windfarm applications totalling a capacity of around 700MW in aggregate

24th September 2007 [redacted] letter to Ofgem supplying table of applications received

22nd October 2007 Ofgem consent to a longer period under standard condition 4D(5) of its distribution licence to offer terms for connection [redacted] received thirteen applications from persons wishing to connect wind turbine generation sites to its distribution system in the [redacted] area Liaison and agreement with [redacted] is required regarding the necessary infrastructure arrangements, especially given the sparsity of electricity infrastructure in that geographical area

31st October 2007 Offer in respect of [redacted] 132kV substation

31st October 2007 Offer in respect of [redacted] 132kV substation

25th January 2008 amendment to Connection Offer in respect of [redacted] at [redacted] 132kV substation issued on 31st October 2007

25th January 2008 amendment to Connection Offer in respect of [redacted] at [redacted] 132kV substation issued on 31st October 2007

31st January 2008 [redacted] Offers issued to all 12 remaining [redacted] Applicants which included

[redacted] - £2,477,894 plus VAT and [redacted] Security Payment £48,000 (West substation)

[redacted] - [redacted] £5,084,512plus VAT and [redacted] Security Payment £108,000 (west substation)

20th February 2008 [redacted] held Workshop to which all applicants were invited to discuss the [redacted] project and the related commercial and contractual arrangements

28th February 2008 [redacted] Connection Offer amended in respect of [redacted] at [redacted] 132kV substation issued on 31st October 2007

28th February 2008 [redacted] Connection Offer amended in respect of [redacted] at [redacted] 132kV substation issued on 31st October 2007

(Construction Programme completion date estimated 31st October 2015)

30th April 2008 Deadline for acceptances for [redacted] (Neither [redacted] or [redacted] accepted)

Attachment 4 is a letter from [redacted] to Ofgem dated 24 September 2007 that set outs a schedule of the [redacted] applications Please note that this contains details of third party projects and should not be disclosed outside Ofgem

As referred to under question 2 above, due to the complexities of this development, it was necessary to make each of the 12 connection offers issued conditional upon the others being accepted This conditionality was required to ensure that [redacted] (and [redacted]) had the flexibility to revise connection and infrastructure designs, programmes, etc depending upon the actual level of capacity take-up Additionally, this conditionality facilitated potential future changes made necessary by subsequent applications or terminations

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In view of the interdependence of the 2 projects in dispute with the other projects in the [redacted] programme, the conditional nature of the offers made, and the long lived nature of this programme [redacted] believes that it was entirely justified in issuing these offers by reference to Section 22 of the Act

List of Attachments

1 Copy of Distribution Licence Conditions 4B (Connection Charging Methodology) and 4D (Requirement to Offer Terms for Use of System and Connection) in force from 1/4/2007,
2 [redacted] Statement of Connection Charging Methodology dated December 2006
3 Background technical paper on the two projects in dispute in the context of the [redacted] project (please note, this is confidential as it contains details of third party connection projects and should not be disclosed outside Ofgem)
4 Letter from [redacted] to Paul Darby, Ofgem, 24 September 2007 relating to [redacted] project (please note, this is confidential as it contains details of third party connection projects and should not be disclosed outside Ofgem)

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27 June 2011 – Customer comments following the Company's 17 June 2011 submission

As an initial consideration, we would like to address what we believe are the underlying principles to the complete issue The law of the land requires that it applies to anyone in the jurisdiction where that law applies [redacted] cannot rely, as a defence, that they were either unaware of the law, the law was not just being misapplied by them but by many other people as well (i e other DNOs) and that they had not been advised by Ofgem as to the law, in our view "ignorantia legis non excusat" applies [redacted] has the organisation, the skills base and huge resources which they should have deployed to fully inform themselves of their obligations and rights and to act within the law in respect of their relationship with the public at large (including us and our clients)

The legislation relevant in this case is the Electricity Act 1989 (as amended), and referred to in Rachel Fletcher's open letter to DNOs dated 17 November 2010, the opening paragraph of which is repeated here to emphasise the basis of our claim *"On 14 August 2008 we published a letter regarding DNOs practice of levying upfront assessment and design (A&D) charges as a pre-condition of providing a connection notice under section 16 of the Electricity Act 1989 (the "Act") The letter stated that there is nothing in section 16 of the Act, nor in the procedure provided for in section 16A of the Act, that permits a DNO to impose any charges as a pre-condition to its meeting the duty under section 16A(5) of the Act to give a formal offer notice setting out its full terms to connect "* Further, in their response, [redacted] try to set aside their obligation to repay the sums to our clients, which we say were illegally applied, by saying that the sums were paid before Ofgem's advice given in Roger Morgan's letter dated 14 August 2008 We say that the absence of Ofgem's advice to [redacted] prior to 2008 is of no consequence to the obligations on [redacted] to act within the law, and the law was the same in 2007 as in 2008 in regard to the issue under dispute

Further to the above, in detailed consideration of some of the points in [redacted] response, we reply in two main parts, the first in regard to any errors of fact in [redacted] responses and second, justification by them for the Fees charged

Errors of Fact in the Company's response to questions posed by Ofgem

Ofgem Q1
The [redacted] statement that the dispute relates to fees paid by [redacted] is incorrect in regard to "[redacted]", which is known as [redacted] We clearly state throughout our presented documents, and as included in the letter to [redacted] dated 28 January 2011, that the application for connection of the [redacted] was made by [redacted] the Directors and controlling owners being [redacted] Therefore, any repayments would require to be made to [redacted]

As to the 12 applications [redacted] received for connections on or around the same time, this is not surprising because [redacted] had resulted in the focus on developing wind farms in [redacted] at around the same time and all participants were seeking when they could obtain a grid connection However, it is not clear as to why this is considered by [redacted] to be relevant to the concept that they are entitled to charge fees as a pre-condition of an application for an electrical connection Even if [redacted] wish to believe otherwise, our statement that *"A connection offer was simply requested following discussion with representatives of* [redacted]*"* is true and we were not involved in any discussions on the need *"to make each of the 12 connection offers issued conditional upon the others being accepted"*, until the Connection Offer was received

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Ofgem Q2
It follows from Ofgem Q1 above that the [redacted] response regarding "the Application Fees paid by [redacted]", in relation to [redacted], is not a correct, neither is the reference to [redacted] making two connection applications, for the same reasons already given here

Item 4, Page 7 of 13, The status of the connection offers provided
[redacted] say that we were asked "to state whether the offers provided were made under S16 or S22 of the Act " In fact were not asked that question by Ofgem, we were asked "How the connection offer was requested" and this is the question that we answered, by saying that "No discussions took place regarding the Sections of the Electricity Act that applied when making a connection application" Therefore, as stated in [redacted] response, "the offer letters, dated 31 January 2008, including on the first page a clear statement that agreement to the offer would take effect as a Section 22 Agreement under the Act" is, in our view, totally irrelevant in relation to the question posed to us by Ofgem Why [redacted] are wishing to place a different interpretation on the question posed we do not know, but we reinforce our statement that we did not request an offer under any Section of the Act

Secondly, Justification by [redacted] for Charging Application Fees as a Pre-Condition of Providing a Connection Offer

Ofgem Q3
Ofgem's Question 3 specifically asks [redacted] to provide *"the legal framework that allowed you to charge these Application Fees as a pre-condition of providing a connection offer"* This, in our view, is not answered by [redacted] They refer continuously in their replies to the various parts of Condition 4, but these Conditions do not state anywhere that [redacted] is required to make a fee as a pre-condition for an applicant to request a connection In fact, [redacted] refer on numerous occasions to different descriptions as to what the payments made are called, or defined as, ranging from "design fees levied in advance", through "upfront A&D fees", "upfront fees", etc and in the Connection Offers themselves (at Page 4) the sums payable on application are described as "Application Fee", there is no mention there of anything being an "Advance" Further, we say that in order for a payment to be an "advanced payment" it needs to be made against an eventual provision of a service, no service was either agreed or provided by [redacted], therefore it was not possible to have made an advanced payment against it The connection offer by [redacted] was totally unacceptable, for reasons that I communicated to Lord Hunt the then Minster of State for Energy and provided to Ofgem as reasons as to why the offer could not be accepted

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20/07/2011 – Company response to the Customers' Agent's comments and further questions posed by Ofgem

Ofgem Q1 - *In your 17 June 2011 response to our questions you state that 'further to the above it is apparent to us that there are several unclear aspects to Sections 16 to 23 of the Act, including*

- *the correct procedure for charging A&D fees,*
- *the scope for a decision under Section 23to be retrospective in nature in relation to A&D fees, and*
- *the time period during which customers are entitled to refer disputes on non-accepted offers*

Please provide an explanation as to why you consider Sections 16 to 23 to be unclear and what you consider those sections require

(a) References to the procedure for charging A&D fees

There is no reference in sections 16 to 23 of the Act as to the procedure by which costs incurred by a licensee in preparing an offer of connection might be recovered, i e the Act does not explicitly prohibit DNOs applying upfront charges nor does it explicitly permit the practice Section19 (1) says that the distributor may require expenses reasonably incurred in providing electrical line or plant to be defrayed by the person requiring the connection to such extent as is reasonable Again, Sections 16, 16A and 19 of the Act do not give guidance on how to factor in the work of preparing the design of a connection Section 16A refers to a process whereby a person requiring a connection under Section 16(1) must provide information to the distributor and the latter must provide a notice in response (a process because Section 22 provides an alternative process) We do not believe that Section 16A rules out upfront charges to an applicant to cover the costs of providing an offer of connection However, we have abided by Ofgem's 2008 stated position in relation to not making upfront charges for A&D costs on the understanding that Ofgem was sympathetic to the practice of DNOs levying upfront fees and that it had indicated that it would be pursuing changes to clarify DNOs' rights in this regard We note that the Energy Act 2008 makes provision for regulations to explicitly allow for upfront A&D fees ("connection offer expenses"), but are disappointed with the delays in bringing this process to fruition

(b) the scope for a decision under Section 23 to be retrospective in nature in relation to A&D fees

Section 23 provides for a determination by the Authority of any dispute arising under sections 16 to 21 between a distributor and a person requiring a connection We are not clear, however, as to what elapsed period of time is appropriate in this regard, for example given changes in regulatory policy, licence and/or statutory requirements that may have taken place in the intervening period

(c) The time period during which customers are entitled to refer disputes on non-accepted offers

An anomaly exists in the time limits placed on referrals for determination For completed connections, a time limit of 12 months, following the time upon which the connection is made, is placed on a dispute being referred for determination The Act is silent on the time period for which a party may refer a dispute to the Authority where a connection has not been made, whether that is due to the offer never having been accepted or the offer having been accepted and subsequently terminated However, the fact that the Authority is now seeking to determine on this matter implies that customers who do not accept a connection offer have greater rights of recourse in terms of the opportunity to seek a determination than those who do

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Ofgem Q2 *- Please explain whether, and if so why, the Company considers that it would be inequitable for the Authority to require them to refund to the customer any Application Fees paid by it which are found not to have been levied in accordance with the law I e , has the Company materially changed its position as a result of receiving the monies*

We are not quite clear on what is being asked here So far as we are aware there has not hitherto been a 'finding' in relation to upfront application/A&D fees We set out in some detail in our previous submission why we believed that upfront A&D fees were reasonable, noted that they were in our charging statements current at the time, and pointed to Ofgem's support for them In addition, as stated above, we do not believe that Section 16A rules out upfront charges to cover the costs of providing an offer of connection
As regards the reference to the monies previously received by [redacted] in upfront A &D fees, we would reiterate the point made in the previous submission that there would be a significant exposure to [redacted] if it was required to repay the amounts concerned to all customers involved However, as we also pointed out in the previous submission at no point on or after 14 August 2008 did Ofgem indicate that A&D fees previously charged by Companies should be refunded to customers

Ofgem Q3 *- Please state whether the differences between a Section 22 and Section 16 offer were explained to the customer and whether it was the customer's choice to receive a Section 22 offer*

As was pointed out in the previous submission, the offers made to the Customer's clients made reference to Section 22 of the Act It included the explicit statement that "If you wish to discuss any of these terms and conditions please contact me If we cannot resolve your query you have the right, prior to acceptance of these terms and conditions to apply to the Office of Gas and Electricity Markets, 9, Millbank, London SW1P 3GE for the determination of any dispute over these terms and conditions "

We find it difficult to understand the relevance of this question to the determination, and we note that the Customer also appears to query this point We note in particular the statement in Rebecca Langford's letter of 29 June 2011 that in determining the dispute, Ofgem is " only determining the case brought by [redacted] " To the best of our belief that case relates to the Application Fees charged by [redacted], not to the status of the connection offer provided We request that Ofgem confirm that the appropriateness of the provision of Section 22 offers does not form the subject matter of this determination, and the relevance, if any, to the Authority's powers in this instance

Ofgem Q4 *- Please provide any other information you consider relevant to your case either in response to this letter or the Customer's comments of 27 June 2011*

Following on from the comments above, we would also point out that unlike the present distribution licence condition 12 2, condition 4D that was in force at the time of the Customer's applications did not specify the type of connection offer that should be made (i e as between Section 22 or Section 16A of the Act) Therefore, setting aside any differences in interpretation of the current Distribution Licence, it therefore cannot be argued that [redacted] offers under Section 22 of the Act in this instance should have been made under Section 16A of the Act as a result of the obligations within [redacted] Distribution Licence

As we set out in our previous submission there were circumstances in this case that made it particularly appropriate for [redacted] to make an offer under Section 22 of the Act in this case These include the following factors

a) Proposed wind farm connections in [redacted] so far remote from the [redacted] network so as to be not technically possible to connect the proposed generation into it,

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b) A requirement for a new [redacted] network connected to a new Grid Supply Point from [redacted] involving a major extension of the [redacted] network into [redacted],

c) High levels of uncertainty over planning consents for wind farms, [redacted] network and [redacted] network,

d) A complex technical solution that was developed to satisfy the connection requirement of multiple large generators that were planning to make connection applications around the same time,

e) Section 16 of the Act lays out the duty on a distributor 'to make a connection between a distribution system of his and any premises ', not between the Transmission Network and any premises

f) Section 17 of the Act lays out circumstances in which there are Exceptions from the duty to connect, including

a) he is prevented from doing so by circumstances not within his control, and
c) it is not reasonable in all the circumstances for him to be required to do so

Status of the August 2008 letter on A & D fees

We would reiterate that Roger Morgan's letter of 14 August 2008 expressed Ofgem's *view* that charging of upfront A&D fees as a precondition of providing a Section 16A(5) connection offer was not consistent with the Act It was not a formal judgement on what the law is Whilst we have acted as requested by Ofgem at that time to suspend A&D fees whilst they clarified the DNO's legal rights, we have at no time stated that we agree with Ofgem's interpretation of the Act

In the same letter Ofgem stated that although it considered the practice of charging upfront A&D fees not to be compatible with the Act as it stood, it nevertheless considered the "*practice to be reasonable and efficient by directly charging parties who impose costs on the DNO Recovering these costs protects consumers generally from bearing the costs of speculative connection requests and provides some protection against abuse of the obligation on DNOs to provide an offer of connection to their networks on request Therefore, going forward,* [Ofgem would] *seek to make an amendment to the Act to allow upfront charging for A&D fees in certain circumstances when a suitable legislative vehicle becomes available* "

Information and observations relating to the Customer's comments
(i) [redacted] and compliance with the 'law of the land'

We note the Customer's comment in his 17 June submission as follows
The law of the land requires that it applies to anyone in the jurisdiction where that law applies The law of the land requires that it applies to anyone in the jurisdiction where that law applies [redacted] cannot rely, as a defence, that they were either unaware of the law, the law was not just being misapplied by them but by many other people as well (i e other DNOs) and that they had not been advised by Ofgem as to the law, in our view "ignorantia legis non excusat" applies

We agree with these comments However, the Customer has misrepresented the case put forward in our previous submission We have not suggested either that any parties were 'misapplying' the law or that we were in 'ignorance' of the law

The Customer's comments indicate that it does not fully appreciate the importance of the compliance by [redacted] with its licence conditions As the Authority is aware, compliance with the licence conditions is a legal obligation We have explained previously that the licence conditions at the time provided, by way of the *Methodology Statement Detailing The Basis of Charges for Connection to* [redacted] *Electricity Distribution System* dated 1

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December 2006, for the charging of upfront fees [redacted] is therefore not relying on ignorance as a defence and in fact feels no need to do so as it was actively complying with the law (in the form of its licence conditions) when the upfront A&D fees were charged to the Customer's clients [redacted] then continued to comply with the Authority's guidance by refraining from charging upfront fees as soon as the Authority issued its 2008 statement to that effect However, it remains [redacted] position that the Act does not rule out upfront charges to an applicant to cover the costs of providing an offer of connection

(ii) 'Errors of fact' (referred to in Customer's submission of 17 June 2011)

'Ofgem Q1'

1 We note the Customer's response to the comment made in our 17th June submission in respect of "fees paid by [redacted]" in respect of the [redacted] and [redacted] wind farms Whilst we consider the point being made by the Customer to be irrelevant to the case in dispute, we acknowledge that the connection offer for the [redacted] wind farm was made to [redacted] and marked for the attention of [redacted]

2 The detail provided by [redacted] was in direct response to Ofgem's request that we indicate whether we agree "with the amounts, dates and circumstances provided in the customer's submission" The extent of the background provided is as a result of Ofgem's apparent desire to extend the scope of this determination from beyond the question whether it is appropriate or not to levy upfront A&D fees to include issues regarding whether it was appropriate for [redacted] to issue offers for [redacted] under Section 22 rather than Section 16 of the Act

For these reasons we felt it particularly pertinent to point out that connection offers were made following both an extended dialogue with key stakeholders and following a concerted effort by [redacted] to ensure that applications for connections in the [redacted] area would be received in a coordinated and planned fashion (rather than on an individual basis) in order that [redacted] might be able to treat the applications and the resultant works on the distribution and transmission systems collectively rather than on an individual basis It is for this reason we challenged the customer's statement that "*A connection offer was simply requested following discussion with representatives of* [redacted]"

For the avoidance of doubt, we did not state that the customer was involved in discussions on the need "*to make each of the 12 connection offers issued conditional upon the others being accepted*" prior to the issue of a connection offer Rather these discussions collectively took place with applicants for connection into [redacted] immediately following receipt (and prior to acceptance) of connection offers

'Ofgem Q2'

1 We note the Customer's reiteration of his comments regarding Application Fees paid by [redacted] and connection applications made by [redacted] and would refer you to our previous response on this matter

2 There seems to be a misunderstanding here We do not dispute that Ofgem asked for details of "*How the connection offer was requested*" However, Ofgem also asked for details of "*Whether the offer provided was made under S16 or S22 of the Electricity Act or whether this was not clear/stated*" (9th in the list of items requested by Ofgem)

'Ofgem Q3'

References to [redacted] justification for charging Application Fees
We agree with the Customer that distribution licence condition 4D (in force in 2007) did not refer to Application Fees or Assessment and Design Fees However, it did refer to the

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Statement of Connection Charging Methodology (as does the corresponding Condition 12 now in force) and required charges for connection to be in accordance with that statement That statement provided for an application fee, and stated that this " acts as an advance payment of Engineering Charges and other expenses involved in making an offer of terms " [redacted] incurred significant engineering cost in providing the Section 22 Offers to these customers who required connection, at that time Application & Design fees simply covered [redacted] 'expenses reasonably incurred'

Even if the offer made to the Customer should have been made under Section 16A(5), which we do not accept, we set out below the provisions of the Act which we interpret as entitling [redacted] to charge upfront A&D fees in any case

Section19 (1) of the Act provides that

'Where any electric line or electrical plant is provided by an electricity distributor in pursuance of Section 16 (1) above, the distributor may require any expenses reasonably incurred in providing it to be defrayed by the person requiring the connection to such an extent as is reasonable in all the circumstances '

Note that Section 16 (1) of the Act only deals with the situation where 'a person requires a connection'

Under Section 20 (1) of the Act 'an electricity distributor may require any person who requires a connection in pursuance of Section 16(1) to give him reasonable security for the payment to him under Section19 in respect of the provision of any electric line or electrical plant '

Section 20 (1A) of the Act deals with the situation where the person fails to provide any security and provides powers for the distributor in these circumstances, including Section 20 (1A) (b) of the Act which states that 'if the connection has not been made, [he may] refuse to provide the line or plant for so long as the failure continues,'

We understand Section 20 to mean that the distributor is entitled to require security for works involved in providing a connection prior to that connection being provided As Application and Design fees cover 'expenses reasonably incurred' then [redacted] is entitled to recover these expenses from the person requiring the connection, or to require security in relation to these expenses, to cover the eventuality that the person no longer requires the connection

If the Offers made by [redacted] in this instance were made under Section 16A(5) of the Act, then it is our position that [redacted] would still have been entitled to recover upfront the Application and Design costs which form part of the 'expenses reasonably incurred' 'in respect of the provision of any electric line or plant'

26 July 2011 – Customers' Agent's response to the Company's 20 July submission

Whilst there are points of detail we could raise in regard to [redacted] response to your letter of 29 June 2011, we feel that none of them would change our underlying case that we have set out in the documents already sent to you In our view it is in everyone's interests if the issues are determined in a timely manner If you consider it appropriate, and no other point is made, perhaps you could convey this to [redacted] as our overall view We could argue as to whether "upfront payments" are the same as "advanced payments" and [redacted] now seem to want to call everything "upfront", but we think that semantics is not what it should be all about

As you are aware, and you have copies of the relevant correspondence, we did ask [redacted] to settle with our clients some months ago, but to no avail This is of course an option still available to them, particularly as they have referred in previous correspondence to the

impact that other (resultant) claims may have on them Again, I am not sure as to the correctness of you communicating such information to them but I am sure that you will give this your consideration

In the event that the determination is made in favour of our clients, and their losses, costs and expenses are deemed payable by [redacted], we estimate that the loss of interest (or cost of the same) since 2007, is £7,300 for "[redacted]" and £2,700 for [redacted] with further sums of £4,000 for [redacted] and £1,500 for [redacted] in respect of costs and expenses incurred

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