

## DCP 181 Draft Legal Text Review

**From:** Gus Wood [mailto:Gus.Wood@wragge-law.com]

**Sent:** 10 August 2015 10:09

**To:** DCUSA

**Cc:** Peter Waymont

**Subject:** RE: For Review By 22 July 2015: DCP 181 Previous Connection Terms Enduring Draft Legal text [EFILE-Legal02.588326.2111933]

Hi Claire

I propose an amended version of paragraph F as follows –

**F Existing connection agreement:** This paragraph F applies in the event that there is an existing agreement governing the connection of the premises to the network (except for standard terms which have effect by virtue of statute or pursuant to a contract with an electricity supplier, or of which an electricity supplier procured acceptance). If the premises are domestic premises and you are party to the existing agreement, then the existing agreement will apply instead of section 2, 3 or 4. If the premises are not domestic premises, then the existing agreement will apply instead of section 2, 3 or 4 (whether or not you are party to the existing agreement). If an existing agreement applies to you and the premises in accordance with this paragraph F, you will have the benefit of the rights, and be bound by the obligations, under the existing agreement from the date that the National Terms of Connection apply to you and the premises, as if you had entered into the existing agreement with the network operator (until paragraph E above applies, or the existing agreement is terminated in accordance with its terms). Information about existing agreements can be obtained from the network operator. Contact details are available from the Energy Networks Association (telephone 0207 706 5137) or at [www.connectionterms.co.uk](http://www.connectionterms.co.uk).

1. I've sought to make the wording clearer. I'd welcome views as to whether it is clear.
2. In particular, I have removed the concept of the existing agreement and the NTC both applying, but the existing agreement applying to the extent inconsistent. I think this previous formulation presented risks around lack of clarity and certainty.
3. I think there are still residual risks in respect of this approach where the NTC are applying as contracts entered into via contracts with suppliers.
4. As a reminder, the incorporation of terms by reference is perfectly legitimate in terms of contract law. However, three things need to be achieved as follows:
  - a. the fact that legal terms are to apply needs to be drawn to the customer's attention;

- b. this needs to be done prior to contract formation; and
  - c. the actual terms need to 'fairly and reasonably' be brought to the customer's attention.
5. The NTC regime is obviously designed to achieve this. The NTC apply via contracts with suppliers, which are themselves understood by customers to be legal documents, and suppliers have an obligation to bring the NTC to the attention of customers.
  6. However, the case law provides that the more onerous and unusual the terms are, the more that must be done to bring them to the attention of counterparties.
  7. The NTC are (by definition) the 'normal' terms of connection for electricity distribution connections in Great Britain. It follows that they cannot be unusual, and so there is a relatively low hurdle to be overcome in terms of bringing them to the customers' attention. In contrast, the existing agreements are (by definition) bespoke and therefore unusual. Without knowing what each bespoke connection agreement provides for, it is impossible to say how unusual the provisions are, and how important it is that particular provisions are flagged to the customers.
  8. One practical problem that we have already discussed, is the ability of DNOs to disclose details of connection agreements to people (other than the existing counterparty) who ask for details of the existing agreements. Have DNOs come to a practical solution on this point? Are any further changes to the DCUSA envisaged? It will clearly harm a claim that the existing agreement applies, if the connectee can show that there was no practical route by which it could obtain details of the terms.
  9. One further drafting change that could be made relates to the wording in schedule 2A to the DCUSA – the wording that suppliers include in contracts. A potential weakness of the wording in paragraph F above is that the existing agreement applies by reference in a provision that is itself incorporated by reference – the existing agreement is two steps removed from the wording that customers see in their supply contracts. It would perhaps be helpful if the possibility of an existing agreement being preserved by the NTC was apparent on the face of the supplier contracts. This would obviously require suppliers to change their contracts.
  10. My advice is on the position under English law. When we originally looked at the NTC, a Scottish firm (Burness) confirmed the position under Scottish law to be the same. The position is unlikely to have changed in the past 10 years, and the DNOs in Scotland may feel comfortable confirming this for themselves, but please let me know if you want us to help in procuring any Scottish law advice.

Gus

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