



## DCUSA Change Report

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### DCP 181 – Previous Connection Terms Enduring

#### **Executive Summary**

DCP 181 proposes that where a distributor has agreed a bi-lateral connection agreement with an owner or occupier in respect of a connection point, those terms should bind on change of ownership or occupation.

The DCP 181 change report was sent back by Ofgem on the 21 March 2016. Please see Attachment 9 for the Ofgem send back letter and Section 11 and 12 of this report for the changes that the Working Group have made to address Ofgem's points.

This document presents the Change Report version 2.0 for DCP 181 and invites all Parties to vote on the proposed change by the **09 May 2016**.

## 1 PURPOSE

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- 1.1 This document is issued in accordance with Clause 11.20 of the DCUSA and details DCP 181 – Previous Connection Terms Enduring.
- 1.2 The voting process for the proposed variation and the timetable of the progression of the Change Proposal (CP) through the DCUSA Change Control Process is set out in this document.
- 1.3 Parties are invited to consider the proposed legal drafting amendments (Attachment 1) and submit their votes using the form attached as Attachment 2 to [dcusa@electralink.co.uk](mailto:dcusa@electralink.co.uk) no later than **09 May 2016**.

## 2 BACKGROUND

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- 2.1 The nature of connections to distribution systems is becoming more bespoke as products are offered to customers that help with the efficiency of the network or promote greener ways of working. Many such products might lead to the need for a bespoke connection agreement, for example if the customer has agreed to be constrained, if unusual technical characteristics apply or if the customer has agreed to avoid use at certain times.
- 2.2 At present, if the customer who has agreed such non-standard terms sells or moves out of the property, the incoming owner or occupier defaults to the generic National Terms of Connection (**NTC**). This means that the new owner/occupier is not bound by the previous non-standard terms, and could (whether deliberately or accidentally) use the connection in a way which is contrary to the previous agreement and which the network is not designed to facilitate.
- 2.3 One way in which the original connection terms could be made to prevail is for the Distributor to take an interest in the land upon which the connection is provided. The Distributor could then (in its capacity as owner of that interest in land) impose an obligation on the owner of the property not to dispose of any interest in the property (or part with or share occupation of the property) without first ensuring that the person to whom the interest is transferred agrees a new connection agreement with the Distributor (which would be on the same terms as the original agreement). This could be coupled with a restriction noted in the relevant property deeds prohibiting the Land

Registrar from registering any transfer of the property without first having received a certificate from, for example, the DNO's Company Solicitor or Secretary confirming that the new connection agreement has been signed. This is a recognised method of ensuring that positive obligations run with land, however it is time consuming and expensive to implement.

- 2.4 The proposer of DCP 181 believes that a more efficient way of achieving the same outcome is to provide within the NTC that the terms of the original bi-lateral connection agreement will bind on change of ownership or occupation, until varied. Although existing terms would be imposed, this CP does not prevent the incumbent customer from seeking to vary them.
- 2.5 The Electricity Act provides for the making of a new connection at s16. S21 allows the Distributor to require the person requesting the connection to accept certain restrictions and terms and conditions. However, s16(4) provides that any reference in s16-23 to making a connection shall include a reference to maintaining a connection. In previous industry groups this has been interpreted, and legal advice has supported, that this means that on change of ownership the rights to be connected is maintained. Thus the need to apply for a "new" connection every time there is a change of ownership or occupation is removed.
- 2.6 However, the proposer of DCP 181 asserts that if the connection (and therefore the capacity associated with that connection) is required to be maintained over time, then any restrictions or terms and conditions associated with providing it should similarly be maintained. S16(4) supports that by referencing s21 – hence the Distributor may require restrictions or terms and conditions in return for maintaining the connection.
- 2.7 However, the existing NTC automatically applies generic connection terms, rather than connection terms appropriate to the connection. By ensuring that the original connection terms are preserved, the proposer believes that the existing benefits, obligations and rights of any subsequent owner and occupier are protected while equitably ensuring that users of a connection to a premises continue to utilise the connection within the parameters for which it has been designed or accepted to be utilised, thus protecting the existing benefits, obligations and rights of the Distributor and customers as a whole.

### **3 DCP 181 WORKING GROUP**

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- 3.1 The DCUSA Panel established a Working Group to assess DCP 181. The Working Group was comprised of Supplier and Distributor representatives.
  - 3.2 Meetings were held in open session and the minutes and papers of each meeting are available on the DCUSA website – [www.dcusa.co.uk](http://www.dcusa.co.uk).
  - 3.3 The Working Group discussed the CP and developed a consultation document (Attachment 3) to gather information and feedback from market participants.
  - 3.4 The Working Group noted that although existing terms would be imposed, this CP does not prevent the incumbent customer from seeking to vary them.

#### **4 DCP 181 CONSULTATION ONE**

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- 4.1 The DCP 181 consultation was issued on 22 August 2013 for a period of three weeks. The consultation was circulated to DCUSA Parties, interested consumers, Consumer Focus, Ofgem, consultants, councils and trade associations.
- 4.2 There were 10 responses received to the consultation. A summary of the responses received, and the Working Group's conclusions are set out below. The full set of responses and the Working Group's comments are provided in Attachment 3.

##### **Question 1 - Do you understand the intent of DCP181?**

- 4.3 The Working Group noted that nine out of ten consultation respondents understood the intent of the CP.
- 4.4 One consultant respondent discussed the intent of "*Where a distributor has agreed a bi-lateral connection agreement with an owner or occupier in respect of a connection point, those terms should bind on change of ownership or occupation*". This respondent was concerned that the legal text only transferred the customer's obligations but did not transfer the benefit of the Distributors obligations and as a result was not quite the same as novating an agreement. This respondent saw this change as a proposal that "*would seem to allow a Distributor to sue the customer for damages in the event that a special operating condition was no longer complied*" with.
- 4.5 The Working Group considered the comment and sought legal advice. The final proposal

developed by the group is to transfer both the rights and the obligations of the outgoing owner/occupier to the incoming owner/occupier from the date that the NTC apply. The proposal is not intended to transfer liabilities arising before a customer becomes subject to the enduring terms.

### **Question 2 – Do you agree with the principles of DCP181?**

4.6 The following table shows the responses to this question split by respondent type.

Respondent Type	Count of Respondents			
	Yes	No	Undecided	Total
<b>DNO</b>	5	0	0	<b>5</b>
<b>IDNO</b>	1	0	0	<b>1</b>
<b>Supplier</b>	1	1	1	<b>3</b>
<b>Consultant</b>	0	1	0	<b>1</b>
<b>Total</b>	<b>7</b>	<b>2</b>	<b>1</b>	<b>10</b>

4.7 Two respondents expanded on their answer. The Supplier who was undecided chose to emphasise the fact that although they understood the principles of the CP as a Supplier they were not party to any bilateral connection agreements.

4.8 The Consultant respondent considered that the default National Terms of Connection should not *“be subverted to allow a Distributor to enforce contractual terms on a customer who has not agreed to”* them.

4.9 The Working Group considered that they had addressed the consultant’s response in question 1. In regards to the three Suppliers responses, the Working Group noted that part of its work will be to address the concern expressed by Suppliers that the customer will not know the terms that apply to their connection when the issue arises.

### **Question 3 - For Distributors:**

#### **Q3A Do you receive D0302 flows from Suppliers on change of customer?**

4.10 Five DNOs and one IDNO responded to this question. One DNO simply responded ‘yes’ to receiving D0302 data flows. Four DNOs noted that the receipt of a D0302 as a change of Customer was not a reliable indicator as they could not rely on receiving it in all circumstances. Furthermore, as the D0302 is a Notification of Customer Details, when a customer changes their name the DNO might receive this notification but it will not represent a change of occupier.

- 4.11 One DNO respondent advised that there were 3.3 million D0302 notifications in 2012 out of a total population of 8.3 million customers. This DNO respondent speculated that there may be duplication in these messages from Suppliers and wondered if they may also send this flow on contract renewal.

**For Distributors:**

**Q3B If no, how are you made aware of a change of owner or occupier at a property?**

- 4.12 There were four responses to this question:

- One DNO respondent advised that they sometimes had direct contact with the tenant in advance of the dataflow. Another DNO stated they were not aware of changes of tenancy.
- The IDNO respondent had noted previously that they did not receive notifications for all changes of tenancy through the D0302 as the number of D0302 flows did not match the number of customers. They stated that there was no other mechanism for being advised of customer details other than MPAS address updates.

- 4.13 The Working Group noted the responses.

**For Distributors:**

**Q3C What action is taken on receipt of a D0302?**

- 4.14 There were five DNO responses and one IDNO response to this question detailing the process and action taken on receipt of a D0302.

- One DNO system triggers an update of the customer details within its “trouble” management system which then updates their internal systems. One DNO noted that although they record the customer information, the dataflow does not contain a date of the change of customer so ultimately they will not know the date the change took place on.
- One DNO respondent had a different process based on the number of data flows received in specific geographic areas. In areas of low dataflow receipts, where a site specific connection agreement exists for the MPAN, the DNO writes to the customer and requests whether they wish to confirm their on-going capacity requirements. If the customer confirms this then a new connection agreement is

issued for the customer's signature. In areas of high dataflow receipts it is not practical to write to all relevant customers so the customer is expected to contact the DNO if any changes are required.

- One DNO respondent produced an internal report concerning Maximum Demand customers and contacted them in relation to their bilateral agreement seeking a change of name. This process allowed the DNO to further update the customer details and discuss the technical details required.
- The IDNO respondent validates the D0302 content and records it in their Customer/Asset database within 5 days.

4.15 The Working Group noted the processes followed in practice by DNO and IDNOs.

**For Suppliers:**

**Q3D Under what scenarios do you send the D0302 to the Distributor?**

4.16 Three Suppliers responded to this question. One Supplier noted that they *"generate the D0302 flow following a 'Change of Ownership'"* notification, one Supplier simply noted 'yes' to this question and the other Supplier provided a screenshot of the D0302 flow as described under the rules of the Data Transfer Catalogue (DTC). A note at the base of the flow advised that the flow must be sent when there was a new or changed value for any data items contained within Group 69C Customer details.

4.17 The Working Group discussed the data flow and agreed that on the whole the customer name and contact details would be the most important items to analyse in this flow for a change of customer. The Working Group considered that a change to the flow to add the date of the change of customer would be beneficial.

4.18 One Working Group member noted that a D055 data flow is sent to flag a change of tenancy but they do not send a D0302 data flow providing customer details. The Working Group agreed that it would be necessary to raise a change under the Master Registration Agreement (MRA) to ensure the D055 data flow initiates a subsequent issue of the D0302 data flow.

**For Suppliers:**

**Q3E Do you always send a D0302 when customer details change due to ownership or tenancy?**

- 4.19 Three Suppliers responded to this question. One Supplier advised that they sent a D0302 in accordance with the DTC guidelines and the other two Suppliers answered 'yes' to this question. The Working Group noted their responses.

**Question 4 - Do you think the existing connection contract should endure or be renegotiated at the point the property is sold?**

- 4.20 Five DNO respondents and one IDNO respondent indicated through their comments that it is necessary for the connection terms to endure. This view largely arises as a consequence of the perceived requirement to maintain capacity but was also felt necessary to facilitate such initiatives as Demand Side Response. One Supplier felt customers should be advised of the existence of existing terms before taking them on and one Consultant respondent did not agree that the connections terms could endure without the express agreement of the incoming customer (including capacity requirements) but the Working Group felt this would be unworkable in practice. Two Suppliers appeared to take a neutral stance based on their comments.
- 4.21 One DNO respondent considered that those Customers premises which were obligated to meet conditions such as a bilateral connection agreement for Demand Side Response (DSR) should be subject to enduring terms when a change of occupier at the property occurs. Demand Side Response customers are expected to change the amount of electricity taken off the system in response to a signal. This flexibility in usage is incorporated in to the network design. The DNO respondent considered that as the Distributor is bound through its legal obligations to maintain the connection then if the new occupier refuses to act in accordance with the conditions of Demand Side Response then it would strand *"the Distributor and hence general customers with the bill for reinforcement to achieve the non DSR connection"*.
- 4.22 Two DNO respondents considered that it would be ideal for the terms to endure with one of the two DNOs noting that the customer would be entitled to renegotiate. Another DNO respondent considered that the enduring terms would help to ensure that there would be less *"unexpected spikes and troughs in demand"* on the network.
- 4.23 One IDNO respondent considered that the existing connection contract should endure providing that the new tenant/customer has the option to contact the Distributor to re-negotiate it.



- 4.24 One DNO respondent considered a scenario where there was a bilateral connection agreement covering technical details. On change of customer, the DNO would be able to apply DUoS based on the last agreed Maximum Import/Export Capacity (MIC/MEC) in accordance with Clause 2.28 of their LC 14 statement. However, they felt any technical details contained in a bilateral connection agreement should endure until a customer renegotiates them. This DNO was concerned that mandatory renegotiation on every change of customer would make it more difficult to get agreements in place when customers refused to respond and would possibly lead to delays in changes of supplier whilst new connection terms are being agreed.
- 4.25 One Supplier respondent considered the customer should be informed of the existing agreements so that they have an opportunity to renegotiate them. The customer needs to be aware of the connection terms especially if it affects the course of their business. This respondent considered that an appropriate mechanism for enduring terms should apply to any change of occupier and not just when the premises have been sold.
- 4.26 The Working Group noted the concern of the Supplier that the customer may not be aware of the conditions in the bilateral connection agreement that would act as the enduring default terms and conditions for the premises. The Working Group discussed the idea of publishing a list of all MPANs with bespoke connection agreements on the National Terms of Connection website. This would highlight to customers whether they have an enduring bespoke connection agreement that they should seek further information on.
- 4.27 One consultant respondent considered that the NTC was being subverted in order to place conditions on customers that they are unaware of and should not be bound by as a matter of law. Where there are special arrangements at a premise then the new occupier will need to be able to understand and agree to them. This respondent considered that the new customer had no right to a capacity unless granted that right by the Distributor. The Distributor could make the availability of capacity to the new occupier conditional on compliance with special operating rules. The Working Group considered these comments but agreed that negotiating a contract for every incoming customer by having no default terms of connection and no right for a new customer to any capacity would require the Distributor to renegotiate every contract which would be untenable.

- 4.28 Two Supplier respondents were neutral in their response. One Supplier advised that they did not consider connection agreements when notified of a new occupier. Another Supplier respondent did not indicate a preference but did highlight the issue of making the customer aware that the existing terms of connection would apply. The Supplier considered that the new occupier would depend on the old occupier being aware of the content of the connection agreement and passing on that information to the new occupier.

**Question 5 - How do customers know that the previous owner's or occupier's connection terms apply?**

- 4.29 All respondents responded to this question with a list of options on how the customer is or could be notified as set out below:

Could be notified?

- Obtain a copy of the contract from the previous occupier or owner of the premises.
- Contact the Distributor in order to develop an understanding of the terms that apply to them.
- The Supplier could advise the customer to check the terms with the Distributor to ensure that no existing contract exists outside of the NTC.
- Amend the NTC to state on the face of them that the NTC terms apply unless there is a pre-existing agreement.
- Require Purchasers to check whether a pre-existing agreement exists. They could do this using the Commercial Property Standard Enquiries or the Sellers Property Information Form (SPIF).
- The Distributor could contact the Customer to advise of the enduring terms of connection which apply to the premise and offer to renegotiate the contract if required.

Is notified?

- If the connection terms fall outside of the default NTC then on sale of a property, the seller should be obliged to provide a copy of the connection contract to the new occupier.
- The customer should be made aware during the sale/agreeing tenancy for the customer.

- Dependent on the previous owner knowing and including this information as part of the property exchange as part of the customer's own due diligence process.
- On sale of a commercial property the Commercial Property Standard Enquiries would be utilized for replies to enquiries. A residential sale would use the SPIF (Sellers Property Information Form). These both have questions that obligate the Seller to disclose any agreements (in the case of the SPIF Question 8.8).

4.30 The Working Group noted the responses and agreed that the method of the customer's notification of the enduring terms is a key element in the development of this change.

**Question Six: For Distributors - How many non-standard connection agreements do you hold?**

4.31 There were six respondents to this question as per the table below. One DNO respondent noted that although they had 34,000 site specific connection agreements, a much smaller number would require enduring terms whilst another respondent advised that they did not specifically record which agreements were non-standard.

Non-Standard Connection Agreements	
DNO	
ENWL	4,700 Bespoke Agreements
Northern Powergrid	Not recorded
SP Distribution and SP Manweb	None
UK Power Networks	Approximately 7,500 Agreements
Western Power Distribution	34,000 site specific Connection Agreements across all four licensed areas, over 20,000 of them in the Midlands area.
IDNO	
ESP Electricity Ltd.	200 Agreements Annexed to the NTC

**Question Seven: How many changes of ownership or tenancy of properties do you record in a year?**

4.32 There were nine respondents to this question as per the table below. A number of respondents pointed out that there was no exact record of the number of changes of ownership or tenancy of properties and that a separate reporting exercise may be required. The D0302 dataflow is not just used to flag change of occupier but also for change of address and change of name so does not provide an exact number. However, one Supplier suggested that *"D302s that are sent with new customer name combined with the number of D055s that are sent to MPAS with the COT flag set to true"* could be

used as a reference to gauge the number of change of occupiers.

Changes of Ownership Or Tenancy Of Properties	
DNO	
ENWL	3000 D0302 Change of Tenancy and name amendments annually for MD sites only
Northern Powergrid	35,684 D0302 flows and these covered 1,894,457 MPANs.
SP Distribution and SP Manweb	We do not routinely get notification of this
UK Power Networks	3.3m based on D302 but believe there may be duplication
Western Power Distribution	Approximately 2,000 thousand notifications across all four licensed areas that relate to a bespoke Connection Agreement.
IDNO	
ESP Electricity Ltd.	A separate reporting exercise would need to be run
Suppliers	
E.ON	Not recorded
Npower	For year 2012 - approx 28,000. For year 2013 (to date) – approx 22,000
Scottish Power Energy Retail Ltd	Unable to provide this information at this time.

- 4.33 The Working Group noted the issues with gauging an accurate indication of the number of changes of occupier at a property and agreed to take it in to consideration in developing a solution for this change.

**Question Eight: For Distributors - Do you receive enquiries on bilateral connection agreement terms from domestic customers? If so, how many?**

- 4.34 Four DNO respondents advised that they did not receive many enquiries on bilateral connection agreement terms from domestic customers with one DNO advising that an exception to this norm would be where a domestic customer lives in large premises with a higher load. One DNO respondent advised that they did not specifically record these calls but the expectation is that there would be very few queries of this kind. Whilst another DNO respondent advised that yes they did receive enquires of this type from domestic customers but there were very few of them.
- 4.35 The Working Group noted the responses and considered that domestic consumers could be taken out of scope for this CP as domestic consumers would automatically expect a standard connection when purchasing or renting a property and would not necessarily consider contacting the Distributor for their connection details.

**Question Nine A: Do you consider that this Change Proposal jeopardises the certainty of the NTC?**

Respondent Type	Count of Respondents				
	Yes	No	Maybe	No comment	Total
<b>DNO</b>	0	4	1	0	<b>5</b>
<b>IDNO</b>	0	1	0	0	<b>1</b>
<b>Supplier</b>	0	0	2	1	<b>3</b>
<b>Consultant</b>	0	0	0	0	<b>0</b>
<b>Total</b>	<b>0</b>	<b>5</b>	<b>3</b>	<b>1</b>	<b>09</b>

4.36 Four DNO respondents and one IDNO respondent did not consider that the CP jeopardised the certainty of the NTC for the following reasons:

- By making it “clear that the NTC doesn’t apply in these instances. The NTC will be strengthened by bespoke terms enduring a change of ownership. Our bespoke terms usually contain specific operational requirements which will always be additional to the NTC terms and so conflict should not occur”.
- “No, it will not jeopardise the certainty of the NTC. The NTC would continue to be the default terms. An incoming Purchaser would either be informed by their Seller that they there was a different pre-existing contract or would know that they were covered by the NTC. The position will not change from their perspective”.

4.37 One DNO respondent and two Suppliers considered that this change may jeopardise the NTC for the following reasons.

- One Supplier respondent considered that it added further complexity which had originally been designed to be captured in bespoke agreements with the Distributor. This respondent considered that the examples used in the consultation were not exhaustive and only focus on where the Distributor has requested terms and not where the Customer has requested terms with no design implications on the network. This respondent considered that a test of materiality would be required on how many of these bespoke terms restrict activity on the customer. This respondent suggested that these agreements be flagged with the land registry so the new purchaser is aware of the restrictions before they proceed with the purchase and can check if there will be any adverse effect on the future use the purchaser may envisage for the site.

- The DNO respondent considered that a legal view may be required as non-standard terms may be technical in nature and therefore not part of the standard NTC.
- Another Supplier respondent advised that although it publishes the information it could not state definitively whether the NTC would be jeopardized or not.

4.38 The Working Group considered each response and agreed to undertake further analysis on the notification of the customer of their connection terms enduring through the land registry and the costs involved.

**Question Nine B: If so, do you consider that only the application of the bespoke terms would be at risk or is the application of the NTC to premises generally at risk?**

4.39 There were three respondents to this question, one Supplier respondent who referred to their answer to question nine A and two DNO respondents. One DNO respondent advised that *“A legal view would be needed to decide if a party can be bound by bespoke terms that they had not formally agreed to as part of the NTC process”*. Another DNO respondent considered that the bespoke terms were already at risk without this change to the NTC.

4.40 The Working Group considered the responses and noted that as there is no change to the National Terms of Connection, the NTC would still be the default terms but the incoming tenant would be notified that there may be bespoke connection terms.

**Question Nine C: How might such issues be overcome?**

4.41 There were three respondents to this question. One Supplier respondent considered that there was no need to alter the NTC. One DNO respondent advised that a legal view was required on determining whether the subsequent owner or occupier could be bound by non-standard terms which were not specifically referred to under the NTC as recorded as bespoke terms. One DNO respondent suggested that the NTC should be amended to state *‘that the NTC terms apply unless there is a pre-existing agreement and require Purchasers to check whether this applies to them’*.

4.42 The Working Group noted the responses.

**Question Ten: If you are a Distributor, what would your response be to a prospective purchaser of premises who asked you for a copy of the connection agreement?**

- 4.43 There were seven respondents to this question comprising five DNO respondents, one Supplier and one IDNO respondent.
- 4.44 Most DNO respondents noted that they would not provide the purchaser with the terms until they were the owner of the premises, or prior to this only if they had the permission of the current owner to provide them, due to general restrictions on disclosure of information under Section 105 of the Utilities Act which prevents a DNO from disclosing information obtained under or by virtue of the Act unless he has permission to do so.

**Question Eleven: Do you believe there there will be consequential changes to other industry codes as a result of each option or solution?**

- 4.45 Five DNO respondents, one Supplier and one IDNO respondent did not consider there to be consequential changes to other codes from this CP. One Supplier was unsure whether there would be consequential changes from this CP as it would be up to the other codes to determine whether they were impacted. One DNO respondent advised that it would depend on the recommended solution.
- 4.46 The Working Group considered that there would be improvements to other codes such as the MRA as some enhancements could be made to data flows.

**Question Twelve: DCP 181 is due to be implemented in the next DCUSA release following authority consent. Do you have a preference on the date that DCP 181 is implemented in to the DCUSA?**

- 4.47 Five DNOs, two Suppliers and one IDNO were supportive of the DCP 181 implementation date of next DCUSA release following Authority consent. One Supplier respondent suggested that this change should be implemented following the completion of the work under the DCP 161 change. Another Supplier respondent requested that DCP 181 change be implemented in one of the standard DCUSA implementation dates of February, June or November.

**Question Thirteen: Which DCUSA General Objectives does the CP better facilitate? Please provide supporting comments.**

1. **The development, maintenance and operation by each of the DNO Parties and IDNO Parties of an efficient, co-ordinated, and economical Distribution System.**

2. The facilitation of effective competition in the generation and supply of electricity and (so far as is consistent with that) the promotion of such competition in the sale, distribution and purchase of electricity.
3. The efficient discharge by each of the DNO Parties and IDNO Parties of the obligations imposed upon them by their Distribution Licences.
4. The promotion of efficiency in the implementation and administration of this Agreement and the arrangements under it.
5. compliance with the Regulation on Cross-Border Exchange in Electricity and any relevant legally binding decisions of the European Commission and/or the Agency for the Co-operation of Energy Regulators.

Respondent Party Type	Objective 1	Objective 2	Objective 3	Objective 4	Objective 5	None	N/A
DNOs	4	2	0	0	0	0	0
Suppliers	1	1	0	0	0	1	1
IDNOs	1	1	0	0	0	0	0
Consultants	0	0	0	0	0	0	1

4.48 There were eight respondents to this question. Four DNOs, one Supplier and one IDNO considered that DCUSA General Objective One was better facilitated by this change for the following reasons:

- *"We believe that general objective one is better facilitated in that it ensures that an efficient network is maintained. Without this we may need to incur costs where the provisions within the bi-lateral agreement with a previous incumbent has fallen away due to a new tenant occupying the property".*
- *"Obj 1 is better facilitated as management of the network is supported by the enforcement of Connection Agreement terms. Voiding agreements without negotiation would put distributors at risk of reinforcement of networks".*
- *"Objective 1 is achieved because the risk of reinforcement due to a customer not being bound by previous terms is avoided".*
- *"We believe the CP better facilitates DCUSA General Objective One as it will allow the Distributor some certainty in the overall development in the network".*
- *"Objective 1 is achieved because the risk of reinforcement due to a customer not being bound by previous terms is avoided."*



4.49 Two DNO respondents, one Supplier respondent and one IDNO respondent considered that DCUSA Objective Two was better facilitated by this change for the following reasons:

- *“Obj 2 is better facilitated as some customers would have non-standard NTC terms and an efficient solution would reduce costs and promote competition”.*
- *“Objective 2 is achieved because generators may require, and increasingly so for larger LV and higher voltage generators, the types of connection that have non-standard terms and the alternative of registering interests with the Land Registry would take time and greater expense as part of the connection process to achieve the same outcome. The proposed solution therefore leads to greater efficiency and hence promotes competition”.*

4.50 One Supplier respondent considered that none of the Objectives were better facilitated by this change. The Working Group noted the response.

4.51 One DNO respondent agreed that DCUSA General Objectives One and Two were better facilitated but highlighted the importance that the technical arrangements and connection agreement conditions, *“as provided for by the Distributor for the original owner/occupier, remains”*. *“Otherwise the new tenant may operate in a manner which has an adverse affect on the network having been designed for the needs of the original owner/occupier”*.

4.52 Following the consideration of the comments provided by the respondents, the majority of the Working Group agreed that DCUSA General Objectives One and Two were better facilitated by this change.

**Question Fourteen: Are there any alternative solutions or matters that should be considered by the Working Group?**

4.53 There were nine respondents to this question. Three DNOs and one Supplier had no further matters or solutions that should be considered by the Working Group. The remaining five respondents comprised of two DNOs, 1 Supplier, 1 IDNO and 1 consultant requested for the Working Group to consider the following matters:

**DNO Respondents**

- One DNO respondent proposed the removal of the words ‘you and’ (“Any existing terms and conditions applying to ~~you and~~ the connection of the premises”) in the draft DCP 181 legal text of DCUSA Schedule 2B F on existing connection terms.

- The Working Group agreed with the proposer and amended the DCP 181 legal text accordingly.
- One DNO respondent requested that where there are non-standard terms which *“have been agreed with an owner or occupier”*, the Working Group should *“consider writing those bilateral terms such that the owner or occupier gives the Distributor and Supplier the automatic right to disclose the terms to prospective purchasers”*. This respondent considered that *“non-standard terms are likely to involve technical issues or restrictions and as such could avoid any data protection issues”*.
- The Working Group considered whether it would be beneficial to add an automatic letter of authority which was limited to certain details on the connection in to the National Terms of Connection. This letter would allow the new occupier to be notified of the enduring terms and technical specifications of their connection. The Working Group agreed that under data protection there was more protection under Section 105 of the Utility Act which required the new occupier to prove that they were the purchaser of the property through a letter of authority.

#### **Supplier Respondent**

- The Supplier respondent considered that this change should be considered *“in combination with the data produced under DCP 161<sup>1</sup> where customers have been charged for excess capacity, the number of customers with bespoke connection agreements that are unaware of the contents as they have never seen the agreement, should be looked at”*.

Furthermore, the Supplier respondent proposed that *“it should be reasonable for a Distributor to contact all new occupant, or perspective purchaser on request, to inform them of the existing connection terms and highlight the consequences both financial through increased charges or business critical through network constraint. Relying on a signpost clause to another document in the Terms and Conditions of the Supplier is not adequate”*.

The Supplier raised a concern with this change in regards to the onerous obligation under DCUSA Clause 17.9 of DCUSA *“on Suppliers to prove that they have sent a*

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<sup>1</sup> DCP 161 ‘Excess Capacity Charges’ CP seeks to improve the cost reflectivity of the excess capacity charge calculation within the CDCM and EDCM. The change to the calculation involves removing the customer contributions and adding in any additional costs that should be attributed to this charge.

*contract to the customer or indemnify Distributors*". This Supplier advised that *"adding more detailed and critical terms to this clause when Distributors cannot produce their own contracts is inappropriate"*.

- The Working Group considered that the notification to the customer of their non-standard conditions was critical to this change. The Working Group agreed to seek legal advice on Clause 17.9 of the DCUSA and the obligations on the Supplier to notify the customer of the National Terms of Connection and how it would apply if it was the notification of non-standard contract terms.

#### **IDNO Respondent**

- One IDNO respondent advised that on request from a Supplier on whether a Customer Agreement is in place and what the applicable terms are, the most common discrepancy is the MIC/MEC<sup>2</sup> agreed by the previous tenant of the premises. This respondent advised that ECOES could be used to record the MIC/MEC and *"a 'special terms' flag could identify any bilateral agreements with bespoke terms"*.
- The Working Group considered the suggestion for a change to the Customer Agreement form to be valid but outside of the scope of this change.

#### **Consultant Respondent**

- The consultant respondent raised some areas of concern in the consultation in particular:
  - 5.1 of the Consultation which advises that *"the Working Group agreed to undertake a cost benefit analysis on the Land registry option versus the connection terms enduring option."* The respondents notes that there is a table with qualitative costs and benefits but considers there to be an insufficient cost analysis undertaken.
  - Under 4.2-4.5 the respondent notes the references to previous industry groups which the respondent considers to be vague and the use of the word "reinterpretation" in regards to the Electricity Act.
  - This respondent considered that this change would allow for the Distributor *"to fail to communicate properly with a new occupier (as it would have do it if it needed an explicit agreement on a site-specific connection agreement), the proposal would accelerate the deterioration in data quality about connection agreements, and make disputes about these agreements more complicated"*

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<sup>2</sup> MEC –Maximum Export Capacity

*(e.g. a distributor would be allowed to rely on old documents that the customer had never seen)”.*

- The Working Group noted that the wording ‘re-interpret the electricity act’ in the consultation was written in error. The Working Group agreed that in order to notify customers of enduring terms better data quality would need to be made available across the industry. Furthermore, the Working Group agreed with the respondent that quantitative analysis would need to occur as part of this change.

## 5 WORKING GROUP ASSESSMENT OF DCP 181

- 5.1 After reviewing the consultation responses the Working Group took legal advice on a number of aspects of the proposal.
- 5.2 The Working Group’s first question concerned the fact that s16 of the Electricity Act imposes an obligation on a DNO to maintain the connection, and s21 enables the DNO to enter into terms in respect of connection. If the customer changes, how do these two reconcile themselves as the s21 terms may be bi-lateral but the s16 obligation to maintain endures. S21 gives the Distributor the right to require a person to accept terms – does this mean that the bi-lateral can be imposed noting that the NTC are deemed to be statutory terms. The response to this question was:

*Section 16 imposes an obligation on Distributors to make (and maintain) a connection. Section 21 allows a Distributor to require a person who requires a connection to accept reasonable terms in respect of the making (and maintenance) of a connection. Both the obligation and the ability to impose terms are on-going. If the customer changes, the obligation to maintain that connection is subject to the Distributor’s ability to require the new customer to accept reasonable terms.*

*The Distributor is entitled to require the owner/occupier to accept the terms. The implication is that the Distributor is not obliged to maintain the connection where the owner/occupier refuses to accept the reasonable terms.*

- 5.3 The Working Group’s second question was whether the NTC apply to renters of properties. The response to this question was:

*People who occupy a premises are clearly occupiers (whether they rent or own the*

*premises). If the 'renter' has a lease of a premises, they are also likely to fall within the definition of 'owner' (as a lessor owns a legal interest in the premises).*

- 5.4 The Working Group's third question concerned the application of Clause 17.9, and whether, if DCP 181 went ahead and so existing terms prevailed, this Clause would impose an obligation (risk of not doing so) on the Supplier to notify a new customer that existing terms apply to them. Alternatively, the NTC would refer to the possible existence of existing terms and so the Supplier need only refer to the NTC as they do now. The response to this question was:

*Clause 17.9 refers to compliance with Clause 17.3. The Supplier's only obligation under Clause 17.3 is to include in its Contracts the wording set out in Schedule 2A (and to include that wording prominently). The Supplier is not obliged (or indeed entitled) to say anything broader. The DCP 181 proposal now provides for the inclusion of slightly different wording in Schedule 2A.*

## **6 REGISTERING AN INTEREST IN LAND WITH THE LAND REGISTRY**

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- 6.1 The Working Group also investigated the costs of registering an interest in land. A representative from the Working Group asked a selection of legal firms to provide;
1. an estimate of the costs to carry out the work, broken down as an hourly rate, dependent on the level of fee earner that would be engaged in undertaking that type of work.
  2. An estimate of the length of time which will be added to the transaction by including such arrangements.
  3. an assessment, on a scale of 1-10, of the likelihood of; developers of renewables projects (e.g. wind farms and photovoltaics), any party with a superior property interest or any lenders being willing to accept such an arrangement.
- 6.2 The average of the responses is shown in the table on the next two pages.
- 6.3 In summary it shows that the costs of registering an interest in land in each case varies from £173 to £903 with a 70% chance of success.

National Terms of Connection Questionnaire (Time)										
			Freehold Acquisition		Freehold Acquisition with Lender		Leasehold Acquisition		Leasehold Acquisition with Lender	
Period of Qualification	Blended Hourly Rate (Q1)	Additional costs (Q1)	Time added to Transaction (Q2)	Likelihood of Transaction (Q3)	Time added to Transaction (Q2)	Likelihood of Transaction (Q3)	Time added to Transaction (Q2)	Likelihood of Transaction (Q3)	Time added to Transaction (Q2)	Likelihood of Transaction (Q3)
<b>N.Q. &lt; 2years PQE</b>	£173	£40 if lodged separately	1 hour	6.5	1-2 hours	7	1 hour	8.5	90 minutes	7
<b>Associate 2 - 5 years PQE</b>	£202	£40 if lodged separately	1 hour	6.5	1-2 hours	7	1 hour	8.5	90 minutes	7
<b>Senior Associate &gt; 5 years PQE</b>	£227	£40 if lodged separately	90 minutes	6.5	2 hours	7	2 hours	8.5	2 hours 30 minutes	7
<b>Partner</b>	£258	£40 if lodged separately	50 minutes	6.5	55 minutes	7	55 minutes	8.5	3 hours 30 minutes	7

National Terms of Connection Questionnaire (Cost)										
			Freehold Acquisition		Freehold Acquisition with Lender		Leasehold Acquisition		Leasehold Acquisition with Lender	
Period of Qualification	Blended Hourly Rate (Q1)	Additional Costs (Q1)	Cost added to Transaction (Q2)	Likelihood of Transaction (Q3)	Cost added to Transaction (Q2)	Likelihood of Transaction (Q3)	Cost added to Transaction (Q2)	Likelihood of Transaction (Q3)	Cost added to Transaction (Q2)	Likelihood of Transaction (Q3)
N.Q. < 2years PQE	£173	£40 if lodged separately	£173	6.5	£173	7	£173	8.5	£259.50	7
Associate 2 - 5 years PQE	£202	£40 if lodged separately	£202	6.5	£202-404	7	£202	8.5	£135	7
Senior Associate > 5 years PQE	£227	£40 if lodged separately	£151	6.5	£454	7	£454	8.5	£567.50	7
Partner	£258	£40 if lodged separately	£215	6.5	£236.50	7	£236.50	8.5	£903	7

## 7 DCP 181 CONSULTATION TWO

The Working Group issued a second consultation. A summary of responses to each question is provided below.

### **Question 1- Is it the entire agreement?**

**Are all terms within an existing bi-lateral connection agreement required to be enduring or is it only a subset of terms and if so what subject matters do they cover?**

7.1 Each respondent advised whether they considered that the bilateral connection agreements terms should endure, parts of the agreement endure or no part of the agreement as set out in the table below.

Respondents By Category	DNO	Suppliers	Consultant	Private Network Operator and Customer	Anonymous
All of the Bi-lateral Connection Agreements Terms Should Endure	3				
Specific Bi-lateral Connection Agreement Terms Should Endure	2	1			
No Part of the Bi-lateral Connection Agreement should endure			2	1	1
No viewpoint provided		1			

7.2 There were 11 responses to this question.

### **Whole Agreement**

7.3 There were three DNO respondents who considered that the whole agreement should endure whose responses have been summarised below:

- One DNO respondent advised that current practice is that the existing bilateral agreement endures until a change is triggered via a request for a change to it by the current customer or a new occupier of the premises. This DNO considered that the bi-lateral agreement is in place as the terms differ from the NTC and that it seemed inappropriate to have a subset of terms as enduring rather than the whole agreement.



- One DNO respondent considered that *“the bilateral connection agreement conveys terms that are statutory in nature and cannot be selectively voided or revoked due to the exchange of ownership or occupation”*. This respondent advised that *“the “terms” have to be seen legally in their entirety continued in their entirety unless varied or subsequently replaced by a new bilateral connection agreement”*.
- This DNO respondent considered that all terms should be enduring and that the terms may include reference to characteristics of the connection, site specific operating constraints and technical interface protection data.

### **Subset of terms**

7.4 There were four respondents who considered that a subset of terms should endure and their responses have been summarised below:

- One DNO respondent advised that either all terms should endure or an overall statement would need to be added to the NTC to highlight the potential for enduring details recorded elsewhere.
- Another DNO advised that they considered *“it appropriate that only a subset of the existing bilateral connection terms require to be enduring, i.e. those that have been identified by the DNO as relating to “technical constraints, characteristics and nature of the physical connection””*.
- A Supplier respondent advised that it would be difficult to limit this change to a subset of terms and subject matters as by nature each bespoke contract would vary greatly. *“However, if the modification is progressed it would be necessary to limit the number of possible variations to where an agreed set of possible variants could be incorporated into a connection agreement”*.

### **No Part of the Agreement Should Endure**

7.5 There were four respondents who considered that no part of the agreement should endure and their responses have been summarised below:

- One anonymous respondent did not agree that bilateral agreement terms should endure and suggested that networks may develop a reputational issue if this change was to go ahead. Furthermore connection terms enduring may lead to

some buildings being unsellable or unlettable and as a result lead to dishonesty on the part of the vendor. Where there is dishonesty, the system of communication suggested by this CP falls down with no recourse for the purchaser.

- One respondent who is both a Private Network Operator and a customer advised that no term additional to the NTC and binding on the customer should be enduring without the express consent of the customer. This respondent considered that this change makes a large assumption *“that the customer will have full disclosure of the ‘bespoke agreement’ via the CPSE. Having spoken to our Director of Estates he confirms that it is not uncommon for the seller to respond to the CPSE Q.10.1 “the Customer should make their own enquiries”. In the case of connection agreements this information would obviously not be available via other means. So the customer could incur a double financial penalty – one for termination of the agreement once they have inherited it and twice for a new connection and possibly feasibility studies”.*
- One consultant respondent advised that no term additional to the NTC and binding on the customer should be enduring without the express consent of the customer. This respondent considered that the consultation did not express clearly the subset of terms the Working Group thought should be enduring and advised that any use of an electricity connection is “physical”. The respondent considered that the *“NTC might not be the right vehicle to achieve this, since a new occupant would find it difficult to enforce a NTC provision about enduring terms as it would not have access to evidence about any agreement between the distributor and the previous occupant”.*
- Another consultant respondent advised that they did not consider that the entire agreement or any part of it should endure. However, they did believe that *“there is a case for making it transferrable from one Customer to another at the same premise only”.* This respondent cited that example *“where a site has been sold and DUOS charges have continued to apply even though the site became non-operational and was about to be dismantled”.* *“If agreements were enduring then the new owner could be bound by said DUOS charges”.*

7.6 The Working Group noted the responses.

**Question 2 - How could the prospective customer discover any existing terms?**

**If a customer contacted a Distributor to request connection terms for a premises for which they are neither the owner or the occupier, are Distributors able to respond to those enquiries and how do they/should they do so?**

7.7 Respondents provided the following suggestions as to how the prospective customer could discover the existing terms:

- Any intention to ensure permission is granted would need to be put in the terms of the lease for the premises.
- Written authority from the current owner/occupier of the premises would need to be provided before providing the information.
- Distributors should not provide information to third parties unless expressly authorised to do so by the occupier. Many utility providers e.g. water companies have 'special agreements' outside of the published charging methodology or connection agreements. The fact that a special agreement exists is published but no details of the special agreement can be published without the express permission of the parties. There is no reason why this should not follow the same logic.
- This DNO respondent considered it appropriate that consideration is given to the inclusion of legal text in to the NTC either authorising the DNO to share non-standard connection terms associated with physical connection characteristics/constraints or placing an obligation on the current owner/occupier to provide such details itself or to give permission upon request for the prospective purchaser to obtain such information via the DNO.

7.8 Respondents advised that the following hurdles would need to be removed in order for customers to be notified of the existing terms for a premises:

- The observance of Data Protection in the energy industry. This would need to change considerably for such information to be willingly divulged
- Where a business is moving out of a premise or is in administration and neither the old or new tenant of the premises have a relationship with the Distributor, the chances of arranging permission are virtually non-existent.
- The DNO is prevented from sharing the full terms of any bi-lateral connection agreement with a prospective purchaser unless the current owner or occupier has given its express permission to do so.

### **S105 of the Utilities Act Comments**

S105 of the Utilities Act requires the current occupier to give permission for information disclosure.

- Is the information requested restricted under S105 of the Utility Act (General restrictions on disclosure of information). It may depend on whether the information relates to the distribution system, and is owned by the Distributor, or relates to the customers and is covered under S105. A legal opinion should be considered. If it is determined that information belongs to the individual or business then it can never be disclosed during the lifetime of the individual or so long as the business continues to be carried on (S105(1)).
- One respondent who considered that Distributors should not provide information to third Parties unless expressly authorised to do so by the occupier stated that:  
*"I would hope that an attempt at circumventing section 105 by inserting terms into the National Terms of Connection would be rejected by Ofgem, and/or would prove legally ineffective".*

7.9 The Working Group noted the responses.

### **Question 3 - Which customers should it apply to?**

**Should the enduring connection terms apply to all customers or only to those say in**

**Section 3 of the National Terms of Connection or other Sections?**

Enduring Bi-lateral Connection Agreements Terms Should:	DNO	Suppliers	Consultant	Private Network Operator and Customer	Customer	Anonymous
Apply to all Customers	4					
Apply to Customers as defined in Section 3 of the NTC	1	1				
Not apply			1	1		1
Other					1	

7.10 The Working Group noted the responses.

### **Question 4 - Do you have any other comments on the DCP 181 change?**

7.11 Three respondents had no further comment on the DCP 181 Change. A summary of the

other eight responses is set out below:

#### **DNO Respondents**

- One DNO respondent advised that s21 of the Electricity Act 1989 allows for DNOs to impose terms and conditions and questioned why any change needs to be made to these terms apart from aiding clarity as both parties will be bound by it until the agreement is varied.
- Another DNO respondent advised that enduring it is not a new concept as Clause 15 Limitation of Liability already survives termination of the connection agreement.
- One DNO respondent considered that capacity is maintained on change of customer and persists until varied. The process for a connection starts with the customer and the Distributor specifying the maximum power requirement and providing the assets to meet that requirement. The DNO is required to maintain the connection under s16 (3) and this must include the capacity under s16A. This respondent questioned that where a change of customer infers there is no on-going need then what need would the purpose of the on-going provision of associated assets meet.

#### **Supplier Respondent**

7.12 One Supplier respondent requested that the Working Group provide clarity on the communication aspect of this change:

- (i) how bespoke terms are communicated and to whom and
- (ii) who is liable if this communication fails.

This respondent raised a concern that this change *“may restrict choice for customers, e.g. not all Suppliers may be able to comply with bespoke enduring terms”*.

#### **Anonymous**

- This respondent considered that few small businesses or domestic customers would know what a connection agreement is. The respondent advised that they had made enquiries with RICS-qualified colleagues whose job is to buy, sell and manage leases on commercial buildings of all sizes. These colleagues although they use CPSE 1 and CPSE 3 forms and considered that a full-time property manager, a busy small trader or conveyancing lawyer, would not be thinking of utility matters when answering those questions and therefore relying on the

CPSE would not have the desired effect. Furthermore *“as CPSE 1 and CPSE 3 are admissible as evidence, there is a risk of vague answers being used if there is something onerous in / attached to a building, such as specific obligations”*. This respondent suggested that if this route was to be taken *“CPSE documents would need to be refined, qualified or perhaps another more specific question added if networks want the right level of information to be sought and disclosed. CPSE 1 & 3 are open source documents that are occasionally updated”*.

#### **PNO and Customer**

- This respondent considered that this change to the NTC would be inappropriate as it would affect the majority of customers when the solution is covering a handful of ‘bespoke special agreements’. The respondents main concerns arise from the legal liabilities, penalties and remedies for a customer inheriting these bespoke obligations or restrictions after buying a piece of land that evidently has a power supply. This respondent considers that the customer should have the opportunity to sign up to and accept the ‘custom’ obligations and provides the following recommendations to the Working Group:
  - a) *“Either establish two levels of connection an unencumbered default position and a bespoke position within the terms so that the terms could be inherited without the adoption of the bespoke terms.*
  - b) *Set up something on the land registry as per the Green Deal solar panels on roof’s where the contractual obligation stays with the property and as such is easily discoverable on the land register”*.

#### **Consultants**

- One respondent considered this legal text change to be a bad change as it seeks to impose obligations on customers going beyond the NTC without gaining customer consent or establishing a public interest in each individual case. The respondent then questioned the process undertaken by the Working Group including;
  - Ability to view the Working Group’s comments on the collated responses to consultation one,
  - the availability of consultation two to the public on the DCUSA website;
  - The cryptic text in paragraphs 3.6 and 3.7 of the consultation document;

- that the Working Group had not provided any quantitative analysis establishing the benefit of this proposal including land charges or explicit arrangements with the new occupier.
  - The Working Group noted that following consultation one, the responses were considered at the next Working Group meeting and that the comments on those consultation responses and the minutes of that meeting are available on the DCUSA website. Furthermore, the DCP 181 consultation two was available on the public section of the DCUSA website for the duration of the consultation response period. The Working Group has noted the consultant's response.
- Another consultant respondent considered that this change should not be implemented and that other more conventional approaches should be adopted such as transfers or re-newed terms for new Customers. The respondent considered that creating unique terms for this market would create confusion and it would be to the detriment of Customers. The respondent advised that customers are quite accepting that when a new site is purchased there may be associated negotiations to be had.

7.13 The Working Group noted the responses.

## **8 WORKING GROUP FURTHER ASSESSMENT OF DCP 181**

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8.1 After reviewing the consultation responses the Working Group took legal advice on a whether the capacity data was customer data (and hence falls under s105 of the Utilities Act) or was Distributor's data (and hence was able to be shared by him). The Working Group also questioned whether the existence of terms could be disclosed even if the terms themselves could not.

8.2 The legal adviser commented as follows:

*I don't think the data can be said to be the Distributor's data. The data relates to a business and has been obtained by the Distributor by virtue of its licence under the Act. Under s105 of the Utilities Act, the data cannot therefore be disclosed without the customer's approval, or where required by the Distributor's licence etc. The same analysis would apply to the obligations of confidentiality set out in the connection agreement, if any - there aren't any in the NTC.*

*This could, of course, be overcome by a provision in the DCUSA which obliges Distributors to make this information available. However, this is obviously a policy decision for Ofgem. From a policy perspective, revealing the existence of an agreement (rather than its terms) seems less of an issue. On a strict interpretation of confidentiality, however, there is no difference between the existence of the agreement as compared to its contents, and so both would be captured by s105 unless provision is made in the DCUSA to require or permit disclosure.*

*The analysis on DPA is similar, in that a company can always disclose personal data if it has an obligation at law to do so. However, the issue is more complex from a policy perspective for Ofgem in deciding whether to require disclosure. For the reason, it would be simpler to apply these rules only to non-domestic premises. This would also (I imagine) make the overall policy decision easier for Ofgem, in terms of whether a new occupier should have to make enquiries about existing connection terms, where I would imagine Ofgem would be less inclined to place the burden on domestic customers.*

- 8.3 The Working Group considered whether a disclosure obligation should be inserted into DCUSA. Concerns were expressed as to how such disclosure could be limited and what checks a Distributor would have to undertake in order to satisfy itself that a request was not frivolous. A disclosure obligation would probably have to recognise that disclosure would have to be to anyone as the Distributor cannot identify whether someone is a prospective purchaser and there could be many such persons. The Working Group concluded that the only “safe” approach remained for the Distributor to continue to provide terms to the current customer only (where the applicant has stated in writing that it is the current customer, if different from the Distributor’s records which often rely on updates being provided by Suppliers) or to anyone with the current customer’s authority. This reflects views received as part of the second consultation. However, the Working Group concluded that disclosure of whether or not bespoke connection agreements existed (without disclosing the contents of the agreements) should be permitted. The Working Group felt that it was important for prospective purchasers to be able to obtain confirmation on whether a bespoke connection agreement exists, and that there was no detriment to current owner/occupiers in this information being revealed.

- 8.4 The Working Group further noted that the industry norm among Distributors is that the



pre-existing terms (particularly capacity values) endure in practice but may not be legally enforceable. This change codifies current industry practice. Without this change there may be a detrimental impact on distribution systems, as customers may exceed the capacity of the local network assets or may not respond to previously agreed constraints. If existing terms do not endure and the existing terms quote the available capacity, it is a grey area as to the entitlement of the incoming customer to the capacity at the premises and hence may lead to a zero entitlement and excess capacity charging and an increase in connections applications.

## **9 IMPACT**

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- 9.1 The Working Group developed some examples of how this change may affect certain scenarios. These are given in Attachment 7.
- 9.2 The Working Group considered that domestic customers and non-domestic customers with whole current meters were less likely to have bespoke connection terms and were less likely to be mindful of the need to make enquiries concerning pre-existing terms. Although in the second consultation DNOs had suggested all customers' terms should endure, other parties had not agreed with this stance. In light of the comments by the legal adviser and noting similar concerns expressed by the Ofgem representative during Working Group meetings, the Working Group determined to limit the impact of this change to only non-domestic customers with C/T metering.

## **10 FURTHER LEGAL ADVICE**

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- 10.1 The Working Group reviewed progress and determined that there were still some unanswered queries regarding the legal effectiveness of this change and its impact on customers. A number of questions were posed to the DCUSA Legal Advisor. Those questions were as follows:
  - 1. Can terms contained in a bilateral contract be enforced against a third party? Is there a publicly available example of situations where this has occurred?
  - 2. Would the proposal in DCP181, if approved by Ofgem, conflict with contract law?
  - 3. Does contract law always apply given the NTC have been approved by Ofgem as being statutory in the absence of an agreement?

4. Could the NTC be varied to place an obligation on the connectee to advise any prospective buyer/new tenant if there is an existing bilateral or existing terms and to disclose them?
  5. How could standard enquiries used on sales of premises (whether domestic or commercial) be extended to asking about connection agreements/terms? Is there a standard process among solicitors?
  6. Under s16-s21 of the Electricity Act, can capacity agreed with (the first?) connectee transfer to a third party without any associated terms? Can a benefit be transferred in this way without associated burden?
  7. Under s22 of the Electricity Act, does the vacation of premises by the connectee cause an agreement to fall away and so the entitlement to use of the connection terminates? Alternatively, can capacity agreed with the first connectee transfer to a third party without any associated terms?
  8. Does the Act oblige the DNO to maintain the connection (the assets) or also its ability to be used (the capacity)? If the latter, what happens to associated agreements or terms under the Act?
  9. How might customers vacating or entering premises be compelled to advise the DNO of this fact and in practice would it be effective/enforceable?
  10. Are there any other factors the group needs to consider?
- 10.2 The legal advisor responded to these questions. In addition, the proposer also gave its view on the answers to these questions. These are provided as Attachment 8a and Attachment 8b.
- 10.3 The Working Group met to review these responses. As a consequence of these responses the Working Group determined that changes were needed to the wording in Schedule 2A that Suppliers must include within their Contracts. This is to ensure that the potential application of existing connection terms via the NTC is brought to the attention of customers as clearly as possible.
- 10.4 The Working Group surveyed Suppliers to determine how long it would reasonably take to amend new contract terms. It was noted that when DCUSA was first designated by Ofgem, there was a three month transition period for Suppliers to move to the “signposting” method of incorporation by reference within the Supply Contract. The Working Group concluded that three months remained a reasonable lead time.

- 10.5 The Working Group considered whether this wording needed to be changed in existing Supplier Contracts. It would clearly be better if it was, as it would bring it very clearly to the attention of the customer. However, the change proposed in the NTC will have effect in all existing contracts (via the NTC change mechanism), and all customers have agreed to that change mechanism. Weighing against the benefit of including the wording in existing Supplier Contracts is the (fairly onerous) burden on Suppliers of having to seek to agree this change in their Contracts (without any guarantee of success). The Working Group concluded on balance that the new wording should be included in new Supplier Contracts only.
- 10.6 In addition, the Working Group considered matters around the change of customer process and information available to incoming customers.
- 10.7 The Working Group determined to make some recommendations that Distributors amend their working for new bi-lateral Connection Agreements. These are explained further below.
- 10.8 However, to gain permission for disclosure in all relevant cases, the Distributors would also have to vary all existing Connection Agreements. To overcome this, the Working Group resolved to propose a right in the DCUSA for Distributors to divulge whether bi-lateral connection terms exist, on request. This overcomes the disclosure limitations imposed by Section 105 of the Utilities Act 2000 because these limitations do not apply if information is disclosed by a license holder as a requirement of a condition of their license (compliance with DCUSA being a Distribution License requirement).
- 10.9 The Working Group also sought advice as to whether the position under Scottish Law was different. It discovered that it was not. This advice is in Appendix A. The Working Group noted the key requirement around bringing the terms to the notice of the customer. The Working Group agreed to format the terms in bold, both in the NTC and the required text for supplier contracts, to enable this.

## **11 FIRST VOTE AND OFGEM SEND-BACK**

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- 11.1 The DCUSA Panel originally approved DCP 181 for voting on 20 January 2016. DCP 181 was voted on by Parties and a recommendation to “reject” passed to Ofgem on 16 February 2016. Ofgem sent back DCP 181 with some requirements for the Working

Group to act on in order to make DCP 181 acceptable. The Working Group has worked on those actions and this Change Report represents the revised version of DCP 181. The only change is in the description of the legal text, which has been updated in light of Ofgem's comments.

## 12 PROPOSED LEGAL TEXT

12.1 The proposed legal drafting of DCP 181 has been considered by the Working Group, and reviewed by Wragge Lawrence Graham & Co, and is provided as Attachment 1.

12.2 The legal text requires that Distributors amend their bi-lateral connection terms in the following ways:

1. To ensure the customer agrees to the Distributor advising any proposed incoming customer (whether owner or occupier) of the existence of the connection terms
2. To place an obligation on the customer to advise any incoming customer (whether new owner or occupier) of the connection terms

12.3 The Legal Text further provides for the continuation of the bi-lateral connection terms and for the visibility of those to customers by making the following changes to DCUSA;

1. To require the distributor to disclose whether bi-lateral connection terms exist, on the application by anyone purporting to be a prospective owner or occupier of the premises. It is further clarified that the details of the terms themselves must not be disclosed without the permission of the customer.
2. To amend the wording that suppliers must include in their contracts by referencing the possible existence of existing terms. This needs to be formatted in bold or highlighted in some other way that draw attention to this
3. To amend paragraph F of section 1 of the NTC, which is in Schedule 2B in DCUSA. The proposed text makes clear that the NTC do not apply where the owner/occupier is already party to a bilateral connection agreement. The proposed text goes on to state that a non-domestic customer with C/T metering will be subject to any pre-existing bilateral connection terms. The customer will have both the rights and the obligations under those terms. This text will be formatted in bold.

### 13 EVALUATION AGAINST THE DCUSA OBJECTIVES

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13.1 The majority of the Working Group considers that the following DCUSA Objectives are better facilitated by DCP 181.

**General Objective One – ‘The development, maintenance and operation by the DNO Parties and IDNO Parties of efficient, co-ordinated, and economical Distribution Networks’**

13.2 The CP better meets DCUSA General Objective One by ensuring that the risk of reinforcement due to a customer not being bound by previous terms is avoided.

**General Objective Two – ‘The facilitation of effective competition in the generation and supply of electricity and (so far as is consistent therewith) the promotion of such competition in the sale, distribution and purchase of electricity’**

13.3 The CP better meets General Objective Two because it facilitates competition in supply by allowing:

- less strict terms to apply to generators who are willing to accept non-standard terms and
- Better management of the network by constraining certain connections thus allowing more connections to the network.

### 14 IMPLEMENTATION

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14.1 DCP 181 is classified as a Part 1 matter and therefore will go to the Authority for determination after the voting process has completed.

14.2 The proposed implementation date for the DCP 181 legal text is the next release that is three months after Ofgem approval. This recognises the impact on new Supplier Contracts, for which templates will need to be changed, and that changes to the NTC must be notified (in the London Gazette) for which there is an administrative process to follow.

### 15 WORKING GROUP CONCLUSIONS

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15.1 The Working Group reviewed each of the responses received in response to its consultations and concluded that the majority of the respondents understood the intent of DCP 181.

15.2 The Working Group agreed that the majority of respondents were supportive of the principle of the CP.

15.3 The Working Group noted that the majority of respondents felt that specifically DCUSA General Objectives 1 and 2 were better facilitated by this change.

15.4 The Working Group concluded that the CP will provide the following benefits:

- By ensuring that the connection terms reflect the technical constraints, characteristics and nature of the physical connection rather than reverting to the generic NTC.

## 16 ENGAGEMENT WITH THE AUTHORITY

16.1 An Ofgem representative participated in the DCP 181 Working Group.

## 17 ENVIRONMENTAL IMPACT

17.1 In accordance with DCUSA Clause 11.14.6, the Working Group assessed whether there would be a material impact on greenhouse gas emissions if DCP 181 were implemented. The Working Group did not identify any material impact on greenhouse gas emissions from the implementation of this CP.

## 18 PANEL RECOMMENDATION

18.1 The Panel approved this Change Report on 20 April 2016. The Panel considered that the Working Group had carried out the level of analysis required to enable Parties to understand the impact of the proposed amendment and to vote on DCP 181.

18.2 The timetable for the progression of the CP is set out below:

Activity	Target Date
Change Report Agreed	20 April 2016
Change Report Issued For Voting	22 April 2016
Party Voting Ends	09 May 2016
Change Declaration Issued	11 May 2016

Authority Decision <sup>3</sup>	15 June 2016
Implementation <sup>4</sup>	Next DCUSA Release that is 3 months following Authority Consent

## 19 NEXT STEPS

19.1 Parties are invited to consider the proposed amendment (Attachment 1) and submit their votes using the Voting form (Attachment 2) to [DCUSA@electralink.co.uk](mailto:DCUSA@electralink.co.uk) by **09 May 2016**.

19.2 If you have any questions about this paper or the DCUSA Change Process please contact the DCUSA by email [DCUSA@electralink.co.uk](mailto:DCUSA@electralink.co.uk) to or telephone 020 7432 3017.

## 20 ATTACHMENTS:

- Attachment 1 - DCP 181 Proposed Legal Drafting
- Attachment 2 – DCP 181 Voting Form
- Attachment 3 – Consultation Document and Responses
- Attachment 4 – Consultation Two Document and Responses
- Attachment 5 – List of consultation recipients
- Attachment 6 – DCP 181 Change Proposal
- Attachment 7 – DCP 181 Worked Examples
- Attachment 8a – Wragge Lawrence Graham & Co response to questions
- Attachment 8b – UK Power Networks response to questions
- Attachment 9 – Ofgem Send Back Letter

## 21 APPENDICES:

- Appendix A - Scottish legal advice

<sup>3</sup> Indicative decision date based on the 25 Working Day KPI

<sup>4</sup> Next DCUSA release three months following Authority consent is the 01 October 2016.

## APPENDIX A – SCOTTISH LAW ADVICE

### 1 BACKGROUND AND SUMMARY

- 1.1 We have been instructed by DCUSA Ltd (“**DCUSA**”) to provide Scots law advice in relation to the wording that it obliges licensed electricity suppliers (acting on behalf of DCUSA) to include in its contractual terms with supply customers and generator customers (the “**Terms**”). DCUSA’s English lawyers, Wragge Lawrence Graham and Co LLP (“**Wragges**”), have provided advice from an English law perspective.
- 1.2 The Terms include wording incorporating National Terms of Connection (the “**NTC**”) by reference. In certain circumstances the NTC incorporate further bespoke terms by reference (the “**Bespoke Terms**”). Additional background information is set out in the email from Wragges dated 18 November 2015 and attached at Appendix 1 to this note (the “**Email**”).
- 1.3 We have been asked to consider whether:
  - 1.3..1 the concept of incorporation by reference is legitimate and whether this remains true where there are two levels of incorporation by reference (see Section 2);
  - 1.3..2 the requirements for incorporation by reference in this manner are the same in Scots law as in English law (see Section 2); and
  - 1.3..3 the steps suggested by Wragges at point 13 of the Email are sensible and/or if we recommend any others (see Section 3).
- 1.4 Our understanding is that the Terms will be entered into with both businesses and consumers and we have therefore considered the advice from both perspectives.
- 1.5 We have concluded that:
  - 1.5..1 there is no prohibition on the concept of incorporation by reference where there are two levels of incorporation (if certain requirements are met);
  - 1.5..2 the requirements for incorporation by reference are generally the same under Scots and English law; and
  - 1.5..3 we agree with the solutions proposed by Wragges but have suggested that any



material terms which are unusual in the NTC or Bespoke Terms are summarised in the body of the Terms themselves.

## 2 INCORPORATION BY REFERENCE

2.1 Wraggles has confirmed that incorporation by reference is legitimate under English law if the following three factors are achieved (the “**Requirements**”):

2.1..1 the fact that the legal terms are to apply needs to be drawn to the customer’s attention;

2.1..2 this needs to be done prior to contract formation; and

2.1..3 the actual terms need to “fairly and reasonably” be brought to the customer’s attention.

2.2 Wraggles has also cautioned that English case law provides that the more onerous and unusual the terms are, the more that must be done to bring the terms to the attention of the counterparties.

2.3 Scots contract law requires the parties must reach “consensus in idem”- that is to say, there must be a “meeting of the minds” between the parties on the same essential terms of the contract.

2.4 Under Scots law, a document which refers to but does not contain the text of terms and conditions will only bring these terms into the contract if **the document itself is understood to be contractual in nature**. In our view, it is clear in these circumstances that the Terms incorporating the NTC and Bespoke Terms are contractual.

2.5 The document making reference to, or the notice embodying further terms and conditions must do so in a way that **serves to draw the existence of the terms and conditions to the notice of the customer**. Prominent notice of any particularly onerous terms should be given at the time of contracting.<sup>5</sup>

2.6 Scottish case law has confirmed that if terms incorporated by reference are **atypical and unforeseeable** they must be **brought “specifically” to the attention of the other**

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<sup>5</sup> Contract Law in Scotland (3<sup>rd</sup> Edition), Joe Thomson

**party** and it is not sufficient if they are “generally” made aware of the term.<sup>6</sup>

- 2.7 The position appears to be even stricter under consumer law (which applies on the same basis under Scots and English law). Under the Consumer Rights Act 2015 (the “Act”), terms may be considered unfair if they have the “object or effect of irrevocably binding the consumer to terms with which the consumer has had no real opportunity of becoming acquainted with”.
- 2.8 The Competition and Markets Authority has issued guidance in relation to this provision and has confirmed that it is a “fundamental requirement of contractual fairness” that **consumers should always have the opportunity to read and understand contracts before becoming acquainted with them**. Any provision which seeks to bind the consumer to accept “hidden” terms is liable to challenge. Therefore, the overriding requirement is that consumers must be effectively alerted to all contractual provisions that could **significantly affect their legitimate interests**.
- 2.9 Therefore, it is clear that the Requirements in terms of incorporation by reference are generally the same under Scots law and English law. Similarly, there is no prohibition on two levels of incorporation by reference under Scots law (provided that the Requirements are met and any significant terms are brought to the customers’ attention).

### 3 STEPS TO ENSURE COMPLIANCE

- 3.1 We generally agree with the steps proposed by Wragges at point 13 in the Email, particularly in relation to the distinction between the approach made to sophisticated and domestic customers (i.e. businesses and consumers).
- 3.2 With reference to points 11 and 12 of the Email, we also agree from a Scots law perspective that any terms that are considered as unusual or onerous should be expressed in the most transparent way possible. This is even more significant in consumer contracts to ensure compliance with the Act.
- 3.3 Therefore, if there are any material provisions in the NTC or Bespoke Terms that are atypical or onerous (for example clauses which impose penalty clauses or additional fees), the best way to ensure compliance would be for these to be drawn to the

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<sup>6</sup> *Montgomery Litho Ltd v Maxwell 2000 SC 56*

attention of the customers in the Terms or otherwise summarised in the body of the Terms themselves. We note that this may not be possible from a practical perspective. As a result, we are of the view that clearly referencing the NTC and Bespoke Terms and perhaps providing a summary in the Terms of what they generally cover would be a reasonable position to adopt.

**Burness Paul LLP**

## Appendix 1

### E-mail from Wragge Lawrence Graham and Co LLP

**Sent:** 18 November 2015 12:43

**To:** David Goodbrand

**Cc:** DCUSA ([dcusa@electralink.co.uk](mailto:dcusa@electralink.co.uk)); Waymont, Peter; John Cooper

**Subject:** DCUSA Ltd: Scottish Law Advice

Hi David

I'm not sure if you will remember, but you helped us with a Scottish law review of an electricity industry agreement known as the DCUSA (the Distribution Connection and Use of System Agreement) back in 2006?

Our client, DCUSA Ltd (which is the body responsible for administering the agreement) needs some further Scottish law contract advice, and I wondered if you could help?

The background and questions are set out below -

1. Licensed electricity suppliers are obliged by the DCUSA to include the following wording in their contracts with supply customers and generator customers –

Your supplier is acting on behalf of your network operator to make an agreement with you. The agreement is that you and your network operator both accept the National Terms of Connection (NTC) and agree to keep to its conditions. You will be bound from the time that you enter into this contract and it affects your legal rights. The NTC is a legal agreement. It sets out rights and duties in relation to the connection at which your network operator delivers electricity to, or accepts electricity from, your home or business. If you want a copy of the NTC or have any questions about it, please write to: Energy Networks Association, 6th Floor, Dean Bradley House, 52 Horseferry Road, London SW1P 2AF: phone 0207 706 5137, or see the website at [www.connectionterms.co.uk](http://www.connectionterms.co.uk).

2. The above paragraph is, in effect, a contract between the customer and the distributor, entered into by the supplier as agent for the distributor, and incorporating by reference the NTC (being the terms set out at [www.connectionterms.co.uk](http://www.connectionterms.co.uk)).

3. The NTC provide (in broad terms) that Scottish law applies where the agreement relates to properties in Scotland.
4. When this approach was adopted in 2006 you confirmed that the concept of incorporation by reference was broadly the same under Scottish law as under English, and that the approach described above was OK.
5. Most of the premises in Great Britain are connected on the basis of the terms at [www.connectionterms.co.uk](http://www.connectionterms.co.uk). However, in certain cases, larger customers are connected on the basis of bespoke connection agreements with special site-specific requirements.
6. The industry is currently considering whether, in certain circumstances, these special site-specific requirements should be preserved and applied to new customers that come to own or occupy the relevant site. This would be achieved by amending the terms at [www.connectionterms.co.uk](http://www.connectionterms.co.uk) to provide that, in those case, the terms that apply are actually the bespoke site-specific terms.
7. In effect, the wording in the supply contracts (see paragraph 1) would incorporate the NTC by reference, and the NTC themselves would (in certain circumstances) incorporate further terms by reference.
8. We have advised that, in English contract law, the concept of incorporation by reference is perfectly legitimate, and that this remains true in a case such as this (where there is two levels of incorporation by reference).
9. However, we have also advised that it will only work in practice if the following three things are achieved:
  - 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.

10. The NTC regime is already designed to achieve these things where it is incorporated via contracts with suppliers. These contracts are themselves understood by customers to be legal documents, and suppliers have an obligation to bring the application of the NTC to the attention of customers.
11. However, we have cautioned that, under English law, 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.
12. 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 customer's attention. In contrast, any existing bespoke 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.
13. The following steps are going to be taken to help ensure that the incorporation by reference of the bespoke site-specific terms is effective in practice:
  - a. we're going to limit the application of this second level of incorporation by reference to non-domestic premises with 'big' meters (so just the relatively sophisticated customers);
  - b. we're going to change the wording in supplier contracts (see paragraph 1 above) to expressly refer to the possibility that the NTC will incorporate by reference existing bespoke terms;
  - c. we're going to change the wording in supplier contracts (see paragraph 1 above) to expressly refer to the possibility of asking the distributor to confirm whether or not there are bespoke terms;
  - d. we're going to permit distributors to disclose to any person purporting to be a prospective owner/occupier of a site whether or not a bespoke contract exists (just its existence);

- e. we're going to suggest that all bespoke connection agreements are amended to oblige customers to provide a copy of the bespoke agreement to prospective owners/occupiers.

14. The questions for you from a Scottish law perspective would be whether:

- a. the concept of incorporation by reference is legitimate, and whether this remains true in a case such as this (where there is two levels of incorporation by reference)?
- b. the three requirements set out in paragraph 9 are (broadly speaking) the same in Scottish law?
- c. the steps highlighted in paragraph 13 above are sensible and/or whether you recommend any others (recognising that we're not being asked to advise on a particular example, and we're not being asked to advise whether the approach will necessarily always work, just whether there is a reasonable prospect of it working).

Could you please let me know if you are willing to help, and what your fees would be?

I'm afraid you'd need to open DCUSA Ltd as a client. In terms of KYC, it is owned by all the suppliers and distributors (many of which are listed), but they only have one share each.

Gus