

<b>DCUSA CONSULTATION DOCUMENT</b>	
<b>CHANGE PROPOSAL</b>	DCP 046 – Common Distribution Charging Methodology Governance
<b>DATE OF ISSUE</b>	13 October 2009
<b>ISSUED TO</b>	DCUSA Contract Managers DCMF members Ofgem Consumer Focus Materially affected interested parties
<b>RETURN DEADLINE</b>	28 October 2009

## 1 PURPOSE

- 1.1 The Distribution Connection and Use of System Agreement (DCUSA) is a multi-party contract between electricity Distributors and electricity Suppliers and large Generators. Parties to the DCUSA can raise Change Proposals (CPs) to amend the Agreement with the consent of other Parties and (where applicable) the Authority.
- 1.2 This document is a consultation issued in accordance with Clause 11.14 of the DCUSA and seeks industry views on Change Proposal DCP 046 - Common Distribution Charging Methodology Governance.

## 2 INTENT OF DCP 046 – COMMON DISTRIBUTION CHARGING METHODOLOGY GOVERNANCE

- 2.1 Licence modifications requiring the governance of the distribution charging methodologies to be placed in the DCUSA have been approved by Ofgem<sup>1</sup>. With effect from 01 October 2009, the distribution licences will be amended such that the charging methodologies and their governance shall fall within the scope of DCUSA from 01 April 2010. DCP 046 seeks to prepare the DCUSA such that the Agreement sets out the governance arrangements to reflect the requirements of the final licence modification, with the methodologies being introduced into the DCUSA at a later stage.

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<sup>1</sup> [Ofgem Notice - Licence Modifications](#)

### 3 BACKGROUND

- 3.1 DCP 046 was considered by the DCUSA Panel at its meeting on 28 August 2009. The Panel determined that the CP is an urgent Part One change and recommended its progression through the Definition Procedure to allow a Working Group to assess and develop the drafting.
- 3.2 The DCP 046 Working Group has met on 2 occasions. Minutes and papers of the DCP 046 Working Group meetings are available on the [DCUSA Website](#).
- 3.3 Parties are invited to consider the proposed amendments attached as Appendix A and Appendix B and submit comments using the form attached as Appendix D to [dcusa@electralink.co.uk](mailto:dcusa@electralink.co.uk) by 28 October 2009.

### 4 DCP 046 – WORKING GROUP CONSIDERATIONS

- 4.1 Common Methodology Group Work Stream 5 has been developing the required drafting amendments to the DCUSA. DCP 046 has been raised to introduce the drafting into the DCUSA. The DCP 046 Working Group has been tasked by the Panel with reviewing the drafting developed by DCMF Work Stream 5 to ensure it reflects the proposed Licence modifications and aligns with DCUSA processes. The Working Group is required to consult with all Parties and submit its final report to the Panel before the Change Proposal is issued to Parties for voting.
- 4.2 The development of the proposed legal drafting for the Change Proposal has evolved through a number of versions following consideration by the Working Group and discussion with Ofgem. The Working Group therefore is consulting on two alternative versions of the proposed legal text – Appendix A, and Appendix B. These two versions were developed from the legal text originally included with the Change Proposal, which was based on text produced by the Common Methodology Group.
- 4.3 Progression from the Change Proposal text to Appendix A
- 4.4 First Change: The licence conditions oblige DNO Parties to meet periodically with persons materially affected by the Charging Methodologies to discuss further development of the Charging Methodologies. The licence conditions also oblige DNO Parties to review the Charging Methodologies against the applicable objectives at least once every year.
- 4.5 The original text imposed an obligation on the DCUSA Panel at clause 5.3.8 to undertake these tasks. However, the Working Group did not consider this appropriate, and has removed the obligation. DNO Parties will therefore need to ensure compliance outside of the DCUSA (and should submit proposals to the Authority on how this is to be achieved).
- 4.6 Second Change: The licence conditions require that the Authority should have the right to veto any change raised prior to 1 April 2015 that effectively substitutes one Charging Methodology with another. The original text included a prohibition on raising any change prior to 1 April 2015 that effectively substitutes one Charging Methodology with another.
- 4.7 However, the Working Group considered that this went further than the licence conditions require. The Authority has the right to veto any proposed change to the Charging Methodologies in any event. The Working Group

therefore proposed that the Authority's express right of veto in this instance be identified as a point for consideration as part of the evaluation of a relevant Change Proposal – see clause 11.4.3.

- 4.8 Third Change: The licence conditions require that any person materially affected by the Charging Methodologies should be entitled to propose modifications to the Charging Methodologies. The original text referred to such persons in clause 10.2 as having an express and automatic right to raise DCUSA Change Proposals.
- 4.9 However, the Working Group considered that the licence requirements could be met by the existing DCUSA text, which enables any person to raise a Change Proposal where that person has been designated by the Authority. Persons materially affected by Charging Methodologies have, nevertheless, been added as an express example of the type of persons who the Authority may choose to designate.
- 4.10 Fourth Change: The licence conditions allow the Authority to exercise a veto in respect of Charging Methodology modifications, so that modifications will be made unless vetoed (rather than the Authority expressly approving or rejecting the modification). The original text provided for a mechanism whereby the Authority would exercise its veto in respect of the outcome of the vote by the DNO Parties. This approach differs to the decision making mechanism applying to existing DCUSA proposals whereby the Authority publishes a decision on the change proposal itself as opposed to the outcome of the vote.
- 4.11 However, the Working Group was uncomfortable giving increased relevance to the vote of any one Party Category. Instead the Working Group proposed that the Authority's right of veto should be exercised against the deemed recommendation of the DCUSA Parties as a whole, and that the Authority's right should be a right to veto a rejection as well as a right to veto an acceptance.
- 4.12 This approach is set out in clause 13.10 of Appendix A. Where the Authority vetoes an acceptance by the DCUSA Parties, the modification would not be made. Where the Authority vetoes a rejection by the DCUSA Parties, the modification would be made.
- 4.13 Progression from Appendix A to Appendix B
- 4.14 The only difference between Appendix A and Appendix B is the proposed drafting of clause 13.10.
- 4.15 The Authority has raised concerns regarding the application of its veto to the recommendation of the DCUSA Parties (i.e. to the outcome of the DCUSA voting mechanism). Retention of its veto/non-veto approach to decisions not with-standing, the Authority considers that it would be appropriate that the decision making mechanism applying to charging proposals under the DCUSA should be as similar to the decision making mechanism applying to non-charging DCUSA proposals as possible. The Authority therefore considers that it would be appropriate for the veto to apply to the Change Proposal itself, so that (regardless of how the DCUSA Parties vote) the modification set out in the Change Proposal will be made unless the Authority exercises its right of veto.

- 4.16 This approach caused some concern within the Working Group as it appeared to reduce the relevance of the recommendation made by the DCUSA Parties. In legal terms this is not the case. Consistent with the existing DCUSA process, in reaching its decision the Authority is required to have regard to the recommendation of the DCUSA parties, among other things in any event.
- 4.17 In a similar vein, some members of the Working Group were concerned that reliance on a veto could result in modifications being made inadvertently as the result of an oversight causing a veto not to be given, which would be problematic if two or more alternates were inadvertently approved, and that Appendix B made this more problematic as it removed the recommendation of the DCUSA Parties from the equation. However it is noted that strictly speaking this relatively low risk would also apply to the approach proposed in Appendix A, and that the risk such as it is, is one which the Authority is currently responsible for with regard to change proposals to existing charging methodologies in force under Standard Condition 13.
- 4.18 Finally, the approach under Appendix B causes some concerns from the perspective of the right to appeal decisions to the Competition Commission. These concerns are dealt with under in section 5 below.
- 4.19 The table attached as Appendix C sets out the relevant licence conditions and identifies how these have picked-up in the proposed the drafting for Appendix A and Appendix B.

## **5 APPEALS TO THE COMPETITION COMMISSION**

- 5.1 Section 173 of the Energy Act 2004 allows certain Authority decisions to be appealed to the Competition Commission. A decision can only be appealed under this section if:
1. it is a decision relating to a document by reference to which provision is made by a condition of a gas or electricity licence;
  2. that document is designated for the purposes of this section by an order made by the Secretary of State;
  3. the decision consists in the giving or refusal of a consent by virtue of which the document has effect, or would have had effect, for the purposes of the licence with modifications or as reissued; and
  4. the decision is not of a description of decisions for the time being excluded from the right of appeal under this section by an order made by the Secretary of State.
- 5.2 Under the Electricity and Gas Appeals (Designation and Exclusion) Order 2009, the DCUSA is designated for the purposes of section 173, and certain decisions are excluded from the appeals mechanism. The decisions that are excluded are decisions to give consent to the deemed recommendation of the parties under the DCUSA voting mechanism (or where the Authority determines that an appeal poses a risk to the availability of electricity).
- 5.3 In a departure from the current process applying to the approval process under the DCUSA, the licence conditions concerning the CDCM governance provide for a veto/non-veto approach. Under this approach, the Authority will not expressly consent to, or reject, the recommendation of the DCUSA

parties. Instead the Authority will either remain silent, in which case the recommendation of the parties (Appendix A) or the change proposal (Appendix B) will be accepted; or the Authority will veto the change proposal or recommendation (as applicable), in which case the change proposal or recommendation will be rejected.

- 5.4 A veto by the Authority clearly satisfies limb 3 above - it would be a decision that consists in the refusal of a consent by virtue of which the DCUSA would have had effect for the purposes of the licence with modifications. Therefore a veto by the Authority would be appealable to the Competition Commission (unless it was an excluded decision - e.g. where the Authority was giving consent to the deemed recommendation of the DCUSA parties).
- 5.5 However, the requirement at limb 3 above is less clearly satisfied where the Authority opts to remain silent, and not to exercise its right of veto. It is arguable that in opting not to exercise its right of veto, the Authority has made a decision, and that this decision consists in the giving of a consent by virtue of which the DCUSA has effect for the purposes of the licence with modifications. However, it would be preferable if this matter could be clarified, so as to avoid the possibility of the Authority objecting to an appeal, or the Competition Commission refusing to hear an appeal, on the basis of this technicality.
- 5.6 Such clarification would ideally be made within section 173 of the Energy Act 2004, which would require primary legislation. Alternatively, it may be possible to clarify the matter as part of the Secretary of State's designation of the DCUSA (i.e. within Electricity and Gas Appeals (Designation and Exclusion) Order 2009).
- 5.7 The table below sets out the different application of the appeals mechanism depending upon whether drafting Appendix A or drafting Appendix B is followed.

Alternative	Appendix A	Appendix B
<b>Veto decision applies to?</b>	The Authority's decision whether to exercise its right of veto applies to the outcome of the voting procedure (i.e. the deemed recommendation of the DCUSA parties).	The Authority's decision whether to exercise its right of veto applies to the modification proposed (i.e. the change proposal).
<b>Authority silence results in?</b>	Where the Authority remains silent, the recommendation of the Parties will be followed (and the modification will either be made, or not made, in accordance with the vote of the DCUSA parties).	Where the Authority remains silent, the modification will be made in accordance with the change proposal (regardless of whether or not the DCUSA parties voted in favour of the change proposal).
<b>Authority veto results in?</b>	Where the Authority exercises its right of veto, the recommendation of the Parties	Where the Authority exercises its right of veto, the modification will not be

	will be reversed, and the modification will be made (if the parties voted against the change proposal), or not made (if the parties voted in favour of the change proposal).	made (regardless of whether or not the DCUSA parties voted in favour of the change proposal).
<b>Capable of appeal to the Competition Commission?</b>	<p>Where the Authority remains silent, there will be no right of appeal as the statutory instrument excludes the ability to appeal where the Authority's decision is consistent with the vote of the DCUSA parties.</p> <p>Where the Authority exercises its veto there will always be a right of appeal as the Authority's decision is inconsistent with the vote of the DCUSA parties.</p>	<p>In the event of Authority silence, there should (in principle) be a right of appeal if the DCUSA parties voted against the change proposal (but not if they voted in favour of it).</p> <p>In the event of Authority veto, there should (in principle) be a right of appeal if the DCUSA parties voted in favour of the change proposal (but not if they voted against it).</p>
<b>Potential uncertainty in statutory language applying to appeals mechanism?</b>	No.	There is potential uncertainty where the DCUSA parties vote against the change proposal and Authority remains silent. In choosing to do so, has the Authority made a decision that consists in the giving of a consent by virtue of which the DCUSA is modified? Probably?

## 6 IMPLEMENTATION

- 6.1 The Panel has recommended that, if approved, the Change Proposal should be implemented within 10 WD of Authority Consent and by the end of the year. In accordance with the timetable set out by the Panel, the CP will be issued to all Parties for voting in October 2009.

## 7 CONSULTATION

- 7.1 Parties are asked to review the drafting attached as Appendix A and the licence conditions / DCUSA solution matrix attached as Appendix C. Parties are asked in particular to consider the following consultation questions submit responses using the form attached as Appendix D:

- Do you understand the intent of DCP 046 and are you supportive of its principles?
- Which drafting alternative – Appendix A or Appendix B do you consider is more appropriate?

- Do you consider that the proposal better facilitates or is detrimental to the DCUSA objectives (please specify which)?
  - Do you consider that the proposed DCUSA drafting effectively discharges the obligations introduced through the licence modifications?
  - Are there any alternative solutions or matters that should be considered by the Working Group?
  - Are you supportive of the proposed implementation date of '10WD following Authority consent or 01 January 2010, whichever occurs later'.
- 7.2 Consultation responses should be submitted to [dcusa@electralink.co.uk](mailto:dcusa@electralink.co.uk) no later than XX October 2009. Parties are asked to provide as much relevant detail as possible to enable the Working Group to understand the comments and the reasons behind them.
- 7.3 Responses, or any part thereof, can be provided in confidence. Parties are asked to clearly indicate any parts of a response that are to be treated confidentially.

## 8 NEXT STEPS

- 8.1 Following the end of the consultation period the Working Group will meet to consider the responses and update the drafting accordingly. The Working Group will liaise with the DCUSA Legal Advisors to ensure that the drafting is legally robust and in keeping with the current DCUSA drafting. The DCP 046 Working Group will submit its final report setting out the proposed variations to the DCUSA to the DCUSA Panel before the CP is issued to all Parties for voting.
- 8.2 If you have any questions about this paper or the DCUSA Change Process please contact the DCUSA Help Desk by email to [dcusa@electralink.co.uk](mailto:dcusa@electralink.co.uk) or telephone 020 7432 3017.

## APPENDICES

- Appendix A – DCP 046 legal drafting whereby the Authority veto applies to the recommendation of the Parties
- Appendix B – DCP 046 legal drafting whereby the Authority veto applies to the Change Proposal
- Appendix C – Licence conditions / DCUSA drafting matrix
- Appendix D – Consultation Response Form