

**DETERMINATION BY THE GAS AND ELECTRICITY MARKETS AUTHORITY OF A DISPUTE REFERRED TO IT BY WESTERN POWER DISTRIBUTION (EAST MIDLANDS) PLC - concerning a request for an electricity connection between a distribution system and a proposed section of network to be operated by an Independent Distribution Network Operator**

## **1. Introduction**

- 1.1. On 1 August 2016 Western Power Distribution (East Midlands) plc (the "Company") referred for determination by the Gas and Electricity Markets Authority<sup>1</sup> (the "Authority"), a dispute between the Company and [REDACTED] ("the Customer").
- 1.2. We consider that it is most appropriate to consider this matter as a dispute under section 16 of the Electricity Act 1989 ("the Act"). Pursuant to section 23(1A)(b) of the Act, we are required to determine the dispute.
- 1.3. The dispute concerns a request that was made by [REDACTED] [REDACTED] [REDACTED] for a connection to the Company's network (the "connection"). [REDACTED] requested a connection to the Company's network at [REDACTED] near [REDACTED], with a capacity of 20MVA. [REDACTED] asked the Company to provide it with Points of Connection ("POCs") at 33kV. The Company issued [REDACTED] with a connection offer for a capacity of 20MVA with POCs at 11kV.
- 1.4. [REDACTED]'s request was for a connection to supply a new electricity network at a site being developed for the use of [REDACTED]
- 1.5. Copies of the submissions of the Company and the Customer in relation to this determination are included as Appendices 1-3 and 4-6 respectively.

## **2. Background**

### The relevant parties

- 2.1. [REDACTED] is a utility procurement consultancy. In requesting the connection, it was acting for its client, the developer of the [REDACTED] site ("the Developer"). The Developer, in turn, is developing the site for its client, [REDACTED]
- 2.2. The Customer is an Independent Distribution Network Operator ("IDNO"). It is part of a group with [REDACTED] [REDACTED] ("[REDACTED]" an Independent Connections Provider ("ICP").
- 2.3. The Customer wished to submit a bid to the Developer for the work to construct the new network assets required for [REDACTED]. It wanted the construction work to be undertaken by [REDACTED] and proposed that the Customer would own the new network.
- 2.4. The connection was required to supply the new network for [REDACTED]. In order for the Customer to build, own and operate all of the new network assets, including a 33/11kV substation ("the substation") that would be part of the connection, it required a connection to the Company's network at 33kV.
- 2.5. The Customer's preferred option is for it to own all of the new assets required to provide the connection, including the substation. Failing that, it would like the Company to offer to part fund the construction of the substation by an ICP in the

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<sup>1</sup> The terms "Ofgem", "the Authority", "we" and "us" are used interchangeably in this document.

same way that the Company would part fund the work with price control revenue if it were to construct the substation itself.

- 2.6. The Customer considers that an important part of its bid to the Developer is its ability to offer a quicker schedule for completion than its competitors and its willingness to offer contractual remedies for failure to meet delivery criteria. By agreeing to part fund the construction of the substation, the Company would allow the possibility of [REDACTED] constructing it. The Customer could then point to its own record on the speed of construction in bidding for the work with the Developer. The Customer would prefer this scenario over one in which the Company constructs the substation.
- 2.7. We received a letter from the Developer, [REDACTED] in support of the Customer's position (Appendix 7). The Developer reiterated the Customer's contention that it might be able to deliver the connection works more quickly than the Company and that the Customer offered the Developer contractual commitments to programme timeframes with associated financial penalties for failure to deliver on time. The Company considered that it was not appropriate to take into account the Developer's contention on the relevant delivery timetables offered by the Customer and the Company given the uncertainty associated with these timetables.

#### The connection request

- 2.8. On 7 September 2015, [REDACTED] sent the Company a request for a POC with a capacity of 6MVA at [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] subsequently dropped this request.
- 2.9. On 11 September, [REDACTED] sent the Company a request for a POC at 8MVA. [REDACTED] subsequently dropped this request.
- 2.10. On 11 September 2015 [REDACTED] sent the Company a request for a POC with a capacity of 12MVA.
- 2.11. On 18 September [REDACTED] informed the Company by email that this POC was for an IDNO connection.
- 2.12. On 23 September 2015 the Company informed [REDACTED] that a new 33/11kV primary substation would need to be installed in order to provide the requested POC. The Company also informed [REDACTED] that the POC would be at 11kV, downstream of the new substation.
- 2.13. In emails, phone calls and meetings between [REDACTED] and the Company in October and November 2015, the Company explained its rationale for insisting that the Company must own the substation.
- 2.14. On 7 December 2015, [REDACTED] sent the Company a connection request for a POC with a capacity of 20MVA. It is this connection request to which this dispute relates.
- 2.15. On 19 January 2016, the Company issued [REDACTED] with an offer for the 20MVA POC. This offer contained two options for the configuration of the connection. The options were an IDNO connection or an ICP connection that would be adopted by the Company on completion.
- 2.16. The voltage of the POC offered was 11kV for both options.
- 2.17. On 19 January 2016, the Company also issued [REDACTED] with an offer for an IDNO POC at 12MVA and 11kV.

- 2.18. On 28 January 2016, the Company hosted a meeting to discuss the 20MVA connection offers.
- 2.19. On 26 February 2016, the Company received a letter requesting that POCs for an IDNO connection be provided on the 33kV network at [REDACTED]
- 2.20. On 9 March 2016, the Company sent a response refusing to offer IDNO access to its 33kV network at [REDACTED]

### **3. Jurisdiction**

#### Decision on powers for determining this dispute

- 3.1. The Company brought the dispute for determination and invited us to consider exercising our powers under, variously, section 23 of the Electricity Act, section 44C of that Act and Standard Condition 7 of the electricity distribution standard licence conditions. After gathering evidence and the views of each of the parties on the matter we have decided to treat this as a dispute under section 16 of the Electricity Act 1989. The Company is therefore entitled to refer the dispute to us for determination under section 23 of that Act.
- 3.2. This dispute is not a dispute which we can consider under section 44C of the Act because such a dispute can only be brought in respect of a written complaint against the holder of an electricity distribution licence or the beneficiary of an exemption from such a licence in respect of that operator's obligations under the Electricity Directive. However, it was the Company (that is, the party subject to the relevant obligations) which referred this dispute to us, not the Customer.
- 3.3. Section 16(1)(a) of the Act provides that an electricity distributor is under a duty to make a connection between its distribution system and any premises when required to do so by either the owner or occupier of those premises or an authorised agent acting with the consent of the owner/occupier of the premises.
- 3.4. Section 16(1)(b) of the Act provides that an electricity distributor is under a duty to make a connection between its distribution system and any distribution system of another authorised distributor, when required to do so by that authorised distributor for the purpose of enabling electricity to be conveyed to or from that other system.
- 3.5. Section 23 of the Electricity Act 1989 provides that any dispute arising under sections 16 to 21 of that Act between an electricity distributor and a person requiring a connection may be referred to us for determination by either party. When such a dispute is referred to us, we will determine the dispute by order.
- 3.6. We will determine whether the Company would have been in contravention of sections 16(1)(a) or 16(1)(b) of the Act, or any other stipulations of the laws and regulations relating to the provision of connections by operators of electricity distribution networks, by offering POCs at 33kV as requested by the Customer. We will also determine whether these stipulations require the Company to honour the Customer's request for a specific voltage for its connection.
- 3.7. The Customer argued that the relevance to this dispute of the regulatory obligations on the Company was in considering whether they prevented the Company from complying with its obligations under Chapter II of the Competition Act 1998. However, we consider that the current dispute can be determined with reference to section 16(1) of the Act, without us needing to decide whether Chapter II of the Competition Act 1998 may apply.

## Other duties on the Company

- 3.8. In this dispute we have also given consideration to the Company's obligations in section 9 of the Act (General duties of licence holders), section 16(2) of the Act (duty to provide necessary equipment) and Condition 19.1 of the Standard conditions of the Electricity Distribution Licence (prohibition on discrimination), in assessing whether the Company's actions were required by the regulatory framework.
- 3.9. Section 9 of the Act provides that an electricity distributor is under a duty to develop and maintain an efficient, co-ordinated and economical system of electricity distribution.
- 3.10. When offering connections to IDNOs under section 16(2) of the Act, a DNO's duty to make a connection to the distribution system requires it to "*provide such electric lines or electrical plant as may be necessary to enable the connection to be used for the purposes for which it is required*".
- 3.11. Condition 19.1 of the Standard Conditions of the Electricity Distribution Licence provides that an electricity distributor must not discriminate between any person or classes of persons in (a) providing Use of System and (b) carrying out works for the purpose of connection to its distribution system.

## 4. The Position of the Company

### The New Network Assets

- 4.1. In its connection offer to ■ the Company sent electrical schematics showing the additional network assets that it intended to construct in order to meet ■ connection request. This is Appendix 8.
- 4.2. The Customer sent us electrical schematics showing the additional network assets that it wished to construct. This is Appendix 9.
- 4.3. From these diagrams we can see that the two configurations of the additional network assets are substantially identical. The only difference is the position of the POCs.
- 4.4. The additional network assets consist of two circuit breakers, two 33kV cables and a 33/11kV substation ("the substation"). The Company planned to provide the Customer with a POC on the 11kV side of the substation. It would build, own and operate the substation as part of the shared use distribution network. The Customer desired POCs on the 33kV side of the substation. It would build, own and operate the substation as part of the new network. This dispute therefore arose out of conflicting desires by both parties to own and operate the substation and its associated assets.
- 4.5. If the Customer were given POCs on the 33kV side of the substation, it would fund fully the construction and capital cost of the substation.
- 4.6. The Customer suggested that if it could not own the substation, the next best outcome for itself would be if the Company agreed to allow an ICP to construct the substation for adoption by the Company and for the Company to apportion the capital cost of the substation between the connecting customer (the Developer) and the Company according to the Company's Common Connection Charging Methodology<sup>2</sup>.

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<sup>2</sup> Statement of Methodology and Charges for Connection to Western Power Distribution (East Midlands) plc's Electricity Distribution System

## The Enhanced Scheme

### *Apportioning costs for reinforcement*

- 4.7. The Company is a licensed Distribution Network Operator ("DNO"). As such, under section 16(1)(a) of the Act, it must offer a connection to its network to any customer making a request for a connection to premises owned by that customer. Under section 16(1)(b), the Company must offer a connection from its own distribution system to a distribution system of another authorised distributor, when requested to do so by that authorised distributor for the purpose of enabling electricity to be conveyed to or from that other system.
- 4.8. The Company has a published document, the Statement of Methodology and Charges, which sets out its policies on responding to connection requests. This document is subject to our approval, and the policies are designed to ensure that the Company acts in compliance with its regulatory obligations, including those arising from section 16 of the Act.
- 4.9. Section 5 of the Statement of Methodology and Charges is a section entitled "Common Connection Charging Methodology" ("the CCCM").
- 4.10. The CCCM stipulates that connection offers made by the Company must be suitable to supply the maximum capacity for the connection as agreed with the customer. This is the Required Capacity. If the Required Capacity exceeds the capacity available on the network at the point where the customer wishes to connect, the DNO must offer either to reinforce the network or to build assets for the sole use of the requesting customer which facilitate the provision of the Required Capacity. Reinforcement is defined as assets installed that add capacity to the existing shared use Distribution System. Assets constructed for the sole use of one customer are known as Extension Assets.
- 4.11. If the DNO provides Extension Assets the customer will fully fund the cost of those assets.
- 4.12. If the DNO reinforces the network the cost of doing so will generally be apportioned between the DNO and the customer. The CCCM describes the calculation that is used to determine how this cost is apportioned. The relative cost paid by each of the customer and the DNO is represented by the Cost Apportionment Factor ("CAF").

### *The Minimum Scheme*

- 4.13. The CCCM states that the Minimum Scheme is the connection design with the lowest capital cost of the feasible designs for providing the Required Capacity. Usually, outside of the circumstances described below, the DNO will offer to construct the Minimum Scheme and will calculate the connection charge based on the estimated cost of the Minimum Scheme.
- 4.14. Paragraph 5.11 of the CCCM states that if the customer requests a supply voltage that is not necessary to meet the Required Capacity, and the local Distribution System is not of the requested voltage, then the customer will pay in full the cost of Reinforcement of the Distribution System to its specified voltage.
- 4.15. In certain circumstances the DNO may decide to offer an Enhanced Scheme instead of the Minimum scheme. The CCCM defines an Enhanced Scheme as a connection design which includes assets in addition to those required for the Minimum Scheme, or which have a larger capacity or different specification to the assets of the Minimum Scheme.

4.16. If the DNO offers an Enhanced Scheme, then the Connection Charge that will apply will be the lower of the Connection Charge associated with the Minimum Scheme and the Connection Charge associated with the Enhanced Scheme. The customer will not pay more than the cost of the Minimum Scheme.

#### ■■■ Connection Request

- 4.17. ■■■ connection request was for a capacity of 20MVA. This exceeded the available capacity on the local network at the time the request was received. The Company determined that a new primary substation would be required in the area in order to provide the Minimum Scheme.
- 4.18. When the connection request was received, the demand on the Company's 11kV network in the area of ■■■ was close to the available capacity of the network.
- 4.19. The Company considered three options that it judged to be feasible for providing the Enhanced Scheme. It calculated that the most cost efficient option would be to build a new 33/11kV substation at ■■■
- 4.20. The Company decided to use the occasion of ■■■ connection request to provide an Enhanced Scheme as the new substation would have provided an extra 30MVA of capacity in total. ■■■ request was for 20MVA. The other 10MVA would be used to bolster the capacity of the wider network in the area. The location specified in ■■■ connection request was conveniently situated to allow the Company to take a supply from the new substation to release capacity on the local network.
- 4.21. Since ■■■ would use two thirds of the capacity, it would only be required to pay for two thirds of the cost. The Company would pay the other third and recover these costs from all network users.
- 4.22. The Company considered this was the most cost efficient of the options available to it in the sense that it had the lowest reinforcement cost per unit of increased capacity. It was also the cheapest option for ■■■. The other two options were -
- Provide a sole use substation to ■■■ to meet their request, and separately enhance an existing substation nearby to increase the capacity on the local network.
  - Provide a sole use substation to ■■■ and install another substation for the use of the Company to supply the shared use distribution system.
- 4.23. These two options would have required ■■■ to pay the whole cost of a substation constructed for its sole use, as this would have constituted Extension Assets (Extension Assets are defined in paragraph 4.10 and 4.11, above). The option that the Company chose was cheaper for ■■■ because, since the Company would use the new shared substation to meet demand on the local network, the substation would constitute reinforcement and the Company would apply the CAF to apportion the cost of the new substation between ■■■ and itself.
- 4.24. The Company argued that it would have been in contravention of its obligation under section 9(1) of the Act to maintain an economic and efficient network if it had chosen either of the options that it rejected. The Company says that if it did not offer an Enhanced Scheme:

*"when further connection requests (which are very likely) would have been received in the relevant wider area, [the Company] would have had less flexibility in the connections which it could offer to those future customers. The likelihood is that future*

*connections would have been comparatively more expensive because of the requirement for additional reinforcement costs which would have still been required."*

## **5. Arguments made by the parties to the dispute**

### Discrimination

#### *Company's Argument*

- 5.1. The Company argued that it was not obliged by the regulations to honour the Customer's request for the connection to be at a specific voltage level. The regulations only require that its offer meets the Required Capacity of the request, as is reflected in paragraph 5.1 of the CCCM, which defines the Minimum Scheme.
- 5.2. The Company cited our guidance<sup>3</sup> in which we state that the requirement on a DNO to offer a connection under section 16 of the Act "does not appear to require the DNO to offer an IDNO a connection at a voltage which is higher than necessary."
- 5.3. Indeed, the Company states that if it were to honour the request for the connection to be made at a specific voltage it would be at risk of discriminating between its customers by treating different connection requests differently. It believes this would put it in violation of Condition 19 of the Standard conditions of the Electricity Distribution Licence.
- 5.4. By providing the POCs at 33kV the Company considered that it would be discriminating against future customers and in favour of the Customer because future customers would have to pay more for connections than if the Company constructed the Enhanced Scheme.

#### *Customer's Argument*

- 5.5. The Customer agrees that the focus of the regulations is to require the Company to offer the capacity requested. However, it argues that the regulations do not prohibit the Company from honouring a request for a particular voltage.
- 5.6. The Customer argues that the Company could ensure that it was not discriminating between customers by ensuring that it always takes account the voltage of a connection request in determining which scheme to offer.

#### *Company's response*

- 5.7. The Company objects to the suggestion that it could avoid discriminating by taking account of the voltage desired in all connection requests. It argued that this would contradict the direction in the regulatory framework to determine the connection based on the capacity requested. Also, if the Company were to take into account the voltage of all connection requests it offered, this could lead to an inefficient and uneconomical network.

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<sup>3</sup> Independent Distribution Network Operators (IDNOs) Point of Connection (POC) Applications, published May 2010

## Economic and Efficient Network

### *Company's Argument*

- 5.8. Under section 9 of the Act, the Company must maintain an economical and efficient network. The company argued that in order to satisfy this obligation it must own the Enhanced Scheme assets (comprising the substation and its associated assets).
- 5.9. The Company quotes the guidance we issued in May 2010 in which we say that "granting of a connection at a higher voltage than is necessary may not be compatible with [a licenced network operator's] duties under section 9(1) of the Act".
- 5.10. The local network around [REDACTED] is close to full capacity. The Company expects that demand will increase beyond the capacity of the network in the near future as a result of demand from expected future customers.
- 5.11. The Company described the expected future demand in the area as follows:

*"Within [REDACTED] and the surrounding areas, land has been identified by the local authority for domestic properties (up to 4,000 homes) and a mix of research and development, industrial and storage / distribution uses. This is in addition to the smaller LV and 11kV connection requests (residential, industrial and commercial) which have been requested and are anticipated to continue to be received across the [REDACTED] area."*

- 5.12. If it constructs the Enhanced Scheme that it offered to [REDACTED] the Company will be able to use the new substation to increase the capacity of the surrounding network by "cut and carving" demand on the 11kV network between this substation and two nearby substations which serve the same network area: the [REDACTED] and [REDACTED] substations.
- 5.13. The Company sent us calculations which it considered to show that the Enhanced Scheme design that the Company offered to [REDACTED] is the most economic and efficient of the three feasible options considered by the Company for providing the Enhanced Scheme, in the sense that it is the option with the lowest cost per unit of extra capacity. It argued that it will therefore be the scheme which enables the Company to meet the demand of future customers in the most cost effective way. The Company argued that it is therefore obliged under section 9 of the Act to offer this connection configuration to the Customer.

### *Customer's Argument*

- 5.14. The Customer suggest that the Company would be able to take a supply from the substation if the Customer were to own it. The Customer contends that this would enable the Company to cut and carve the local network in the same way as if it owned the substation itself. The Company would therefore not be prevented from meeting its obligation to provide an economic and efficient network if the Customer were to own the substation.
- 5.15. The Customer pointed out that it was not uncommon for IDNOs or DNOs operating out of area to depend on other licensed distributors to meet statutory and licence obligations on matters such as restoring supplies, and that similar dependencies between DNOs also arose where there were interconnectors between neighbouring DNO networks.
- 5.16. The Customer also pointed out that if it owned the substation it will be able to offer connections to future customers in the area itself. The Customer argued that this contradicts the Company's argument that it needs to own the substation in order to ensure an economic and efficient network for future customers.

## Reinforcement under the CCCM

### *Company's arguments*

5.17. The Company argued that the substation could not be owned by anyone other than the Company according to its policy under the Statement of Methodology and Charges. This is because the substation constitutes reinforcement as it would be used to supply customers on the wider network. This is stipulated in paragraphs 6.6 and 6.13 of the Statement of Methodology and Charges. Paragraph 6.6 lists the works deemed to be non-contestable, meaning that only the Company can construct them. *Bullet point 6* states that reinforcement works are non-contestable unless they meet the criteria under paragraph 6.13.

5.18. Paragraph 6.13 states:

*"Certain types of Reinforcement and diversionary work may also be carried out by suitably accredited ICPs for adoption by us."*

5.19. The implication of this is that according to the Statement of Methodology and Charges, those reinforcement works that are contestable must still be adopted by the Company. Therefore, according to the Statement of Methodology and Charges, all reinforcement works, whether constructed by the Company or and ICP, must be owned by the Company after construction.

5.20. The Company also referred to our guidance<sup>4</sup> in which we state that "it is not appropriate to allow IDNOs to adopt assets funded with price control revenue".

5.21. The Company argued that if the Customer were to own the substation, the Company would have concerns about its ability to meet its obligation to restore supplies, maintain and repair the network assets, since the assets would be outside its control.

### *Customer's Response*

5.22. The Customer does not consider that if the Company were to take a supply from its network this would equate to the Customer having adopted the assets that had been part funded with price control revenue. It contends that the Company is misapplying its Statement of Methodology and Charges. The Customer argues that if the Company offers a POC at 33kV, the primary substation would be a contestable extension asset. This would not be changed by the Customer then offering some of the capacity of the substation to other customers or to the Company.

5.23. Since the Customer would fund fully the construction of the substation, its ownership of it would not constitute an IDNO adopting assets part funded with price control revenues.

### **Applying the CAF if an ICP constructs the substation**

5.24. The Customer told us that its preferred scenario was for the Company to grant it 33kV POCs so that it could build, own and operate the new network and all assets downstream of the POCs. If this were not possible, the Customer would prefer the Company to allow the substation to be constructed by an ICP and to apportion the cost of construction using the CAF.

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<sup>4</sup> Competition for part funded connections: guidance and summary of responses, Published 29 July 2011

### *Customer's argument*

- 5.25. The Customer believes that in refusing to apportion the costs for an ICP constructing the substation, the Company is relying on paragraph 6.13, bullet point 3 of its Statement of Methodology and Charges. This states that certain reinforcement works can be carried out by ICPs, but in those cases the works must be fully funded by the party seeking the connection.
- 5.26. The Customer argues that this paragraph in the Statement of Methodology and Charges does not prevent the Company from apportioning the costs of construction by an ICP because the paragraph can be varied at any time subject to "veto" by us. It is also possible to apply for a derogation from the Statement of Methodology and Charges. The Customer's solicitor believes that "Ofgem's attitude to date indicates that it is unlikely to oppose a request to change or derogate from the position".

### *Company's argument*

- 5.27. The Company ran a trial to allow ICPs to carry out part funded reinforcement work. However, the value of the work in this case exceeds the cap for works eligible for the trial. The Company is planning a new trial, but the value of these works exceeds the cap for the new trial. The cap is set in view of the Utilities Contract Regulations 2016<sup>5</sup>.
- 5.28. The Company considers that in order to comply with the Utilities Contract Regulations 2016, in allowing an ICP to construct part funded reinforcement, the Company would be required to go through a full procurement process, including advertising the opportunity for the work and going out to tender.
- 5.29. The Company's solicitors argued on its behalf that running a public procurement process for all works where there was a possibility for the involvement of an ICP would not be practicable as it would add several months' worth of delays to projects which went out to procurement.

### *Customer's response*

- 5.30. The Customer argues that the points above made by the Company "are written on the basis that [the Company] would be procuring part-funded work by accepting an ICP offer under utility procurement rules." However, the Customer argues that this is not the same as the situation in which the connecting customer is able to decide who provides their connection, deciding whether to appoint the Company or one of their ICP competitors to undertake the construction work.

## **6. Discussion**

### **Section 16 - Duty to connect**

- 6.1. Section 16(1)(a) of the Act places a duty on the Company to provide a connection upon request between its network and premises owned by the requesting person. Section 64 of the Act specifies that for its purposes, unless the context otherwise requires, premises includes any land, building or structure. Section 16(1)(b) places a duty on the Company to provide a connection upon request between its network and the network of another licenced electricity distributor. We consider that both section 16(1)(a) and section 16(1)(b) have a bearing on the determination of this dispute.
- 6.2. We are satisfied that, in making its offer, the Company provided a scheme which met the capacity requirements of the Customer whilst also supporting the future

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<sup>5</sup> Utilities Contracts Regulations 2016

development of the area. We have no views on the costs incurred as these were not the focus of the determination.

- 6.3. This dispute however does not concern the nature of the scheme that the Company offered – it is a dispute over the ownership of the substation. The Company believed that it had to be the owner in order to comply with its duty under section 9 of the Act to maintain an efficient and economic network and its policy in the Statement of Methodology and Charging.
- 6.4. We have determined, based on the information that we have received from the parties, and evidence we have admitted from third parties, that it is feasible for the Customer to build, own and operate the substation and for the Company to remain in compliance with the relevant law and regulations. If the Company were to consider the premises that were to be connected under section 16 of the Act to be the substation, then much of this dispute would fall away.

*Section 16(1)(a)*

- 6.5. For the purposes of section 16(1)(a) the Company typically requires connection applicants to specify the premises to be connected in their request. ■ made its request for the connection on 7 December 2015 in an application for a POC with a 20MVA capacity. Previously, on 18 September 2015, ■ sent an illustrative development plan (Appendix 10) to the Company in support of the request it had made for a 12MVA connection on 11 September. This plan showed the proposed position of the primary substation for the connection, but it showed no assets downstream of the substation.
- 6.6. From email correspondence between the Company and ■ (Appendix 11), we can surmise that the location of the primary substation shown in the plan submitted in connection with the 12MVA POC request made on 11 September 2015 was the same location as that intended for the primary substation that would be required to provide the 20MVA POC.
- 6.7. The Company was made aware in subsequent correspondence with ■ and the Customer that the POC was for an IDNO connection, that the Customer wanted POCs on the 33kV network, and that the Customer intended to fund fully the construction of the substation.
- 6.8. Given that the Company had been sent a plan showing the desired location of the substation required for the connection, but showing no network assets downstream of the substation, and that it was aware that the Customer wished to own and fund fully the construction of the substation, it is reasonable, as part of the Company's obligations under section 16(1)(a), to consider the substation as constituting the premises of ■ request for the connection.
- 6.9. It follows, since the premises were a 33/11kV substation, that in order to comply with its obligation under section 16(1)(a) to offer a connection to the premises "for the purpose of enabling electricity to be conveyed to or from the premises", the Company was required to provide POCs at 33kV, since a 33/11kV substation requires a 33kV supply.

*Section 16(1)(b)*

- 6.10. A similar conclusion follows from section 16(1)(b) of the Act. The Customer intended to fund fully the capital and construction costs of all the new network assets downstream of the 33kV POCs, including the substation. The Customer is an authorised distributor for the purposes of the Act. The new network assets therefore

constitute the network of an authorised distributor, to which the Company is under a duty to provide a connection in accordance with section 16(1)(b) of the Act.

- 6.11. In order to comply with its obligation under section 16(1)(b) to offer a connection that was suitable "for the purpose of enabling electricity to be conveyed to or from [the Customer's] system" the Company was required to provide POCs at 33kV, since a 33/11kV substation requires a 33kV supply.

#### Discrimination

- 6.12. Condition 19.1 of the Standard conditions of the Electricity Distribution Licence provides that an electricity distributor must not discriminate between any person or classes of persons in carrying out works for the purpose of connection to its distribution system.
- 6.13. The Company will not be at risk of being found to be discriminating by treating different connection requests differently, as long as it adheres to its duties under section 16 of the Act as described above in the same way for all customers.
- 6.14. The Company argued that offering the connection at 33kV would constitute discrimination in favour of the Customer and against future customers. We do not think that this is the case. The Company must offer the POC at 33kV under section 16 of the Act, as requested by the Customer. It may be that customers wishing to connect to the network in the area around [REDACTED] in the future will face costs for reinforcement that they would not have faced if the Company owned the substation. However, this will not constitute discrimination because it arises from correct adherence to the Company's obligation to provide the 33kV POCs in accordance with section 16.

#### Economic and Efficient Network

- 6.15. We agree with the Customer that the regulations do not prevent the Company from taking a feed from the Customer's network. We also agree with the Customer that if it were to own the substation it would be able to offer connections itself to future customers. However, our decision is not reliant on these two factors.
- 6.16. We consider that the Company is required to offer the POCs requested by the Customer at the voltage requested under section 16 of the Act. In order to comply with section 9 of the Act, it is required to do so in such a way that there is no detrimental effect on the supply received by the customers already connected to the network. In its submissions, the Company has identified no way in which the service to current customers would be affected by the new connection. It has identified that the spare capacity created by the substation would provide an efficient way for it to meet future demand. Therefore, there is no contradiction between the Company's obligations under sections 9 and 16 if the Company connects the premises of [REDACTED] connection request – the substation.
- 6.17. The Company told us that demand will exceed the capacity of the current network assets in the near future. We consider that the Company can both provide the Customer with the connection it desires and, if it needs to, reinforce the network at another location.
- 6.18. We note that this suggestion corresponds with the two options for providing the connection to [REDACTED] that the Company rejected in favour of the Enhanced Scheme that it offered. These options were -
- To enhance another existing nearby substation and build a new substation for the sole use of the user of [REDACTED] connection.

- To construct a new substation elsewhere on the local network and to build a new substation for the sole use of the user of [REDACTED] connection.

6.19. The Company argued that section 9 obliged it to reject these two options in favour of the Enhanced Scheme that it offered to [REDACTED]. We do not agree with the Company that section 9 requires this. We consider that the Company was obliged under section 16 to meet the connection requirements of the Customer. If any network reinforcement to meet the future requirements of the network was required under section 9 after doing this, this should have been undertaken as a separate endeavour.

#### *Ofgem guidance*

6.20. The May 2010 Ofgem guidance addresses the issue of IDNOs requesting connections to the distribution network above the voltage level that is required. IDNOs are able to earn a higher income if they connect at a higher voltage because they pay a lower charge to the DNO to which they are connected if they connect at a higher voltage.<sup>6</sup> The guidance therefore seeks to avoid situations where IDNOs earn higher incomes by connecting at higher voltages than necessary without providing additional required distribution services.

6.21. As stated in the guidance, we would expect that in return for any additional income that the Customer will earn for connecting at a higher voltage level it is providing services that are both additional and required. The guidance states:

*"Additional and required services in these circumstances might mean the IDNO has installed and is operating and maintaining assets at lower voltage levels (to its POC) similar to the assets that would have been put in place if the connection had been made by a DNO."*

An indication that the Customer is providing services that are additional and required is that it intends to install exactly the same assets as the Company would install if it were to make the connection.

6.22. We do not think that the reduction in charges paid by the Customer as a result of connecting at 33kV rather than 11kV is a problem in this case. The fact that the Customer intends to install exactly the same assets as the Company would install if it were to make the connection shows that the Customer will be providing additional and required distribution services if it connects.

#### Reinforcement under the CCCM

6.23. In order to comply with its obligations under section 16 of the Act the Company was required to offer a connection to the Customer with a POC on the 33kV network. As such, the substation did not constitute reinforcement assets under the definition given in the Statement of Methodology and Charges because it would have been an asset owned by the Customer for the purposes of supplying the new network, not the shared distribution network. There was therefore no requirement under the Statement of Methodology and Charges for the Company to own it.

6.24. For the avoidance of doubt, we do not consider that this prevents the Company from taking a feed from the Customer's network in order to offload the existing 11kV network.

<sup>6</sup> A more detailed description of the methodology used to derive IDNO charges can be found on page 571 of the [Distribution Connection and Use of System Agreement](#)

- 6.25. The Customer intended to pay the whole cost of the substation. Therefore, no price control revenue was required to fund its construction and the objections relating to an IDNO adopting assets funded using price control revenues do not arise.
- 6.26. We state above that our decision does not rely on the ability or otherwise of the Company to take a supply from the Customer's network. The Company must decide on how best to operate its network. However, on the basis of the information we have received, we do not think the Company has good grounds for its stated concerns about its ability to meet its obligation to restore supplies and maintain and repair the network assets if it were to take a feed from the Customer's network. Like DNOs, IDNOs are subject to regulations and licence conditions which require them to ensure reliable electricity supplies for their customers and, as claimed by the Customer, there may well be existing arrangements where DNOs rely on supplies from IDNOs and other DNOs.

### Applying the CAF if an ICP constructs the substation

- 6.27. The Customer told us that its preferred outcome for the determination is for it to be able to construct, own and operate the new network assets using its own funding. Our decision requires the Company to enable this. There is no need therefore for us to determine whether or not the Company should apportion the cost of the substation if an ICP undertakes the construction works.

## 7. Decision

- 7.1. As we explain in paragraph 6.2, we believe the Company made an offer to the Customer that was reasonable in relation to the capacity requested. Whilst we have no views on the costs associated with the offer, we acknowledge that the Company's scheme would result in the Customer paying less for the connection than the other options identified whilst also providing an opportunity to meet future requirements of the network efficiently. In ordinary circumstances therefore, the offer made by the Company would have been in accord with the various obligations it is required to meet. If the substation is considered reinforcement, and partly funded through use of system revenues, then the Company's stance is correct.
- 7.2. However, in this case, the Customer was prepared to pay more for its connection in order to have ownership of the substation. As a result, the substation did not have to be considered as reinforcement works and Use of System revenues were not required to part fund its construction. The Company argued that the regulations it is subject to meant it could not comply with this request. We do not agree that this is the case.
- 7.3. In light of the information and evidence submitted by the parties, we consider that, in order to comply with its duty under section 16(1)(a) of the Act to make a connection between the distribution network and the premises specified in a connection request (where the 33kV/11kV substation here constitutes the premises), the Company was required to offer the connection at the requested voltage.
- 7.4. Similarly, in order to comply with its duty under section 16(1)(b) of the Act to make a connection between its distribution network and the network of an authorised distributor, where the substation constitutes part of the Customer's network, the Company was required to offer the connection at the requested voltage. The Company should therefore have honoured the Customer's request.
- 7.5. The Company should now make a connection offer to the Customer which honours the Customer's requested voltage in response to the original connection request.

## **8. Responses to our Minded-to Decision**

- 8.1. On 16 December 2016, we issued the Company and the Customer a notice of the decision we were minded to make. The comments of both parties in response to our "Minded-to Decision" are in Appendices 12 and 13. Our final decision is the same as our Minded-to Decision.
- 8.2. Our response to the Company's comments is below.

### The Company's response

- 8.3. The Company requested clarification and confirmation from us of some points arising from our decision.
- 8.4. Four of the five queries that the Company raised related to how a DNO should balance its obligations under section 16 of the Act - the duty to offer a connection on request - against those under section 9 - the obligation to maintain an economic and efficient network.
- 8.5. The fifth clarification that the Company requested related to how a DNO should interpret "premises" or "distribution system" as they appear in section 16 of the Act in cases where neither have yet been built at the time of the application.

### *Obligations under Section 9 and Section 16 of the Act*

#### Company's Arguments

- 8.6. In its response to our Minded-to Decision, as well as in its previous submissions to us, the Company argued that it was prevented by its obligations under section 9 of the Act from honouring the Customer's request for a connection at 33kV. It argued as follows.
- 8.7. The offer to ■■■ for a POC at 11kV was based on the most efficient way of providing the connection with the capacity requested, given the need to reinforce the network to meet likely future demand.
- 8.8. Our decision means the Customer will own the substation, so the Company may not have access to the excess capacity. This means that when reinforcement is required, it may need to be done in a more expensive way than if the Company had owned the substation. Since network reinforcement is part funded through price control revenue, a proportion of this relative increase in costs would be paid for by customers currently connected to the network. The Company argued that this would put it in contravention of its obligations under section 9.
- 8.9. The Company requested that we clarify whether we intend, by determining that it is obliged under section 16 of the Act to offer the 33kV POC to the Customer, for the implication of our decision to be that section 16 takes precedence over section 9.

#### Our clarification

- 8.10. In our determination we have considered matters raised in this specific dispute. We have not sought to establish any degree of precedent on different sections of the Act.
- 8.11. Based on the facts of this case, including the fact that the Customer was willing to fund the new network assets in full, and given the requirements for its connection that it communicated to the Company, we have determined that the substation constituted the "premises", or alternatively, part of the Customer's "distribution system" for the purposes of section 16(2)(a) of the Act. The Company was therefore

required under section 16 to offer the Customer a connection to the substation with a POC at the appropriate voltage. This is also qualified by the fact that we have assumed that the Customer's desired connection would have no detrimental impact on the service currently received by existing customers on the wider network, since no evidence was submitted to us to the contrary. Any alternative connection arrangement would not have met the Customer's request for connection. The Company was therefore obliged to offer the connection under section 16 of the Act.

8.12. In relation to the issue of higher costs for others, we note that this dispute is one of ownership of the new substation – which in the first instance will have the same spare capacity post-connection, irrespective of who owns it. Both parties are licensed electricity distributors, so future demand, whether from general load growth or future connections, can conceivably be met by either the Company or the Customer, both of whom are obliged to offer a connection upon request and face incentives (in some form) to utilise available capacity.

The Company's comments in full

8.13. The following are the Company's comments in full, along with our views in response to each of them.

*Comment 1*

*"By sections 7.1 and 7.2 of Ofgem's minded to determination, [the Company] understands that the reason the IDNO's connection request is to be provided as requested by the IDNO (and that [the Company] must not treat the substation as partially funded reinforcement) is that the IDNO has chosen to fully fund all the works associated with the connection and declined the enhanced scheme and the partial reinforcement funding. Please can Ofgem make clear if this is indeed its intention."*

Our response

8.14. In this case the Customer chose to fund fully the additional network assets required to provide it with its required capacity. Also, we have assumed that the Customer's desired connection would have no detrimental impact on the service currently received by existing customers on the wider network, since no evidence was submitted to us to the contrary. Given these facts, and from communication between the Company and the Customer, it was clear that it was appropriate to consider the new substation as the premises of the request for the purposes of section 16 of the Act. The Company was therefore obliged under section 16 of the Act to make a connection offer in response.

8.15. As the substation constituted the premises of the request, it was not a reinforcement asset.

*Comment 2*

*"In this case and as a result of Ofgem's minded to determination, the IDNO will be able to secure a connection at a higher voltage than is necessary for the capacity requested and, with that, an opportunity to operate assets that are capable of distributing capacity in excess of what is required and secured at the time of the connection."*

*"Please can Ofgem state how that position fits with the IDNO's own obligations under section 9 of the Electricity Act to develop an efficient network, in particular where (i) the future demand on their distribution system in the local area is uncertain and/or (ii) the effect on the upstream Distribution System of reserving capacity, in excess of their development's requirements, can impact the cost and scale of the schemes of other customers / IDNOs requesting connections in the wider area."*

Our response

8.16. For the purposes of this determination it is not necessary for us to take a view on whether the Customer will be meeting its obligations under section 9 of the Act.

8.17. We have determined that the substation constituted the premises of the Customer's connection request. The Company was therefore obliged under section 16 to respond to the Customer's request with an offer that took into account the appropriate voltage level for supplying electricity to the substation.

*Comment 3*

*"In sections 6.12 to 6.19 of its minded to determination Ofgem makes it clear that it is acceptable for an IDNO (which is also under the obligations in section 9) to require a connection even if that connection stands to make reinforcement comparatively more expensive for future customers. Please note that [the Company's] position is that our section 9 obligations included minimising the costs to existing customers in reinforcing the network, not just future connectees. We comment further on this specific in 4 below. However, as regards sections 6.12 to 6.19 of the minded to determination (which state categorically that it is correct that an IDNO is able to require that we provide a connection without enhancement, even if that makes future reinforcement comparatively more expensive for customers):*

*"a. Please can Ofgem make clear whether it means that section 16 will always prevail over the section 9 obligations, irrespective of the extra costs which will be incurred in relation to later reinforcement in the local area.*

*"b. If Ofgem however intends that there is a point at which the section 9 obligations override a request under section 16 (ie. where the likely costs of future reinforcement outweigh a request to connect at a higher voltage than is necessary), please can Ofgem give clear guidance in its final determination on the criteria which are to be applied to analyse when section 9 or section 16 prevails."*

Our response

8.18. We agree with the Company that its obligations under section 9 of the Act require it to minimise the costs to existing and future customers in designing the connections that it offers. We consider that our decision does not put the Company in contravention of section 9. In what follows we give our view as to how section 9 applies in the context of this dispute.

8.19. We have determined that the Company was obliged under section 16 of the Act to make the Customer an offer that took into account its desired voltage. The Company's obligations under section 9 required it to minimise the costs to existing customers of providing the connection which the Customer desired. Neither section 9 nor section 16 permitted the Company to refuse the Customer's request.

8.20. The Company originally offered the Customer a connection at 11kV. This was the connection design for the capacity requested that minimised costs to existing customers in reinforcing the network, in accordance with the Company's obligations under section 9. Should that scheme have met the Customer's request, the Company's proposal may well have been appropriate. However, it then became clear that the Customer desired the connection to be at 33kV. It was this connection that the Company was obliged to provide and, in line with section 9, it was required to do so while minimising the costs to current customers.

#### Comment 4

*"We have set out in previous responses how we considered that the Enhanced scheme offered to [REDACTED] represents the most economical solution in developing the network for imminent demand requirements. This conclusion was based not only on the costs to future connectees but also on the financial impact on existing customers. As and when additional capacity is required in the area, the reinforcement work to provide that capacity is likely to be more expensive compared to the partially funded reinforcement which was involved in the connection which was offered to [REDACTED] (as explained in our previous submissions and as referred to by Ofgem in section 7.1 of its minded to determination). That extra cost filters down to be borne, in part at least, by existing customers. Cost to current customers therefore stands to be adversely affected by the connection which Ofgem requires us to offer to [REDACTED]*

*"Please can Ofgem therefore confirm that when assessing, in relation to future connections, [the Company's] compliance with its obligations (and bearing in mind Ofgem's "Quicker and More Effective Distribution Connections" [sic] guidance), the fact that the network in a local area could have been reinforced more efficiently as part of an earlier connection request will be disregarded where a customer has itself requested that it fully fund that earlier connection and has rejected a partially funded Enhanced Scheme."*

#### Our response

8.21. It is for DNOs to ensure that they act in accordance with all the relevant laws and regulations. In this case, we have determined that the Company was obliged to offer the connection as requested. We offer no view on how we might theoretically respond in a future case.

#### Comment 5

*"Ofgem's minded to determination is, in part, on the basis that a customer is entitled to demand a connection to a "premises" and/or to a "distribution system of another authorised distributor".*

*"When initially assessing the PoC for a connection application, we consider the connection characteristics in terms of capacity, location / premise and date required – in this case, had there been sufficient capacity on the local 11kV network, this would have been the appropriate connection voltage and the "premises" would have been the boundary for the customer's development site and the distribution system of the IDNO. Given, however, that there was not sufficient capacity to accommodate the customer's request on the local 11kV network, the solution involved a new sub-station and a PoC to the existing 33kV network. A 33kV PoC was not technically required for the customer's proposed connection and only arose as a result of the design solution required based on the current network circumstances.*

*"We therefore continued to view the "premises" as the boundary for the customer's development site and maintained an 11k PoC. It was only once the customer had received our initial connection offer that they requested that they own the new sub-station when, as we understand it from Ofgem's minded to determination, the location of the "premises" should then have been changed to be the new sub-station.*

*"When considering, therefore, what should constitute the "premises" and "distribution system" when initially assessing an application, it may be that neither actually exist until both the design solution and the customer's ownership requirements (which can necessarily only follow from the design) are known.*


*"Please can Ofgem therefore state clearly in its final determination how a distributor is required to interpret "premises" or "distribution system" (both as used in section 16) where, as is the case for this substation, neither physically exist."*

Our response

8.22. In the first instance, DNOs may consider the premises of a request to be that specified in the connection application.

8.23. We expect DNOs to engage with their connections customers to determine the requirements for their connections, including agreeing the appropriate definition of premises for the purpose of the request.

8.24. In this case, the premises were determined as a result of the design solution proposed by the Company. Through communication between the Company and the Customer in the light of this design solution, it became clear that it was most appropriate to consider that the substation constituted the premises of the request.

A handwritten signature in black ink, appearing to read "Andrew Burgess". The signature is written in a cursive, slightly slanted style.

**Andrew Burgess**  
**Associate Partner, Energy System Integration**  
**Duly authorised on behalf of the Gas and Electricity Markets Authority**

**27 February 2017**

**Referral to Ofgem of issues in dispute between:**

**Western Power Distribution (East Midlands) plc**

**and**

██

**1. Introduction and summary of dispute**

1.1 The dispute which is the subject of this referral document (the "Dispute") relates to complaints by an IDNO ██████████ ("██████" that Western Power Distribution (East Midlands) plc ("WPD") did not make connection offers at a voltage level requested by ██████████ ("██████" requested connections at 33kV whereas Point of Connection Offers were made (for the requested capacity) with a connection at 33kV to the existing Distribution System and providing a Point of Connection for the ICP / IDNO at 11kV.

1.2 ████████ asserts that WPD should have offered connections at the (higher) voltage level which ████████ requested.

1.3 WPD considers that the regulatory framework regarding Points of Connection (including guidance from Ofgem):

- (a) Required it to make an offer for the capacity requested.
- (b) Is such that it would have been contrary to the regulatory framework to have made an offer at the voltage requested, which (bearing in mind the status of the Relevant Section of the Network): (i) was excessive for the capacity requested; and (ii) would restrict WPD's ability to take into consideration its wider obligations to develop an economic and efficient network.
- (c) Gives clear guidance that it is not appropriate to allow IDNOs to adopt assets which were part-funded with price control revenue (guidance issued by Ofgem in July 2011).

1.4 ████████ has claimed that WPD's acts amount to abuse of a dominant position, in breach of Chapter II of the Competition Act 1998. WPD denies that allegation.

1.5 WPD considers that it has applied, and has acted within, the Ofgem mandated regulatory framework regarding Point of Connection requests. **The issues on which WPD is seeking a determination and/or guidance are:**

- (a) A determination of whether WPD has applied the regulatory framework correctly.
- (b) Assuming that WPD has applied the regulatory framework correctly, whether Ofgem wishes to amend its guidance dated 4 May 2010 such that when analysing a Point of Connection request a DNO should, from the date which any amended guidance takes effect, take into account a voltage level request, even where: (i) that voltage level is excessive for the capacity requested; and (ii) this may limit a DNO's ability to enhance a connection scheme to provide for more efficient and economic development of the Distribution System for the wider customer base.
- (c) Whether, in relation to a Point of Connection offer which would result in an IDNO adopting an asset which is part funded with price control revenue, Ofgem wishes to issue new guidance (superseding its guidance from July 2011) that such a scheme would now be acceptable under the regulatory framework.

1.6 WPD considers that the above determination and review of Ofgem's May 2010 and July 2011 guidance would be for the benefit of end customers and all distribution stakeholders, including IDNOs, ICPs and DNOs. WPD also considers that Ofgem is best placed to decide these matters, bearing in mind its overarching responsibilities to end customers and in ensuring competition.

1.7 This document sets out an outline of the issues. WPD's written submissions will provide further detail, as appropriate.

## 2. **Basis on which this referral is being made**

2.1 WPD refers this Dispute to Ofgem (i) in view of its position as regulator of the electricity industry in the UK (and its duties to protect the interests of existing and future electricity consumers, promote value for money, promote security of supply for consumers and domestic and industrial users and to supervise and develop markets and competition); and/or (ii) under sections 44B and 44C of the Electricity Act 1989; and/or (iii) under section 23 of the Electricity Act 1989; and/or under condition 7.2 of the Standard Conditions of the Electricity Distribution Licence.

2.2 The Dispute is an Article 37 dispute (and therefore within sections 44B and 44C of the Electricity Act 1989) in that it:

- (a) involves holders of distribution licences (both a DNO and an IDNO); and
- (b) is wholly or mainly a dispute regarding obligations of WPD under conditions/requirements which arise under the Electricity Directive (2009/72/EC). Those conditions/requirements on WPD include (but are not limited to):
  - (i) Ensuring the long-term ability of the Distribution System to meet reasonable demands for the distribution of electricity, for operating, maintaining and for developing under economic conditions a secure, reliable and efficient system in WPD's area with due regard for the environment and energy efficiency (Article 25(1) of 2009/72/EC).
  - (ii) Not to discriminate between the Distribution System users and, in particular, not to favour its related undertakings (Article 25(2) of 2009/72/EC).
  - (iii) Ensuring third party access to the electricity transmission and Distribution System based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users (Article 32(1) of 2009/72/EC),

as the above are implemented through the Electricity Act 1989, WPD's distribution licence and the Distribution Code (including Sections 9 and 16 of the Electricity Act 1989 and Conditions 13, 14, 21, 24 and 25 of the distribution licence.

2.3 Further or alternatively the Dispute is a dispute under section 16 of the Electricity Act 1989 which WPD is entitled to refer to Ofgem under section 23 of that Act. We comment further as follows:

- (a) Section 16(1) provides:
  - An electricity distributor is under a duty—
    - (a) to make a connection between a distribution system of his and any premises, when required to do so by—

- (i) the owner or occupier of the premises; or
- (ii) an authorised supplier acting with the consent of the owner or occupier of the premises,

for the purpose of enabling electricity to be conveyed to or from the premises;

- (b) to make a connection between a distribution system of his and any distribution system of another authorised distributor, when required to do so by that authorised distributor for the purpose of enabling electricity to be conveyed to or from that other system.

(b) Section 23 provides:

- (1) This section applies (in addition to any disputes to which it applies by virtue of any other provision of this Act) to any dispute arising under sections 16 to 21 between an electricity distributor and a person requiring a connection.

(1A) A dispute to which this section applies—

(a) may be referred to the Authority by either party, or with the agreement of either party, by the Council; and

(b) on such a reference, shall be determined by order made either by the Authority or, if the Authority thinks fit, by an arbitrator (or in Scotland an arbiter) appointed by the Authority.

(c) WPD is an electricity distributor for the purposes of section 23.

(d) █████ is a "person requiring a connection" for the purposes of section 23 since █████ and █████ intention was, according to █████ that █████ would own and operate the sub-station which connected to WPD's network. Indeed, the fundamental basis of █████ position is that it requires a connection to WPD's network. █████ therefore "required a connection".

(e) The dispute between an electricity distributor (WPD) and a "person requiring connection" (█████) arises under section 16 since █████ is "another authorised distributor" which requires a connection between WPD's distribution system and a █████ distribution system for the purpose of enabling electricity to be conveyed to █████ system and therefore the dispute arises under section 16(1)(b).

(f) The dispute is therefore a dispute arising under section 16 and WPD is entitled under section 23 to refer the dispute to Ofgem.

2.4 Further or alternatively, this is a dispute which falls under condition 7.1 of the Standard Conditions of the Electricity Distribution Licence. WPD applies to Ofgem under condition 7.2 of those Standard Conditions for a determination.

### 3. **Details of complainant (referring party)**

3.1 The referring party is Western Power Distribution (East Midlands) plc.

3.2 WPD's address is Avonbank, Feeder Road, Bristol BS2 0TB.

3.3 The person dealing with the matter at WPD is [REDACTED]  
[REDACTED]  
[REDACTED]

4. **Details of the other party**

4.1 The other party is [REDACTED]

4.2 [REDACTED] address is [REDACTED]

4.3 A person at [REDACTED] with whom WPD has had contact in relation to this matter is [REDACTED]. More recently correspondence has been from solicitors instructed by [REDACTED] WPD cannot of course speak for who at [REDACTED] will be the person with responsibility for this matter.

5. **Description of what is being disputed**

5.1 WPD refers Ofgem to section 1 of this referral document, which summarises the dispute and (at section 1.5) the determination/guidance sought. Sections 5.2 – 5.6 below provide further detail. Please note that, in Appendix B to this document, WPD expands further on section 5.5 and how WPD dealt with the three requests received from [REDACTED].

5.2 **Introduction**

(a) [REDACTED] made the connection requests which resulted in the Points of Connection Offers which are the subject of the Dispute. WPD understands (from correspondence from [REDACTED] that [REDACTED] sought the connections with the intention that an IDNO (ie. [REDACTED] would construct, own and operate all network assets downstream of that Point of Connection.

(b) Excluding two applications which it subsequently withdrew of its own accord, [REDACTED] made three applications to WPD: one (on 11 September 2015) was for a Required Capacity of 12MVA and two (on 10 December 2015) were for a Required Capacity of 20MVA (one where construction would be carried out by an IDNO and the other where construction would be by an ICP).

5.3 **Offers made by WPD to [REDACTED] which are the subject of the Dispute**

(a) As regards the offers about which [REDACTED] has complained, WPD made Interactive Point of Connection Offers for the Required Capacities. Those offers complied with WPD's licence obligations and were in accordance with the procedures set out in the Common Connection Charging Methodology contained in Schedule 22 of the Distribution and Connection Use of System Agreement, as approved by Ofgem. The 12MVA Required Capacity offer was made on 19 January 2016 (ref: 2322326) and the 20MVA Required Capacity offers (ref: 2394659 and 2395126) were made on the same date. All those offers were made at 11kV, for the reasons outlined at 5.5 below.

5.4 **[REDACTED] request for a connection at 33kV**

(a) Following receipt of the requests from [REDACTED] which are the subject of the Dispute, it became clear that [REDACTED] was requesting Points of Connection at 33kV. As stated above, WPD understands from [REDACTED] that [REDACTED] intention was that an ICP would construct and an IDNO would own and operate all network assets downstream of that Point of Connection, including a new primary sub-station.

## 5.5 **Basis for WPD's offers and its refusal of a 33kV connection for 20MVA**

- (a) **Appendix A** to this document sets out a summary of the regulatory framework, in so far as it is relevant to the issues in dispute. Capitalised terms used in this the following paragraphs are as defined in Appendix A.
- (b) The **core reasons** why WPD did not, in relation to the [REDACTED] development area, offer a connection at 33kV (but rather at 11kV) are as follows:
- (i) The regulatory framework regarding connection requests is structured around capacity, in terms of kVA or MVA, being requested. It does not provide for connection requests being framed in terms of voltages. Providing a Point of Connection at 11kV was the most cost effective method of providing the capacity requested, taking into account the issues which WPD is required by the regulatory framework to take into account.
  - (ii) In order to ensure that it complied with its obligation to promote fair competition, WPD assessed and dealt with the connection requests on the basis of the capacity requested, in terms of kVA or MVA. It determined the appropriate point of connection and its voltage based on the characteristics of the required connection and the status of the existing Relevant Section of Network ("RSN") in accordance with its obligations under the Distribution Licence and therefore with the principles set out in the Distribution Code.
  - (iii) In making its assessment of the connection requirements and the status of the RSN, WPD determined that an Enhanced scheme would create wider network capacity which was required in the area. This was determined to be the most efficient and economic method compared to alternatives. In enhancing the scheme the primary substation became part-funded reinforcement under the CCCM and therefore non-contestable works.
  - (iv) If WPD introduced, as a factor to consider in the assessment of requests, the specific voltage at which the customer wishes to connect at the Point of Connection, it would be open to a complaint that it was taking into consideration a requested factor which the regulatory framework does not state should be taken into account. In that scenario it would be at risk of treating different connection requests differently and therefore be at risk of being found to be in breach of its obligation to act in a non-discriminatory and pro-competition manner.
  - (v) In its open letter dated 4 May 2010 (titled "Independent Distribution Network Operators (IDNOs) Point of Connection (POC) Applications") Ofgem gave the following guidance:
    - (A) In paragraph 2: "An electricity distributor does not have an obligation to offer IDNOs a connection at the voltage level that they request if the resulting agreement for doing so would be likely to cause it to be in breach of its duties under section 9 of the Electricity Act 1989"; and
    - (B) In paragraph 5: "When offering connections to IDNOs under section 16(2) of the Act we note that a DNOs' duty to make a connection to the distribution system requires it to "provide such electric lines or electrical plant as may be necessary to enable the connection to be used for the purposes for which it is required". This duty, therefore, does not appear to require the DNO to offer an IDNO a connection at the voltage level that it requests if the voltage level of the connection is higher than necessary."

- (vi) In addition, if WPD had offered a Point of Connection for 20MVA at 33kV, this would have resulted in an IDNO adopting an asset which was part funded with price control revenue. This would be contrary to Ofgem guidance from July 2011.
- (c) **Further details** of how WPD dealt with the requests which were made by [REDACTED] are set out in **Appendix B** and WPD refers Ofgem to that Appendix.
- (d) The result of the connection applications by [REDACTED] which were made in September and December 2015 was that our client made three Point of Connection Offers, which [REDACTED] opted not to accept.

## 5.6 **Claim by [REDACTED]**

- (a) [REDACTED] has, through solicitors, made a detailed claim of abuse of dominant position. It argues that WPD should have made a Point of Connection Offer for the 20MVA capacity at 33kV.
- (b) WPD denies that it is abusing a dominant position, as alleged or at all. WPD has applied the regulatory framework, including current Ofgem guidance, and therefore cannot be breaching competition law. Furthermore, if WPD had carried out its Point of Connection request analysis on the basis of the voltage requested by [REDACTED], it considers that it would have been taking into account a factor which is outside of the express regulatory framework requirements. It would be at risk of treating different connection requests differently and therefore be at risk of being found to be in breach of its obligation to act in a non-discriminatory manner. WPD would also be ignoring its wider obligations to develop an economic and efficient distribution system if it had not proceeded with an enhanced scheme, including part-funding the shared use assets which would subsequently be constructed.
- (c) Ofgem should also be aware that, in response to a further request from [REDACTED], WPD made, on 15 July 2016, an offer to [REDACTED] of a 52MVA/132kV Point of Connection to the [REDACTED] GSP – [REDACTED] BSP 132kV dual circuit towerline. WPD therefore offered, to the same party and in the same area, a higher voltage point of connection since the higher capacity requested justifies that higher voltage and there was no efficient and economic method of enhancing the scheme to provide the wider capacity required in the area. If [REDACTED] is involved in that connection, it will presumably be able to benefit from that higher voltage.
- (d) WPD does not speak for [REDACTED] regarding what issues it may or may not wish Ofgem to consider. WPD anticipates that, after [REDACTED] has received a copy of this referral document, it will make its own comments to Ofgem prior to the Case Officer setting the parameters and timetable of Ofgem's process in this matter.

## 6. **Copies of relevant correspondence**

### 6.1 WPD encloses with this referral document:

- (a) Copies of [REDACTED]'s Point of Connection requests
- (b) Copies of WPD's Point of Connection offers
- (c) Copies of correspondence between the parties' consultant and between [REDACTED] solicitors and WPD

**7. Explanation of process used to resolve the dispute**

7.1 The parties' solicitors have, at the date of this referral document, exchanged correspondence. [REDACTED] solicitors have previously corresponded with WPD. [REDACTED] solicitors have threatened to issue proceedings for alleged abuse of dominant position.

**8. Timing implications**

8.1 [REDACTED] has stated that the matter is urgent since, on its case, it risks losing the opportunity to build the relevant asset. WPD is happy for this matter to move swiftly, provided that (i) the parties have sufficient time to prepare their submissions and (ii) Ofgem is satisfied that it has sufficient material on which to make its decisions.



Signed by [REDACTED]

For and on behalf of Western Power Distribution (East Midlands) plc

Dated: 1<sup>st</sup> August 2016

## Appendix A

### Regulatory framework – relevant sources and provisions

- (a) Section 16 of the Electricity Act 1989 (the "Act") provides:
- "(1) An electricity distributor is under a duty—
- (a) to make a connection between a distribution system of his and any premises, when required to do so by—
- (i) the owner or occupier of the premises; or
- (ii) an authorised supplier acting with the consent of the owner or occupier of the premises,
- for the purpose of enabling electricity to be conveyed to or from the premises;
- (b) to make a connection between a distribution system of his and any distribution system of another authorised distributor, when required to do so by that authorised distributor for the purpose of enabling electricity to be conveyed to or from that other system.
- (2) Any duty under subsection (1) includes a duty to provide such electric lines or electrical plant as may be necessary to enable the connection to be used for the purpose for which it is required.
- (3) The duties under this section shall be performed subject to such terms as may be agreed under section 16A for so long as the connection is required."
- (b) Section 16A of the Act provides that a notice requiring a distributor to offer terms for making a connection to the distributor's distribution system must specify, amongst other matters, the maximum power at which electricity may be required to be conveyed through the connection (underlining added).
- (c) Section 9(1) of the Act provides that an electricity distributor is under a duty (a) to develop and maintain an efficient, co-ordinated and economical system of electricity distribution and (b) to facilitate competition in the supply and generation of electricity. These dual obligations are also included in the Distribution Code, to which WPD is subject.
- (d) These obligations are, in part, given effect through the "Statement of Methodology and Charges for Connection to Western Power Distribution (East Midlands) PLC's Electricity Distribution System" dated June 2016 (the "Connection Charging Methodology"). Each DNO is obliged by Standard Licence Condition 13 to have a Connection Charging Methodology in force and to include within its connection charging methodology the Common Connection Charging Methodology set out at Schedule 22 of the Distribution and Connection Use of System Agreement ("CCCM"). The CCCM has been approved by Ofgem and WPD has included it in Section 5 of its Connection Charging Methodology.
- (e) The CCCM explains that WPD is obliged to offer the "Minimum Scheme". Section 5.1 provides:

"The Minimum Scheme is the Scheme with the lowest overall capital cost (as estimated by us), solely to provide the Required Capacity. The Minimum Scheme will be subject to:

- accepted industry standards, including the requirements of the Distribution Code;
- the status and configuration of the Relevant Section of Network (RSN);
- the standard sizes and types of equipment currently used by us on our Distribution System which shall be reasonable in all the circumstances;
- maintaining our ability to minimise regulatory penalties associated with the Interruptions Incentive Scheme and the Guaranteed Standards of Performance; and
- where the Customer is an LDNO, maintaining the Customer's ability to minimise regulatory penalties associated with the Guaranteed Standards of Performance.

and shall be consistent with our statutory and licence obligations including the requirement to develop, maintain and operate an efficient, co-ordinated and economical electricity Distribution System."

- (f) "Required Capacity" is defined as is the Maximum Capacity agreed with the Customer.
- (g) "Maximum Capacity" is, in relation to any connection the maximum amount of electricity, as agreed with our client and expressed in kW or kVA, that can be imported from or exported onto WPD's Distribution System (underlining added).

**Appendix B**

**Further details (expanding on section 5.5) of how WPD dealt with the requests which were made by [REDACTED]**

As regards **further details** of how WPD dealt with the requests which were made by [REDACTED]:

**Minimum Scheme**

- (a) WPD considered both the Minimum Scheme (ie. the scheme with the lowest overall capital cost solely to provide the Required Capacity), including "the status and configuration of the Relevant Section of Network (RSN)" (as required by the second bullet in Section 1 of the CCCN), as well as its wider obligation to develop an efficient, co-ordinated and economical electricity distribution system, including the need for any additional capacity in the area.
- (b) At the time [REDACTED]'s requests were received, due to recent acceptances of significant 11kV connection offers within the area, there was very limited capacity available on the existing 11kV network. The status of the primary substations in the RSN was as follows:

**Existing (2015/16) Primary Substation demands - capacity and demand shown as summer/winter figures:**

	Current Demand	maximum	Forecasted demand (including accepted schemes and unused ASC's <sup>#</sup> )	maximum (including schemes and unused ASC's <sup>#</sup> )	Firm Capacity
[REDACTED]	18.75/22MVA		38.8/42.05MVA		32/40MVA
[REDACTED]	6.6/9.6MVA		20.7/23.7MVA		19/22.5MVA*

\*limitation of the substation firm capacity due to the 33kV circuit rating

<sup>#</sup>this is the total maximum forecast substation demands including accepted demand connections and the Agreed Supply Capacity (ASC) for large HV connections where the demand has not been diversified for this table.

- (c) When assessing [REDACTED]'s applications it was therefore clear that the primary substations in the RSN were close to full capacity and that a new primary substation would be required in order just to provide the Required Capacity. It was also clear that there was significant development taking place in the area for which additional capacity would be likely required, in addition to the Required Capacity.

**Enhanced Scheme**

- (d) WPD therefore assessed enhancing the connection scheme, ie. cost effectively providing additional capacity for wider customers. This takes into account standard plant capabilities and the nature of the load being requested to determine if scheme enhancement is technically feasible and cost efficient.
- (e) WPD decided to design an Enhanced Scheme, which would provide assets of a larger capacity than those required by the Minimum Scheme, in order to provide the Required Capacity to [REDACTED]. The closest point on WPD's network with sufficient capacity to support the Required Capacity requested by [REDACTED], as well as providing additional

capacity required in the area in order to provide the Enhanced Scheme, was the [REDACTED] 132/33kV BSP.

(f) WPD considered various options for providing the Enhanced Scheme with this Point of Connection, including following discussions with the customer and [REDACTED] as follows:

(i) **Option 1**

- (A) Increase capacity at [REDACTED] substation by upgrading the existing plant, which would provide future capacity within the [REDACTED] area.
- (B) The costs associated with upgrading this plant and cables would have been approximately £5.85m. This would have provided an additional 13MVA summer / 16MVA winter headroom.
- (C) This would not have been sufficient to provide the requested 20MVA for [REDACTED], but would provide additional capacity within the network area.
- (D) This would therefore have resulted in the upgrade works of an existing substation being carried out (in addition to the new substation requested by [REDACTED]).

(ii) **Option 2**

- (A) Install a new WPD standalone substation (in addition to the substation required for this scheme). This was considered as an alternative to enhancing the connection scheme.
- (B) The costs associated with WPD installing the new standalone substation would have been approximately £5.5m and would have provided an additional 19MVA summer / 24MVA winter headroom.
- (C) Using standard equipment sizing, the new [REDACTED] / [REDACTED] standalone substation would have had transformer capacity headroom for an additional capacity of 10MVA summer / 20MVA winter headroom over and above the supply capacity which was requested.

(iii) **Option 3**

- (A) Install a shared sub-station – The development area indicated by [REDACTED] was considered by our client to be conveniently situated for a shared sub-station which would unlock local 11kV capacity and the connection requirements were appropriately defined (including the Required Capacity and the fact that the demand was classified as non-disturbing with no embedded generation within [REDACTED]'s proposed network). This sub-station would feed out into the local existing 11kV networks, transferring some of the existing load at the [REDACTED] and [REDACTED] substations and unlocking capacity across the local 11kV network.
- (B) By sharing the installed substation as part of an enhanced scheme, the connection charge to [REDACTED] was apportioned at 66% of the total reinforcement costs (since it would be using 20MW of the 30MW capacity installed).

- (C) This resulted in £5.9m reinforcement being shared between WPD and ■■■. An additional 10MVA summer / 20MVA winter headroom was created with WPD contributing £2.0m towards the reinforcement scheme.
- (g) As is clear from the above, Option 3 provided the best way of delivering the Enhanced Scheme in line with our client's obligation to develop an efficient, co-ordinated and economical electricity Distribution Network. Options 1 and 2 would have resulted in a higher reinforcement cost per MW and were less efficient than option 3.

***Charging Methodology treatment of Option 3***

- (h) As regards the Charging Methodology treatment of Option 3:
- (i) Since the entire capacity of the proposed new primary substation to be developed in the Enhanced Scheme under option 3 (ie. 30MVA) would not be taken up by ■■■, whose Required Capacity was a maximum of 20MVA, the 33kV works and the establishment of the new primary substation would be treated as reinforcement works in excess of the Minimum Scheme, in respect of which a Cost Apportionment Factor (as mandated in the CCCM) would be applied. The cost to be paid by the customer would therefore be apportioned based on the capacity they had requested as against the new network capacity that such reinforcement would create. As the works would constitute part-funded reinforcement, these works are non-contestable and could only be carried out by WPD.
- (ii) In its "Competition for part-funded connections work" consultation document dated 1 June 2011, Ofgem asked DNOs to seek to develop a mechanism by which an ICP could have access to price control revenue for part-funded connections in order to develop competition in this area. In Ofgem's resulting guidance issued in July 2011, however, Ofgem's view that it was not appropriate to allow IDNOs to adopt part-funded assets funded with price control revenue on the basis that it was not clear that this would deliver any significant benefits to customers additional to those associated with allowing ICPs to compete to construct the part-funded connection, and raises complex issues, including around the nature of the relationship between a DNO and an IDNO in relation to capacity required by the DNO and the potential for IDNOs to charge customers for the provision of assets funded via price control revenue (as outlined in Ofgem's consultation dated 1 June 2011).

***Risk of acting in a discriminatory manner if WPD had taken into account the voltage level requested***

- (i) As explained above, the regulatory framework mandates that connection applications are assessed on the basis of the capacity, in terms of kVA or MVA, which is requested, not the Point of Connection voltage. If WPD took into account, in relation to some Point of Connection requests, the Point of Connection voltage which a potential customer wished to receive, that would (i) be contrary to the criteria which the regulatory framework stipulates must be considered and (ii) WPD would be at risk of acting in a discriminatory manner.

***Current Ofgem guidance in relation to connection requests at voltages which are higher than necessary for the capacity requested***

- (j) Furthermore, Ofgem, in its open letter dated 4 May 2010 (titled Independent Distribution Network Operators (IDNOs) Point of Connection (POC) Applications, states:

- (i) In paragraph 2: that "an electricity distributor does not have an obligation to offer IDNOs a connection at the voltage level that they request if the resulting agreement for doing so would be likely to cause it to be in breach of its duties under section 9 of the Electricity Act 1989".

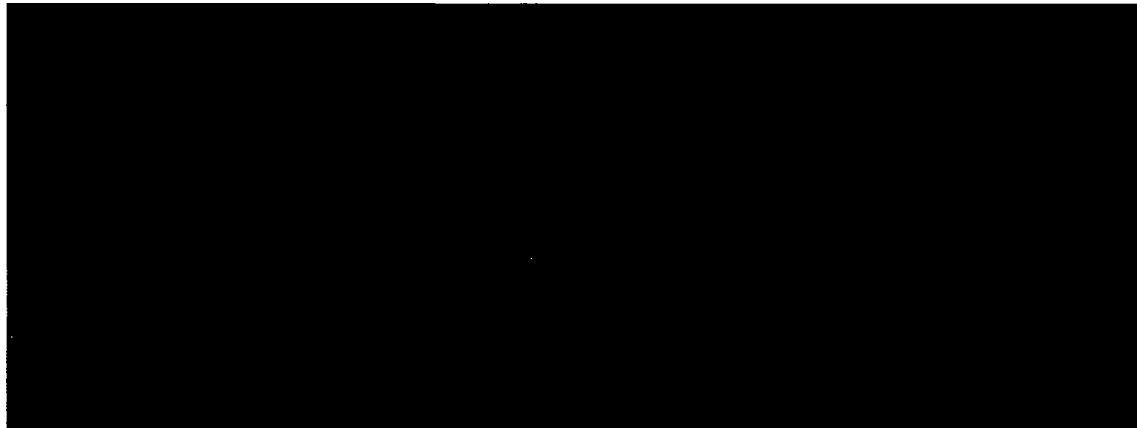
WPD has explained above how using the Point of Connection voltage requested by [REDACTED] as one of the criteria when assessing the request would not be appropriate and would put WPD in breach of its duties under section 9 of the Electricity Act 1989.

- (ii) In paragraph 5: "When offering connections to IDNOs under section 16(2) of the Act we note that a DNOs' duty to make a connection to the distribution system requires it to "provide such electric lines or electrical plant as may be necessary to enable the connection to be used for the purposes for which it is required". This duty, therefore, does not appear to require the DNO to offer an IDNO a connection at the voltage level that it requests if the voltage level of the connection is higher than necessary."

The Required Capacities (12MVA and 20MVA) which [REDACTED] requested do not require a 33kV Point of Connection. In addition, [REDACTED] did not give any adequate technical reason why the connection at a higher level than is necessary (for the capacity requested) was required.

***Further request by [REDACTED] for a Point of Connection at 52MVA/132kV and Point of Connection offer by WPD to [REDACTED] at that capacity and (higher) voltage***

- (k) WPD considers that it is also relevant that, in response to a further request from [REDACTED], WPD made, on 15 July 2016, an offer to [REDACTED] of a 52MVA/132kV Point of Connection to the [REDACTED] GSP – [REDACTED] BSP 132kV dual circuit towerline. WPD offered a higher voltage point of connection since the higher capacity requested justifies that higher voltage and there is not an economic or efficient enhanced scheme which would provide additional capacity required in the area. If [REDACTED] is involved in that connection it will presumably be able to benefit from that connection at a higher voltage than those which were offered to [REDACTED] in offers 2322326, 2394659 and 2395126.
- (l) WPD submits that this further offer is clear evidence that it is not discriminating against [REDACTED]



*Our ref*

*Your ref*

*Date*

-

26 September 2016

[Redacted]

**Response to Ofgem's request for further information relating to issues in dispute between: Western Power Distribution (East Midlands) plc ("WPD") And [Redacted] ("[Redacted]")**

**Introduction**

We set out below our responses to the requests for further information which Ofgem made on 8 September 2016.

In addition to the documentation provided previously in our referral of 1<sup>st</sup> August 2016, we are sending to you with this letter via email, the documents which you have requested and/or to which we refer in these replies.

Please contact me for any queries or further information.

Yours sincerely

[Redacted signature]

## Responses to questions raised by Ofgem

### 1. Please explain exactly what is in dispute in this case, attaching any relevant paperwork to back up your argument.

#### 1.1 Introduction

- (a) The core of the dispute is whether, in relation to requests for connections at [REDACTED] [REDACTED] WPD correctly applied the provisions of the relevant regulations in reaching its decision to design an Enhanced Scheme which created additional network capacity and which resulted in:
- (i) a connection point being offered to the customer at 11kV for the requested capacity (12MVA and 20MVA); and
  - (ii) the work associated with such creation of additional capacity constituting Reinforcement, the cost of which would be apportioned using the Cost Apportionment Factor calculation, which resulted in such work being Non-Contestable.
- (b) [REDACTED] argues that WPD should have provided offers (for the requested capacities of 12MVA and 20 MVA) with a connection point at 33kV. Further details of the requests and offers are in section 1.2 below.
- (c) [REDACTED] has stated that Ofgem should view the dispute more broadly as a dispute regarding the scope of competition in connections. WPD acknowledges that the regulatory framework within which it operates requires it to facilitate competition. WPD however submits that the crux of the dispute which Ofgem is to determine, at this stage, remains whether WPD applied the regulatory framework correctly in relation to the specific connection requests, such that it balanced: (i) the efficiency, security and resilience of the network; (ii) the requirement to facilitate competition in connections and (iii) the interests of all stakeholders, including existing and future customers and other IDNOs.
- (d) [REDACTED] has itself indicated in its initial response to Ofgem dated 8 August 2016 that it recognises that there is merit in Ofgem determining the issue between the parties using sector specific powers before a potential competition law claim is considered.
- (e) WPD also acknowledges that if Ofgem concludes that WPD did not apply the regulatory framework correctly, [REDACTED] is likely to wish to pursue a complaint/claim under Chapter II of the Competition Act 1998 (or equivalent EU legislation). However, if (which WPD submits is the case) WPD acted correctly within the regulatory framework, no competition law abuse can have occurred. It is therefore appropriate that the scope of this current dispute is as set out at (a) above.

#### 1.2 Relevant facts

- (a) Excluding two applications which it subsequently withdrew of its own accord, [REDACTED] [REDACTED] ('[REDACTED]') made three applications to WPD: one (on 11 September 2015) was for a Required Capacity of 12MVA and two (on 10 December 2015) were for a Required Capacity of 20MVA (one where an ICP would construct and an IDNO would own and operate the network downstream of the connection point provided by WPD and the other where this would be constructed by an ICP and then adopted by WPD). The applications made no reference to the voltage at which [REDACTED] was seeking those connections.

- (b) As regards the offers about which [REDACTED] has complained, WPD made Interactive Point of Connection Offers for the Required Capacities. Those offers complied with WPD's licence obligations and were in accordance with the procedures set out in the Common Connection Charging Methodology contained in Schedule 22 of the Distribution and Connection Use of System Agreement, as approved by Ofgem. The 12MVA Required Capacity offer was made on 19 January 2016 (ref: 2322326) and the 20MVA Required Capacity offers (ref: 2394659 and 2395126) were made on the same date. All those offers were made for a connection at 11kV, for the reasons outlined at 3.3 below.
- (c) It became clear that [REDACTED] was requesting a connection to the 33kV network. As stated above, WPD understands from [REDACTED] that [REDACTED] intention was that an ICP would construct and an IDNO would own and operate all network assets downstream from the 33kV network, including a new primary sub-station.
- (d) In line with the directions in your request dated 8 September 2016, we also refer you to our detailed explanation of the dispute contained in our referral document dated 1 August 2016 at sections 1 'Introduction and summary of dispute' and 5 'Description of what is being disputed'.

### 1.3 **Comments on the approach suggested by [REDACTED]**

- (a) [REDACTED] has submitted that Ofgem should approach the dispute by asking if there are any regulatory prohibitions which expressly prevent WPD from offering a connection at the voltage requested, with the implication that if there are no express prohibitions, WPD should connect at the voltage requested.
- (b) Framing the dispute in the manner suggested by [REDACTED] would overlook the fact that, when considering connection requests, DNOs such as WPD are balancing several factors (including the interests of other existing customers and, crucially, future customers and other IDNOs). The simple absence of an express prohibition of a particular course of action cannot mean, without more, that following that particular course of action would then necessarily be appropriate. The balancing act which a DNO carries out can properly lead to the conclusion that the particular course of action is not appropriate, bearing in mind the various factors and interests which the DNO is required to balance.

### 1.4 **Additional issue in relation to [REDACTED] [REDACTED]**

- (a) [REDACTED] [REDACTED] ('[REDACTED]' described by its solicitors as a sister company to [REDACTED] is an ICP. It has asked WPD for permission to build the reinforcement assets which are the subject of the disputed POC offers, on the basis that it would receive price control revenue funding from WPD equivalent to the WPD Cost Apportionment Factor element. Clearly this request would require the connection offers made by WPD to be accepted. [REDACTED] and [REDACTED] have asked that the [REDACTED] request be considered as part of the current dispute.
- (b) WPD has explained that the value of that work would be above the relevant threshold in the Utilities Contract Regulations 2016, that putting that work out to procurement (which would be a legal requirement) would lead to a delay which would likely be unacceptable to [REDACTED] and the end customer. WPD has also explained that it is engaging with Ofgem to identify a workable procurement process which would enable such requests to be progressed swiftly. WPD had previously advertised a trial for this type of work (with a value cap of £500,000), in order to assess how best to administer and handle requests from ICPs, but no ICP wished to participate in the trial and the anticipated experience and learning therefore did not materialise. WPD is also in the process of starting a new trial with a value cap of £4,000,000 (but the [REDACTED] request would also be outside the scope of that trial).

- (c) WPD is actively seeking a process, in relation to which Ofgem has no objections, to enable a request such as [REDACTED] request to proceed efficiently. WPD submits that there is therefore no active dispute in relation to [REDACTED] request.

**2. Description of the works the dispute relates to and attach any relevant paperwork**

2.1 The works to which this dispute relates are set out in 1.2 above. For ease of reference we repeat that information below.

- (a) Excluding two applications which it subsequently withdrew of its own accord, [REDACTED] [REDACTED] ('[REDACTED]') made three applications to WPD: one (on 11 September 2015) was for a Required Capacity of 12MVA and two (on 10 December 2015) were for a Required Capacity of 20MVA (one where an ICP would construct and an IDNO would own and operate the Customer Installation network and the other where this would be constructed by an ICP and then adopted by WPD). The applications made no reference to the voltage at which [REDACTED] was seeking those connections.
- (b) As regards the offers about which [REDACTED] has complained, WPD made Interactive Point of Connection Offers for the Required Capacities. Those offers complied with WPD's licence obligations and were in accordance with the procedures set out in the Common Connection Charging Methodology contained in Schedule 22 of the Distribution and Connection Use of System Agreement, as approved by Ofgem. The 12MVA Required Capacity offer was made on 19 January 2016 (ref: 2322326) and the 20MVA Required Capacity offers (ref: 2394659 and 2395126) were made on the same date. All those offers were made for a connection at 11kV, for the reasons outlined at 3.3 below.
- (c) It became clear that [REDACTED] was requesting a connection to the 33kV network. As stated above, WPD understands from [REDACTED] that [REDACTED] intention was that an ICP would construct and an IDNO would own and operate all network assets downstream from the 33kV network, including a new primary sub-station.

3. **Does WPD have or know of a published policy that states that only the capacity requested by a customer seeking a new connection will be taken into account by a DNO and not the voltage level? If so, please provide a copy of this policy.**

3.1 **Introductory comments**

- (a) The Regulatory Framework (explained further below) requires DNOs to take several factors into account when dealing with connection requests. The position is therefore more subtle than whether or not a policy or other regulatory document contains an express prohibition on taking the voltage level into account. As explained above, the absence of an express prohibition of a particular course of action cannot mean, without more, that following that particular course of action would then necessarily be appropriate.
- (b) However and in any event, Ofgem, in its open letter dated 4 May 2010 (titled Independent Distribution Network Operators (IDNOs) Point of Connection (POC) Applications, states:
- (i) In paragraph 2: that "an electricity distributor does not have an obligation to offer IDNOs a connection at the voltage level that they request if the resulting agreement for doing so would be likely to cause it to be in breach of its duties under section 9 of the Electricity Act 1989";
- (ii) In paragraph 5: "When offering connections to IDNOs under section 16(2) of the Act we note that a DNOs' duty to make a connection to the distribution system requires it to "provide such electric lines or electrical plant as may be necessary to enable the connection to be used for the purposes for which it is required". This duty, therefore, does not appear to require the DNO to offer an IDNO a connection at the voltage level that it requests if the voltage level of the connection is higher than necessary."; and
- (iii) In paragraph 6: "We also note that both IDNOs and DNOs have a duty under section 9(1) of the Act to "*develop and maintain an efficient, coordinated and economical system of electricity distribution*". We therefore consider it could be the case that the seeking and granting of a connection at a higher voltage than is necessary may not be compatible with their duties under section 9(1) of the Act."
- (c) In this specific case:
- (i) WPD applied the Regulatory Framework and concluded that providing a connection at 33kV with no enhancement would not provide the most efficient solution for the network in the area as a whole, which would put WPD in breach of its duties under section 9 of the Electricity Act 1989 and would be contrary to WPD's wider obligations to maintain an economic, efficient, secure and resilient network for all its stakeholders, including existing and future customers. As a result of its decision to enhance the connection scheme and provide a connection at 11kV to the customer (which was sufficient to deliver the customer's required capacity), the 33kV connection requested by the customer would be higher than was necessary (and therefore excessive), again putting WPD in breach of its duties under section 9 of the Electricity Act 1989).
- (ii) To that extent, WPD clearly did take into account the connection voltage level requested by the customer but it concluded that offering a connection at that voltage level would mean that the most efficient connection scheme (i.e. the Enhanced Scheme) was not being offered.

- (iii) As explained further below, the Regulatory Framework requires DNOs to arrange connections to provide the capacity which is requested and that is clearly distinct from the voltage of the connection.
- (d) In addition, if WPD had agreed a connection for the required capacity at 33kV with the IDNO owning and operating all down-stream assets then, when further connection requests in the relevant surrounding area (which are very likely) would have been received, WPD would have had less flexibility in the connections which it could offer to existing and future customers (including other IDNOs) which would have benefitted from the reinforcement provided as part of the Enhanced Scheme. The likelihood is that future connections would have been comparatively more expensive. Future customers would then suffer as a result of ■ obtaining a connection at a voltage which was higher than was necessary for the capacity requested and owning and operating all assets down-stream from that.
- (e) In the following sub-sections of reply to question 3 we explain: the Regulatory Framework (3.2); how WPD reached its conclusion (3.3); and the consequences if it had agreed to offer connections for 12MVA and 20MVA at 33kV instead of at 11kV (3.4).

### 3.2 **The Regulatory Framework**

For ease of reference we set out below the relevant regulatory provisions which form the background to WPD's offers in this case.

- (a) Section 16 of the Electricity Act 1989 (the "Act") provides:
  - "(1) An electricity distributor is under a duty—
    - (a) to make a connection between a distribution system of his and any premises, when required to do so by—
      - (i) the owner or occupier of the premises; or
      - (ii) an authorised supplier acting with the consent of the owner or occupier of the premises,
  - for the purpose of enabling electricity to be conveyed to or from the premises;
  - (b) to make a connection between a distribution system of his and any distribution system of another authorised distributor, when required to do so by that authorised distributor for the purpose of enabling electricity to be conveyed to or from that other system.
  - (2) Any duty under subsection (1) includes a duty to provide such electric lines or electrical plant as may be necessary to enable the connection to be used for the purpose for which it is required.
  - (3) The duties under this section shall be performed subject to such terms as may be agreed under section 16A for so long as the connection is required."
- (b) Section 16A of the Act provides that a notice requiring a distributor to offer terms for making a connection to the distributor's distribution system must specify, amongst other matters, the maximum power at which electricity may be required to be conveyed through the connection (underlining added).

- (c) Section 9(1) of the Act provides that an electricity distributor is under a duty (a) to develop and maintain an efficient, co-ordinated and economical system of electricity distribution and (b) to facilitate competition in the supply and generation of electricity. These dual obligations are also included in the Distribution Code, to which WPD is subject.
- (d) These obligations are, in part, given effect through the versions of the "Statement of Methodology and Charges for Connection to Western Power Distribution (East Midlands) PLC's Electricity Distribution System" dated May 2015 and November 2015 (the "Connection Charging Methodology"). These are the versions which were in force at the relevant time. Each DNO is obliged by Standard Licence Condition 13 to have a Connection Charging Methodology in force and to include within its connection charging methodology the Common Connection Charging Methodology set out at Schedule 22 of the Distribution and Connection Use of System Agreement ("CCCM"). The CCCM has been approved by Ofgem and WPD has included it in Section 5 of its Connection Charging Methodology.
- (e) The CCCM explains that WPD is obliged to offer the "Minimum Scheme". Section 5.1 provides:
- "The Minimum Scheme is the Scheme with the lowest overall capital cost (as estimated by us), solely to provide the Required Capacity. The Minimum Scheme will be subject to:
- accepted industry standards, including the requirements of the Distribution Code;
  - the status and configuration of the Relevant Section of Network (RSN);
  - the standard sizes and types of equipment currently used by us on our Distribution System which shall be reasonable in all the circumstances;
  - maintaining our ability to minimise regulatory penalties associated with the Interruptions Incentive Scheme and the Guaranteed Standards of Performance; and
  - where the Customer is an LDNO, maintaining the Customer's ability to minimise regulatory penalties associated with the Guaranteed Standards of Performance.
- and shall be consistent with our statutory and licence obligations including the requirement to develop, maintain and operate an efficient, co-ordinated and economical electricity Distribution System."
- (f) "Required Capacity" is defined as is the Maximum Capacity agreed with the Customer.
- (g) "Maximum Capacity" is, in relation to any connection the maximum amount of electricity, as agreed with WPD and expressed in kW or kVA, that can be imported from or exported onto WPD's Distribution System (underlining added).
- (h) Ofgem's open letter dated 4 May 2010 (titled Independent Distribution Network Operators (IDNOs) Point of Connection (POC) Applications give clear guidance in relation to whether a DNO should take into account the voltage level of connections which are requested by customers (as paragraph 3.1 above).

### 3.3 How WPD assessed the connection requests from [REDACTED]

As regards how WPD dealt with the requests which were made by [REDACTED]

#### (a) Minimum Scheme

- (i) At the time [REDACTED] requests were received, due to recent acceptances of significant 11kV connection offers within the area, there was very limited capacity available on the existing 11kV network and insufficient to provide the Required Capacity. The status of the primary substations in the RSN was as follows:

**Existing (2015/16) Primary Substation demands - capacity  
and demand shown as summer/winter figures:**

	Current maximum Demand	Forecasted maximum demand (including accepted schemes and unused ASC's <sup>#</sup> )	Firm Capacity
[REDACTED]	18.75/22MVA	38.8/42.05MVA	32/40MVA
[REDACTED]	6.6/9.6MVA	20.7/23.7MVA	19/22.5MVA*

\*limitation of the substation firm capacity due to the 33kV circuit rating

<sup>#</sup>this is the total maximum forecast substation demands including accepted demand connections and the Agreed Supply Capacity (ASC) for large HV connections where the demand has not been diversified for this table.

- (ii) When assessing [REDACTED] applications it was therefore clear that the primary substations in the RSN were close to full capacity and that a new primary substation would be required in order just to provide the Required Capacity as part of the Minimum Scheme - the [REDACTED] 132kV/33kV BSP was determined as the closest point on WPD's network to support the Required Capacity and deliver this Minimum Scheme.

#### (b) WPD considerations and options

- (i) WPD considered both the Minimum Scheme (ie. the scheme with the lowest overall capital cost solely to provide the Required Capacity), including "the status and configuration of the Relevant Section of Network (RSN)" (as required by the second bullet in Section 1 of the CCCN), as well as its wider obligation to develop an efficient, co-ordinated and economical electricity distribution system, including the need for any additional capacity in the area.
- (ii) It was clear that there was significant development taking place in the area for which additional capacity would be likely required, in addition to the Required Capacity. WPD therefore considered various options for providing the Required Capacity in conjunction with its need to create additional capacity in the local area, including following discussions with the customer and [REDACTED] / [REDACTED] as follows:

- (A) Option 1 (sole use [REDACTED] assets and existing substations):

- (i) Increase capacity at [REDACTED] substation by upgrading the existing plant, which would provide future capacity within the [REDACTED] area.
  - (ii) The costs associated with upgrading this plant and cables would have been approximately £5.85m. This would have provided an additional 13MVA summer / 16MVA winter headroom.
  - (iii) This would not have been sufficient to provide the requested 20MVA for [REDACTED] but would have provided additional capacity within the network area.
  - (iv) This would therefore have resulted in the upgrade works of an existing substation being carried out in addition to the new substation requested by [REDACTED]
- (B) Option 2 (sole use [REDACTED] assets and WPD standalone substation):
- (i) Install a new WPD standalone substation, in addition to the sole use [REDACTED] substation required for this scheme.
  - (ii) The costs associated with WPD installing the new standalone substation would have been approximately £5.5m and would have provided an additional 19MVA summer / 24MVA winter headroom. This cost would have been in addition to the cost to [REDACTED] of providing the sole use [REDACTED] assets.
- (C) Option 3 (Enhanced Scheme and shared sub-station):
- (i) Install a shared sub-station. The development area indicated by [REDACTED] was considered by WPD to be conveniently situated for a shared sub-station to allow WPD to interconnect this new sub-station to the existing network. The connection requirements were also appropriately defined such that shared sub-station was technically feasible, including the Required Capacity<sup>1</sup> and the fact that the demand was classified as non-disturbing with no embedded generation within [REDACTED] proposed network. This sub-station would feed out into the local existing 11kV networks, transferring some of the existing load at the [REDACTED] and [REDACTED] substations and unlocking capacity across the local 11kV network.
  - (ii) By sharing the installed substation as part of an enhanced scheme, the connection charge to [REDACTED] would have been apportioned, using the Cost Apportionment Factor calculation at 66% of the total reinforcement costs (since it would be using 20MW of

<sup>1</sup> Using standard equipment sizing, the new substation would have had transformer capacity headroom for an additional capacity of 10MVA summer / 20MVA winter headroom over and above the Required Capacity.

the 30MW capacity installed) (see further paragraph 3.3(c) below).

- (iii) This would have result in £5.9m reinforcement being shared between WPD and ██████. An additional 10MVA summer / 20MVA winter headroom would have been created, with WPD contributing £2.0m towards the reinforcement scheme.
- (iii) As is clear from the above, Option 3 provided the best way of delivering the Required Capacity in line with WPD's obligation to develop an efficient, co-ordinated and economical electricity Distribution Network. Options 1 and 2 would have resulted in a higher cost per MW and were less efficient than option 3.

(c) **Charging Methodology treatment of Option 3**

- (i) As regards the Charging Methodology treatment of Option 3:
  - (A) Since the entire capacity of the proposed new primary substation to be developed in the Enhanced Scheme under option 3 (ie. 30MVA) would not be taken up by ██████ whose Required Capacity was a maximum of 20MVA, with the addition of the 11kV interconnection enhancement the 33kV works and the establishment of the new primary substation would be treated as reinforcement works in excess of the Minimum Scheme, in respect of which a Cost Apportionment Factor (as mandated in the CCCM) would be applied. The cost to be paid by the customer would therefore be apportioned based on the capacity they had requested as against the new network capacity that such reinforcement would create. As the works would constitute part-funded reinforcement, these works are non-contestable and could only be carried out by WPD.
  - (B) In its "Competition for part-funded connections work" consultation document dated 1 June 2011, Ofgem asked DNOs to seek to develop a mechanism by which an ICP could have access to price control revenue for part-funded connections in order to develop competition in this area. In Ofgem's resulting guidance issued in July 2011, however, Ofgem's view that it was not appropriate to allow IDNOs to adopt part-funded assets funded with price control revenue on the basis that it was not clear that this would deliver any significant benefits to customers additional to those associated with allowing ICPs to compete to construct the part-funded connection, and raises complex issues, including around the nature of the relationship between a DNO and an IDNO in relation to capacity required by the DNO and the potential for IDNOs to charge customers for the provision of assets funded via price control revenue (as outlined in Ofgem's consultation dated 1 June 2011).<sup>2</sup>
  - (C) WPD has considered whether certain provisions of the Common Connection Charging Methodology (section 5 of WPD's Connection Charging Methodology) lead to a conclusion that ██████ should be permitted to build and pay for the assets which would be necessary for a connection at 33kV. For example, section 5.11 refers to an applicant paying in full for the Reinforcement of the Distribution

<sup>2</sup> For WPD's comments regarding ██████ request, as an ICP, to build the assets which would be required if WPD's current offers were accepted, please see 9 below

System where they have requested a supply voltage that is not necessary to meet the Required Capacity (which is the capacity agreed between the DNO and the customer) and the local RSN is not of the requested voltage. However, that provision only becomes relevant where the DNO has concluded that the solution which would involve that reinforcement would be in line with the DNO's obligation under the Electricity Act 1989 to achieve an efficient, co-ordinated and economical system of electricity distribution (whilst also facilitating competition in the supply and generation of electricity). As explained above, WPD concluded that providing an Enhanced Connection with Reinforcement of the network to provide extra capacity for other and future customers (including other IDNOs) was the most efficient solution, which also meant that the Required Capacity would be supplied at 11kV. In relation to this WPD notes:

- (i) Section 5.11 in the Connection Charging Methodology (and similar provisions) do not give an applicant an unrestricted right to insist on a particular connection.
  - (ii) Instead, the section details the charging consequences if the connection, which a DNO concludes is appropriate, is offered at a voltage which is higher than that required for the Required Capacity.
  - (iii) In this case, the connection offered was not at a voltage which was higher than that required for the Required Capacity and therefore section 5.11 is not engaged.
  - (iv) In addition, section 5.11 in the Connection Charging Methodology is subordinate to the DNO's obligations in the Electricity Act 1989. It would be incorrect for section 5.11 to override a DNO's assessment of what is the most efficient connection for the network, taking into account the interests of all stakeholders and not just the specific customer which has requested that connection. In the situation under dispute here, allowing the connection at the higher voltage would mean that WPD were unable to undertake the Enhanced Scheme and deliver its benefits.
- (d) ***Current Ofgem guidance in relation to connection requests at voltages which are higher than necessary for the capacity requested***
- (i) Furthermore, Ofgem, in its open letter dated 4 May 2010 (titled Independent Distribution Network Operators (IDNOs) Point of Connection (POC) Applications, states:
    - (A) In paragraph 2: that "an electricity distributor does not have an obligation to offer IDNOs a connection at the voltage level that they request if the resulting agreement for doing so would be likely to cause it to be in breach of its duties under section 9 of the Electricity Act 1989".

WPD has explained above how using the Point of Connection voltage requested by ■ as the driving criteria when assessing the request

would not be appropriate and would put WPD in breach of its duties under section 9 of the Electricity Act 1989.

- (B) In paragraph 5: "When offering connections to IDNOs under section 16(2) of the Act we note that a DNOs' duty to make a connection to the distribution system requires it to "provide such electric lines or electrical plant as may be necessary to enable the connection to be used for the purposes for which it is required". This duty, therefore, does not appear to require the DNO to offer an IDNO a connection at the voltage level that it requests if the voltage level of the connection is higher than necessary."
- (ii) Once WPD had established that the utilisation of the required 33kV assets for an Enhanced Scheme was appropriate, the Required Capacities (12MVA and 20MVA) which ■■■ requested did not require a connection at 33kV. In addition, ■■■ did not provide any technical information which indicated that a connection at 11kV would not meet the requirements and the characteristics of their connection and capacity.

**3.4 Comments on the consequences if WPD had offered connections to ■■■ for 12MVA or 20MVA at 33kV instead of at 11kV**

- (a) In addition, if WPD had agreed a connection for the Required Capacity at 33kV and no Enhanced Scheme then, when further connection requests (which are very likely) would have been received in the relevant wider area, WPD would have had less flexibility in the connections which it could offer to those future customers. The likelihood is that future connections would have been comparatively more expensive because of the requirement for additional reinforcement costs which would have still been required, such that future customers and end consumers would suffer as a result of ■■■ obtaining a connection at a voltage which was higher than was required for the Required Capacity and no Enhanced Scheme being provided.
- (b) By ensuring that it offered to ■■■ the most efficient connection for the capacity requested (ie. an 11kV connection and a shared sub-station), WPD optimised the use of its network for both other existing and future customers.
- (c) If WPD, in situations such as this, did not enhance the connection scheme and instead offered sole-use assets and connections at voltages which were higher than was required for the requested capacity, the inefficiencies in WPD's network would multiply. Overall, customers would pay more for connections than would otherwise be the case and this would be contrary to WPD's and ■■■ common duties to maintain an economic, efficient, secure and resilient network for all its stakeholders.
- (d) Ofgem should also be aware that, in response to a further request from ■■■ WPD made, on 15 July 2016, an offer to ■■■ of a 52MVA, 132kV Point of Connection to the ■■■ GSP – ■■■ BSP 132kV dual circuit towerline. WPD offered a higher voltage point of connection than was requested by ■■■ since the higher capacity requested justifies that higher voltage and there is not an economic or efficient enhanced scheme which would provide additional capacity required in the area. If ■■■ were involved in that connection it would presumably be able to benefit from that connection at a higher voltage than those which were offered to ■■■ in offers 2322326, 2394659 and 2395126. WPD submits that this further offer is clear evidence that it is not discriminating against ■■■ and that it offers higher voltage connections when that is the most efficient connection for the given situation.

4. In your referral document you state that if WPD were to take into account the voltage requested when making an offer for connection, they could be, or be perceived to be, acting in a discriminatory manner.

(a) Why is this?

- (i) As explained in reply 3 above, providing an Enhanced Scheme with a connection at 11kV and a shared sub-station was the most efficient way for WPD to provide the Required Capacity and provide additional capacity in the *local area, whilst also taking into account the factors which WPD is required by the Regulatory Framework to take into account.*
- (ii) In order to ensure that it complied with its obligations to maintain an efficient and economic network and to facilitate competition, WPD assessed and dealt with the connection requests on the basis of the capacity requested. It determined the appropriate point of connection and its voltage based on the characteristics of the required connection and the status of the existing RSN, in accordance with its obligations under the Distribution Licence and therefore with the principles set out in the Distribution Code.
- (iii) In making its assessment of the connection requirements and the status of the RSN, WPD determined that an Enhanced scheme would create wider network capacity, which was required in the area. This was determined to be the most efficient and economic method compared to alternatives (again, please see 3.3 above).
- (iv) If WPD had offered the connection at the voltage requested, then:
  - (A) It would have been departing from the Regulatory Framework which has led to the conclusion that an Enhanced Scheme was required. Please see the reply to question 3 for details of how this would have been incorrect. If WPD had used the voltage requested to determine the type of connection (such that it would have departed from the Regulatory Framework), it would be at risk of treating different connection requests differently and therefore be at risk of being found to be in breach of its obligation to act in a non-discriminatory and pro-competition manner.
  - (B) █████ has argued that WPD could avoid the discrimination in (A) above by taking into account a requested connection voltage in each application for a connection where a specific voltage is requested. That is not a workable solution:
    - (i) First, that would run contrary to the clear direction in the Regulatory Framework to determine connections on the basis of the capacity requested.
    - (ii) Second (and in any event), if WPD had agreed a connection for the required capacity at 33kV then, when further connection requests (which are very likely) would have been received, WPD would have had less flexibility in the connections which it could offer to those future customers. The likelihood is that future connections would have been comparatively more expensive (since additional transformers would be required to be built). Future customers (including

other IDNOs) would then pay a higher connection charge and suffer as a result of [REDACTED] obtaining a connection at a voltage which was higher than was required for the capacity requested.

**(b) Who might it discriminate against?**

- (i) Taking into account the voltage requested for a new connection (in the sense that the connection is offered at that voltage, even if that were not the most efficient connection for the capacity requested) would discriminate against current and future customers who would require connections in the relevant area in the future. As explained above, those future connections would be into a network which was not optimised in terms of efficiency. As a result, those future connections would be likely to require extra assets to be built, which would increase the cost of those connections. That would therefore favour the party in [REDACTED] position, which had obtained a connection which exceeded its stated capacity requirement, at the cost of customers which seek connections to that area of the network in the future and end consumers.

**(c) Have other parties made similar requests to the one made by [REDACTED] If so, please can you provide details of these requests, including their volumes and the reasons for them?**

- (i) Other parties have made similar requests, ie. they requested connections at higher voltages than were necessary for the capacity requested. Examples of these are below:

(A) [REDACTED]

- (i) Another IDNO requested numerous connections for capacities 340kVA, 2.23MVA, 3.2MVA and 6.8MVA capacities. WPD made offers for all connections at 11kV. This was because an 11kV connection was the minimum engineering solution.

The IDNO requested a meeting with WPD and subsequently made a 340kVA connection application, stating they specifically wanted this at 33kV (Reference number 2552516). They requested this as a more "future proofed" connection in the event additional future demand that was not yet being considered would be requested, in excess of the 3.2MVA which they had also requested. The IDNO said they did not have any supporting evidence to support a demand above 3.2MVA.

WPD concluded that 11kV was the appropriate voltage for connections for all of the capacities previously applied for, and specifically the 340kVA and 3.2MVA capacities, and it informed the IDNO of this. If WPD had provided a 33kV connection, it would have added additional plant to the network and additional points of failure when there was already capacity within the existing network to support future demand increases. The IDNO made a further application at 11kV as previous offers had expired.

(B) [REDACTED]

- (i) Another IDNO was offered an 11kV connection for a capacity of 3MVA (reference number 2487602). This involved network reinforcement at [REDACTED]. The IDNO requested that WPD provide the connection at 33kV, as it would be a more "future proofed" connection in the event additional future demand that was not yet being considered would be requested. The IDNO said they did not have any supporting evidence to support a demand above 3MVA. This application was not accepted and is no longer valid.

(C) [REDACTED]

- (i) [REDACTED] submitted enquires 1672926 & 1794095 for a connection for a capacity of 8MVA. WPD offered a connection at that capacity at 11kV PoC. That required network reinforcement (ie. providing a new substation) as [REDACTED] is a growth area.

[REDACTED] then requested a connection at 33kV and stated that their ICP would construct and equip a new primary substation for adoption by WPD. They proposed that WPD would then pay their ICP a sum equivalent to 11/19 of the proposed scheme (minus works undertaken by WPD for protection, monitoring and inspection). This did not happen (for similar reasons to WPD's decision in the scheme which is the subject of this dispute).

An 11kV connection was accepted by [REDACTED] and the substation was constructed as network reinforcement.

5. **If [REDACTED] were to construct, own and operate a new substation at the point of connection to the 33kV network, how would this impact on WPD's ability to operate an economic and efficient network?**

**(a) Which customers (and on which parts of the network) would be affected?**

**(b) What would be the extent of the detriment?**

- 5.1 As explained in the replies to questions 3 and 4 above (and WPD refers Ofgem to those answers), if [REDACTED] were to construct, own and operate a new substation at the point of connection to the 33kV network, existing and future customers (including other IDNOs) would not be to be make future connections in as cost effective a manner as would otherwise be the case. This is because WPD would not have been able to reinforce the network to maximise the opportunity for cost effective connections to the network in that area. New connection customers would be contributing more than they would otherwise have been required to contribute.
- 5.2 If WPD were not to construct the Enhanced Scheme and provide the interconnection on the 11kV network, this would restrict WPD's ability to 'unload' some of the other primary substations in the relevant area, to free up capacity for other connection customers. As a result of this, subsequent connection schemes in this relevant area would be likely to trigger other reinforcement schemes to meet their capacity requirements. Whilst quantifying the cost to these customers and the wider DUoS customer base would be dependent on the characteristics of these future connection schemes, WPD's response to 3.3(b) give an indication of the costs of alternate reinforcement options in the area to create similar levels of capacity on the Distribution System. The inability for WPD to create the additional capacity via the Enhanced Scheme could not only lead to additional costs to future customers, but also delays due to the timescales involved in carrying out the alternative reinforcement works which may be required instead of being able to connect using the capacity already created as part of the Enhanced Scheme.

6. If WPD were to construct and own the substation at the point of connection to their 33kV network, how would this support the development of an economic and efficient network

(a) Other than the [REDACTED] site, what further demands are anticipated in the parts of the network that would be supplied through the capacity in this substation?

(b) What evidence does WPD have for these future demands?

(c) Were these future demands identified in WPD's RIIO-ED1 business plans or any subsequent publication concerning network development?

(d) What were WPD's plans to meet these demands prior to the application by [REDACTED]

(e) Why would WPD's ability to meet these future demands only be achieved if they constructed and owned this substation?

(a) *Other than the [REDACTED] site, what further demands are anticipated in the parts of the network that would be supplied through the capacity in this substation?*

(i) Within [REDACTED] and the surrounding areas, land has been identified by the local authority for domestic properties (up to 4,000 homes) and a mix of research and development, industrial and storage / distribution uses. This includes up to 171.5ha of employment land.

(ii) This is in addition to the smaller LV and 11kV connection requests (residential, industrial and commercial) which have been requested and are anticipated to continue to be received across the [REDACTED] area. These further demands would be supplied by both this substation and the other surrounding substations ([REDACTED] and [REDACTED] which are now at their capacity limit. Their 11kV networks would be "cut and carving", which would share the loads across all three substations and would facilitate additional headroom across this wider area of [REDACTED] most cost effectively.

(b) *What evidence does WPD have for these future demands?*

(i) There have been discussions between numerous developers and the local authority, [REDACTED] City Council on large strategic demand growth around [REDACTED] and the surrounding areas. On 14<sup>th</sup> October 2015, this was formalised in writing with the Local Authority outlining to WPD their development plans across the whole [REDACTED] network and including within [REDACTED] / [REDACTED] areas. The earlier draft versions now been formalised and published as part of their Local Plan –

[REDACTED]

(ii) WPD has also had 5,600VA demand acceptances over the last 24 months within these areas, and has further 1,055kVA of live offers for additional demand across these areas.

- (iii) Through historical demand growth in the area, there is sufficient evidence that network demands within this area is going to continue to grow and that additional capacity will be required to facilitate further demand growth.

(c) **Were these future demands identified in WPD's RIIO-ED1 business plans or any subsequent publication concerning network development?**

- (i) Within this area, when the ED1 plan was submitted, [REDACTED] [REDACTED] was identified as an area of general load growth area that would trigger network reinforcement schemes within ED1.
- (ii) The RIIO-ED1 CV102 LI risk through time details shows the two schemes at [REDACTED] [REDACTED] and [REDACTED] [REDACTED] [REDACTED] [REDACTED] had a combined £4.7m of reinforcement schemes to provide an additional 19MVA winter demand and 12MVA summer demand capacities within the area. The location of the associated primary substations, [REDACTED] (labelled substation 5), [REDACTED] [REDACTED] (labelled substation 3), [REDACTED] (labelled substation 6) and [REDACTED] (labelled substation 4), are shown as green dots in the version of the map transferred via Ofgem's secure file transfer system.
- (iii) These schemes were not identified for any specific new development within the [REDACTED] [REDACTED] area, but rather the large number of smaller schemes forecast to occur within ED1.

(d) **What were WPD's plans to meet these demands prior to the application by [REDACTED]**

- (i) The two identified schemes to meet these demands are:
- (A) [REDACTED] at [REDACTED] Primary Substation was an identified scheme due to a shortfall of capacity after general load growth. The proposal identified is to replace the existing transformers with two 30/40MVA units and overlay cable circuits with 40MVA cables, replacing the 11kV switchboard as a result of this work. This scheme is estimated to cost £3.03m and would provide an additional 16MVA of demand in the winter and 11MVA in the summer.
- (B) [REDACTED] at [REDACTED] Primary Substation was an identified scheme due to a shortfall of capacity after general load growth. The proposal identified is to replace the existing cables for 40MVA rated cables. This scheme is estimated to cost £1.658m and would unlock an additional 3MVA in the winter and 1MVA in the summer. It would also allow the transformers to be replaced when necessary, which would unlock further capacity in the future.
- (ii) WPD will always assess if there are better, more cost effective opportunities to provide additional capacity in the right areas, which is a benefit to all distribution customers.

(e) **Why would WPD's ability to meet these future demands only be achieved if they constructed and owned this substation?**

- (i) WPD's position is not that the future demands can only be met if WPD constructed and owned this substation. Rather, when dealing with connection requests, it takes into account future capacity as one of the factors in its assessment of what is the most efficient connection, for the capacity requested. The conclusion that a new substation would be built, by WPD, is

the result of applying the Regulatory Framework, as explained in replies 3, 4 and 5. It is of course possible that, had [REDACTED] connection request had different parameters, the most efficient connection scheme could have involved [REDACTED] having a connection at a higher voltage, etc.

- (ii) If it had not offered a connection with an Enhanced Scheme and [REDACTED] had owned and operated the substation, WPD would have been required to undertake additional/alternative reinforcement to meet the needs of future customers, including potentially other IDNOs.

7. **Can WPD cite any other instances where they have taken the approach of not permitting a connection at the voltage level requested?**

At [REDACTED] [REDACTED] and [REDACTED] (please see 4(c) above) the connection offers have been made for the most appropriate voltage, not at the voltage requested because it would result in negative impacts on the network for existing and future customers, adding additional plant.

8. **We understand that WPD contends that an IDNO cannot adopt an asset that has been part funded from price control revenues. Why is this relevant in permitting ██████ to solely fund the construction and subsequent ownership of a substation at 33kV?**

8.1 ***Ofgem's statement that an IDNO should not adopt an asset that has been part funded from price control revenues***

- (a) In its "Competition for part-funded connections work" consultation document dated 1 June 2011, Ofgem asked DNOs to seek to develop a mechanism by which an ICP could have access to price control revenue for part-funded connections in order to develop competition in this area. WPD has progressed this issue, as explained further in our reply to question 9.
- (b) That consultation is relevant since, in its resulting guidance issued in July 2011, Ofgem stated that it was not appropriate to allow IDNOs to adopt part-funded assets funded with price control revenue on the basis that it was not clear that this would deliver any significant benefits to customers additional to those associated with allowing ICPs to compete to construct the part-funded connection, and raises complex issues, including around the nature of the relationship between a DNO and an IDNO in relation to capacity required by the DNO and the potential for IDNOs to charge customers for the provision of assets funded via price control revenue (as outlined in Ofgem's consultation dated 1 June 2011).

8.2 ***Why is this relevant in permitting ██████ to solely fund the construction and subsequent ownership of a substation at 33kV?***

- (a) This question engages points set out in the replies to questions 3, 4 and 5 above. Allowing ██████ to solely fund the construction and subsequent ownership of a 33kV substation would, in this case, at worst place WPD in breach of its statutory obligation under the Electricity Act 1989 and otherwise at least be discriminatory to other customers (see our response to 4):
  - (i) At the time WPD received the connection requests from ██████ due to recent acceptances of significant 11kV connection offers within the area there was very limited capacity available on the existing 11kV network. Therefore, in order to maintain an efficient, co-ordinated and economical network (as required by the Electricity Act 1989), enhancement was required at the 33kV to 11kV level. This enhancement was to consist of a shared substation which would feed out into the local existing 11kV networks, transferring some of the exiting load at the ██████ and ██████ substations and unlock capacity across the local 11Kv network.
  - (ii) If ██████ solely funded the construction and owned a 33kV substation WPD would be hindered from meeting its obligations under the Regulatory Framework. It would lose the opportunity to carry out the necessary enhancement scheme to improve the efficiency of the network (in that area) as a whole, taking into account the interests of all stakeholders, including future customers and end consumers. Those future customers and end consumers would face increased connection costs whilst ██████ obtained a connection at a voltage which was greater than that required for the capacity which had been requested.
- (b) Additionally, the Regulatory Framework leads to the conclusion that the network should be reinforced at the 33kV level. According to the Connection Charging Methodology, that reinforcement is non-contestable work, which must be carried out

by WPD<sup>3</sup>. Having concluded that the most efficient solution for the network is to carry out reinforcement at the 33kV level, WPD would arbitrarily be dis-applying its Charging Methodology if [REDACTED] funded and owned the relevant new substation. WPD of course cannot pick and choose when it derogates from its Connection Charging Methodology.

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<sup>3</sup> WPD is in dialogue with Ofgem regarding implementing a workable utilities contracts procurement process so that ICPs can carry out that reinforcement work, having already implemented a trial to investigate how best to achieve that goal

9. **WPD has previously trialled arrangements that permit ICPs to carry out 'part-funded' connections work. In the event of WPD owning the substation at the point of connection, would these arrangements have permitted [REDACTED] (ICP) to have constructed the connection assets and benefited from the cost apportionment factor for this work? If not, why not?**
- 9.1 WPD put in place a trial of arrangements for permitting ICPs to carry out "part-funded" connections work (<https://www.westernpower.co.uk/Connections/Competition-in-Connections/Part-funded-reinforcement-trial.aspx>). The purpose of the trial, which was sanctioned by Ofgem, was to investigate a workable and sustainable way of enabling ICPs to undertake PFR work. The intention was that the experience and feedback from participants in the trial would enable WPD to propose to Ofgem a process structure and suite of documents which could be developed and then used in relation to ICPs undertaking future PFR work. No ICPs sought to undertake PFR work as part of that trial. The trial had a cap of £500,000 for each connection "project" and therefore [REDACTED] constructing the connection assets would not have fallen within the scope of that trial.
- 9.2 Due to the lack of engagement in the trial by ICPs, WPD is, subject to no objections being received from Ofgem, in the process of setting up a further PFR work trial. It is intended that the aggregate value of PFR work for all schemes agreed across all WPD licences, for the purposes of the new trial, will be capped at a maximum of £4m (sum of customer and DUOS elements) for the duration of the trial period. The cap is being set in view of the Utilities Contract Regulations 2016. The [REDACTED] connection request however has a capital value which significantly exceeds the £4m cap. That work would therefore be outside the scope of the intended new trial.
- 9.3 WPD has considered whether it would be possible to place the PFR work with [REDACTED] outside of the intended new trial.
- (a) Due to the value of the work and the value threshold in the Utilities Contract Regulations 2016, it is not possible for WPD to place that work with [REDACTED] direct. A public procurement process would be required.
- (b) WPD has also considered whether it would be practicable to run a procurement process for each project where an ICP indicated that it was interested in carrying out the PFR work and/or where it is apparent that ICPs may be interested in carrying out that work. That would involve, for example, notifying the opportunity to the market through OJEU and then running a procurement process to ensure compliance with the Utilities Contract Regulations 2016. WPD has concluded that adopting that process would cause significant delay to connection projects, adding several months to each project which went out to public procurement.
- (c) WPD is therefore now considering accelerating the design of a procurement process to try and to provide a "business as usual" streamlined process for ICPs to be able to compete for PFR work.
- 9.4 The purpose of the trials mentioned above was and is to provide insights and experience which would help with the design of an enduring process. WPD is however realistic in recognising that waiting for feedback and insights from the trials may not result in any meaningful information since (i) there was no take up by ICPs in the initial trial and (ii) there may be no take up in the intended new trial. In order to progress and facilitate ICPs being able to carry out PFR work (and therefore to support competition) WPD has opened dialogue with Ofgem regarding how a procurement process can be designed and implemented. One of the central issues which will need to be considered includes how the carrying out of PFR work by ICPs would affect DNO price control settlements.

10. **Would WPD be prepared to take a supply from an IDNO? (and have they ever done so in the past? If so, please provide details). If not, please provide reasons why not.**

10.1 **Would WPD be prepared to take a supply from an IDNO adopted part-funded asset?**

(a) If an IDNO adopted a part-funded asset funded with price control revenue this would be contrary to Ofgem's July 2011 guidance which stated that doing so would be inappropriate, as explained in reply to question 8 above. It follows that a DNO taking a supply from such an asset would be equally inappropriate.

(b) In view of (a) above, WPD has not taken such a supply in the past.

10.2 **Would WPD be prepared to take a supply from an IDNO if the asset had been fully funded by [REDACTED]**

(a) In this scenario, [REDACTED] would have fully funded the asset and Ofgem must have confirmed that [REDACTED] carrying out the non-contestable enhancement was a permitted derogation from WPD's Connection Charging Methodology (since the network reinforcement is non-contestable work, which the Ofgem-sanctioned Charging Methodology requires WPD to carry out).

(b) WPD considers that this scenario would, under the current Regulatory Framework (and without further comprehensive guidance from Ofgem regarding derogation from the Charging Methodology), be unlikely to occur. However, even if WPD were permitted to derogate from its Charging Methodology, providing [REDACTED] with a connection at 33kV where they would own and operate the downstream assets would not have been the most efficient solution for the wider network, as explained in detail in replies to questions 3, 4 and 5. WPD therefore considers that it would be unrealistic, given the facts of the current case, that it would take a supply from [REDACTED] in the scenarios which are the subject of this dispute.

(c) An additional point is that in the scenario of the Enhanced Scheme under dispute here, were WPD to take a supply from an IDNO to provide the interconnection on the 11kV network and free up capacity, the supplies(s) would feed non-specific customers on the wider network (with the supplying asset being fully funded (and owned) by that IDNO). There is no guidance within the current Regulatory Framework on how the DNO's wider operational and maintenance obligations are affected by an arrangement such as this. For example, the DNO is under an obligation to restore supplies, maintain and repair the network assets but it would have concerns in doing this in relation to assets which are outside of its control.

11. **In considering this connection request, how has WPD balanced the obligation to ensure an economic and efficient network with the obligation to facilitate competition in the supply of electricity?**
- 11.1 When considering this connection request (which was for non-disturbing loads of 12MVA or alternatively 20MVA, with no embedded generation), WPD assessed the capacity in the RSN, the current demand and the likely future demand.
- 11.2 As explained in section 3.3 above, WPD concluded that the most efficient solution, which also satisfied the interests of the majority of relevant stakeholders, was an Enhanced Scheme which would create extra capacity across the local 11kV network. This took advantage of a connection request to develop the network in a manner which benefitted the greatest number of stakeholders and facilitated competition in the supply of electricity, as follows:
- (a) [REDACTED] customer would obtain the capacity which they required, at a voltage which was appropriate for the nature of the load (ie. non-disturbing and with no embedded generation). In addition, they would only pay a proportion of the costs of the reinforcement in line with the proportion of the capacity which they would be able to take from the new substation.
  - (b) Existing customers would benefit. If they wished to increase their existing connection capacity, they would be able to access further capacity on the network in the relevant wider area (not just local to the proposed new primary substation at [REDACTED]). That increase could be provided more quickly and cheaply than if [REDACTED] had obtained a connection at 33kV and owned and operated all assets downstream from that.
  - (c) Future customers would benefit since they would also have the opportunity to have quicker and more efficient connections, in a similar way to existing customers (explained above).
  - (d) Existing and future customers would both benefit further since the network would be being expanded as cost effectively as possible. Therefore the overall costs of running the network and reinforcing it to provide additional capacity (some of which are ultimately passed through to customers) are minimised.
  - (e) Other IDNOs would stand to benefit since they would also be able to connect to the 11kV network more cost effectively and quickly. This clearly facilitates competition in connections.
- 11.3 If WPD had agreed a connection for the requested capacity at 33kV with no Enhanced Scheme then, when further connection requests (which are very likely) would have been received in the relevant wider area, WPD would have had less flexibility in the connections which it could offer to those future customers. The likelihood is that future connections would have been comparatively more expensive because of the requirement for additional reinforcement costs which would have still been required. If WPD, in situations such as this, did not enhance the connection scheme and instead offered sole-use assets and connections at voltages which were higher than was required for the requested capacity, the inefficiencies in WPD's network would multiply. Overall, customers would pay more for connections than would otherwise be the case. This would be contrary to the balancing process which WPD is required to carry out.
- 11.4 As for competition in constructing reinforcement assets, WPD has been at the forefront of trying to develop a sustainable "business as usual" procurement process for the construction of part-funded connections by ICPs. It ran a trial to develop learning in this area, but no ICPs sought to undertake PFR work as part of that trial. WPD is now setting up a further trial and is now considering accelerating the design of a procurement process to try and provide a "business as usual" streamlined procurement process for ICPS to compete for PFR work. The

works which be involved in the connection which is the subject of this dispute would be above the threshold in the Utilities Contract Regulations 2016 and (in the absence of a streamlined process, which WPD is actively investigating) would require a full public procurement process. Running a procurement process, eg notifying the opportunity through OJEU and then running the procurement, would cause significant delay, adding several months to the project, which would not be acceptable for the customers involved.

11.5 WPD assessed the connection requests and reached its conclusions in line with the Regulatory Framework. Importantly, it is within that framework which WPD is obliged to facilitate competition. WPD's assessment in relation to this specific connection is explained in more detail in section 3 above and WPD refers Ofgem to that section. Crucially:

- (a) The legislation clearly makes the capacity which is requested the focus of the DNO's analysis; and
- (b) Ofgem's guidance from May 2010 is clear that a DNO's duty under section 16(2) of the Electricity Act 1989 does not appear to require the DNO to offer an IDNO a connection at a voltage which is higher than necessary.
- (c) The capacity which ■■■ requested did not require a connection at 33kV and WPD took the opportunity to offer an Enhanced Scheme which would develop the network in the most economic and efficient manner.

WPD has balanced its various obligations when considering the requests from ■■■ which are the subject of this dispute.



Our ref

Your ref

Date

-

14 October 2016

[Redacted]

**Response to Ofgem following review of [Redacted] and [Redacted] replies to Ofgem's requests for information relating to issues in dispute between: Western Power Distribution (East Midlands) plc ("WPD") and [Redacted]**

Thank you for your email dated 30 September 2016, inviting us to comment on [Redacted] and [Redacted] responses to Ofgem's request for information (addressed to [Redacted] and [Redacted]).

I set out below our comments. We do not consider that it will assist Ofgem to deal exhaustively with each and every point in [Redacted] and [Redacted] replies to your information requests ("[Redacted] Replies") with which WPD disagrees. Our comments are instead (1) overarching comments which apply to the entirety of [Redacted] Replies and (2) comments on some of the specific points set out in [Redacted] Replies.

Please contact me for any queries or further information.

Yours sincerely

[Redacted signature block]

1. **OVERARCHING COMMENTS**

1.1 **██████ Replies repeatedly make the broad allegation that WPD is acting anti-competitively (and for the avoidance of doubt, WPD denies that it has acted in that way). That broad assertion does not in this case move matters forward:**

- (a) ██████ Replies do not engage in any real detail with the Regulatory Framework, which forms the background against which WPD's acts and decisions are to be assessed.
- (b) In paragraph 3.3 of their own Initial Response to Ofgem dated 8 August 2016 ██████ stated that "it may be appropriate to determine [WPD's actions under the regulatory framework] under sector-specific powers before considering the exercise of powers under the Competition Act 1998." ██████ Replies do not however adopt this approach.
- (c) As explained in WPD's replies dated 26 September 2016, if Ofgem concludes that the Regulatory Framework has been applied correctly, no competition law abuse can have occurred.
- (d) WPD therefore repeats paragraph 1.1(a) of its replies dated 26 September 2016 (ie. that, in order to deal with the dispute properly, Ofgem should decide whether WPD correctly applied the relevant regulations in reaching its decision to design an Enhanced Scheme, which created additional network capacity and which resulted in (a) a connection point being offered at 11kV for the requested capacity and (b) the work associated with the creation of the additional capacity constituting Reinforcement which, using the CAF calculation, resulted in that work being Non-Contestable).

1.2 **██████ Replies do not engage with the balancing act which WPD, as a regulated DNO, is required to carry out but focus instead on ██████ and ██████ own interests:**

- (a) Whilst ██████ Replies major (almost exclusively) on WPD's obligation to facilitate competition, they make little if any reference to the equally important obligation under section 9 of the Electricity Act 1898 to "develop and maintain an efficient, co-ordinated and economical system of electricity distribution".
- (b) Those other obligations require WPD to take into account a wide range of stakeholder interests, including (in an area where there is anticipated further capacity demand, such that Reinforcement is appropriate) the interests of existing customers which may require further capacity, potential new customers and other IDNOs.
- (c) By contrast, throughout the ██████ Replies ██████ and ██████ focus primarily on their own interests. Whilst ██████ mention the un-named customer's interest when they assert, without any proof, that they could deliver the connection quicker than WPD, they expressly state that their selling point to the un-named customer would be unlikely to be net construction cost.

1.3 **By setting out issues as isolated points in boxes A1 – A4, B1 – B4 and C1 – C2, [REDACTED] have avoided dealing with the core issue of balancing facilitation of competition with developing and maintaining an efficient, co-ordinated and economical distribution system.**

(a) [REDACTED] are adopting too narrow a perspective. Please see 1.2 above. We submit that Ofgem should avoid analysing the relevant situation as a collection of isolated points.

1.4 **[REDACTED] is itself under the obligations set out in section 9 of the Electricity Act 1989 but is not taking into account the relevant wider interests beyond its own.**

(a) In view of 1.1 – 1.3 above, [REDACTED] is failing to take into account its own obligation to assist the development, maintenance of an efficient, co-ordinated and economical distribution system and therefore failing to take into account the numerous wider interests at stake.

(b) Engineering Recommendation G88 (Issue 2 2014), which was developed by a working group involving representatives from Ofgem, DNOs, IDNOs and the HSE, sets out the principles for the planning, connection and operation of networks at the interface between DNOs and IDNOs. G88 sets out Planning Requirements, including in section 4.1 that the Point of Connection will be "determined taking into account all the IDNO's requirements and the DNO's wider obligations" (underlining added). [REDACTED] cannot ignore or avoid that "wider obligation" joint responsibility. In addition, The Planning Requirements which the IDNO must comply with (see section 4.1) focus on the IDNO providing details of the capacity required. Voltage is only required to be confirmed where the connection will be generating electricity for export onto the network.

## 2. **COMMENTS ON SPECIFIC POINTS IN [REDACTED] REPLIES**

2.1 **Paragraph 7, Issue B1** – WPD does take the voltage level requested into account when considering connection requests. The Regulatory Framework however requires that the voltage level be what is necessary for the scheme which is assessed to be the most efficient for the network overall.

[REDACTED] has acknowledged that WPD cannot use the voltage level requested as the driving criterion in some connection requests but not in others as doing so would be discriminatory. Instead [REDACTED] suggests that WPD would avoid that discrimination if it (i) always takes account of the voltage request and (ii) ensured that it offered a choice of connection voltages, presumably including at the voltage level requested.

[REDACTED] suggestion is not workable. First, it would run contrary to the clear direction in the Regulatory Framework to determine connections on the basis of the capacity requested. In addition, if WPD did always strive to offer the voltage level requested (and therefore offered connections at voltages which were excessive for the capacity requested and ignored potential opportunities to undertake enhanced schemes such as in this case), the result could be an inefficient and uneconomical network. The greater the number of such inefficient connections (in order to offer the voltages which are requested but which are not necessary), the more inefficient the network could become.

- 2.2 **Paragraph 7, Issue B2** – as detailed in WPD's replies dated 26 September 2016, although the new primary substation and associated 33kV plant were required in any event in order to provide the capacity that had been requested by ██████████ once WPD had established that the utilisation of these assets for an Enhanced Scheme was appropriate, there were no technical reasons why the capacity which ██████████ requested required a connection at 33kV and could instead be met with an 11kV connection – any subsequent connection by ██████████ at 33kV would, in light of the this, have then been higher than was necessary and therefore excessive.
- 2.3 **Paragraph 7, Issue B3** – ██████████ comment here would be correct were no Enhanced Scheme to be provided. However, as again detailed in WPD' replies dated 26 September 2016, as WPD determined that providing an Enhanced Scheme would best meet its obligations to develop an efficient, co-ordinated and economical network, the 33kV works and the establishment of the new primary substation would (in accordance with WPD's charging methodology) be treated as reinforcement works in excess of the Minimum Scheme, in respect of which a Cost Apportionment Factor (as mandated in the CCCM) would be applied. If such assets were subsequently to be adopted by ██████████ they would be adopted assets that had been part-funded with price control revenue.
- 2.4 **Paragraph 7, Issue B4** – ██████████ have missed the point here. WPD are subject to the Utilities Contract Regulations 2016 and, after taking legal advice, consider that any works for which WPD would pay (i.e. under the CAF apportionment, and whether the contribution is made to the customer or to the ICP) and in respect of which WPD specifies the technical requirements would, where the value of such works exceeds the specified threshold, require WPD to advertise, compete and award the contract in accordance with such regulations. As explained in WPD's replies dated 26 September 2016, however, WPD is actively seeking a to put in place a process that would enable a request such as ██████████ request to proceed efficiently whilst not exposing WPD to any risk of procurement law breach.
- 2.5 **Paragraph 12** – In ██████████ Replies, ██████████ state that they have no first-hand information about the customers/occupiers of premises served. That contrasts with clear statements in ██████████ solicitors' letter dated 23 June 2016, for example the statement in paragraph 11 of that letter that "the site is being developed by the Developer for future occupation by ██████████ There are similar confirmations in paragraphs 51.a and 52 of the letter – in paragraph 52 ██████████ is stated to be "the ultimate consumer".

Earlier on in the dispute ██████████ was clear about the identity of the end customer. It appears that ██████████ is now (ie. during a formal Ofgem process) reticent or unable to put that information on record.

- 2.6 **Paragraphs 14 – 20** – ██████████ state that WPD has not offered firm quotations for connections work and that this is part of the reason why they cannot state whether their proposals would be more expensive than the connection scheme offered by WPD.

As Ofgem will be aware, WPD's connection offers include clear costs of the connection work. Clause 5 of WPD's Specific Conditions for Connections Work sets out a limited number of variables to which the Connection Charge is subject and WPD reserves the right to amend its Connection Charge in line with those stated variables. The variables are entirely reasonable and this approach is

standard amongst DNOs. [REDACTED] therefore have very clear indications of the cost of the connection works.

WPD notes [REDACTED] statement that [REDACTED] have not developed a detailed costing or price proposal so far. It is of course a matter for [REDACTED] but WPD would expect a business, which was keen to undertake the connection works which it proposed/requested, to have worked up costings and/or price proposals so that it could establish the viability or otherwise of its proposal.

[REDACTED] have stated that they have also not worked up detailed costing or price proposals since WPD's alleged anti-competitive conduct has rendered that pointless. As is already clear, WPD denies that it has acted anti-competitively.

## 2.7 **Chronology**

We have set out in the Appendix to this letter the chronology with some additional detail to ensure that information is put into its correct context. Our additions are highlighted for ease of reference.

## Appendix – Chronology with additional detail for correct context

4 May 2010	Ofgem letter on Independent Distribution Network Operators (IDNOs) Point of Connection (POC) Applications.
1 Jun 2011	Ofgem consultation on contestability of part-funded connections work.
29 Jul 2011	Ofgem guidance on contestability of part-funded connections work.
24 Aug 2012	Ofgem guidance on the determination of disputes for use of system or connection.
7 Sep 2015	Formal request to WPD for point of connection for 6MVA (subsequently dropped)
11 Sep 2015	Formal request to WPD for point of connection for 8MVA (subsequently dropped)
11 Sep 2015	Formal request to WPD for point of connection for 12MVA
18 Sep 2015	Email to WPD clarifying that the request is for an IDNO point of connection.
23 Sep 2015	<ul style="list-style-type: none"> <li>● WPD emailed [REDACTED] to state that:</li> <li>● “It is likely that WPD will need to install a 33/11kV primary substation within the proposed development. Can you please highlight on a plan a suitable primary substation location (approx. 60mx60m in size) and a 33kV cable route to the potential primary site from the east ([REDACTED]) side of the site as our 33kV substation is located at grid ref 435248,277439 from which the supply to any new primary substation will be derived. Also, can you confirm that you will be willing to excavate across the proposed development site for any WPD cables that will be required to service a new primary substation.</li> <li>● The proposed Point of Connection would be (for all requested demand levels) 2 x 11kV circuit breaker out of a newly established primary. Could you please confirm if this would be sufficient for the planned embedded network.”</li> </ul>
1 Oct 2015	<p>WPD email “As the feed out would be required by WPD, we would treat this as a CAF scheme. ICP can install the new primary and WPD would adopt this, however in this case CAF would not apply.”</p> <p><i>For context, this email relates to the questions asked by [REDACTED] by email below (30.Sep 2015)</i></p> <p>[REDACTED] Email “Please confirm why the construction of the new primary and lay of the 33kV cables cannot be carried out by an ICP? Are you treating this as a CAF scheme?”</p> <p>If WPD are to adopt the Primary as a networked solution, as this is to service our site, there should be no reason why we can’t utilise an ICP to construct the 33kV/11kV Primary as part of the embedded network connection works ”</p>

23 Oct 2015	<p><i>Missing text from the email added</i></p> <p>WPD email "As discussed during our telephone conversation, WPD have a requirement for additional 11kV capacity to the South of [REDACTED] BSP.</p> <p>Energy Networks Association Engineering Recommendation G88 paragraph 3.2 refers as follows: 'The POC will be determined by the DNO taking into account all of the IDNO's requirements and the DNO's wider obligations.'</p> <p>The development area indicated by you is conveniently situated to allow WPD to feed out from the proposed new substation to the local area thus off-loading the existing 11kV network. As feed out would be required by WPD, the 33kV works and establishment of the primary substation would be treated as non-contestable with CAF apply. The proposed Point of Connection would be (for all requested demand levels) 2 x 11kV circuit breaker out of a newly established primary."</p>
28 Oct 2015	<p>WPD email stating that there is no spare capacity on existing 33kV circuits and promising a future reply on the possibility of a 33kV IDNO point of connection.</p> <p>WPD did not follow up on the possibility of a 33kV IDNO point of connection.</p>
6 Nov 2015	<p>WPD hosted a meeting with [REDACTED] at this meeting the 33kV IDNO point of connection and strategy was discussed.</p>
7 Dec 2015	<p>Formal request to WPD for point of connection for 20MVA.</p>
19 Jan 2016	<p>WPD offer 2322326 for 12MVA IDNO point of connection, at 11kV from a new non-contestable WPD primary substation.</p>
19 Jan 2016	<p>WPD offer 2394659 for 20MVA IDNO point of connection, at 11kV from a new non-contestable WPD primary substation.</p>
19 Jan 2016	<p>WPD offer 2395126 for 20MVA ICP point of connection, at 11kV from a new non-contestable primary substation.</p>
28 Jan 2016	<p>As meeting hosted by WPD to discuss the Interactive Point Of Connection Offers 2394659, 2395126.</p> <ol style="list-style-type: none"> <li>1) POC-Level 11kv/33kv (Competition in Connections)</li> <li>2) Reinforcement/Specification and works</li> <li>3) Interactivity of reinforcement – what elements are interactive, what aren't?</li> <li>4) Actual costs of reinforcement works and apportionment</li> <li>5) Breakdown of costs on supplied POC</li> </ol>
26 Feb 2016	<p>Letter to WPD seeking IDNO access to WPD's 33kV network.</p>
9 Mar 2016	<p>Letter from WPD (dated 7 March 2016) refusing to offer IDNO access to WPD's 33kV network.</p>
17 Mar 2016	<p>[REDACTED] request to WPD for point of connection for 52MVA.</p> <p>[REDACTED] have not been not involved in this application.</p>

21 Mar 2016	Letter to WPD with a specific proposal that would permit competition whilst accommodating WPD's preferred approach to capacity management.
23 Mar 2016	WPD request to ██████████ for details of the 52MVA of load. ██████████ have not been not involved in this application.
30 Mar 2016	Letter from WPD.
1 Apr 2016	██████████ plan showing some details of the 52MVA of load. ██████████ have not been not involved in this application.
18 Apr 2016	Meeting with WPD. We explained our proposals of 21 March 2016 and sought to understand what was preventing WPD from accepting them. WPD promised a reply in the week of 2 May 2016.
29 Apr 2016	Paper to WPD explaining how the industry-standard use of system charging arrangements would work with our proposals of 21 March 2016.
6 May 2016	Email to WPD chasing overdue response.
10 May 2016	Email to WPD chasing failure to respond.
11 May 2016	Email from WPD: "I should be getting a senior management response to enable me to come back to you this week with a follow-up".
17 May 2016	Email from WPD: "this is still under consideration by senior management, when I hear back on this I will be able to come back to you with an update".
18 May 2016	██████████ called ██████████ of WPD, who said that the matter was out of his hands and being discussed by senior management, and that he did not know when anything might get done.
23 May 2016	Letter from WPD to ██████████ providing information about a potential point of connection for 52MVA of load. The point of connection would consist of 20MVA from a double 33kV feeder from ██████████ substation, and 32MVA from a double 33kV feeder from ██████████ substation. ██████████ have not been involved in this application.
1 Jun 2016	Emails from WPD to ██████████ saying that the 52MVA has been placed "on hold" because WPD is "unable to definitively determine [...] that the development boundaries in this application and in the recently accepted application do not overlap". WPD has not said what the "recently accepted application" was. ██████████ have not been involved in this application.
1 Jun 2016	Email from ██████████ to WPD chasing overdue response.
2 Jun 2016	Letter from WPD: flat refusal to engage.
23 Jun 2016	Letter from ██████████ lawyers about ██████████ claim of abuse of a dominant position.
5 Jul 2016	Letter from WPD's lawyers (dated 1 July 2016) about timing for a response.

6 Jul 2016	Letter from ██████ lawyers about timing for a response.
13 Jul 2016	Letter from WPD's lawyers about timing for a response.
22 Jul 2016	Letter from WPD's lawyers responding to ██████ claim of abuse of a dominant position.
29 Jul 2016	Letter from ██████ lawyers about ██████ request for contestability of part-funded assets and potential claim for abuse of a dominant position.
29 Jul 2016	Letter from ██████ lawyers about ██████ claim for abuse of a dominant position.
2 Aug 2016	WPD referral to Ofgem: letter dated 1 August 2016 and attachment.
2 Aug 2016	Letter from WPD's lawyers about timing for a response on contestability request.
15 Aug 2016	██████ initial response to Ofgem re WPD referral: letter and attachment.
19 Aug 2016	Letter from WPD's lawyers about timing for a response on contestability request.
25 Aug 2016	Ofgem dispute resolution letter.
26 Aug 2016	Letter from WPD's lawyers about trials for contestability of part-funded assets.
8 Sep 2016	Ofgem dispute resolution letter and questionnaire.
9 Sep 2016	Second letter from WPD's lawyers about trials for contestability of part-funded assets. This makes a claim about the application of procurement regulations.

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**INITIAL RESPONSE OF [REDACTED] AND [REDACTED]  
[REDACTED] TO THE FORMAL DISPUTE REFERRAL MADE BY WESTERN  
POWER DISTRIBUTION (EAST MIDLANDS) PLC ON 1 AUGUST 2016**

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**1. INTRODUCTION AND SUMMARY**

- 1.1 Western Power Distribution (East Midlands) plc (“WPD”) has framed the dispute between the parties in terms that are too narrow. This is less a dispute about the voltage of connection to be provided than about the scope for competition in new connections.
- 1.2 This dispute concerns a site being developed for the use of [REDACTED] near [REDACTED] which is known as “[REDACTED]”. The development will require a new electricity network. The developer wishes to have a choice as to who installs and operates the network. We understand that the developer is particularly keen to be able to use competition to incentivise timely energisation of the site.
- 1.3 WPD’s actions prevent or, at least, substantially restrict the scope for competition. WPD has insisted that it alone must operate part of the new network. It has also effectively blocked the possibility of third parties constructing the relevant part of the new network by imposing onerous financial conditions if an ICP undertakes the work. As energisation of the site will be dependent on the work to be completed by WPD, the actions of WPD will effectively prevent the developer securing the competition it wishes to achieve.
- 1.4 Ofgem should not decide only on whether WPD must offer a 33kV connection allowing an IDNO to operate the whole of the network but also, in the alternative, on whether WPD should at least allow an ICP to construct some or all of the reinforcement assets to be adopted by WPD on terms that allow effective competition for construction of the new network.
- 1.5 The regulatory framework is, of course, highly relevant but it should only be considered determinative if it prohibits any more competitive course of action. The issues for determination need adjusting accordingly.
- 1.6 This response is focused on the question of whether Ofgem should accept the dispute for determination and, if so, what the proper parameters of the dispute should be. We reserve the right to respond more fully on the substantive issues as and when Ofgem has made a decision to accept the dispute for determination.

## 2. PARTIES TO THE DISPUTE

2.1 As this dispute is about construction as well as operation of the new network, it is wrong for it to be seen as purely a dispute between WPD and [REDACTED] ([REDACTED] an IDNO. [REDACTED] [REDACTED] ([REDACTED] an ICP that is a sister company of [REDACTED] should be joined as an additional party to the dispute. This submission is made on behalf of both [REDACTED] and [REDACTED]

2.2 WPD has specified [REDACTED] as the respondent to the dispute because our solicitors initially wrote on behalf of [REDACTED] alone. This reflects the fact that our preferred solution is to be able to adopt the whole of the new network and not merely construct it. Previous correspondence was not, however, limited to the position of [REDACTED] and we have now formally complained through our solicitors on behalf of [REDACTED] as well.<sup>1</sup> WPD may say that there is not yet a crystallised dispute with [REDACTED] because it is yet to respond to our solicitors' letter but this ignores the fact that the issue in question has arisen previously and is closely linked to the issues that [REDACTED] has raised. It also ignores the fact that it was WPD, not us, which decided to refer a dispute when it did and that it did so knowing that there was an outstanding complaint from [REDACTED] in relation to precisely the same Point of Connection requests. WPD has said that it will respond next week to the letter written on behalf of [REDACTED]<sup>2</sup> Ofgem should not fix the parameters of this dispute until it has seen the response from WPD. Unless, contrary to previous indications, WPD responds positively to the complaint from [REDACTED] we would ask for the issues in relation to [REDACTED] to be added to the current dispute. If necessary, please treat this as a formal referral of the relevant issues or else allow us the opportunity to make a formal referral after WPD's response on terms that will allow the two disputes to be joined and handled together.

2.3 The registered office addresses for [REDACTED] and [REDACTED] are the same: [REDACTED]  
[REDACTED]

2.4 The person dealing with this matter at both [REDACTED] and [REDACTED] is [REDACTED]  
[REDACTED]  
[REDACTED]

## 3. BASIS FOR REFERRAL OF THE DISPUTE

3.1 [REDACTED] and [REDACTED] express no opinion on the legal basis for determination of this dispute and, whilst welcoming any guidance that Ofgem may be willing to provide on the substantive issues, must reserve their position on the extent to which any determination will be legally binding, if at all.

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<sup>1</sup> Letter from [REDACTED] dated 29 July 2016 (on behalf of [REDACTED] enclosed with WPD's Referral.

<sup>2</sup> Letter from [REDACTED] dated 2 August 2016, enclosed as **Annex 1**.

3.2 [REDACTED] and [REDACTED] do, however, consider it important to respond to the contention that this dispute relates wholly or mainly to WPD's obligations binding on it under Articles 25(1), 25(2) and 32(1) of the Electricity Directive (2009/72/EC). [REDACTED] and [REDACTED] accept that these obligations may be relevant but wish to emphasise that they have not alleged that WPD is failing to comply with those requirements. [REDACTED] and [REDACTED] contend that WPD is failing to comply with its obligations under UK and/or EU competition law. The relevance of the Electricity Directive and other regulatory obligations is in considering whether they prevent WPD complying with its competition obligations.

3.3 [REDACTED] and [REDACTED] note that before using any sector-specific powers Ofgem must consider whether it would be more appropriate to use powers under the Competition Act 1998 instead.<sup>3</sup> As matters currently stand, WPD has said that its actions are required by the regulatory framework. As such, it may be appropriate to determine that issue first under sector-specific powers before considering the exercise of powers under the Competition Act 1998. It may be that WPD will change its position voluntarily if it is determined that there are no regulatory prohibitions preventing it from meeting the requests of [REDACTED] and/or [REDACTED]

#### 4. ISSUES FOR DETERMINATION

4.1 [REDACTED] and [REDACTED] do not agree with the contentions way in which WPD has framed the issues for determination at paragraphs 1.3 and 1.5 of the Referral. It is not right, for example, to suggest that we are asking Ofgem to:

*“amend its guidance dated 4 May 2010 such that when analysing a Point of Connection request a DNO should, from the date which any amended guidance takes effect, take into account a voltage level request, even where: (i) that voltage level is excessive for the capacity requested; and (ii) this may limit a DNO's ability to enhance a connection scheme to provide for more efficient and economic development of the Distribution System for the wider customer base”<sup>4</sup>*

4.2 Our position is that the voltage level requested was not excessive, whether in the meaning of the 4 May 2010 letter or at all. Equally, we do not accept that the request limited WPD's ability to develop its distribution system efficiently and economically. As such, we are not asking Ofgem to change its guidance.

4.3 Equally, whilst it might be appropriate for Ofgem to revisit its position on IDNO adoption of assets partly funded by price control revenues in circumstances where ICPs are still unable to compete to construct such assets, we do not say that it is necessary to do so in order to resolve

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<sup>3</sup> See the discussion in *Guidance on concurrent application of competition law to regulated industries* (CMA10, March 2014), Section 4.

<sup>4</sup> Referral, paragraph 1.5(b).

this dispute in favour of █████<sup>5</sup> █████ offered the option of including extra capacity at no cost to WPD (and therefore using no price control revenue). As such, there was no need for █████ to adopt any assets part-funded with price control revenue.

4.4 █████ and █████ consider that, at the highest level, the two questions to be addressed by Ofgem ought to be as follows:

- (a) Are there any regulatory prohibitions on WPD meeting the requests of █████ and/or █████
- (b) If there are no relevant regulatory prohibitions, does competition law require WPD to meet the requests of █████ and/or █████

4.5 Answering these two questions is likely to require Ofgem to consider the following sub-issues:

- (a) Is it ever lawful for WPD to take account of the voltage requested when considering a point of connection request? WPD's rather extreme position in correspondence, repeated in paragraph 5.5(b) (iv) of the Referral, is that it simply cannot take account of the voltage requested at all. Whilst we accept that the regulatory scheme focuses on capacity, we do not accept that it prohibits any account being taken of any voltage request that is made.
- (b) Is a voltage request to be considered excessive, such that it is to be disregarded by a DNO, in circumstances where substantially the same network assets will be installed if an IDNO connects at the voltage requested as if the DNO made the same connection to the end-user? Without prejudice to its view that voltage must be entirely disregarded anyway, WPD has adopted the position that the voltage requested is to be considered excessive wherever it is higher than the voltage that will actually be supplied to the end-user. █████ considers that it is only excessive in such circumstances if it is already possible to take a supply from the DNO at the lower voltage. If new transformation will be required in any event and it is just a question of whether the DNO or IDNO installs and operates the transformers, █████ does not believe it to be "excessive" to request connection at the higher voltage.
- (c) Do any regulatory obligations require WPD to be satisfied that future capacity demands can be met from its network in circumstances where they can be met from another licensed distributor's network? █████ offered a solution that would have meant it installed the extra capacity that WPD wanted in the enhanced scheme at its own cost. This would have meant that either █████ could meet future capacity needs or it could

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<sup>5</sup> Contrary to the suggestion in Referral, paragraph 1.5(c).

resell capacity to WPD or another distributor to meet those needs. WPD maintains that this is not sufficient to allow it to satisfy its own obligations to develop an efficient and economic system.

- (d) Is it lawful for WPD to take a supply from an IDNO connected to its network? It seems that the reason WPD is unwilling to accept [REDACTED] solution is because WPD seems to think that paying [REDACTED] to take a supply from it, on the same terms that WPD applies to [REDACTED] would amount to allowing [REDACTED] to adopt assets part-funded with price control revenue. [REDACTED] does not consider this to be correct and, in any event, cannot see what is objectionable on the facts of this case. There are already a number of situations where DNOs have taken connections from IDNOs so it would be surprising if it were actually unlawful. In any event, Ofgem's historic position on IDNO adoption of part-funded reinforcement was conditioned on its view that similar benefits could be achieved through ICP competition to construct such assets but that has not actually occurred in practice. As such, it might well be time to revisit those views.
- (e) Is it actually necessary for WPD to insist on the Enhanced Scheme? In putting forward alternative solutions, [REDACTED] has been content to assume that it is right that extra capacity is needed and can only efficiently be provided by enhancing the scheme requested by the developer. It is far from obvious, though, that this is correct. Ofgem has previously noted that there is the potential for abuse in making demands for enhancement.<sup>6</sup>
- (f) Even if WPD cannot be obliged to give [REDACTED] a connection at 33kV, would it be unlawful for WPD to allow [REDACTED] or another ICP to construct some or all of the reinforcement assets to be adopted by WPD without requiring the developer to fully fund the construction? WPD's position to date, which we expect to be confirmed in its response to our solicitors' letter on behalf of [REDACTED] is that it can only allow [REDACTED] to construct the asset which would otherwise be part-funded reinforcement assets if the developer sacrifices the nearly £2 million of Cost Apportionment Factor ("CAF") to which it would otherwise be entitled. We believe WPD relies on paragraph 6.13 of its Connection Charging Methodology in this respect. We consider that this is a flawed position as WPD can, and should, either vary its Connection Charging Methodology or seek a derogation from it in the circumstances of this case. We cannot see any lawful justification for WPD's insistence that it will only allow an ICP to construct reinforcement works where fully funded by a single party seeking a connection.

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<sup>6</sup> *Update on competition in connections market review: issues limiting effective competition* (7 October 2014, Ofgem), paragraphs 3.88-89.

(g) In the light of the answers to the preceding questions, and given the requirements of competition law, should WPD be required to offer [REDACTED] the connection it has sought or, in the alternative, should WPD be required to pay CAF if [REDACTED] constructs the relevant reinforcement assets? As already noted in the introduction, we believe that it is clear that competition law requires WPD to meet the requests of [REDACTED] and/or [REDACTED] unless prohibited to do so by regulatory requirements.

4.6 We do not propose to engage further with the substance of WPD's position until Ofgem has decided on the parameters of the dispute but Ofgem will get a sense of our arguments from what is set out above and from the correspondence exchanged between solicitors.

4.7 We should, though, briefly address one point that is mentioned in the Referral. WPD notes that it has in fact recently offered a high-voltage connection in response to another point of connection request from an agent for the same developer (Referral, paragraph 5.6(c)). It might be thought that this renders [REDACTED] and [REDACTED] complaints redundant but this would be wrong. [REDACTED] and [REDACTED] have not been involved at all in relation to the request referred to in this paragraph. Moreover, [REDACTED] and [REDACTED] understand that the offer will only be taken up if several developers and/or their clients agree to work together. This means that there is no certainty at all that this particular plan will be able to proceed. If it does not, the original point of connection requests will remain relevant.

## 5. TIMING

5.1 [REDACTED] and [REDACTED] seek an early determination of this dispute so that it can be taken into account by the developer in awarding contracts for installation of the new electricity network. Whilst the developer could make a decision at any time, it has recently indicated that it is unlikely to reach a decision before November. We suggest it should be possible for Ofgem to reach a determination before November without involving any undue haste.

8 August 2016

**Referral to Ofgem of issues in dispute between: Western Power Distribution (East Midlands) plc and [REDACTED] and [REDACTED]**

**Confidentiality**

1. All of the information provided in this submission can be shared with WPD (but some of the attachments might not be suitable for publication).

**1. Please explain exactly what is in dispute in this case, attaching any relevant paperwork to back up your argument.**

2. There are two problems:
  - (a) WPD has abused its dominant position to prevent competition in the construction and operation of a new primary substation. This abuse has manifested itself through a refusal to offer a 33kV feed to a new IDNO network; using delaying tactics in discussions; and a refusal to allow ICP construction of WPD's enhanced scheme.
  - (b) WPD has made a reference to Ofgem which misstates the dispute and risks masking the real issues about WPD's anti-competitive conduct.
3. WPD has abused its dominant position to prevent competition in the construction and operation of a new primary substation. The effect of these abuses is to prevent [REDACTED] from competing for the construction and operation of a new primary substation to serve a business development in [REDACTED]
4. The previous correspondence details these allegation of anti-competitive conduct. See the appended chronology for a guide to this correspondence. The letters from [REDACTED] lawyers from 23 June 2016 and 29 July 2016 provide a summary of these arguments.
5. The pattern of WPD's anti-competitive conduct, including delaying tactics, can also be seen from the correspondence between 26 February 2016 and 2 June 2016, before lawyers were engaged.
6. Table 1 lists the issues raised by WPD's submissions, which we have organised into three categories. We think that WPD's submissions misstate the dispute and risk masking the real issues about WPD's anti-competitive conduct.

**Table 1 Issues raised by WPD's submissions**

Category A	Issue A1	WPD asks for an Ofgem "determination of whether WPD has applied the regulatory framework correctly".
	Issue A2	WPD says that "the regulatory framework ... required it to make an offer for the capacity requested".

	Issue A3	WPD says that “the regulatory framework ... is such that it would have been contrary to the regulatory framework to have made an offer at the voltage requested, which (bearing in mind the status of the Relevant Section of the Network): (i) was excessive for the capacity requested; and (ii) would restrict WPD’s ability to take into consideration its wider obligations to develop an economic and efficient network”.
	Issue A4	WPD says that “the regulatory framework ... gives clear guidance that it is not appropriate to allow IDNOs to adopt assets which were part-funded with price control revenue (guidance issued by Ofgem in July 2011)”.
Category B	Issue B1	WPD says that “if WPD took into account, in relation to some Point of Connection requests, the Point of Connection voltage which a potential customer wished to receive, that would (i) be contrary to the criteria which the regulatory framework stipulates must be considered and (ii) WPD would be at risk of acting in a discriminatory manner” and this “would put WPD in breach of its duties under section 9 of the Electricity Act 1989”.
	Issue B2	WPD says that “the Required Capacities (12MVA and 20MVA) which █████ requested do not require a 33kV Point of Connection” and links that Ofgem guidance that “When offering connections to IDNOs under section 16(2) of the Act we note that a DNOs’ duty to make a connection to the distribution system requires it to “provide such electric lines or electrical plant as may be necessary to enable the connection to be used for the purposes for which it is required”. This duty, therefore, does not appear to require the DNO to offer an IDNO a connection at the voltage level that it requests if the voltage level of the connection is higher than necessary.”
	Issue B3	WPD says that “if WPD had offered a Point of Connection for 20MVA at 33kV, this would have resulted in an IDNO adopting an asset which was part funded with price control revenue. This would be contrary to Ofgem guidance from July 2011.”  WPD also says that “Ofgem’s view that it was not appropriate to allow IDNOs to adopt part-funded assets funded with price control revenue on the basis that it was not clear that this would deliver any significant benefits to customers additional to those associated with allowing ICPs to compete to construct the part-funded connection”.
	Issue B4	WPD’s lawyers say that “Our client has considered whether it would be possible to place the PFR work with your client outside of the intended new trial. However, due to the value of the work and the value threshold in the Utilities Contract Regulations 2016, it is not possible for our client to place that work with your client direct. A public procurement process would be required.
Category C	Issue C1	WPD asks whether Ofgem wishes to amend its guidance dated 4 May 2010 such that when analysing a Point of Connection request a DNO should, from the date which any amended guidance takes effect, take into account a voltage level request, even where: (i) that voltage level is excessive for the capacity requested; and (ii) this may limit a DNO’s ability to enhance a connection scheme to provide for more efficient and economic development of the Distribution System for the wider customer base.

	Issue C2	WPD asks whether, in relation to a Point of Connection offer which would result in an IDNO adopting an asset which is part funded with price control revenue, Ofgem wishes to issue new guidance (superseding its guidance from July 2011) that such a scheme would now be acceptable under the regulatory framework.
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7. Table 2 provides our analysis of the issues in table 1.

**Table 2 Analysis of issues raised by WPD's submissions**

Category A	Issue A1	It would be inappropriate for Ofgem to certify that WPD's conduct is compliant with the regulatory framework.  If, contrary to the above, Ofgem wants to make any statement about WPD's compliance, then it needs first to address the question of whether WPD's conduct was anti-competitive. Compliance with competition law is part of the regulatory framework, alongside the points listed by WPD.
	Issue A2	The statement about the regulatory framework is uncontroversial but nothing follows from it.
	Issue A3	The statement about the regulatory framework is uncontroversial; but whether WPD's application of it to the case at hand is correct will depend on the outcome of analysis of issues B1 and B2.
	Issue A4	The statement about the regulatory framework is uncontroversial but, unless the analysis of issue B3 below is wrong, nothing follows from it.
Category B	Issue B1	WPD is wrong to say that taking account of customer requests would put it in breach of its obligation not to discriminate. WPD could easily ensure non-discrimination by always taking account of such requests, and/or by ensuring that it offers a choice of connection voltage in a non-discriminatory manner.
	Issue B2	WPD is misapplying Ofgem's guidance here.  Ofgem's guidance is that only electric lines and plant that are necessary should be provided. For example, in a hypothetical case somewhere else where the load could be supplied from an existing 11kV network, then a new primary substation should not be provided just to meet an IDNO request for a 33kV connection because that would involve unnecessary electric lines and plant.  But in the case at hand there would be no additional electric lines and plant that would be provided if [REDACTED] was allowed to take a supply from WPD at 33kV, because it is WPD's view that a new primary substation and associated 33kV plant is required to supply the load anyway.
	Issue B3	WPD's claim that "if WPD had offered a Point of Connection for 20MVA at 33kV, this would have resulted in an IDNO adopting an asset which was part funded with price control revenue" is wrong. If WPD had offered to supply a new [REDACTED] network at 33kV and the offer had been accepted, then no WPD price control funding would have been provided for [REDACTED] assets.

	Issue B4	WPD's lawyers' comments about public procurement reveal a misconceived approach to competition. We do not want to compete to be a supplier to WPD, we want the customer (who is not subject to the utilities procurement rules) to have a choice of supplier, unimpeded by WPD's anti-competitive conduct. There are several ways in which WPD could cease anti-competitive conduct without undertaking any procurement: for example, WPD could offer a 33kV IDNO connection as we asked for; or WPD could offer to make a CAF contribution to a customer-procured primary substation construction scheme to be adopted by WPD.
Category C	Issues C1/C2	It would be wrong to expand this dispute to review general Ofgem guidance. If Ofgem nevertheless decides to review its guidance, then our submission is that it does not need to be amended. The problem is with WPD's anti-competitive misapplication of the guidance, not with the guidance itself.

**2. Please provide a description of the works this dispute relates to, attaching any relevant paperwork.**

8. This dispute relates to WPD's anti-competitive conduct.
9. One of the effects of WPD's anti-competitive conduct has been that WPD has prevented competition for the construction of a new primary substation which would supply in the first instance up to 20MVA to a new business development in [REDACTED]
10. A description of WPD's proposed works can be found in the documents mentioned in the appended chronology, in particular in WPD's offer of 19 January 2016 for a 20MVA IDNO scheme. Because of WPD's anti-competitive conduct in refusing to offer access to its 33kV network, [REDACTED] has not been in a position to develop a detailed counter-offer to date, so there is no information about what works [REDACTED] would offer to undertake if allowed to compete on a fair basis.

**3. Please provide details of the quote provided to [REDACTED] by WPD, attaching any relevant documentation. If they have received more than one quote please provide details of all the quotes and the reasons multiple quotes for this work were received.**

11. See appended chronology and the documents believed to have been provided by WPD to Ofgem. The most relevant quotation is the one made on 19 January 2016 for a 20MVA IDNO scheme.

**4. Can you please provide details of [REDACTED] end-customer; that is, the developer of the [REDACTED] site?**

12. [REDACTED] potential customer(s) for ICP construction services have been acting through [REDACTED]. We have no first-hand information about them.

13. [REDACTED] customers would be licensed suppliers using [REDACTED] system. [REDACTED] would also have connection agreements with the occupiers of the premises served. We have no first-hand information about any of these.

**5. In offering to solely fund the construction of the substation and associated network assets, this presumably would cost [REDACTED] more than if WPD had provided an enhanced scheme and only charged [REDACTED] a proportion of the cost of this work. Is this correct?**

14. This sounds plausible, but we cannot be sure, because:
- (a) WPD does not offer firm price quotations for connections work, so we (or the customer) cannot know for sure what the WPD scheme would cost.
  - (b) WPD's anti-competitive behaviour has stood in the way of the customer ability to accept a [REDACTED] quotation for the works, and therefore [REDACTED] have not developed a detailed costing so far.
15. Instead of that this question and its subsidiary questions below only apply in respect of WPD providing a 33kV IDNO connection. They would not apply if
16. As an alternative to offering a 33kV supply to an IDNO, WPD might be able to remedy its anti-competitive behaviour by allowing ICP construction of WPD's enhanced scheme. In that case, questions 5, 5a, 5b and 5c would not apply.

**a. If so, what was the difference in cost to [REDACTED] of constructing the assets themselves compared to WPD carrying out the work and apportioning the costs?**

17. We do not know, because we cannot ascertain:
- (a) what WPD's outturn costs would be for the substation construction work if it built its enhanced scheme; or
  - (b) what WPD would charge for a 33kV connection to [REDACTED] or for non-contestable services in connection with an ICP construction of WPD's enhanced scheme.
18. Furthermore, WPD's anti-competitive behaviour has prevented the customer from accepting a [REDACTED] quotation for the works, and therefore [REDACTED] have not developed a detailed costing or pricing proposal so far.

**b. Would this difference in cost be met through [REDACTED] own financing arrangements, or was it anticipated that it would be passed through to the end customer?**

19. WPD's anti-competitive behaviour has prevented the customer from accepting a [REDACTED] quotation for the works, and therefore [REDACTED] have not developed a detailed financial proposal.

20. If a new system was constructed without WPD part funding and adopted by ██████████ ██████████ would consider making a contribution to the costs of construction as part of the adoption arrangements. The existence, amount and terms of any such contribution would be a matter for confidential commercial negotiation with the customer or their representatives. That negotiation cannot start whilst WPD's anti-competitive behaviour would make it impossible for the customer to accept a ██████████ proposal on these terms.
21. In this scenario, ██████████ selling point to the customer would likely not be about net construction cost. ██████████ believes that the on-time-delivery record of ██████████ for construction works, and willingness to offer a firm price and contractual guarantees about delivery timescales give it significant competitive advantages over WPD's performance and offer in these areas, and that a ██████████ connection would prove competitive and attractive to the customer even if the headline price was higher than WPD's offer. All that we are asking for is the right to test these points in a competitive market free from the distortions that have been caused so far by WPD's anti-competitive behaviour.

**c. If so, was the end customer advised of this difference?**

22. ██████████ is aware of these issues.
23. ██████████ have not to date prepared a detailed quotation; that would be wasted work since, due to WPD's anti-competitive behaviour, the customer could accept any such quotation. The purpose of this dispute is to allow ██████████ to compete with WPD for the delivery of the primary substation. That competition can only happen once a stop has been put to WPD's anti-competitive behaviour.
24. It is not possible to "advise" the customer of the benefits of fair competition since:
- (a) The nature of competition would depend on how WPD chooses to move away from anti-competitive conduct: market conditions would be quite different if WPD chooses to allow ICP construction of part-funded schemes and if WPD offers a 33kV feed to an IDNO.
  - (b) The customer benefits of competition would depend on dynamic competitive effects: for example, maybe WPD would improve its offer further if it faced effective competition.

**6. Why does ██████████ not want WPD to do this work? Do you consider there to be further opportunities to develop the network in this area that could only be met through ownership of the substation and associated network assets?**

25. ██████████ and WPD are competitors. Wanting to win work over your competitors is normal and healthy. ██████████ would like the opportunity to compete with WPD for the provision of new networks, without being impeded by WPD's anti-competitive behaviour.

26. If [REDACTED] were free to compete for the work, they would argue that they offer a better chance of on-time delivery and a better contractual structure (firm price with contractual guarantees about delivery timescales), and therefore that the customer should want [REDACTED] to do the work rather than WPD.

**7. In what areas of the country does [REDACTED] operate? Have they made this type of request before and if so, how have other DNOs responded?**

27. [REDACTED] and [REDACTED] are authorised to operate throughout England, Wales and Scotland.
28. Whilst there have been other instances in which [REDACTED] has perceived that decisions made by DNOs in the design of connection schemes have been anti-competitive, this is the first case in which [REDACTED] decided to invest the time and effort necessary to challenge this alleged anti-competitive conduct. In any event, it would be inappropriate for us to make any reference to discussions about other schemes or other DNOs in the context of this focused and bi-lateral dispute.
29. [REDACTED] and [REDACTED] have offered WPD a number of solutions that would avoid or mitigate anti-competitive consequences. These solutions have included allowing [REDACTED] to take a 33kV feed from WPD and to provide an 11kV feed to WPD if desired, or allowing [REDACTED] to construct WPD's preferred reinforcement scheme. The individual elements of each of these solutions are standard (licensed distributors feeding each other's network and charging each other use of system charges, nested IDNO networks, an ICP working for more than one customer). We are not aware of any other case in which there has been an implementation of the particular combinations of these standard features that would enable WPD to comply with competition law in the circumstances of this scheme.

**Chronology**

30. Table 3 provides a chronology of events to date.

**Table 3 Chronology of main events**

4 May 2010	Ofgem letter on Independent Distribution Network Operators (IDNOs) Point of Connection (POC) Applications.
1 Jun 2011	Ofgem consultation on contestability of part-funded connections work.
29 Jul 2011	Ofgem guidance on contestability of part-funded connections work.
24 Aug 2012	Ofgem guidance on the determination of disputes for use of system or connection.
15 Sep 2015	Formal request to WPD for point of connection for 12MVA (also 6MVA and 8MVA requests, subsequently dropped).
18 Sep 2015	Email to WPD clarifying that the request is for an IDNO point of connection.

1 Oct 2015	WPD email "As the feed out would be required by WPD, we would treat this as a CAF scheme. ICP can install the new primary and WPD would adopt this, however in this case CAF would not apply."
23 Oct 2015	WPD email "The development area indicated by you is conveniently situated to allow WPD to feed out from the proposed new substation to the local area thus off-loading the existing 11kV network. As feed out would be required by WPD, the 33kV works and establishment of the primary substation would be treated as non-contestable with CAF apply. The proposed Point of Connection would be (for all requested demand levels) 2 x 11kV circuit breaker out of a newly established primary."
28 Oct 2015	WPD email stating that there is no spare capacity on existing 33kV circuits and promising a future reply on the possibility of a 33kV IDNO point of connection. WPD did not follow up on the possibility of a 33kV IDNO point of connection.
7 Dec 2015	Formal request to WPD for point of connection for 20MVA.
19 Jan 2016	WPD offer 2322326 for 12MVA IDNO point of connection, at 11kV from a new non-contestable WPD primary substation.
19 Jan 2016	WPD offer 2394659 for 20MVA IDNO point of connection, at 11kV from a new non-contestable WPD primary substation.
19 Jan 2016	WPD offer 2395126 for 20MVA ICP point of connection, at 11kV from a new non-contestable primary substation.
26 Feb 2016	Letter to WPD seeking IDNO access to WPD's 33kV network.
9 Mar 2016	Letter from WPD (dated 7 March 2016) refusing to offer IDNO access to WPD's 33kV network.
17 Mar 2016	██████████ request to WPD for point of connection for 52MVA. ██████████ have not been not involved in this application.
21 Mar 2016	Letter to WPD with a specific proposal that would permit competition whilst accommodating WPD's preferred approach to capacity management.
23 Mar 2016	WPD request to ██████████ for details of the 52MVA of load. ██████████ have not been not involved in this application.
30 Mar 2016	Letter from WPD.
1 Apr 2016	██████████ plan showing some details of the 52MVA of load. ██████████ have not been not involved in this application.
18 Apr 2016	Meeting with WPD. We explained our proposals of 21 March 2016 and sought to understand what was preventing WPD from accepting them. WPD promised a reply in the week of 2 May 2016.
29 Apr 2016	Paper to WPD explaining how the industry-standard use of system charging arrangements would work with our proposals of 21 March 2016.

6 May 2016	Email to WPD chasing overdue response.
10 May 2016	Email to WPD chasing failure to respond.
11 May 2016	Email from WPD: "I should be getting a senior management response to enable me to come back to you this week with a follow-up".
17 May 2016	Email from WPD: "this is still under consideration by senior management, when I hear back on this I will be able to come back to you with an update".
18 May 2016	██████████ called ██████████ of WPD, who said that the matter was out of his hands and being discussed by senior management, and that he did not know when anything might get done.
23 May 2016	Letter from WPD to ██████████ providing information about a potential point of connection for 52MVA of load. The point of connection would consist of 20MVA from a double 33kV feeder from ██████████ substation, and 32MVA from a double 33kV feeder from ██████████ substation. ██████████ have not been involved in this application.
1 Jun 2016	Emails from WPD to ██████████ saying that the 52MVA has been placed "on hold" because WPD is "unable to definitively determine [...] that the development boundaries in this application and in the recently accepted application do not overlap". WPD has not said what the "recently accepted application" was. ██████████ have not been involved in this application.
1 Jun 2016	Email from ██████████ to WPD chasing overdue response.
2 Jun 2016	Letter from WPD: flat refusal to engage.
23 Jun 2016	Letter from ██████████ lawyers about ██████████ claim of abuse of a dominant position.
5 Jul 2016	Letter from WPD's lawyers (dated 1 July 2016) about timing for a response.
6 Jul 2016	Letter from ██████████ lawyers about timing for a response.
13 Jul 2016	Letter from WPD's lawyers about timing for a response.
22 Jul 2016	Letter from WPD's lawyers responding to ██████████ claim of abuse of a dominant position.
29 Jul 2016	Letter from ██████████ lawyers about ██████████ request for contestability of part-funded assets and potential claim for abuse of a dominant position.
29 Jul 2016	Letter from ██████████ lawyers about ██████████ claim for abuse of a dominant position.
2 Aug 2016	WPD referral to Ofgem: letter dated 1 August 2016 and attachment.
2 Aug 2016	Letter from WPD's lawyers about timing for a response on contestability request.
15 Aug 2016	██████████ initial response to Ofgem re WPD referral: letter and attachment.

19 Aug 2016	Letter from WPD's lawyers about timing for a response on contestability request.
25 Aug 2016	Ofgem dispute resolution letter.
26 Aug 2016	Letter from WPD's lawyers about trials for contestability of part-funded assets.
8 Sep 2016	Ofgem dispute resolution letter and questionnaire.
9 Sep 2016	Second letter from WPD's lawyers about trials for contestability of part-funded assets. This makes a claim about the application of procurement regulations.

## Documents

31. WPD's referral documents claims that WPD has enclosed:

- “(a) Copies of [REDACTED] Point of Connection requests
- (b) Copies of WPD's Point of Connection offers
- (c) Copies of correspondence between the parties' consultant and between [REDACTED] solicitors and WPD”

32. Table 4 lists subsequent documents which we believe have been sent to Ofgem.

**Table 4** Subsequent documents sent to Ofgem

29 Jul 2016	Letter from [REDACTED] lawyers about [REDACTED] request for contestability of part-funded assets and potential claim for abuse of a dominant position.
2 Aug 2016	WPD referral to Ofgem: letter dated 1 August 2016 and attachment.
15 Aug 2016	[REDACTED] initial response to Ofgem re WPD referral: letter and attachment.

33. Recent letters from WPD's lawyers say that they have been copied to Ofgem.

34. We have not seen any list of documents that WPD has sent to Ofgem.

35. Please do not hesitate to contact us if you need a copy of any documents mentioned in the chronology above, whether already sent to Ofgem or not; or if you would like us to validate an Ofgem document list against our records.

KX 2174 7041 9GB

Recorded  
Delivery

FILE COPY

Our ref: me/dmj

28 November 2016

OFGEM

Electrical System Integration  
9 Millbank  
London  
SW1 3GE

For the attention of

Dear Sirs

OFGEM Determination with regards to Western Power Distribution vs  
(ICP) and (IDNO)

Developments Limited are the developer on the site called in (see attached masterplan). We understand that OFGEM is currently determining two complaints made against Western Power Distribution by and (which are an ICP and IDNO we have engaged with on this scheme).

With regards to the above we wish to provide our support to the case made by both and . We understand WPD have made a decision to prevent any ICP or IDNO providing the upgrade reinforcement works in the area of this project. However, we feel that this is precluding us as a developer from gaining any alternative bids and possibly much quicker solution to providing an electrical supply to our scheme and proposed world headquarters expansion.

WPD have formally quoted the scheme to however the timescale (3 years) to deliver the requested 20mVA supply is more than double the project programme and is considered too long, indeed it is over 18 months too late for what require.

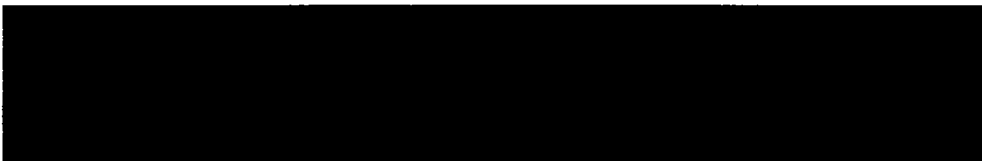
However, have informed that they may be able to provide the 20mVa within the timeframe and save up to 18 months on programme to satisfy both our, and needs. We have worked with these ICP/IDNO companies before and know that they can deliver schemes much quicker than the incumbent utility providers. They will also sign up to forms of contract that stipulate programme timeframes and financial damages for failure to deliver on time. None of these advantages are on offer from a contract with WPD.

When reviewing the case and in making your determination we would like OFGEM to take into account the programme timeframe. We feel WPD are not structured to deliver, or able to sign up to a form of construction contract that is suitable to our needs in this circumstance. We would also like to have the ability to choose which source of provider, rather than being told by WPD that only they can work on the network.

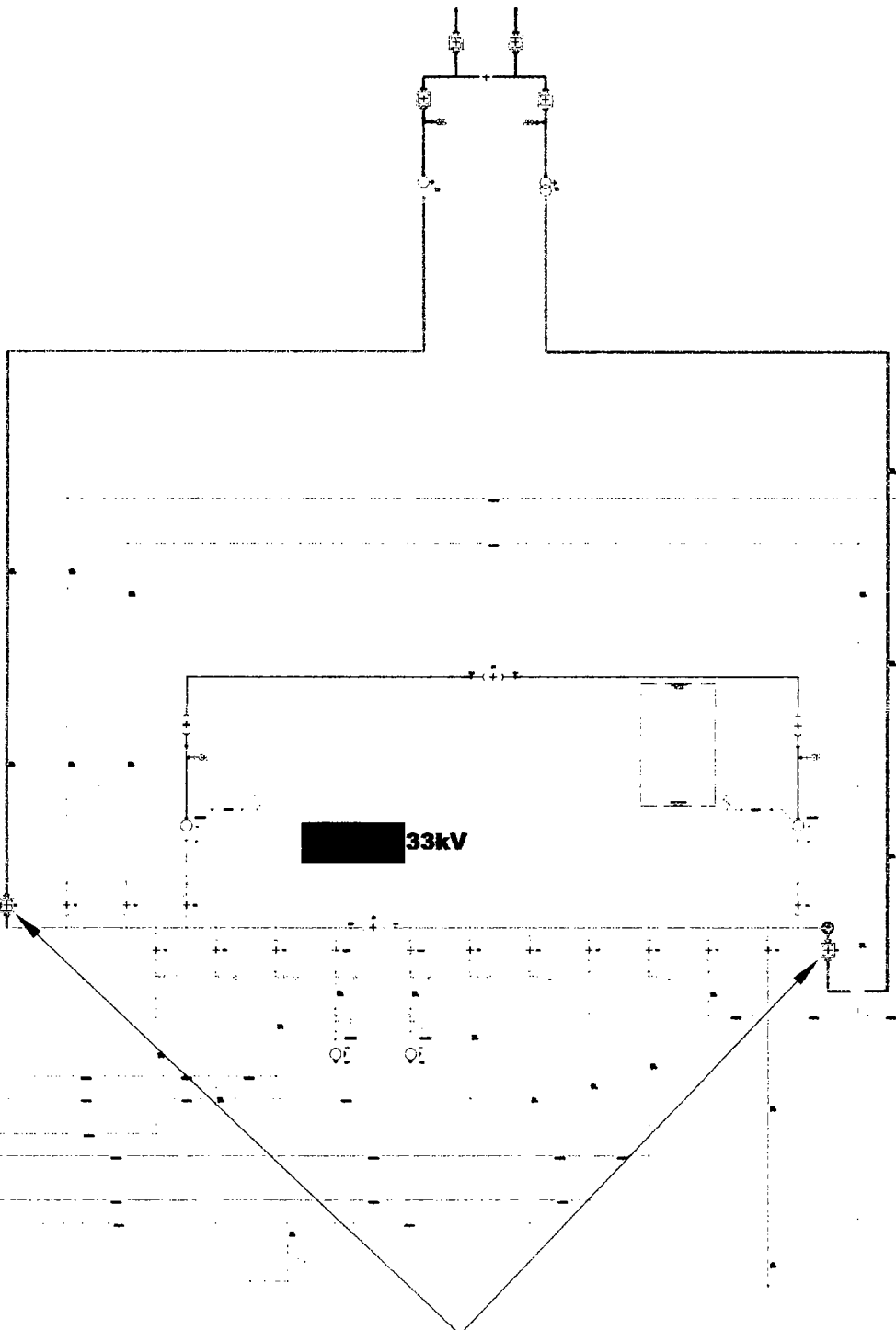
2.

We would welcome your review and the option for Roxhill to choose a provider rather than what appears to be a very non-competitive, monopoly, situation we find ourselves.

Yours faithfully

A solid black rectangular redaction box covering the signature area.A solid black rectangular redaction box covering the signature area at the bottom of the page.





REQUESTED POC LOCATIONS  
(REFUSED BY WPD)

<table border="1"> <tr> <td>Rev</td> <td>Date</td> <td>Technician</td> <td>Eng</td> <td>Drawn</td> </tr> <tr> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> </tr> </table>	Rev	Date	Technician	Eng	Drawn						Client: OFGEM Design: WPD Design: CM    Date: 08 11 16    Scale: E A1    NTS Drawn: CM    Date: 08 11 16    Scale: E A1    NTS				Title: [REDACTED] DETERMINATION PROPOSAL SHEET 2 OF 2	Drawn: [REDACTED] Title: [REDACTED] Date: [REDACTED] Scale: [REDACTED] NTS: [REDACTED]
	Rev	Date	Technician	Eng	Drawn											
	N/A				Drawn: MN209809-CM-010	Title: N/A										
N/A				Drawn: MN209809-CM-010	Title: N/A											
N/A				Drawn: MN209809-CM-010	Title: N/A											



C1 HOTEL (5 floors)		
R	5	11,817 m <sup>2</sup> 125,045 ft <sup>2</sup>
A 1/A3/A5 RETAIL		
S	1	1,803 m <sup>2</sup>
T	1	697 m <sup>2</sup>
<b>TOTAL</b>		<b>2,300 m<sup>2</sup></b> <b>24,757 ft<sup>2</sup></b>

B1/ B1c	Unit storeys	Unit GIA
A	1	1,857 m <sup>2</sup>
B	1	1,394 m <sup>2</sup>
C	1	1,394 m <sup>2</sup>
D	3	3,000 m <sup>2</sup>
E	2	2,620 m <sup>2</sup>
F	2	1,850 m <sup>2</sup>
G	2	2,350 m <sup>2</sup>
H	2	3,875 m <sup>2</sup>
J	2	3,875 m <sup>2</sup>
K	2	4,750 m <sup>2</sup>
L	3	2,500 m <sup>2</sup>
M	3	6,958 m <sup>2</sup>
N	2	3,920 m <sup>2</sup>
O	2	3,300 m <sup>2</sup>
P	2	6,650 m <sup>2</sup>
Q	2	6,475 m <sup>2</sup>
<b>TOTAL</b>		<b>58,766 m<sup>2</sup></b> <b>631,030 ft<sup>2</sup></b>



**From:** [REDACTED]  
**To:** [REDACTED]  
**Subject:** RE: [REDACTED] Development  
**Date:** 09 December 2015 16:44:15

---

Hi [REDACTED]

No generation on site,

I'll try and get some more detail regarding load form the client. In the meantime, could you progress.

Many Thanks,

[REDACTED]

---

**From:** [REDACTED]  
**Sent:** 09 December 2015 16:41  
**To:** [REDACTED]  
**Subject:** RE: [REDACTED] Development

Hi [REDACTED]

What about the generation on site. Should we assume that no generation will be installed?

Also could you please provide a detailed breakdown of the load you are planning to connect.

Following from your comment, we will raise two enquiries, one for an IDNO and one for an ICP.

Kind Regards

[REDACTED]  
[REDACTED]  
Western Power Distribution (East Midlands)  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

---

**From:** [REDACTED]  
**Sent:** 09 December 2015 15:06  
**To:** [REDACTED]  
**Subject:** RE: [REDACTED] Development

Hi [REDACTED]

We would be looking at both options; embedded and adopted.

There are no disturbing loads and the current layout would be applicable.

Thanks,

[REDACTED]

---

**From:** [REDACTED]  
**Sent:** 09 December 2015 12:44  
**To:** [REDACTED]  
**Subject:** RE: [REDACTED] Development

Hi [REDACTED]

Could you please confirm if the enquiry is for the embedded network connection.  
Also, will there be any generation and/or disturbing loads connected?

Are the drawings previously provided (for enquiry 2322326) that show the extend of the development are still relevant for this enquiry?

Kind regards

[REDACTED]

[REDACTED]

Western Power Distribution (East Midlands)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

---

**From:** [REDACTED]  
**Sent:** 09 December 2015 11:41  
**To:** [REDACTED]  
**Subject:** RE: [REDACTED] Development

Hi [REDACTED] – Apologies, wrong attachment.

Regards,

[REDACTED]

---

**From:** [REDACTED]  
**Sent:** 09 December 2015 11:23  
**To:** [REDACTED]  
**Subject:** RE: [REDACTED] Development

Hi [REDACTED]

The attached application seems to be an old one for 6,8 &12 MVA POCs.

Kind regards

[REDACTED]  
[REDACTED]  
Western Power Distribution (East Midlands)  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

---

**From:** [REDACTED]  
**Sent:** 09 December 2015 09:01  
**To:** [REDACTED]  
**Subject:** RE: [REDACTED] Development

Hi [REDACTED] – POC application for the 20MVA as requested.

Regards,

[REDACTED]

---

**From:** [REDACTED]  
**Sent:** 02 December 2015 14:42  
**To:** [REDACTED]  
**Subject:** [REDACTED] Development

Hi [REDACTED],

You can appreciate that without extensive studies the extend of the potential reinforcement cannot be determined.

I can confirm that potential upgrade to [REDACTED] BSP would involve the 132kV reinforcement, as in example installation of further 132/33kV Grid Transformer is considered as 132kV reinforcement.

However, we would have to carry out a wider network assessment to ascertain if there is a more economical solution available to supply the load required.

Further to your e-mail I will now close the enquiries: 2321408 (6MVA) & 2321514 (8MVA). The enquiry we will proceed with is 2322326 (12MVA).

Kind Regards

[REDACTED]  
[REDACTED]  
Western Power Distribution (East Midlands)  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

---

**From:** [REDACTED]  
**Sent:** 02 December 2015 14:23

**To:** [REDACTED]  
**Subject:** RE: [REDACTED] Development

Thanks [REDACTED]

Does that potentially mean works at 132 level/or upgrades to [REDACTED] primary ?

No I think we are beyond the 6 & 8. Please keep the 12MVA offer at present though.

Many Thanks,

[REDACTED]

---

**From:** [REDACTED]  
**Sent:** 02 December 2015 14:19  
**To:** [REDACTED]  
**Subject:** RE: [REDACTED] Development

Hi [REDACTED],

High level assessment suggests that [REDACTED] 33kV doesn't have sufficient capacity to support 24MVA. Therefore further reinforcement would be required.

Also, could you please clarify if you still require the offers for 6MVA and 8MVA.

Kind Regards

[REDACTED]

Western Power Distribution (East Midlands)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

---

**From:** [REDACTED]  
**Sent:** 02 December 2015 09:49  
**To:** [REDACTED]  
**Subject:** RE: [REDACTED] Development

[REDACTED]

To be honest, I think the approach is a little unreasonable. Surely the spirit of working together, and as WPD keep inferring, there is a benefit to all parties in respect of these work, a little common sense could apply here.

I'm not asking for full or formal figures, just a view on what the likely implications of this increased load. This enables are client to make informed decisions, about how to progress the site. All I am asking is do you believe the existing 33kv network would sustain this load form the given POC ?

Regards,

[REDACTED]

---

**From:** [REDACTED]  
**Sent:** 02 December 2015 09:33  
**To:** [REDACTED]  
**Subject:** RE: [REDACTED] Development

Hi [REDACTED]

Until the assessment for the 24MVA is carried out I am unable to comment on the availability of the demand and required reinforcement.

I hope you will find this in order

Kind Regards

[REDACTED]

[REDACTED]

Western Power Distribution (East Midlands)

[REDACTED]

[REDACTED]

[REDACTED]

---

**From:** [REDACTED]  
**Sent:** 02 December 2015 09:23  
**To:** [REDACTED]  
**Subject:** RE: [REDACTED] Development

[REDACTED]

I appreciate a new enquiry would be needed, I was just asking for a steer to the implications, so our client can make some informed decisions.

Do you think further reinforcement beyond what is already planned be required ?

Regards,

[REDACTED]

---

**From:** [REDACTED]  
**Sent:** 02 December 2015 09:07  
**To:** [REDACTED]  
**Subject:** RE: [REDACTED] Development

Hi [REDACTED]

Thank you for the clarification with regards to the cable route.

Due to the change of the requirements (required ASC doubled as well as the extend of the development to be supplied has changed) the new enquiry would have to be raised.

Could you please clarify how you would like us to proceed.

Kind Regards

[REDACTED]  
[REDACTED]  
Western Power Distribution (East Midlands)

---

**From:** [REDACTED]  
**Sent:** 01 December 2015 08:59  
**To:** [REDACTED]  
**Subject:** [REDACTED] Development

Hi [REDACTED]

Just a couple of matters

Firstly, in respect of the road, this is private, none adopted and in the ownership of a third party. As such, it is not an option to use. We cannot confirm that any consent would be given to lay cables. Please could you use the route along the existing adopted highway.

Secondly, Due to the dynamic nature of the development, the second phase is now to be developed. As such, the load required will now increase from the 12MVA already requested to 24MVA. Please could you advise the potential impact of this ?

Many Thanks,

[REDACTED]

---

**From:** [REDACTED]  
**Sent:** 30 November 2015 14:53  
**To:** [REDACTED]  
**Subject:** RE: 2321408, 2321514, 2322326 - [REDACTED] [REDACTED] Development - POC Request Zone A

Hi Damian

I noticed on the schematic you provided that one of the suggested cable routes is out of the north of the development (it crosses the [REDACTED]).

Unfortunately our maps do not include any roads / infrastructure above [REDACTED]

that your drawings suggest maybe in place. Could you please clarify if there is a development and infrastructure will be installed in that area. Also would these work be associated with and facilitate your development.

This is in order to find the most direct and achievable route between our Bulk Supply Point and indicated location for the primary substation.

If you would like to discuss this further, please give me a call.

Kind Regards

[REDACTED]  
[REDACTED]  
Western Power Distribution (East Midlands)

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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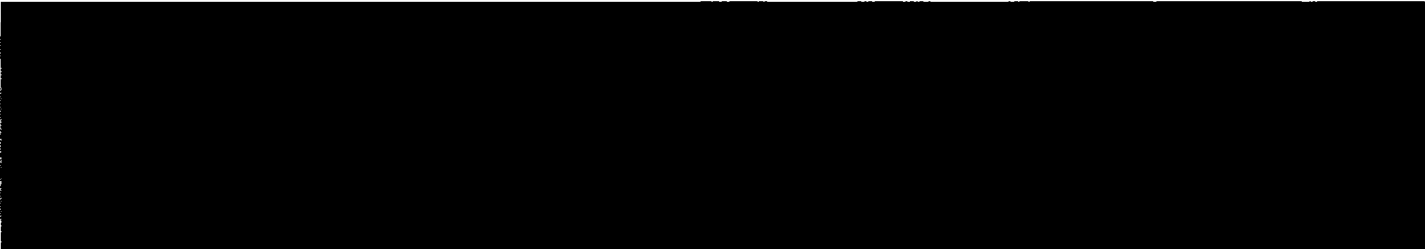
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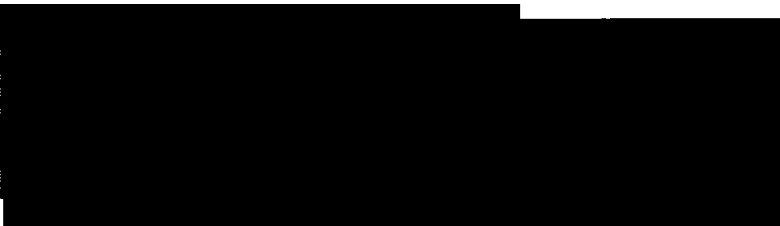












2<sup>nd</sup> January 2017

  
**Referral to Ofgem of issues in dispute between: Western Power Distribution (East Midlands) plc and  and **

I refer to your email dated 16<sup>th</sup> December 2016 in respect to Ofgem's minded to determination.

1. We are content with Ofgem's minded-to decision. We will be reviewing the sections of the document covering arguments made and discussion over the coming days.
  2. The purpose of this note is to draw your attention to issues which might affect the eventual practical effectiveness of the decision that Ofgem is minded to make.
  3. The issues are about timing.
  4. We think that there are risks that the application of business-as-usual processes to implement Ofgem's decision could lead to a situation where the decision would not achieve its intended effect.
  5. If business-as-usual processes were followed in the resolution of this dispute and the implementation of Ofgem's decision, then:
    - (a) WPD could bring new material to the table in its response to the minded-to decision, which Ofgem would need time to assess.
    - (b) Once Ofgem had made its decision, WPD could then initiate a new period of 65 working days to process the point of connection request.
    - (c) The request could fall within an interactive process and a WPD connection queue, leading to further delays.
- 

- 
6. The timing implications of these business-as-usual processes could lead to a situation where the customer would be practically prevented from securing the benefits of effective competition for the construction of the substation and associated assets, thus potentially negating the effectiveness of Ofgem's decision.
  7. We believe that the customer would like to place their connection order at the end of January 2017 so as to get the new supply energised in the summer of 2018.
  8.  Networks has taken all steps within its powers to mitigate the risks to timely delivery:
    - (a)  Networks has already designed the scheme and would therefore be able to make an offer to the customer promptly upon receipt of the 33kV point of connection offer from WPD.
    - (b)  Networks offers rapid deployment, so that construction of the  scheme would only take approximately 15 months.
  9.  Network's mitigation actions mean that it is still possible for the customers' requirements to be met, despite the 10-month delay that has arisen since   formally sought a 33kV IDNO point of connection offer from WPD.
  10. But nothing that  Networks or  can do could counter the risks that would go with following business-as-usual processes in the resolution of this dispute and the implementation of Ofgem's decision.
  11. In order to ensure that the industry can meet the customer's requirements in this case, we think that it is necessary for WPD to issue a 20MVA 33kV point of connection offer in January 2017, using the connection queue position that was established by the 2015 requests and disregarding the fact that some offers might have lapsed during the course of the dispute resolution process.
  12. We believe that WPD can derive sufficient comfort from Ofgem's minded-to decision in order to take this pro-active pro-competitive action before the completion of the dispute resolution process. Even if Ofgem's final decision turns out to be different from its minded-to position, we think that WPD would not be at risk of regulatory action by having given effect to a minded-to position that was established by Ofgem after a detailed review of the evidence over a period of several months.
  13. We also acknowledge that WPD making a 33kV connection offer in these circumstances would have no precedential value unless and until Ofgem confirms its minded-to decision.
  14. We would be grateful if Ofgem and WPD could confirm whether this is an acceptable way forward.
- 

[Redacted]

Please feel free to contact me if you need any further information.

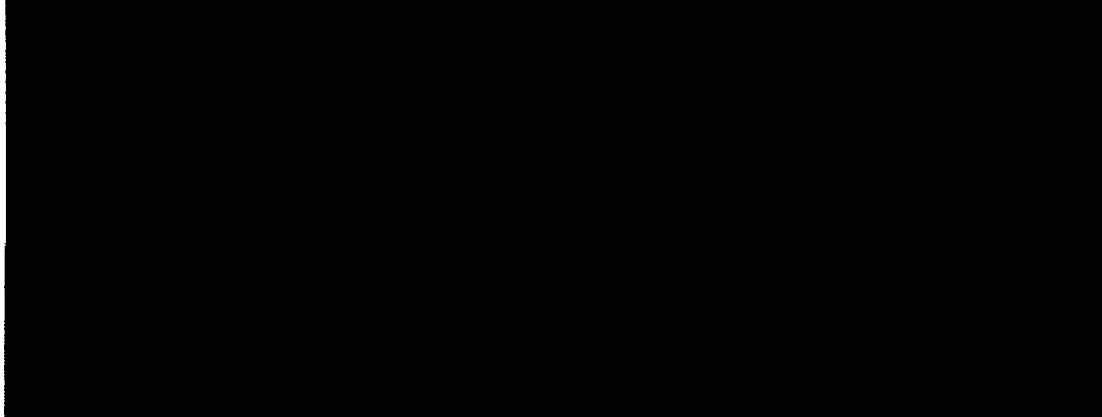
Yours sincerely

[Redacted]

[Redacted]

On behalf of [Redacted] and [Redacted]

[Redacted]



*Our ref*

*Your ref*

*Date*

-

30 January 2017

**Response to Ofgem's minded to decision on the dispute between: Western Power Distribution (East Midlands) Limited plc and [REDACTED] and [REDACTED]**

Thank you for your email dated 16 December 2016, with Ofgem's minded-to decision. As you invited, I set out below our comments on the minded-to decision.

For the reasons set out in our various submissions we consider that we applied the regulatory framework correctly but we note Ofgem's intended decision in this case.

On the assumption that, despite our previous submissions, Ofgem proceeds to make its final decision in line with its minded to decision, we set out below our comments. Each of these comments requests that Ofgem include in its final decision important clarification or confirmation in relation to specific consequences of the minded to decision.

The requests for clarification/confirmation in comments 1 – 4 relate to the prioritisation of obligations as between section 16 and section 9 and the impact, on a DNO's and an IDNO's other obligations, of prioritising the section 16 obligations.

The request for clarification/confirmation in comment 5 relates to how a DNO should interpret "premises" when making its offer where, as is the case in this matter, the customer's requirements are unclear and/or do not exist until the design solution and subsequently the customer's ownership requirements are known.

**Comments**

1. By sections 7.1 and 7.2 of Ofgem's minded to determination, WPD understands that the reason the IDNO's connection request is to be provided as requested by the IDNO (and that WPD must not treat the substation as partially funded reinforcement) is that the IDNO has chosen to fully fund all the works associated with the connection and declined the enhanced scheme and the partial reinforcement funding. Please can Ofgem make clear if this is indeed its intention.
2. In this case and as a result of Ofgem's minded to determination, the IDNO will be able to secure a connection at a higher voltage than is necessary for the capacity requested and, with that, an

opportunity to operate assets that are capable of distributing capacity in excess of what is required and secured at the time of the connection.

**Please can Ofgem state** how that position fits with the IDNO's own obligations under section 9 of the Electricity Act to develop an efficient network, in particular where (i) the future demand on their distribution system in the local area is uncertain and/or (ii) the effect on the upstream Distribution System of reserving capacity, in excess of their development's requirements, can impact the cost and scale of the schemes of other customers / IDNOs requesting connections in the wider area.

3. In sections 6.12 to 6.19 of its minded to determination Ofgem makes it clear that it is acceptable for an IDNO (which is also under the obligations in section 9) to require a connection even if that connection stands to make reinforcement comparatively more expensive for future customers. Please note that WPD's position is that our section 9 obligations included minimising the costs to existing customers in reinforcing the network, not just future connectees. We comment further on this specific in 4 below. However, as regards sections 6.12 to 6.19 of the minded to determination (which state categorically that it is correct that an IDNO is able to require that we provide a connection without enhancement, even if that makes future reinforcement comparatively more expensive for customers):

- a. Please can Ofgem make clear whether it means that section 16 will always prevail over the section 9 obligations, irrespective of the extra costs which will be incurred in relation to later reinforcement in the local area.
- b. If Ofgem however intends that there is a point at which the section 9 obligations override a request under section 16 (ie. where the likely costs of future reinforcement outweigh a request to connect at a higher voltage than is necessary), please can Ofgem give clear guidance in its final determination on the criteria which are to be applied to analyse when section 9 or section 16 prevails.

4. We have set out in previous responses how we considered that the Enhanced scheme offered to [REDACTED] represents the most economical solution in developing the network for imminent demand requirements. This conclusion was based not only on the costs to future connectees but also on the financial impact on existing customers. As and when additional capacity is required in the area, the reinforcement work to provide that capacity is likely to be more expensive compared to the partially funded reinforcement which was involved in the connection which was offered to [REDACTED] (as explained in our previous submissions and as referred to by Ofgem in section 7.1 of its minded to determination). That extra cost filters down to be borne, in part at least, by existing customers. Cost to current customers therefore stands to be adversely affected by the connection which Ofgem requires us to offer to [REDACTED]

**Please can Ofgem therefore confirm** that when assessing, in relation to future connections, WPD's compliance with its obligations (and bearing in mind Ofgem's "Quicker and More Effective Distribution Connections" guidance), the fact that the network in a local area could have been reinforced more efficiently as part of an earlier connection request will be disregarded where a customer has itself requested that it fully fund that earlier connection and has rejected a partially funded Enhanced Scheme.

5. Ofgem's minded to determination is, in part, on the basis that a customer is entitled to demand a connection to a "premises" and/or to a "distribution system of another authorised distributor".

When initially assessing the PoC for a connection application, we consider the connection characteristics in terms of capacity, location / premise and date required – in this case, had there been sufficient capacity on the local 11kV network, this would have been the appropriate connection voltage and the "premises" would have been the boundary for the customer's development site and the distribution system of the IDNO. Given, however, that there was not sufficient capacity to accommodate the customer's request on the local 11kV network, the solution involved a new sub-station and a PoC to the existing 33kV network. A 33kV PoC was not technically required for the customer's proposed connection and only arose as a result of the design solution required based on the current network circumstances.

We therefore continued to view the "premises" as the boundary for the customer's development site and maintained an 11k PoC. It was only once the customer had received our initial connection offer that they requested that they own the new sub-station when, as we understand it from Ofgem's minded to determination, the location of the "premises" should then have been changed to be the new sub-station.

When considering, therefore, what should constitute the "premises" and "distribution system" when initially assessing an application, it may be that neither actually exist until both the design solution and the customer's ownership requirements (which can necessarily only follow from the design) are known.

**Please can Ofgem therefore state** clearly in its final determination how a distributor is required to interpret "premises" or "distribution system" (both as used in section 16) where, as is the case for this substation, neither physically exist

Please let me know if we can assist further with any queries or further information.

Yours sincerely

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