Determination No. RBA/TR/A/DET/159

DETERMINATION OF DISPUTES UNDER SECTION 23 OF THE ELECTRICITY ACT 1989 BETWEEN CITY OF WESTMINSTER, LONDON BOROUGH OF CAMDEN, LONDON BOROUGH OF ISLINGTON AND EDF ENERGY NETWORKS (LPN) PLC

1. INTRODUCTION

1.1. On 3 December 2007, EDF Energy Networks (LPN) plc ("EDF") referred to the Gas and Electricity Markets Authority ("the Authority") a dispute with the City of Westminster ("Westminster"), and a separate dispute with the London Borough of Camden ("Camden"), for determination by the Authority under section 23 of the Electricity Act 1989 (as amended) (the "Act"). On 24 January 2008, EDF referred an additional dispute with the London Borough of Islington ("Islington") to the Authority for determination. In this document, Camden, Westminster and Islington are, where appropriate, collectively referred to as "the Councils".

1.2. The principal point for determination in these disputes is who bears responsibility in law for renewing the rising and lateral mains ("R&Ls") inside the common parts of particular multi-occupancy apartment blocks under the freehold ownership of the Councils[1], and who bears the cost of such renewal. In very broad summary, EDF maintains that the relevant Council is responsible for the R&Ls at the block under its freehold ownership and therefore it (rather than EDF) should in each case bear the costs of replacing the R&Ls. The three Councils maintain that EDF is obliged to replace the R&Ls and to bear the costs of the replacement.

1.3. The parties to the disputes have confirmed in writing that they are content for their identities to be disclosed in this document and its Appendix and the accompanying parties' Submission Documents.

[1] The individual residential flats are either leased to Council tenants or have been granted long leaseholds.

2. BACKGROUND

2.1. The particular Council blocks which are relevant to the disputes are as follows:

2.1.1. **John Aird Court, Westminster.** John Aird Court is a complex of low and medium rise buildings constructed around 1950. There are 228 individual flats in John Aird Court. City of Westminster is the freehold owner. It is not clear who installed the R&Ls. There is no record of London Electricity Board ("LEB" - EDF's statutory predecessor) carrying out the installation of the R&Ls and none of LEB, London Electricity plc ("LE" – again EDF's predecessor) or EDF have ever maintained the R&Ls[2].

2.1.2. **Dorney House, Chalcots Estate, Camden.** Dorney House at Chalcots Estate, Camden, is a tower block constructed between 1965 and 1970. There are 76 residential flats in Dorney House. London Borough of Camden is the freehold owner. It is not clear who originally installed or thereafter maintained the R&Ls, but again there is no evidence of any involvement of EDF or its statutory predecessors.

2.1.3. **Sadler House, Spa Green Estate, Islington.** Sadler House, Spa Green Estate, Islington is a block of 48 flats constructed between 1938 and 1950. London Borough of Islington is the freehold owner. The original electrical installation was carried out in 1950 by Berkeley Electrical Engineering Company Ltd. The works were managed by the Municipality of Finsbury and London County Council. There is no evidence of involvement of LEB (EDF's statutory predecessor) in the installation or the maintenance of the R&Ls. Recent work has been carried out by contractors (Lovelock & Taylor) for the installation (in the ground floor intake cupboard) of a new Ryefield distribution board and replacement of the risers from the ground floor. LEB / EDF was not involved in this work[3]. Islington have confirmed this[4].

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[2] Appendix 1 to Submission Document in the Westminster Dispute at paragraphs 5 & 9
[3] Appendix 1 to the Submission Document to the Islington Dispute, at paragraphs 5 to 12
[4] Paragraph 3.7 to the Islington Submission Document

2.2. The Authority notes that, for the purposes of determining these disputes, the parties agree that the R&Ls in the particular premises need replacing and that the Authority should proceed on that basis. In Islington's case, recent work has been carried out on the R&Ls by private contractors consisting of the installation (in the ground floor intake cupboard) of a new Ryefield distribution board and replacement of the risers from the ground floor at Sadler House: paragraph 9 of Appendix 1 of the Islington Submission Document. In Westminster's case, between March and August 2008, the R&Ls in John Aird Court were replaced, which involved installation of new cables, new trunking and new Ryefield fuse board by private contractors: paragraph 8 of Appendix 1 of the Westminster Submission Document).

2.3. The Authority emphasises that this determination is made in respect of (and is limited to) each of the buildings which are the subject of the particular disputes that have been referred to it. It does not apply to any other buildings. The position concerning other residential blocks will depend on the circumstances and evidence available in relation to those particular blocks, although the principles set out below are likely to be applicable.

3. STATUTORY OBLIGATIONS

3.1. Any dispute arising under sections 16 to 21 of the Act, between an electricity distributor and a person requiring a supply of electricity may be referred to the Authority under section 23 of the Act for determination. There was no dispute that the Authority has jurisdiction under that section to resolve the issues referred to it.

4. APPLICABLE STATUTORY FRAMEWORK

4.1. The relevant current statutory regime is set out in sections 16 to 21 of the Act as amended by the Utilities Act 2000. References to the Act are to the Act as amended, save as otherwise indicated.

4.2. The starting point is section 16 of the Act. Section 16(1) provides for a duty on an electricity distributor to (a) 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* "; and/or (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*". By section 16(4)(b), references to making a connection "*includes a reference to maintaining the connection*".

4.3. "Premises" is defined by section 64 of the Act as "*includ*[ing] *any land, building or structure*".

4.4. The meaning of "distribute" and "distribution system" is provided by section 4(4) of the Act: "*distribute, in relation to electricity, means distribute by means of a distribution system which consists (wholly or mainly) of low voltage lines and electrical plant and is used for conveying electricity to any premises or to any other distribution system.*" An "electricity distributor" for the purposes of section 16(1)(a) is, by section 6(1)(c) and section 6(9), a person who is licensed under the Act to distribute electricity. For the purposes of section 16(1)(b) of the Act, "authorised distributor" is defined (at section 64 of the Act) as meaning "*a person who is authorised by a licence or exemption to distribute electricity.*"

4.5. Section 16(2) of the Act provides that "*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.*"

4.6. Section 16(4) of the Act provides that "*(a) any reference to making a connection includes a reference to maintaining a connection (and continuing to provide the necessary electric lines or electrical plant); (b) any reference to requiring a connection includes a reference to requiring the connection to be maintained (and the continued provision of the*

necessary electric lines and electrical plant); and (c) any reference to the provision of any electric line or electrical plant is a reference to the provision of such a line or an item of electrical plant either by the installation of a new one or by the modification of an existing one.

4.7. Section 16A of the Act sets out the procedure in relation to requests for connection.

4.8. Section 17 of the Act provides for certain exceptions from the duty to connect (under section 16 of the Act), including where (and to the extent that) an electricity distributor "*is prevented from doing so by circumstances not within his control*" (section 17(1)(a) of the Act), or "*it is not reasonable in all the circumstances for him to be required to do so*" (section 17(1)(c) of the Act).

4.9. Section 19 of the Act makes provision for an electricity distributor to recover expenses reasonably incurred (to such extent as is reasonable in all the circumstances) where any electric line or electrical plant is provided by him in pursuance of the duty under section 16(1) of the Act.

4.10. Section 20 of the Act makes provision for a power on the part of the electricity distributor to require reasonable security for payment under section 19 from any person requiring a connection in pursuance of section 16(1), failing which the electricity distributor may (if he thinks fit) (a) if the connection has not been made, refuse to provide the line or plant for so long as the failure continues; or (b) if the connection is being maintained, disconnect the premises or distribution system in question.

4.11. Section 21 of the Act provides that an electricity distributor may require certain additional terms of connection to be accepted from any person requiring a connection in pursuance of section 16(1) of the Act.

5. SUMMARY OF CONCLUSIONS

5.1. The Authority has set out below a summary of its conclusions applying what it considers to be the proper construction of sections 16 to 21 of the Act to the evidence as presented in written submissions from all parties,

and to the evidence/arguments presented at the Oral Hearing on 27 April 2010:

5.1.1. The Authority agrees with the Councils that the term "premises" in section 16 of the Act is capable in principle of referring to privately owned/occupied flats within multi-occupancy residential apartment blocks.

5.1.2. However, there is no evidence that EDF or its statutory predecessors ever installed, owned, controlled or otherwise operated the electrical infrastructure within the common parts of the relevant Council blocks. There is no evidence of any action taken by EDF (or its predecessors) to suggest that a duty to control, operate or maintain the R&Ls transferred to EDF.

5.1.3. Accordingly, the Authority finds that EDF and its predecessors have had no role in installing or maintaining any of the R&Ls at any time, and that therefore EDF cannot be regarded as owning or having operational responsibility for them.

5.1.4. The Authority concludes that the R&Ls did not, as at the date of the recent requests for maintenance, form part of EDF's "distribution system" within the meaning of the Act.

5.1.5. The Authority considers that the R&Ls in the relevant blocks subject of the disputes are the responsibility of the relevant Councils, subject to any landlord/tenant or landlord/lessee arrangements.

5.1.6. The Authority considers that the duty to "maintain" a connection under section 16(4)(a) of the Act only applies to a connection which has originally been made pursuant to a request under section 16(1) of the Act.

5.1.7. Accordingly, since in the case of the three blocks EDF did not install the R&Ls, it cannot now in the Authority's view be required under section 16 of the Act to maintain that connection by replacing the R&Ls under section 16(1) of the Act.

5.1.8. In any event, the Authority notes that any section 16 duty is subject to considerations of reasonableness in section 17 ("Exceptions from duty to connect"). The Authority considers that it may not be reasonable for a distributor to be required to maintain (or make) a connection consisting of R&Ls (section 17(1)(c)). For instance, if EDF is asked to effectively adopt the assets and maintain them, they will then become responsible for them under law. In this instance, EDF will want adequate certainty that no-one else has access to their assets and this may be difficult given their location in the Councils' blocks. This of itself may not be insurmountable, but the Authority would expect that EDF would need a workable set of contracts in place to protect EDF's assets. The issue of reasonableness of any request does not arise for determination given the Authority's other findings.

5.1.9. In accordance with the conclusions set out above, the Authority considers that the Councils are responsible for renewing the R&Ls and bearing the cost of such renewal in the relevant blocks subject of the disputes subject to any landlord/tenant or landlord/lessee arrangements.

5.2. These issues are discussed in turn in sections 6 and 7 of this document. The Authority notes that a number of issues have been raised in the Submission Documents (and other papers submitted by the parties) which the Authority believes are either not, or are no longer, directly relevant, or are of limited assistance in resolving the central issue in these disputes, which is the proper construction of the regime in sections 16 to 21 of the Act. However, the Authority has considered these issues and addressed them in an Appendix attached to this document.

6. EVIDENCE OF INSTALLATION OR OWNERSHIP OF R&LS

6.1. The parties have agreed[5] the following:

[5] Email from Islington dated 27 April 2010 (timed 08.49), email from Camden dated 23 April 2010 (timed 13.16), email from Westminster dated 26 April 2010 (timed 15.41) and EDF Skeleton Argument for Oral Hearing dated 27 April 2010.

6.1.1. There is no direct documentary evidence that EDF or its predecessors actually installed the R&Ls or has ever carried out maintenance work on the internal electrical infrastructure of the Council blocks since their installation.

The Authority notes that Islington makes the point that they have provided Ofgem[6] with photographic evidence showing London Electricity test labels placed on what Islington refer to as the supply equipment (further information provided to Ofgem dated 28 November 2008). EDF argues that these are not test labels but red label paper seals placed on the fuse carriers for "revenue protection" purposes: paragraph 14 of Appendix 1 of the Islington Submission Document with copies of labels attached. Islington suggests these seals are evidence of maintenance of the R&Ls by EDF's predecessors and therefore submit that EDF's predecessors *adopted these R&Ls as part of their distribution system by virtue of* such maintenance. Furthermore, Islington suggests that, based on the recollection of Michael Garrett, the Senior Electrical Engineer (who has 46 years of experience in the electricity industry and is employed by its agent, Homes for Islington), the usual position is that LEB would have maintained the equipment and would have put seals on it: Oral Hearing Transcript of 27 April 2010 page 42, paragraph A to D and paragraph 3.7 of the Islington Submission Document. EDF, however, argues that sealing is done for purposes of safety and to prevent illegal abstraction of electricity and does not denote ownership or control: paragraph 4.48 of the Islington Submission Document.

As a preliminary point, the Authority considers that the seals referred to do not clearly denote ownership or control of the R&Ls by EDF. One of the labels is a metering seal label, which is not relevant to R&Ls. Metering is the responsibility of the supplier and is about measuring energy used. It is not relevant to the issue of who owns the distribution system which, since October 2001, has been an activity separate from electricity retail. Another label is "the R&Ls inspection" label which has EDF Energy Network's logo. But it is not clear in what capacity EDF placed the label on the

[6] Ofgem is the office set up to assist the Authority discharge its statutory functions.

equipment as there is no date or signature of the examiner on the label. The final label is the seal placed on, as contended by Islington, the fuse carriers for "revenue protection" purposes, with EDF Energy logo.

Islington suggests that these labels are evidence of maintenance work done to the R&Ls. But, in the Authority's view, even if EDF had actually maintained the R&Ls at some point (for which there is no evidence), there is no indication of the capacity in which such work, if any, was undertaken (i.e. whether as a private contractor or otherwise). Equally, the Authority considers that there is no evidence to support Islington's contention that once the R&Ls had been installed in Sadler House in 1950 (by Berkely Electrical Engineering Company Ltd), they would have been 'adopted' or 'taken over' by EDF's statutory predecessor, the LEB, by virtue of any purported maintenance work. Further, there is no documentary evidence to support that EDF itself adopted the R&Ls at any stage.

In this respect, the Authority notes that the historical correspondence from Offer / Ofgem and DTI (referred to at paragraphs 4.26 to 4.29 of the Islington Submission Document and in the Appendix to this document) also supports EDF's view, i.e. that London Electricity placed seals on equipment to prevent illegal abstraction of electricity and such seals do not denote ownership or control.

6.1.2. There is no evidence of any specific agreements between the Councils and EDF or its statutory predecessors as to the terms on which the R&Ls were installed.

6.1.3. There is no evidence that EDF or its predecessors have ever included charges for renewing R&Ls in its authorised charges or charging statements.

6.2. In addition, EDF makes the point (which, while not agreed, was not challenged by any evidence to the contrary) that the R&Ls have never been listed in any LE/LEB/EDF's asset base/schedule as its property (paragraph 28 of EDF's Further Submissions in relation to Ofgem's email

dated 11 January 2010 and letter dated 18 January 2010). By contrast, as EDF points out, each Council has purported to sell at least parts of these R&Ls to their long leaseholders: paragraph 4.17 of the Islington Submission Document, paragraph 4.34 of the Camden Submission Document and 4.44 of the Westminster Submission Document. EDF points out that such transfer would have been perfectly lawful on the basis that the R&Ls, being fixed to the land, became part of the land, in the ownership of the Councils.

6.3. There is simply no evidence as to installation, except in the case of Sadler House where Islington states that the original electrical installation was carried out in 1950 by Berkeley Electrical Engineering Company Ltd (which in any case was not a statutory undertaker under the pre-1989 electricity legislation): paragraph 5 of appendix 1 to the Islington Submission Document). Nor is there any evidence that the R&Ls were otherwise ever treated as the assets of, or as being within the operational responsibility of EDF, or that EDF ever included charges for renewing R&Ls in its authorised charges or charging statements. If it were otherwise, then Westminster and Islington (as the Councils who engaged private contractors to carry out work on their internal electrical infrastructure), would have acted inconsistently with the rights and obligations on EDF, and EDF would now have to adopt that work at its own risk and expense.

6.4. In summary, therefore, the Authority finds that EDF and its predecessors have had no role in installing or maintaining any of the R&Ls at any time. EDF does not own or have any rights or control over them.

7. INTERPRETATION OF APPLICABLE STATUTORY FRAMEWORK

Summary of parties' views

7.1. In summary, the three Councils submit that the term 'premises', as used in section 16 of the Act, means (or at least can include) each individual flat of the Council tenants, rather than the Council blocks themselves. On this basis, they submit that EDF's 'distribution system' (as defined by section 4(4) of the Act) does (or can) include the electrical lines inside the Council blocks which end at the connecting terminals for each flat (being the

isolating switch at each unit). Their primary argument is that EDF is required to maintain its "distribution system" (including, here, the R&Ls in the Council blocks) at its own cost, and that the relevant "connection" for the purposes of section 16(1) is at the point of each individual tenant flat.

7.2. Insofar as section 19 of the Act entitles a distributor to recover expenditure reasonably incurred in the provision of electric lines and electrical plant in pursuance of section 16(1), the Councils argue that section 19 only applies when establishing or maintaining a connection *between* a distribution system and the individual flats. Since the R&Ls (as they contend) already form part of EDF's distribution system, they argue as their primary case that section 19 does not entitle EDF to recover expenses for renewing electric lines / plant, since they are already part of that system[7]. Thus Westminster, for example, submits that EDF's right to recover expenses under section 19 is limited to the costs of any electric line or plant used to connect the isolating switch or meter in each flat to the distribution system before that isolating switch or meter[8] (since this is not part of the distribution system).

7.3. In the alternative, if the R&Ls do not already form part of EDF's distribution system, then the Councils argue that they are entitled to request a connection (or request that EDF maintain the connection) pursuant to section 16 of the Act between EDF's distribution system and the individual flats, because the individual flats are each (or can each be) "premises" for the purposes of section 16. EDF thus has a duty to make and maintain a connection. On this alternative case, the Councils accept that they would have to pay EDF's reasonably incurred expenses pursuant to section 19.

7.4. EDF does not accept that the lines used to convey electricity within the Council blocks are part of its 'distribution system'. Rather, EDF maintains that the R&Ls are, and have been treated by the 3 Councils as being, in the Councils' ownership and control (as the freehold owners of the Council block buildings), as is clear from the terms of the Councils' leases with their tenants. EDF state that the R&Ls were not installed by EDF, are not owned by EDF and do not form part of their distribution system.

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[7] For example, Camden's submissions at paragraphs 19-21 & 33-35 of Appendix 2 to the Camden Submission Document

[8] Paragraph 3.11A of Westminster's submissions in the relevant Submission Document

7.5. EDF's principal case is that (for reasons summarised below) they have no obligation to offer terms to renew the R&Ls under section 16 of the Act. Renewal is simply a matter for the Councils, or (if different) owners of the R&Ls. Alternatively, EDF argue that if it is found that they do have an obligation to renew, then that duty can only arise under section 16 of the Act (as indeed the Councils accept and assert, on their alternative case) and EDF can therefore charge reasonably incurred expenses for such renewal under section 19 of the Act[9]. At least by the time of the Oral Hearing on 27 April 2010, therefore, the parties' alternative cases appear to coincide.

7.6. In support of its primary case that it has no obligation to offer terms at all, EDF argues that the term "premises" in section 16(1) of the Act is not capable of including individual units within buildings: it is defined in section 64 of the Act by reference to "any land, building or structure", which here means the entire block in each case. The distributor may thus be required (on request) to make a (single) connection to the premises owned or occupied by the person making a request (or by an authorised supplier acting with the consent of that owner) for the purpose of enabling electricity to be conveyed to or from the same premises. EDF submits that the language of the statute assumes one connection to one owner of a building or premises. EDF state that section 16 of the Act is not drafted to provide for multiple requests for connections in the same building by multiple owners where none can be actioned without the consent of the freeholder / owner of the common parts. In other words, section 16 of the Act cannot be read to permit one owner (the freehold owner) to demand multiple connections, nor can the individual lessees make such a request. No distributor can be required to offer terms for installation of internal electrical infrastructure within a building under section 16(1) or to continue it under section 16(4)[10] of the Act.

7.7. EDF argues that even if section 16 of the Act meant that a distributor could be compelled to install the internal infrastructure of a building, it is not reasonable in all the circumstances to do so under section 17 of the Act. EDF states that the work would involve removing the old cables from

[9] Paragraph 4.6 to the Westminster Submission Document, and/or paragraph 4.7 of the Islington Submission Document

[10] Paragraphs 4.39 to 4.42 of the Islington Submission Document

the fabric of the building and would require wayleaves to be compulsorily obtained[11].

7.8. EDF further argues that even if sections 16 and 17 of the Act do (contrary to the above argument) permit freeholders or individual unit owners to demand connections, section 19 of the Act allows a distributor to charge reasonable costs of renewing electrical infrastructure inside a building, whether or not the R&Ls had technically become part of its 'distribution system'. So if section 16 of the Act does apply to multi-occupancy buildings, such that EDF is required to provide electric lines necessary to create / maintain a connection, section 19 of the Act would allow it to charge accordingly[12].

7.9. The Authority discusses below the various parts of the parties' arguments and sets out the Authority's views.

Meaning of "Premises"

7.10. The convenient starting point in analysing the parties' submissions is the definition of the term "premises" in the Act. The Authority considers that the term "premises" under section 16 of the Act is capable, as the Councils contend, of meaning not merely a block of flats, but individual flats within a block. It does so for a number of reasons.

7.11. First, the term is broadly defined in the Act. Section 64(1) states that "premises" includes *"any land, building or structure"*. This is not an exclusive definition, but merely gives an indication of the width of the provision. It does not of itself resolve the issue of whether separately owned or occupied units within one "building" can be separate "premises". But the Authority does not accept, as EDF asserts, that the language of the statute assumes that there will be only one connection to one owner of a building or a free-standing premises. As Islington points out, the definition does not define premises by reference to "a building".

7.12. Some assistance is given by the case of Thames Water Utilities Limited v. Hampstead Homes [2003] 1 WLR 198, where the Court of Appeal held that

[11] Paragraph 4.43 of the Islington Submission Document
[12] Paragraph 4.45 of the Islington Submission Document

it was a question of fact and degree as to whether, where an existing office block was converted into 109 flats, the result was or included the construction and connection of "premises" which had never previously been connected to the water and sewerage system - or whether the conversion retained the identity of "premises" which existed and were connected before the conversion took place. On the facts, the Court found that the 109 flats were new "premises" which had never previously been connected.

7.13. As EDF has rightly pointed out, the decision in Thames Water is distinguishable on a number of bases. The statutory wording of section 45 of the Water Industry Act 1991 at issue in that case is in significantly different terms to section 16. In particular, it refers to "*the owner or occupier of any premises ... which ... consist in the whole or any part of a building*" (emphasis added), thereby strengthening the argument that a flat in a block can constitute "premises" for the purposes of that legislation. Further, the central issue in that case was not whether the flats were or could be "premises" at all, but whether or not their conversion had resulted in *new* premises. Nevertheless, the judgment did proceed on the basis that the individual flats could be (and were, on the facts) "premises" for the purpose of the legislation, and it is of some persuasive force in demonstrating how a roughly contemporary statute dealing with the same issue in respect of another utility did contemplate that "premises" would have the wide meaning which the Councils contend here. The case also emphasises that the meaning of "premises" in any particular case is a matter of fact and degree; not (as EDF asserts) of absolute meaning by reference solely to linguistic considerations.

7.14. A second consideration in favour of according "premises" a wide meaning so as to include individual flats in section 16 is that (as EDF concedes) the same term must be capable of bearing such a wide meaning in section 4 of the Act. Section 4(4) (defining certain terms for the purposes of Part 1 of the Act) defines "distribute", in relation to electricity as:

> "*distribute by means of a distribution system, that is to say, a system which consists (wholly or mainly) of low voltage lines and electrical plant and is used for conveying electricity to any premises or to any other distribution system*".

7.15. As EDF recognises (and indeed asserts as part of its case), a person in the position of one of the Councils may be an "exempt distributor" (referred to further below at paragraph 7.25 et seq.), where the council owns the R&Ls – the distribution system internal to the block – and have a single point of supply from the main distributor. Such an exempt distributor "distributes" electricity within the meaning of that term in section 4(4). But in that case, it is clear that "premises" must be capable of meaning the individual flats, because an exempt distributor conveys electricity from some "other distribution system" (i.e. EDF's) *to* "any premises", which can only be the individual flats.

7.16. While, as EDF contend, it is not impossible for the same term to bear different meanings in different sections in the same statute (indeed, in the same Part of the same statute) where the context so demands, it is not the natural reading of the provisions. Absent some good reason to construe them differently, the Authority would expect the meaning of "premises" in section 16 to accord with what is, after all, a definitional provision for the purposes of Part I of the Act in section 4(4) (albeit not a definition of "premises").

7.17. A third, and strong, reason for according "premises" in section 16 a wide meaning arises from the wording of section 16 of the 1989 Act *before* it was amended by the Utilities Act 2000 and hence before the functions of distribution and supply of electricity were split in the currently enacted legislation. In its unamended form, section 16(1) required a "public electricity supplier", "*upon being required to do so by the owner or occupier of any premises*", to:

> "*(a) give a supply of electricity to those premises; and*
> *(b) so far as may be necessary for that purpose, provide electric lines or electrical plant or both".*

7.18. It must have been the case that, under the unamended section 16, an individual flat owner could request a *supply* of electricity to his or her premises – i.e. the individual flat – pursuant to section 16(1)(a), from EDF or its statutory predecessor. "Premises" in section 16(1)(a) must therefore have been capable of bearing the wide meaning contended for by the Councils. But if that is the case, it would be very surprising were "premises" in the opening words of unamended section 16(1) not to bear

the same meaning - so that, at least pre- 2000, an occupier of a flat could request not merely a supply to his or her flat, but (pursuant to unamended section 16(1)(b) of the Act) electric lines or plant insofar as necessary for the purposes of supply.

7.19. On that basis, the Authority would expect, absent some clear reason for a different approach, the word "premises" in section 16 to bear the same wide meaning after its amendment. EDF's case would appear to involve the proposition that the split of supply and distribution functions effected by the amending Utilities Act 2000 had the effect of *narrowing* the definition of "premises" for the purpose of distribution, so that a flat owner could no longer require the provision of electric lines to his or her "premises", because the flat would no longer count as "premises". There would appear to be no indication that there was any such statutory purpose in making the amendments.

7.20. For all these reasons, the Authority rejects EDF's submissions as to the meaning of "premises" and prefers the approach of the Councils.

Distinction between "Premises" and "distribution system"

7.21. The above conclusion merely establishes that "premises" *can* bear the wider meaning contended by the Councils i.e. that in the case of multi-occupancy residential buildings, the term "premises" is capable in principle of including individual flats within a block. But it is does not follow that just because the Authority agrees with the Councils in this respect, the R&Ls in the common parts of the blocks under the freehold ownership of the Councils therefore necessarily formed part of EDF's "distribution system". Even if individual flats can be "premises", that does not mean that the Council blocks themselves are not also capable of being "premises" which house electrical infrastructure in the common parts of the buildings. Accordingly, it is next necessary to look at what has occurred in relation to these particular Council blocks and whether the electrical infrastructure in the Council's blocks can be regarded as forming part of EDF's "distribution system" within the meaning of the Act.

7.22. In this connection, the Authority notes that section 4(4) defines a "distribution system" generally as consisting *"(wholly or mainly) of low*

voltage lines and electrical plant ...used for conveying electricity to any premises or to any other distribution system". But section 16(1)(a) and (b) refers to connections between a "distribution system *of his*" (emphasis added), i.e. a system "of" a licensed distributor and a "premises" or a "distribution system" "of" another authorised distributor. In the Authority's view, the word "of" in section 16 contemplates ownership or, or at the very least, continued possession, maintenance or operation of the relevant electric lines and plant which are said to form part of its "distribution system". That being so, then in the absence of any evidence that internal wiring within blocks erected and owned by the Councils was ever installed, owned, operated or maintained by EDF, it is reasonable to conclude that responsibility for the R&Ls remains with the Councils (subject to any landlord/tenant or landlord/lessee arrangements). If that is right, then internal electrical infrastructure (including the R&Ls) in the common parts of the Councils' blocks should be regarded as forming part of the land owned by the Councils themselves: see Melluish v BMI (No. 3) [1996] AC 454. As addressed above (at paragraphs 6.1 to 6.3), there is no evidence that the EDF or its predecessors was ever asked (until the recent requests) to make or maintain a connection between its distribution system and any premises other than the main block in each case.

7.23. Accordingly, on the basis of what the Authority considers to be the proper construction of section 16 of the Act and the evidence b*efore it, the Authority concludes that the R&Ls did not, as at the date of the recent requests, form part of EDF's distribution system. EDF had never* done any work on the R&Ls which might (on the Council's argument) have led to the connections between the individual flats and the main point of connection to the blocks becoming part of EDF's distribution system.

7.24. The Authority therefore considers that the R&Ls are the responsibility of the relevant Councils (subject to any landlord/tenant or landlord/lessee arrangements) and there is no evidence of any action taken by EDF (or its predecessors) to suggest that a duty to control, operate or maintain the R&Ls transferred to EDF.

Councils as exempt distributors

7.25. The Authority recognises that there is a class of electricity distributor under law which is exempt from holding a licence. The Authority notes EDF's contention that the Councils can properly be regarded as having responsibility for their own R&Ls as "exempt distributors" under the Electricity (Class Exemptions from Requirement for a Licence) Order 2001: paragraph 4.64 of the Westminster Submission Document, paragraph 4.54 of the Camden Submission Document and paragraph 4.53 of the Islington Submission Document). This Order, made under section 5(1) of the Act, has the effect of exempting a person coming within its terms from the prohibition on unlicensed distribution imposed by section 4(1) of the Act. Such a person is not authorised to distribute by way of licence (under section 6 of the Act), and is not an "electricity distributor" within section 6(9) of the Act, but is nonetheless entitled by virtue of a class exemption to distribute through a distribution system[13]. That is clear from the terms of section 16(1)(b), which contemplates a request for a connection to be made between the distribution system of a licensed distributor and that of another "authorised distributor", defined in section 64 of the Act as a "person authorised by a licence *or exemption* to distribute electricity" *(emphasis added)*.

7.26. The Authority notes that when Ofgem queried with the Councils whether they considered that they were operating a private distribution network under a relevant class exemption they responded that they were not[14]. In the Authority's view, however, this is not significant for the purposes of the determination. There is no requirement on persons to apply for the benefit of a class exemption, or otherwise to notify their status. Thus the issue is not one of knowledge or intention, but is one of legal classification of their status.

7.27. The Authority considers that EDF's argument is supported by the DTI's consultation document published before making the 2001 Exemptions

[13] For example, exemption is granted to persons falling within Class A (Small Distributor's) in Schedule 3 of the Electricity (Class Exemptions from Requirement for a Licence) Order 2001 who do not at any time distribute more electrical power than 2.5 megawatts for the purpose of giving a supply or enabling a supply to be given to domestic customers.

[14] In email from Islington dated 27 April 2010 (timed 08.49), email from Camden dated 23 April 2010 (timed 13.16), email from Westminster dated 26 April 2010 (timed 15.41), in response to questions asked by Ofgem on 19 April 2010. Also in email from Westminster dated 25 February 2010 (timed 11:06) and Appendix 2 of the Westminster Submission Document, in a letter from Islington dated 3 March 2010 and email from Camden dated 17 March 2010 (timed 10:17).

Order, *"Exemptions from the Requirement for a Licence to Distribute Electricity"* (the "2001 Consultation Document"), which Ofgem sent to the parties on 10 May 2010, inviting comments in writing. The Authority notes the submissions made by the parties. In particular, Camden pointed out, in its email of 14 May 2010, that the 2001 Consultation Document refers to the Government's obligation under the then applicable relevant Directive to ensure that the distribution system covers all wires going to the end user for the supply of electricity (clause 6.1 of the 2001 Consultation Document) and that, if the case for EDF is correct, the Councils will be distributors but the exemption will apply to them just as it will apply to landlords who requested the supply/connection themselves. Camden notes that the 2001 Consultation Document does not state that a distributor such as EDF cannot or will not be the distributor to the flats.

7.28. In its email of 14 May 2010, Westminster notes that it is not an "electricity distributor" within the meaning of the Act as, pursuant to section 6, this term *"means any person who is authorised by a distribution licence to distribute electricity"*. As noted above, this definition does not include any person who is exempt, under section 5 of the Act, from requiring a licence (and Westminster would be exempt if the R&Ls were to be deemed to form a "distribution system" within the meaning of the 1989 Act). The Authority notes that the definition of electricity distributor does not include any person who is exempt, under section 5 of the Act, from requiring a licence but (also as noted above at paragraph 7.25 of this document), such a person could nonetheless, by section 64, possibly be an "authorised distributor" (as referred to in section 16(1)(b) of the Act), since this includes an exempt distributor. Westminster also states that it is impermissible and wrong in law for the DTI's March 2000 consultation document to be used in any capacity as an aid to the construction of legislation.

7.29. Westminster also notes that the March 2000 consultation document was drafted prior to the passing of the Utilities Bill. In this context, Westminster notes that paragraph 50 of the official Explanatory Notes to the Utilities Act 2000 does not follow the DTI Consultation Document's example of "systems of wires" in a "caravan site" or a "block of flats". Rather, Westminster argues that paragraph 50 of the official Explanatory Notes to the Utilities Act 2000 takes these same settings and provides a

restricted interpretation: "*Examples might be the owner of a caravan who* resupplies power to each of the caravans, or a local authority which operates a combined heat and power scheme for a block of flats". Westminster considers that it is neither "resupplying" electricity to the occupiers and owners of the individual flats by means of the R&Ls and nor is it operating any form of combined heat and power scheme. In an email to Ofgem dated 17 May 2010, Islington states that it adopts Westminster's response.

7.30. The Authority considers that the DTI Consultation Document provides evidence of the Government's understanding which was that distribution networks "as small as blocks of flats" should be exempted from the requirement to hold a distribution licence by the proposed class exemption (see in particular, paragraphs 6.1 and 6.3.3 of the DTI Consultation Document), and that such exemptions would be required for someone other than the public electricity supplier/distributor: paragraph 4.1 of that document.

7.31. The Authority considers that whilst this does not on its own provide an *answer to the question of who, in a particular case, is responsible for (and* thus requires to be licensed or exempted from the requirement to be licensed) a particular distribution system, it does demonstrate that an analysis which leaves the Councils responsible as exempt distributors is not contrary to the Government's understanding of the regulatory position.

7.32. In any event, the Authority notes that the issue regarding exempt distributors is not a matter for the determination and does not alter the outcome of the determination.

Status of a request to make or maintain a connection

7.33. It follows from the above conclusion (i.e. that the R&Ls did not, as at the date of the recent requests, form part of EDF's distribution system) that the Authority must consider whether the Councils were entitled to request EDF to make or maintain a connection to anything other than the relevant block itself. In other words, were the Councils entitled to make a section 16 request to maintain or replace the R&Ls, treating the "premises" in respect of which the request was made as the individual flats?

7.34. The starting point, in the Authority's view, is that there is already a "connection" (in the broad sense of an electrical connection) in place to the individual flats. The Councils are not in reality asking, or able to ask, EDF to "make" a new connection to the individual flats (i.e. to provide new wiring to the flats) but requesting that action be taken (by renewing or replacing the R&Ls) to maintain the existing connection (which as noted above, may be the connection to the exempt distribution system of the Councils). Any such request thus falls to be considered within the terms of section 16(4)(a) (duty to maintain a connection).

7.35. The Authority considers that the section 16(4)(a) duty to "maintain" a connection only applies to a connection which has originally been made pursuant to a section 16(1) request; i.e. one which has become part of the distributor's distribution system. That is clear from the wording of section 16(4)(a), which is drafted in terms of "maintaining the connection", referring back to the "making [of] a connection" in the opening words of section 16(4)(a), and thereby referring back to the making of a connection under section 16(1).

7.36. Accordingly, the duty to maintain a connection upon request under section 16(4)(a) does not arise or exist in respect of lines or plant which were never installed by or on behalf of the relevant licensed electricity distributor or its predecessor. This outcome accords with a workable and sensible system, and a conclusion to the contrary would result in a distributor having a duty under section 16 to maintain internal wiring inside properties which it never installed, and has never had any involvement with. The Authority does not think the legislation intended this result.

7.37. Accordingly, since in the case of the three blocks EDF did not install the R&Ls, it cannot now in the Authority's view be required under section 16 to maintain that connection by replacing the R&Ls under section 16(1).

7.38. The Authority adds that, in any event, any section 16 duty is subject to considerations of reasonableness in section 17 ("Exceptions from duty to connect"). It might very well not be reasonable for a distributor to be required to maintain (or make) a connection consisting of R&Ls at the

request only of certain premises (i.e. certain flats) within a block, whether that request came from the individual flat owners or lessees, or the council as owner/lessor (section 17(1)(c)). It might well be that only a collective request could be treated as one which it would be reasonable for the distributor to comply with. Furthermore, there could well be questions of access and permission to do work which would render it impossible to carry out the work, thus coming within the exception in section 17(1)(a). For instance, if EDF is asked to effectively adopt the assets and maintain them, they will then become responsible for them under law. In this instance, EDF will want to be absolutely certain that no-one else has access to their assets and this will be difficult given that they will be in someone else's building. This is not insurmountable, but the Authority would expect that EDF would need a workable set of contracts in place to protect EDF's assets. However, the Authority does not pursue this issue because it does not, on the Authority's findings, arise.

7.39. It is open to the Councils to ask EDF to maintain/repair and essentially adopt the R&Ls. However, the Authority notes that this would not be a request under section 16 of the Act, and therefore not covered by the Authority's powers to determine disputes.

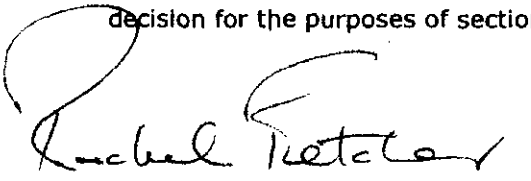
8. DETERMINATION

8.1. Having due regard to all of the points outlined above, the Authority has concluded that:

8.1.1. Since, in the case of Sadler House on the Spa Green Estate in Islington, John Aird Court in Westminster and Dorney House on the Chalcots Estate in Camden, EDF did not install the R&Ls, it cannot now be required under section 16 of the Act to maintain that connection by replacing the R&Ls under section 16(1) of the Act. Therefore, the relevant Council bears responsibility for renewing the R&Ls inside the common parts of Sadler House on the Spa Green Estate in Islington, John Aird Court in Westminster and Dorney House on the Chalcots Estate in Camden, subject to any landlord/tenant or landlord/lessee arrangements.

8.1.2. It follows that EDF cannot be required to bear the cost of such renewal under section 19 of the Act. Therefore, the relevant Councils are to bear the cost of renewal of the R&Ls inside the common parts of Sadler House on the Spa Green Estate in Islington, John Aird Court in Westminster and Dorney House on the Chalcots Estate in Camden, subject to any landlord/tenant or landlord/lessee arrangements.

8.2. This document constitutes a notice stating the reasons for the Authority's decision for the purposes of section 49A of the Act.



Rachel Fletcher **12 August 2010**

Partner, Distribution

Duly authorised on behalf of the Gas and Electricity Markets Authority

APPENDIX

1. FURTHER ISSUES REFERRED TO BY THE PARTIES IN THEIR FRONT END DOCUMENTS AND IN RESPONSE TO QUESTIONS BY OFGEM

1.1. This Appendix addresses supplementary issues raised by the Councils and EDF in the course of these disputes which, in the Authority's view, were either not, or are no longer, strictly relevant to, or not determinative of, the primary issue which arises in these disputes, namely the proper construction of the regime in sections 16 to 21 of the Act. Nevertheless, the Authority has considered these issues and has therefore addressed them below.

Submissions on historical statutory framework

1.2. The Authority notes that Camden has sought to rely on predecessor legislation to the Act by submitting that the duty to supply electricity prior to the enactment of the Act (and before distribution and supply were conceptually split in the amendments made by the Utilities Act 2000) has always included the obligation to provide electric lines to the consumer terminals on the contracting party's premises. Camden explained that, historically under the Electric Lighting Act 1882, anyone in the relevant area was able to contract for supply and, under the Electric Lighting (Clauses) Act 1899, any owner or occupier of any premises was able to do so, i.e. those in individual flats (paragraph 3.1 to paragraph 3.3 and appendix 2 of the Camden Submission Document).

1.3. Camden submitted that once a contract is made, the duty has always been for the supplier to provide lines to the terminals of the consumer on the contracting party's premises (Attorney-General v Leicester Corporation [1910] 2 Ch 359); in this case, Camden submitted, up to and into the flats. Camden went on to assert that the Act (irrespective of property or contract law) then defines the lines provided for that connection as being the distribution system of the electricity distributor. Section 4 of the Act defines the distribution system to mean the lines and plant used to convey electricity to any premises. Therefore, once lines are laid to any premises, Camden maintains that those lines are part of the distribution system for

the purposes of the Act. The distributor, as with the supplier before, is responsible for its distribution system.

1.4. EDF considers that the schedule to the Electric Lighting (Clauses) Act 1899, the Act and the Utilities Act 2000 have two central features, namely that work carried out to make the connection includes work to continue or maintain such a connection and the undertaker can offer terms and charge for that work (paragraph 4.38A of the Camden Submission Document).

1.5. The Authority notes the submissions made by Camden on the historical statutory framework. However, it does not consider that the arguments advanced by Camden in this respect affect the Authority's analysis in section 7 of this document.

1.6. First, the enactment of the (unamended) Act in 1989 significantly reformed the statutory scheme for supply of electricity and the nature of obligations on electricity suppliers. As distinct from the pre-1989 legislation relied on by Camden, it has been held that agreements for supply of electricity under section 16 of the (unamended) Act were not to be regarded as contractual, absent any "special agreements" under section 22: see Norweb Plc v Dixon [1995] 1 WLR 636 (per Dyson J).

1.7. Second, whilst Camden has sought to rely on authority from the early 20th Century (i.e. Attorney-General v Leicester Corporation [1910] 2 Ch 359) to support its argument that supply of electricity continues up to the terminals on the "consumer's premises", that case did not consider the position (as here) with respect to multi-occupancy, Council owned blocks of flats. In this respect, the Authority considers that the concept of a "consumer" under pre-1989 legislation (which is absent from the sections 16 to 21 regime in the Act) may have embraced a local authority itself in respect of the common parts of Council blocks for which it took a supply of electricity and had an independent electrical installation.

1.8. Third, the Authority also considers that Camden's argument does not address the point that where existing lines have been installed by / under the responsibility of the Councils and not EDF (there being no evidence that EDF or its predecessors actually provided the R&Ls in the Council blocks in the first place), those lines cannot form part of the EDF's

"distribution system" within the current meaning of the Act, and cannot be subject to a statutory duty to maintain thereafter.

Layout of the electrical infrastructure

1.9. The parties have provided information as to the particular layout and setup of the relevant electrical infrastructure within their respective blocks. The factual details are set out at Appendix 1 of the Submission Documents. EDF submitted that in respect of any building constructed in the last 80-90 years, the building would have been wired when constructed by the builder or main contractor / specialist subcontractor: paragraph 4.9 of the Westminster Submission Document and the Camden Submission Document, and paragraph 4.10 of the Islington Submission Document. Westminster submitted that the a statutory definition of "distribution system" applies regardless of issues of original installation or ownership, and that the "distribution system" supplying the flats ends with the isolating switch (invariably located with or as part of the meter) in the individual flat: see paragraph 3.10A(vi) & (vii) of the Westminster Submission Document. EDF stated that metering may take place in the individual flats, directly outside or in various parts of the common parts (paragraph 4.10 of Westminster Submission Document and the Camden Submission Document, paragraph 4.11 of the Islington Submission Document).

1.10. EDF maintained that they have no influence over where the meters are first sited or where they may be sited if they are moved, as the decision to move a meter from the basement or other communal part to inside the flat is one made by the supplier/meter operator and the customer. Its case was that its responsibility could not be enlarged by that decision: paragraph 4.11 of the Westminster Submission Document and the Camden Submission Document, paragraph 4.12 of the Islington Submission Document.

1.11. The Authority has considered the layout of the infrastructure in the relevant blocks, and the issue regarding the location of metering, but concluded that the above points do not take matters any further. As Westminster has contended, the issue is the proper meaning of terms such as "distribution system" in section 16 of the Act. For the reasons set out in

section 7 of this document, the Authority has concluded that the R&Ls in the blocks do not form part of EDF's distribution system.

Safety Regulations

1.12. Camden previously argued[15] in the course of correspondence with EDF that LEB "owned" the electrical infrastructure in the Council blocks; that that ownership transferred to EDF; and that by virtue of the Electricity Safety Quality and Continuity Regulations 2002 ("ESQCR") "the distributor is responsible for the works necessary to ensure that the electrical infrastructure complies with [ESQCR] Regulations and hence for the cost of the replacement of the electrical infrastructure, including the risers"[16].

1.13. EDF argued that the original Electricity Supply Regulations 1937 ("ESR 1937"), in force at the time that the R&Ls were installed, made clear the circumstances in which responsibility for R&Ls lay with its statutory predecessor, LEB: i.e. where lines were actually placed by LEB on the premises of a consumer and either belonged to LEB or were in its control, which has never been the case here. EDF said that position was not materially altered by the updated Electricity Supply Regulations 1988 ("ESR 1988"), or the ESQCR, which were not intended to transfer ownership of assets such as the already installed R&Ls. Furthermore, the maintenance liability of distributors under the ESQCR is based on actual ownership or 'operation' of the R&Ls by EDF, and they have not been 'operated' by EDF at any point.

1.14. The Authority has considered the application and effect of the ESR 1937 and 1988, together with the ESQCR (collectively, "the Regulations"). In the Authority's view, they are of limited assistance in determining the central issue concerning the proper interpretation of the primary statutory regime in sections 16 to 21 of the Act. However, to the extent that they are relevant to whether "responsibility" for maintaining and/or renewing the R&Ls has historically rested and/or continues to lie with EDF *by virtue of those Regulations*, the Authority prefers the arguments of EDF. The ESR 1937 (as the regulations in force at the time that the blocks were built) made provision at regulation 25 for statutory undertakers to be

[15] In correspondence with EDF dated 11 January 2007
[16] Letter of Camden to EDF dated 11 January 2007, in relation to which EDF's response is at paragraph 4.19-4.22 of the Camden Submission Document

"responsible for all electric lines and apparatus placed by them on the premises of a consumer and either belonging to the Undertakers or under their control..." (emphasis added). As stated above, there is no evidence that EDF's predecessors ever "placed" R&Ls or other electrical infrastructure inside the common parts of the Council blocks or the flats themselves, and/or that they otherwise had control of them from the point of installation. Likewise, the ESR 1988 provided (at regulation 25(1)) that a "supplier shall ensure that all his works on a consumer's premises which are not under the control of the consumer (whether forming part of the consumer's installation or not) are– (a) suitable for their respective purposes; (b) installed and, so far as is reasonably practicable, maintained so as to prevent danger;..." (emphasis added). "Suppliers works" was defined as meaning "electric lines, supports and apparatus of or under the control of a supplier used for the purposes of supply, and cognate expressions shall be construed accordingly; ..." (emphasis added). As already explained, there is no evidence that EDF's predecessors carried out works belonging to them (as denoted by "of" in regulation 25(1)) or works over which they have continued to maintain control.

1.15. The ESQCR currently provide for comparable obligations on 'distributors' (and others) for their "networks" and "equipment" after the distinction between distribution and supply was introduced into the Act in 2000. "Distributor" is defined in regulation 1(5) as meaning (so far as relevant) "a person who owns or operates a network...". To like effect, regulation 1(6) provides that "In relation to a distributor, generator or meter operator a reference in these Regulations to his network, his overhead line, his substation or his equipment is a reference to a network, an overhead line, a substation or equipment (as the case may be) owned or operated by him" (emphasis added). The concept of a "network"[17] (as opposed to a "system") does not feature in the sections 16 to 21 regime of the Act. But it appears to the Authority that, as with its reading of "distribution system" in section 16(1) of the Act, the absence of any evidence that the R&Ls were ever installed, owned or subsequently operated (in any commonly understood sense) by EDF or its predecessors leads to the conclusion they should not be regarded as forming part of EDF's "network" or equipment

[17] Defined in regulation 1(5) of the ESQCR as meaning "an electrical system supplied by one or more sources of voltage and comprising all the conductors and other equipment used to conduct electricity for the purposes of conveying energy from the source or sources of voltage to one or more consumer's installations, street electrical fixtures, or other networks, but does not include an electrical system which is situated entirely on an offshore installation".

under the ESQCR for which EDF is responsible. The Authority is also satisfied that the effect of the introduction of the ESQCR was not to transfer ownership of, or responsibility for, the R&Ls to EDF in circumstances where previous legislation did not establish that EDF / its predecessors ever had possession or operational control of them in the past. It is unlikely that any of these sets of Regulations were ever intended to impose liability on suppliers or distributors for the safety of electrical infrastructure of which they have never had ownership or operational control. Furthermore, insofar as the provisions of the ESQCR adopt other terms which are not in the sections 16 to 21 regime of the Act (e.g. "consumer" and "consumer's installation"), these raise further difficulties of interpretation in relation to multi-occupancy apartment blocks under the freehold ownership of local councils.

1.16. Consequently, the Authority considers that the ESQCR take matters no further in determining whether EDF either owns or otherwise has responsibility for renewing the R&Ls in the Council blocks under sections 16 to 21 of the Act.

Charging

1.17. Westminster argued that the costs of maintenance of the R&Ls should have been included in the price charged by EDF's predecessors at the time R&Ls were installed as part of the capitalised value of expenses referred to in section 19(4) of the Act[18]. EDF asserted that it and its predecessors have never included sums for renewing risers and laterals in their authorised charges, and there was no basis for them to do so: paragraph 4.33 of the Westminster Submission Document and paragraph 4.23 of the Camden Submission Document and the Islington Submission Document.

1.18. The Authority notes that it is now agreed by all parties and referred to earlier in this document that there is no evidence that EDF or its predecessors have ever included charges for renewing R&Ls in its authorised charges or charging statements[19]. The Authority notes that EDF provided Ofgem with a Witness Statement from Tony Woods dated 21 April

[18] Paragraph 3.15 of the Westminster Submission Document
[19] Email from Islington dated 27 April 2010 (timed 08.49), email from Camden dated 23 April 2010 (timed 13.16), email from Westminster dated 26 April 2010 (timed 15.41) and EDF's Skeleton Argument for Oral Hearing dated 27 April 2010

2010 which confirms there was never a capital sum charged in respect of the renewal of R&Ls.

1.19. The Authority considers that whether or not EDF could or should have included sums for renewing risers and laterals in their authorised charges is properly regarded as a consequence of the determination of these disputes: it does not have an effect on the proper construction of the currently enacted legislative scheme.

1.20. The Authority notes Westminster's argument that if EDF do have the right to make a charge for renewing R&Ls then EDF should develop a policy to set out the basis on which they will charge for renewing R&Ls. Westminster indicated that it would welcome clarification as to the principles applicable to maintenance of electricity supplies to multi-occupied buildings: paragraph 3.22 of the Westminster Submission Document. Further, the Authority notes Islington's contention that if EDF is entitled to charge Islington for renewing the R&Ls, Islington is entitled to know the precise legal basis for the charging and the methodology to be applied: paragraph 3.18 of the Islington Submission Document). Whilst the Authority recognises Westminster's and Islington's concerns, in light of the Authority's findings in sections 5 to 7 of this document, the Authority considers that the issue is not relevant to the determination.

'Electricity Metering Protocol' produced by the Review of Electricity Metering Arrangements Emergency Services Expert Group

1.21. In producing its statement of facts, Camden relied on a document entitled 'Electricity Metering Protocol' produced by the Review of Electricity Metering Arrangements Emergency Services Expert Group (REMA). Camden recognises that REMA is not a body that can determine the proper interpretation of the legislation, and that REMA was set up on behalf of the industry. But Camden maintained that their observations are still of note: Transcript of the Oral Hearing on 27 April 2010, page 21, paragraph A.

1.22. Camden stated that the purpose of the REMA document is to provide a protocol for existing and future providers of metering services. At paragraph 3.9 and 3.20 to 3.25 of the Camden Submission Document, Camden set out what it considered to be the relevant extracts of the REMA

document. In summary Camden stated that, from the relevant extracts/sketches of the REMA document (provided to Ofgem as part of Camden's Statement of Case dated 27 February 2008), REMA recommends that the division between (i) distribution; (ii) metering; (iii) further distribution (where the customer is not directly connected with the installed meter) and (iv) customer installation should be made according to (i) the main cable into the premises; (ii) primary metering; (iii) customer distribution and (iv) customer installation. The cabling and installation after (as in this case) the main isolating switch is the responsibility of the customer. Camden also stated that the statutory duty of the distributor is to maintain the connection that is made at this place. Camden asserted that the distributor has responsibility for all mains cables, all transformer units, primary and secondary distribution and associated fused connections, meters and connections to the consumer's unit.

1.23. Camden further pointed out REMA's observation that "one rule emerges", which is that where metering is situated in communal metering area then the risers are normally privately owned and where metering is situated in the individual flats then risers are normally owned by the distribution business.

1.24. EDF disputes the relevance of the REMA document: see paragraph 4.78 of the Camden Submission Document. EDF stated that it is concerned with metering and the responsibilities of the metering company. So far as what the REMA document calls "High Risers and Laterals" are concerned, the situation is complex and needs consideration that is more detailed. EDF pointed out that no source is given for the "one rule" and that it appears to suggest ownership is guided by reference to the position of meters, which is a matter of chance and can be influenced by outside parties (as noted above).

1.25. The Authority notes the points made by Camden and EDF, and considers that this document does not take the dispute any further. It appears to set out recommendations in relation to responsibilities of metering companies. In any case, REMA's observations do not alter, and are not a proper interpretative guide to, the statutory scheme in sections 16 to 21 of the Act. Nor, in the Authority's view, does it provide direct evidence of, or

evidence for a presumption that, EDF owned, installed, controlled or operated the R&Ls relevant to the premises with which the determination is concerned.

HSE improvement notice to Camden

1.26. Camden pointed out that the HSE has imposed an obligation on it to relocate meters to within residential flats or to otherwise introduce a single management process to manage the inspection of meter positions. Camden argued that EDF must pay for the new system as they need access to meter positions: paragraph 3.19 of the Camden Submission Document. Camden noted in the Oral Hearing of 27 April 2010 that this is not a matter which is actually before the Authority for determination, but asserted that this is an issue of practical note: one could have a situation where meters are located within residential flats or alternatively a single management process could be introduced: Transcript of the Oral Hearing on 27 April 2010, page 18, paragraph D).

1.27. EDF denied the relevance of this issue: paragraph 4.77 of the Camden Submission Document. EDF stated its understanding that the HSE has been discussing with meter operators that they would wish to see meters moved into flats but this is not an imposition.

1.28. The Authority notes that Camden provided Ofgem with a copy of that HSE improvement notice on 3 March 2010 requiring improvement across the borough to ensure suitable systems are in place to provide electrical safety. The Authority also notes that this notice was issued to Camden in its capacity as an employer pursuant to the relevant Health and Safety at Work legislation on the grounds that Camden did not have suitable systems in place to ensure that electrical systems under its control, including electrical intake rooms and communal lighting, were at all times of such construction so as to prevent danger. Further, Camden did not have suitable systems in place to ensure that these electrical systems are adequately maintained so as to prevent danger, as far as reasonably practicable. The Authority considers that this issue does not impact the determination.

St Pancras Electricity & Lighting Committee minute of meeting dated 8 January 1947

1.29. In response to questions asked of the Councils on 18 January 2009 by Ofgem, Camden provided a copy of a minute of the St Pancras Electricity & Lighting Committee meeting dated 8 January 1947 and also referred to this document in the Oral Hearing on 27 April 2010: Transcript of the Oral Hearing on 27 April 2010, page 22: paragraphs C to H, page 23: paragraphs A to D.

1.30. The Authority notes that the minute refers to the then practice in Hampstead of terminating that part of the electricity supply system which is owned and controlled by the council at a point in the basement or on the ground floor of the multi storey blocks of flats. "This procedure leaves it to the owner of premises to provide and install a main which rises to each floor for the purpose of conducting electricity to the meter positioned in each tenant's flat."

1.31. The Authority further notes the statement in the minute that "an arrangement" existed between the London County Council ("LCC") and the various electricity supply authorities, both municipally and company owned, which was operating successfully in many parts of the metropolitan area. Under that arrangement, the electricity authority provided and installed the rising mains in LCC blocks of flats at their own cost, on the understanding that the LCC provided and installed at their own cost the pipe or conduit from the rising main to the meter position in each flat and also from the meter position to the cooker position in the kitchen in each flat. A pair of wires could then be readily drawn into the latter conduit at any time required, giving the tenant free choice if gas piping has also been laid and a gas point installed in the kitchen.

1.32. The minute states a recommendation that the committee adopt a similar procedure to the above in the case of new blocks of flats. It was resolved that it should be recommended to the council that the proposed procedure be adopted.

1.33. EDF made submissions on this document on 17 March 2010, in its response to Ofgem's questions of 11 January 2010 and 18 January 2010.

EDF considered that this minute is either irrelevant or supportive of its case. EDF argued that the minute pre-dates nationalisation and supports the proposition that, until then, the council acting in its capacity as statutory undertaker had not installed the R&Ls but had stopped installation at exactly the point that EDF stated is the limit of its obligation. EDF pointed out that it is suggested in the minute that the Councils should install the R&Ls at their own expense. EDF argued that the suggestion that this idea had been taken up elsewhere in London says nothing about the extent of that take-up, to what blocks it applied or what flowed (by way of ownership) from it.

1.34. In the Authority's view, this minute does not take the dispute any further. First, it simply relates to the practice in Hampstead, which would not necessarily be the same as the practice in other London boroughs. Second, in referring to an "arrangement" reached between the LCC and electricity supply authorities as to the provision of rising main in blocks of flats (at the latter's expense), it does not provide direct evidence, or evidence for a presumption, that EDF or its predecessors ever owned, installed, controlled or operated the R&Ls, or even what the 'practice' was in connecting the particular Council's premises which are the subject of the dispute. More importantly, it does not provide a guide to the correct legal position under the legislation enacted at the time, or the currently enacted scheme in sections 16 to 21 of the Act.

Vesting of property, rights, liabilities and obligations in Electricity Boards under the Electricity Act 1947

1.35. By a letter to Ofgem dated 3 March 2010, Islington apparently sought to rely on vesting provisions under the Electricity Act 1947 ("the 1947 Act"), specifically section 14, to the effect that R&Ls installed in local authority blocks of flats by the "electrical arms" of borough councils prior to nationalisation by the 1947 Act would (presumably) have vested in EDF's statutory predecessor, the LEB. It explained that the area on which the Spa Green Estate was to be built (between about 1948-1950) was not within the Borough of Islington, but was within the Borough of Finsbury. That Borough licensed an electricity company, Central London Electricity Limited (a statutory undertaker under Schedule 2 to the 1947 Act), to supply electricity to the Borough. Islington also referred to a minute from

19 December 1947 recording approval of an estimated £20,000 for the installation of rising mains in private properties at its own expense. It was unable to provide any direct evidence as to any arrangements entered into between Islington Borough Council and the LEB for an electricity connection. Nor was it able to provide any agreements which may have been made with LEB under the Electricity (Vesting of Assets) Regulations 1948, made under section 15 of the 1947 Act.

1.36. In its Submission Document, Islington had made clear that the electrical infrastructure in the Spa Green Estate had been installed by Berkley Electrical Engineering company in 1950 (not a statutory undertaker under the 1947 Act) and that there was no evidence of any involvement by LEB: Appendix 1 to the Islington Submission Document. At the Oral Hearing on 27 April 2010, Islington confirmed that was the position and submitted that, although it still maintained that Islington Borough Council had an electrical company arm and believed that property held by that electrical arm vested in the LEB on nationalisation, this argument only applied to blocks completed and R&Ls installed before 1 April 1948. Islington therefore accepted it was not relevant for this reference: Oral Hearing Transcript of 27 April 2010 page 41: paragraph A-F.

1.37. Accordingly, the Authority considers that the Electricity Act 1947 is no longer relevant to these disputes. In any event, its provisions do not, in the Authority's view, throw light on who owned the R&Ls before or after its vesting provisions took effect, nor any presumption as to ownership, in the absence of evidence that a statutory undertaker/LEB installed, controlled or operated the R&Ls, or evidence of any agreements or registration that the R&Ls vested in the LEB.

Property law

1.38. As part of its submissions, EDF highlighted that each Council has purported to sell at least parts of these R&Ls to their long leaseholders: paragraph 4.17 of the Islington Submission Document, paragraph 4.34 of the Camden Submission Document and 4.44 of the Westminster Submission Document. EDF referred specifically to Camden's lease which imposes a service charge on its tenants for maintenance of internal wiring at Dorney House: paragraph 4.17 of the Camden Submission Document.

1.39. EDF also referred to Westminster's standard leases and argued that they are relevant because it is Westminster's case that the R&Ls belong to EDF and are part of its distribution system, whereas it was clear to EDF that R&Ls have been demised by Westminster to their Lessees: paragraph 4.88 of the Westminster Submission Document. Westminster did not consider the standard leases to be relevant in the determination as it maintained that it has only demised what it is capable of demising to a lessee. For example, if Westminster had purported to demise EDF's supply head it would merely be a purported demise which is incapable of taking effect because Westminster lacks the capacity to make such demise: paragraph 3.24 of the Westminster Submission Document.

1.40. Islington also addressed property law issues arising from the short and long leases which it has with individual council tenants. In summary, it considered that any statutory obligations on it in the context of landlord and tenant (e.g. under the Landlord and Tenant Act 1985 or Housing Act 1985) in relation to maintaining installations for the benefit of Council tenants are not strictly relevant. It does not follow from these obligations that third parties (i.e. EDF) have no obligations in relation to repair and renewal of the Council blocks' electrical infrastructure[20].

1.41. The Authority considers that any provisions in leases do not affect the proper construction and operation of the statutory scheme in sections 16 to 21 of the Act. As such, they are of limited relevance to the determination, save that the terms on which the leases were granted provide some indication that the Councils themselves proceeded on the basis that they owned the R&Ls at that time and that EDF had no role in ownership or operation.

Monopolies Commission Report

1.42. The Monopolies Commission Report on Connection Charges for Electricity and Gas dated July 1972[21] (the "Report") provides insight into how, historically, estates and tower blocks were generally connected. This is a

[20] Paragraphs 3.3-3.7 of Islington's Submission Document
[21] The Monopolies Commission, A Report on Connection Charges for Electricity and Gas, July 1972, Command 5036 setting out the Working Formula for Electricity Supplies to Council Estates

document which Ofgem referred to the parties for them to consider on the basis that it may contain material relevant to the issues being determined.

1.43. EDF, in its Further Submissions dated 17 March 2010, stated that it does not consider the Report to be relevant to the disputes, for reasons provided in that submission. In so far as the Report contains any policy issues (being issues relating to charging for connections), EDF believes it supports EDF's position: paragraph 5 of EDF's Further Submissions. In summary, EDF's submissions related in part to the status of the report: it did not set out a definitive view of the law as it then stood (in 1972); it could not alter existing legal rights or retrospectively impose new obligations; it had no status in law (being a recommendation to Government and the industries and parties involved); and it did not investigate or state any facts relevant to EDF or the installations in the buildings in question. No primary or subordinate legislation was passed in consequence of the Report: paragraph 6 of EDF's further submission. EDF also made submissions in relation to, the purpose of the Report, which it said was not to investigate, analyse or make recommendations about issues that are subject of the Authority's determination, but to consider what are the principles that *should* govern the level and character of charges made and the terms (including any scales of rebates or discounts) for connection of new domestic customers to a supply of electricity and gas.

1.44. As to the principles on subsidy stated in the Report, EDF submitted that no consideration was given in the Report to the specific installations of R&Ls inside blocks of flats, or to the fact that R&Ls could be installed by a developer rather than an area board, and that the Report did not purport to define what is now a distribution system. EDF also maintained that the description of the "network" given in the Report was broad for the purposes of introducing the work and how it might be valued for the purpose of considering the costs that were or may be levied. Further, insofar as the Report said anything about what is part of the distribution system, EDF asserted that they are not inconsistent with its submissions to the Authority.

1.45. In relation to the system of charging as at 1972, EDF also submitted that paragraph 68 of the Report provides what the Monopolies Commission

then understood to be the structure of costs at the time. EDF states that it has always maintained that it makes no charge for replacement of R&Ls. EDF noted the historically different position of the Southern Electricity Board (SEB) as set out in appendix 2 to the Report. EDF stated that other Area Boards may well have followed the practice of SEB. But EDF highlighted that the Report recognised SEB as different and, in any event, it was a practice that EDF is not now, and LEB was not, obliged to follow.

1.46. The Councils did not provide views on the relevance of the Report, with the exception of Islington who later stated that the Report appears to set out the general position up to 1972.

1.47. Having considered the above submissions, the Authority is of the view that the Report merely illustrates that, prior to 1956, the practice of Electricity Boards charging for connections varied. Some Boards levied a fixed charge for connection and some made no charge. A Working Formula was introduced in 1956 (following consultation between the electricity industry and associations of local authorities) providing that no contribution towards the cost of an electricity supply would be required if the wiring was of a minimum standard and the consumer's freedom of choice as to fuel source was not restricted by the estate developer installing appliances using fuel other than electricity: paragraph 40 of that Report.

1.48. The Authority appreciates that the Working Formula was intended to be a basis for negotiation rather than a comprehensive agreement: paragraph 41 of that Report. Appendix 1 to the Report set out the Working Formula for Electricity Supplies to Housing Estates and notes that Electricity Boards would not charge a contribution towards the capital cost of taking a supply to a housing estate (other than cost of service lines and connections), in certain circumstances, except in cases of abnormal cost and difficulty. An example of abnormal cost or difficulty provided by the Working Formula was accommodation for rising mains in blocks of flats. But the Report noted that cases of abnormal cost or difficulty would vary depending on the circumstances. It became apparent by the mid-1960s that the Working Formula was regarded as unsatisfactory by the electricity industry, a point also made by EDF in its Further Submission: paragraph 42 of the Report.

1.49. In the light of the above, the Authority considers that the Report does not offer much assistance in resolving these disputes, except to clarify that even up to the 1970's the practices for connecting new estates varied from area to area and, essentially, connections were individually negotiated and special arrangements between local authorities and electricity boards could exist.

1.50. The Authority has not considered the subsidy principles stated in the Report on which submissions are made by EDF as, in the Authority's view, the subsidy principles are not relevant to the determination in the light of the Authority's findings set out in section 7 of this document.

1.51. In respect of EDF's submissions on the references to "network" in the Report, the Authority notes that the Report does not consider R&Ls specifically in its description of network and, further, the description of network set out above does not define what a 'distribution system' is under the Act.

1.52. The parties agree that there is no evidence that EDF or its predecessors have ever included charges for renewing R&Ls in its authorised charges or charging statements. Therefore, and in any event, the Authority has not considered it relevant to address the Monopolies Commission's understanding of the structure of charges at the time of the Report.

Previous correspondence from Offer, Ofgem and DTI to London Electricity plc (EDF's predecessor)

1.53. EDF referred to previous correspondence from Offer (dated 1 June 1993) as confirming that R&Ls would be the responsibility of the owner/occupiers of the building, as they form part of its internal wiring installation: paragraphs 4.36 of the Westminster Submission Document, and 4.26 of the Camden Submission Document and Islington Submission Document. Further, the correspondence expressed the view that, to prevent any illegal abstraction of electricity, it would be reasonable for London Electricity to place their seals on various connections, but this does not imply ownership. This latter point was also made in Offer correspondence dated 10 June 1998 and in DTI correspondence dated 30 July 2002: paragraphs 4.37 and 4.39 of the Westminster Submission Document, and

4.27 and 4.29 of the Camden Submission Document and the Islington Submission Document. EDF also refers to previous correspondence of Ofgem (dated 16 October 2000) explaining that normally 'responsibility for maintaining the internal system lies with ownership': paragraphs 4.38 of the Westminster Submission Document, and paragraph 4.28 of the Camden Submission Document and the Islington Submission Document. If London Electricity owned the cabling, it formed part of their public distribution network. If the cables were not owned by London Electricity, then the responsibility lay with the owners and occupiers of the property. Ofgem also pointed out that there is not one rule that can be applied to all blocks of flats.

1.54. EDF explained that LEB maintained a contracting division which did not carry out statutory works but rather competed for business along with other electrical contractors. It considered that the R&Ls in these cases could have been installed by a private electricity contractor, or by LEB if post-1947 or by LEB's predecessor if pre- 1947: paragraph 4.13 of the Camden Submission Document and the Westminster Submission Document and paragraph 4.14 of the Islington Submission Document.

1.55. In this respect, EDF referred to a letter from Gordon Rees (Solicitor and Secretary for LEB) to the HSE, dated 5 January 1987, as confirming EDF's position: paragraph 4.14 of the Camden Submission Document and the Westminster Submission Document and paragraph 4.15 of the Islington Submission Document. It states that:

1.55.1. as will be evident from a closer inspection of the supply arrangements in an installation such as a high rise block of flats, the supply cable terminates at a cut-out unit which is invariably situated in a room to which public have access. The mere fact that the cut-out has a piece of LEB sealing wire open upon it is irrelevant to the question of who controls the cable between the cut-out and the meter, since the cable is accessible to the public as it leaves the cut-out and makes its way through the building to the meters; and

1.55.2. regulation 25(a) of the Electricity Supply Regulations 1937 make plain that for responsibility for electric lines and apparatus to be

placed on an Electricity Board two requirements must be satisfied:

- the lines must have been placed by the Board on the consumer's premises; and
- the lines must belong to the Board or be under its control, and

1.55.3. regulation 25(a) makes clear that it is concerned with the position where lines are placed by the 'undertakers'.

1.56. EDF has also provided the Authority with Witness Statements from Mike Cuddihey and Jim Barrett (both dated 4 September 2009) to confirm that when those named persons joined LEB, there already existed an LEB contracting division to compete for work not carried out as statutory undertaker. When a new building was built, LEB as statutory undertaker would be asked to carry out the work of bringing the distribution main into the cut-out in the basement or some other agreed intake room. Some local authorities and some private developers would additionally invite LEB to quote for installing the R&Ls in the building and sometimes LEB contracting division would quote but would not get the job.

1.57. The views contained in the letters referenced above are not expressed in relation to the particular disputes which the Authority has to determine, and therefore do not directly assist the Authority in establishing whether EDF installed, controlled or operated the R&Ls or what the practice was in connecting the particular premises subject of the disputes. However, as stated in paragraph 6.1.1 of this document, the Authority agrees with the previously stated position of Offer (in correspondence dated 1 June 1993 and then 10 June 1998) and the DTI (in correspondence of 30 July 2002) that London Electricity seals on equipment designed to prevent the illegal abstraction of electricity does not denote ownership or control. Furthermore, the Authority considers that the correspondence relied on by EDF is consistent with its determination of these disputes.

Minutes from London Councils Housing Forum on 6 June 2007

1.58. The Authority notes that EDF has also provided Ofgem with minutes from the London Councils Housing Forum on 6 June 2007 showing that the Forum Councils (which appear to comprise various London councils including Camden and Islington) believe that, prior to EDF, LEB took responsibility for maintenance and renewal of R&Ls.

1.59. However, EDF maintained that LEB did not accept responsibility for renewing R&Ls and their position does not represent any change of policy or stance. EDF suggests that minutes display a lack of understanding of EDF's position and of the historic and present position on R&Ls. The Authority notes EDF's points and is of the view that this document records what the London Councils Housing Forum believed at the time, but does not take the dispute any further.

Distribution and Connection Use of System Agreement ("DCUSA")[22]

1.60. DCUSA is a multi-party contract, established in October 2006, between the licensed electricity distributors, suppliers and generators of Great Britain. The Authority is not a party to it, but has approved it, and licensees are required to follow it by the terms of their licence. Clause 18.2 of the DCUSA provides that the obligation of the electricity distributor to convey electricity to a particular exit point or from a particular entry point (pursuant to Clause 18.1) is, in each case, subject to (amongst other things) there being a connection agreement in full force and effect relating to the connection of the relevant connected installation (which essentially means structures, electric lines or equipment connected to the distribution system at an exit point).

1.61. In practice, suppliers act for the (licensed) distribution network operator ("DNO") in procuring the connection agreement (on National Terms of Connection (the "NTC")) at the same time as they get customers to sign up to the supply agreement (clause 17 of the DCUSA). A connection agreement may be entered into in accordance with clause 17 of the DCUSA or otherwise.

[22] Distribution Connection and Use of System Agreement, version 3.9, 16 April 2010

1.62. The implication of these provisions was queried with the parties at a meeting on 19 March 2009. Westminster responded that it did not hold a connection agreement under the DCUSA nor is it a party to the DCUSA: Appendix 2 of the Westminster Submission Document. EDF agreed that would be the position whether or not the Council is an exempt distributor: Response 6 to Ofgem's further questions dated 7 December 2009. Camden and Islington have not provided views on this issue.

1.63. EDF considered that the NTC do not relate to the ownership of R&Ls or assist as to the obligation to install or renew them: Response 3 to Ofgem's further questions dated 7 December 2009. EDF submitted that the very recent introduction of these standard terms could not, in any event, establish a liability that did not previously exist or which the statute did not and does not provide. EDF went on to state that the primary purpose of NTC is to provide a machinery whereby distributors can seek to exclude and limit liability for a failure to deliver electricity and that is unaffected by the issues concerning the R&Ls. Further, the NTC are compatible with connection being achieved via an intermediate sub-system.

1.64. The Authority notes that the NTC arrangements significantly post-date the construction of the relevant premises. The Authority also considers that, as a (non-statutory) multi-party contract reached between licensed parties, the DCUSA does not interfere with the core issues which the Authority has had to determine under the primary statutory scheme in sections 16 to 21 of the Act.

Evidence of agreements under the Distribution Code[23]

1.65. DNOs are obliged under Standard Condition 21 of their electricity distribution licences to maintain a Distribution Code detailing the technical parameters and considerations relating to connection to, and use of, their systems. Ofgem queried with EDF, at a meeting on 19 March 2009, whether there was evidence of any agreements under the Distribution Code as to the point of supply and respective ownership of plant and apparatus. Clause 5.4.1 of the Distribution and Planning Connection Code

[23] The Distribution Code, Issue 12, February 2010

contemplates agreements being reached between a DNO and a User[24] concerning the point/points at which a supply is given or taken between the User and the DNO's distribution system. Clause 5.4.1 goes on to provide that for supplies at Low Voltage, the general rule is that the point of supply will be at the outgoing (i.e. User's side) terminals of the item of DNO or Meter Operator owned Apparatus where the transition is made to the User's tails or other User owned Apparatus. Clause 5.4.2 then provides that the respective ownership of Plant or Apparatus will be recorded in a written agreement between the DNO and the User as required. In the absence of a separate agreement between the parties to the contrary, construction, commissioning, control, operation and maintenance responsibilities follow ownership. ('Plant' is defined as Fixed and movable items used in the generation and/or supply and/or transmission of electricity other than Apparatus. 'Apparatus' means all equipment in which electrical conductors are used, supported or of which they may form a part.)

1.66. EDF submitted that there are no such agreements relevant to the determination: Response to Ofgem's further questions dated 7 December 2009. EDF considered that the above points refer to a general rule that arises (amongst other things) from DNO ownership and to the suggestion in the Distribution Code that responsibility follows ownership in the absence of other agreement. The above provisions of the Distribution Code do not assist in the determination of the Disputes. If they did, they assist EDF's position that ownership stops at the cut-outs. In any event, there is no reason to believe that the general rule should apply where there are commonly used lines in the ownership of the landlord (here, the Councils). The point of supply under the Distribution Code is where the R&L connects to the cut-outs and the Council is the 'User' thereafter.

1.67. The Authority has considered the application of the above provisions under the Distribution Code, but concluded that they do not assist in determining the issues in these disputes. First, the Code substantially post-dates the factual circumstances at stake in these disputes. Second, in any event, similar interpretative difficulties arise under the Distribution Code as under the statutory scheme under the Act itself in relation to multi-occupancy

[24] A 'user' is a term used in various sections of the Distribution Code to refer to the persons using the electricity distributor's Distribution System, more particularly identified in each section of the Distribution Code (Distribution Glossary and Definitions of the Distribution Code, Issue 12, February 2010).

residential units in apartment blocks under the freehold ownership of the Councils. Accordingly, third, the Distribution Code does not provide a proper interpretative guide to the interpretation of sections 16 to 21 of the Act.