SUBMISSIONS ON DCP 033
CONSULTATION RESPONSE

ON BEHALF OF

EDF ENERGY NETWORKS (EPN) PLC,
EDF ENERGY NETWORKS (LPN) PLC,
EDF ENERGY NETWORKS (SPN) PLC,
AND EDF ENERGY (IDNO) LIMITED

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Introduction

1. This document sets out submissions on behalf of the above-named EDF Energy companies ("EDF Energy") in response to the DCP 033 Consultation in respect of the National Terms of Connection ("NTC").

2. EDF Energy proposes 6 amendments to the current proposed draft of the NTC and 2 amendments to the proposed Distribution Connection and Use of System Agreement ("DCUSA"). In summary the proposed amendments are:

   NTC General Section:

   (1) Incorporate as an additional clause a reference to section 21 of the Electricity Act 1989.

   (2) Add an additional clause making it clear that these terms and conditions apply to any other connection in any other premises of which the customer is an owner or an occupier unless covered by a separate agreement between us.

NTC Sections 1, 2 and 3:

(3) Add clause in each section imposing an obligation on a consumer to bring these terms to the attention of the owner and/or occupier of the premises.

NTC Section 1:

(4) Add wording to clause 7 to exclude losses for which domestic customers should be insured and to encourage consumers to take out insurance.

(5) Change the wording of the clause 7 exclusion to make it clear that all loss of profits and other economic losses are excluded.

(6) Amend the wording to provide a better definition of a business customer in clause 8.

DCUSA

(7) Add words to Schedule 2A of DCUSA to reflect Proposal 1.

(8) Add words to DCUSA clause 17 to reflect Proposal 1.

Proposal 1: Section 21

Add Clause F: *So far as may be necessary, you are required to accept these terms of the National Terms of Connection relevant to you (under Clause C) including terms excluding and restricting our liability to you as it is reasonable to do so under section 21 Electricity Act 1989.*

Proposal 2: Other Connections

Add Clause C: Y*ou also agree that these terms apply to any other connection in any other premises of which you are an owner or an occupier unless*

covered by a separate agreement between us (other than another standard connection agreement or connection terms contained within a supply contract).

(Subsequent clauses to be re-numbered)

Proposal 3: Obligation to communicate with owner/occupier

Add a new clause 9 to section 1, suitably modified in Sections 2 and 3:

If you are the owner but not the occupier of the premises in which the connected installation is situated you agree to bring these terms and conditions forthwith to the attention of all the occupiers; if you are the occupier but not the owner you agree to bring these terms and conditions forthwith to the attention of all the owners; if you are neither the owner nor the occupier you agree to bring these terms and conditions forthwith to the attention of all of the owners and occupiers;

Proposal 4: Limit liability by reference to insurance

Add to clause 7 (after "goodwill"): *or for any loss in respect of which you have agreed with an insurer to be insured. You are strongly advised to take out your own appropriate insurance cover for all such potential losses.*

Proposal 5: Clarify the exclusion of all economic loss

Amend Clause 7: We will not be required to compensate you ... for any *wasted expenses, any loss of profit revenue or interest, any loss of business commercial market or economic opportunity, any loss of contract or goodwill, or any* indirect consequential economic or financial loss *of any other kind* ~~(including wasted expenses or any loss of revenue, profit, or interest, any loss of business, commercial, market, or economic opportunity, or any loss of contract or goodwill~~.

The full text of Clause 7 (taking account of Proposals 4 and 5) would then read:

> *If something goes wrong.* If we fail to comply with any term of this agreement, or are negligent, you may be entitled under the general law to recover compensation from us for any loss you have suffered. However, *you are strongly advised to take out your own appropriate insurance cover for all such potential losses: we will not be required to compensate you for loss caused by anything beyond our reasonable control, or for any wasted expenses, any loss of profit revenue or interest, any loss of business commercial market or economic opportunity, any loss of contract or goodwill, or any indirect consequential economic or financial loss of any other kind or for any loss in respect of which you have agreed with an insurer to be insured* ~~indirect, consequential, economic, or financial loss (including wasted expenses or any loss of revenue, profit, or interest, any loss of business, commercial, market, or economic opportunity, or any loss of contract or goodwill)~~, other than where you are entitled to recover compensation for such loss under the general law in relation to death or personal injury.

Proposal 6: Better definition of Business Customer

Amend clause 8: used wholly, mainly *or in any substantial way* for business purposes

Proposal 7: Reflect Proposal 1 in DCUSA

Amend Schedule 2A: **National Terms of Connection**

> Your supplier is acting on behalf of your network operator to make an agreement with you *and so far as may be necessary to notify you of terms and conditions that you are required to accept under section 21 Electricity Act 1989.* The agreement is that you and your network

operator both accept the National Terms of Connection (NTC) and agree to keep to its conditions. This will happen 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 *from which it* 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.

Proposal 8: Reflect Proposal 1 in DCUSA

Amend clause 17: **Appointment as Agent**

17.1 The Company hereby appoints the User as the Company's agent for the purpose of procuring agreements with Customers and Generators on the terms set out at Schedule 2B (the **National Terms of Connection**) *and so far as may be necessary notifying them that they are required to accept such terms under section 21 Electricity Act 1989* in accordance with this Clause 17, and the User agrees to act in that capacity.

17.2 In respect of the Customers of a Relevant Exempt Supplier, the User is authorised to, and shall, appoint the Relevant Exempt Supplier as the sub-agent of the User for the purpose of procuring agreements on *and notifying the terms of* the National Terms of Connection in accordance with this Clause 17, and shall procure that the Relevant Exempt Supplier agrees to and does act in that capacity.

Obligation to Include Wording in Contracts

17.3 The User shall ensure that, on each occasion on which it, or any Relevant Exempt Supplier, enters into a Contract (whether written, oral, or deemed), the wording set out in Schedule 2A is included within

that Contract. The User shall ensure that such wording is presented in such a way as to create an effective contract (insofar as one can be created by presentation alone) between the Company and the relevant Customer or Generator on the terms and conditions of the National Terms of Connection *and to make it clear that so far as may be necessary the relevant Customer or Generator is required to accept such terms under section 21 Electricity Act 1989*.

Proposal 1 Reasoning

3. The key question is whether the relationship between consumer and distributor is statutory or contractual. If it is a statutory relationship then one looks to section 21 (including the cases decided under it and the nature of the amendments to section 21 effected by the Utilities Act 2000) for guidance as to the scope of the permissible exclusions. If section 21 only applies to a new connection (or the maintenance of an existing connection) that can only be effected by a notice under section 16A then it follows that the relationship is not regulated by statute at all except in the sense that the statute would set up the existence of the licence-holder who would be required by his licence to provide a connection, but the nature of the relationship would be left to some other, unspecified, mechanism.

4. It is considered unlikely that Parliament set up a complex structure for ensuring that contracts existed for suppliers (and were artificially created by statute for that purpose) while removing the mechanics of the statutory relationship for distributors (that had undoubtedly existed throughout the 1990s) and putting nothing in its place except for new/maintained connections that were effected by a section 16A notice.

5. The NTC are in a standard form and cannot be changed without the Regulator's authority. While it is to be noted that clause 11 purports to allow the negotiation of different terms "if either [party] believes the change is needed because of the nature of your connection or because this agreement is no longer appropriate" that still indicates that the *standard* terms are not negotiated although it leaves open the possibility that the parties might (at least in theory) agree something different in the future (which is

merely suggesting the possibility of the distributor either being prepared to consider requiring different terms under section 21 of the Electricity Act 1989 or flagging up the possibility of a future special connection agreement under section 22).

6. The routes by which the industry has sought to incorporate these terms has changed over time. The time periods that fall to be considered are as follows namely (i) 1990-1998, (ii) 1998-2001, (iii) 2001-2006, and (iv) post-2006. It is not necessary to consider the position before the EA 1989. The relevant primary changes during these periods were as follows:

1990-1998

(1) During the period 1990 to 1998 public electricity suppliers fulfilled all distribution and the vast majority of supply requirements, although the market for supply was gradually liberalised with second tier suppliers allowed to compete in increasing, but still quite small, sectors of the market. During this period the industry regulated its relationships with customers via tariff terms or, in a small percentage of case, via special agreements under EA section 22. Case law establishes that whatever the documentation might have said the relationship between a monopoly supplier and the consumer was statutory rather than contractual.

1998-2001

(2) In 1998 the market opened fully and all consumers were entitled to purchase electricity from second tier suppliers. At this stage the industry imposed a requirement through DUoSA on all suppliers to procure a separate contract between the consumer and the distributor. This was set up on the basis that the supplier was appointed the agent of the distributor and in that capacity the supplier established a separate contract between the consumer and the distributor to which the consumer agreed by entering into the supply contract. The terms of such an agency contract were set out in the standard connection agreement ("SCA"). During this period there were no longer any monopoly

suppliers (as that word is now understood) but of course all distribution remained a monopoly.

(3) Accordingly, during this period there would still have been tariff customers taking both supply and distribution from the local PES. Even though they had a choice whether to continue to take electricity from their local PES, if the customer continued to do so then the terms of supply would be statutory rather than contractual. There would then be many customers taking supply from second tier suppliers in the free market. Those supply relationships would undoubtedly be contractual rather than statutory. Using the agency contract and the SCA, attempts were made to create contracts between distributors and the customers taking free market second tier supply but it remains to be established whether any such contracts truly existed at all.

2001-2006

(4) The Utilities Act 200 created further changes and in effect completed and formalised the separation of distribution and supply functions. The relations between consumer and supplier and consumer and distributor underwent major changes: schedule 7 of the UA created about 20 million contracts between suppliers and consumers by deeming that every tariff customer was converted by law onto a deemed supply contract; schedule 4 of the UA (schedule 6 of EA Amended) provided that any supply otherwise than pursuant to a contract would also be deemed to be pursuant to a contract. However, Parliament did not choose to establish deemed distribution contracts. During this period, the distribution industry sought to regulate the terms upon which it distributed electricity by requiring suppliers to set out the distributors' terms in the supply contract and providing expressly that the distributor had the right to enforce those terms under the Contracts (Rights of Third Parties) Act 1999.

Post-2006

(5) The regulation of the relationship between consumers and distributors has changed again although the statutory regime has not changed. Once again, the suppliers have been required (this time by DCUSA) to act as agent for the distributors in establishing self-standing contracts with consumers with the terms being incorporated into National Terms of Connection ("NTC") which terms are "signposted" on all suppliers' literature with a reference to a discrete NTC website. Whether these stand as contracts or not remains an issue.

(6) There is no difference in principle between the agency contract sought to be established post-2006 and those that were attempted between 1998 and 2001 except for the aspect of "signposting", i.e. a more consistent method of bringing the existence of the agency contract and its terms to the attention of the consumer.

7. The principal statutory provisions are EA 1989 sections 16 to 23; UA 2000 Schedule 7; EA Amended sections 16 to 27 and Schedule 6.

8. The EA licensing regime provided for first tier suppliers and second tier suppliers. A public electricity supplier (i.e. first tier supply by "PES") under the EA was necessarily at that stage both supplier and distributor with a general duty under EA section 9 "to develop and maintain an efficient, co-ordinated and economical system of electricity supply". This issue has been considered by the court in *Norweb v Dixon* [1995] 1 WLR 636 by reference to sections 16 to 24 of the EA. In summary these sections provided 10 key features as follows:

(1) Section 16 (1) and (5): a duty to supply and continue to supply upon being required to do so.

(2) Section 16 (2): a duty on the consumer wanting a supply to give notice to the supplier.

(3) Section 17: limited exceptions to the duty to supply.

(4) Section 18: the charges for the electricity will be in accordance with published tariffs.

(5) Section 19: the power to recover expenditure in providing lines or plant for the purpose of providing the supply under section 16.

(6) Section 20: a power to require security.

(7) Section 21: a power for the PES to require a person who requires a supply to accept restrictions necessary for safety and terms restricting liability in certain circumstances.

(8) Section 22: the ability for supplier and consumer to enter into a special agreement.

(9) Section 23: provision for disputes arising under sections 16 to 22 to be referred to the regulator.

(10) Section 24: introduced Schedule 6 which set out the public electricity supply code which confirmed in paragraph 1 that the supplier could recover from the tariff customer charges in respect of supply or provision of meter, line or plant.

9. Under the earlier legislation (the Electricity Act 1947) the high court had held in *Willmore v South Eastern Electricity Board* [1957] 2 LLR 375 (see page 380) that the supply of electricity by a then electricity board was pursuant to a statutory duty and did not create a contract between the board and the customer. In 1995 a similar issue came before the Divisional Court consisting of Lord Justice McCowan and Mr (now Lord) Justice Dyson in *Norweb*. The case was an odd one as it concerned an allegation first heard by magistrates that *Norweb* had committed harassment of a tariff customer during 1993 under a statutory provision that had nothing to do with electricity by repeated demands for the payment of bills wrongly alleged to be

outstanding. In deciding the appeal the court had to consider whether there was "a debt due under a contract".

10. The main judgment was given by Dyson J. He held that there was no contract between a PES and a tariff customer:[1]

> "In my judgement, the legal compulsion both as to the creation of the relationship and the fixing of its terms is inconsistent with the existence of a contract. As regards the creation of the relationship, the supplier is obliged by section 16(1) of the Act to supply if requested to do so. The exceptions from the duty to supply provided in Section 17 are very limited in scope … [and] [s]ave in certain narrowly defined circumstances, if a customer requests the supply of electricity, the supplier is obliged to supply. … The tariff is fixed by the supplier (Section 18). The supplier can require the consumer to defray any expenses reasonably incurred in supplying any electric line or plant (Section 19), and to give reasonable security (Section 20(1)). The supplier can also impose additional terms of supply (Section 21). The consumer has no bargaining power in relation to these matters. It seems to me that the principal terms are imposed on the consumer by the supplier not as a result of bargaining, but by the supplier exercising the power conferred on it by the Act. The words of Section 22 of the Act provide further support for the view that there is no contract. That section refers to a special agreement "for the supply on such terms as may be specified in the agreement". What is contemplated is a negotiated agreement to meet the particular requirements of a consumer … [and] … [t]hus a clear distinction is drawn as to the source of the rights and liabilities between (i) supplies under special agreements which are governed by the terms of those agreements, and (ii) supplies to tariff customers which are governed by the Act. This provides clear confirmation that the rights and liabilities as between tariff customers and their public electricity suppliers are governed by statute and not by contract."

11. This reasoning was accepted and applied by the trial judge in *Beckett v Midlands Electricity* Lawtel (17/1/00). It was not affected by the later decision of the court of appeal in that case.

12. Clearly the application of sections 16 to 24 (and sections 25 and 27) of the EA to suppliers covered their activities both of what we would now call supply and distribution. The competitive market opened up in 1998 but under the same statutory provisions. Those provisions were amended by the UA but it is important to see what

[1] Technically, the comments of Dyson J on this issue may be considered to be obiter since it was not necessary for him to decide whether there was *in fact* a contract in existence or whether it was merely *contended* that money was due under a contract.

remains of them. Sections 16 to 24 now apply only to distributors. Of the 10 original features I have listed above, 8 remain, suitably amended to apply to distribution: only numbers (4) and (10) have gone (the original sections 18 and 24) and they related only to *charges for electricity* which would now be inappropriate. Everything else remains. The reasoning of Dyson J therefore remains materially unaffected. The reality is that the terms of connection are nationally negotiated and cannot be altered without Ofgem's agreement.

13. The distinction drawn by Dyson J between statutory and contractual arrangements is also further reinforced by a consideration of section 23 and the important amendment made to that section by the UA and of sections 25 and 27 which he was not asked to consider:

(1) Section 23: the dispute resolution powers of the regulator originally applied to any dispute under sections 16 to 22 (i.e. including a special supply contract). The amended section 23 applies only to disputes arising under the provisions of sections 16 to 21, i.e. the statutory scheme.

(2) Sections 25 and 27: these were not considered in *Norweb* but they are plainly important in setting up a clear statutory scheme with its own provisions for liability. In particular, it is clear from section 25(3) that section 27 excludes all liabilities arising out of the section 16 obligations other than negligence or failure to comply with Ofgem's provisional or final orders.

14. Accordingly, in principle there is no reason for Dyson J's analysis not to apply to the relationship between consumer and distributor just as it did to the earlier relationship between consumer and PES (i.e. between consumer and a company undertaking both supply and distribution).

15. It is more likely that the court will conclude that the Act sets up two schemes for connection: one statutory under sections 16 to 21 and one contractual under section 22, just as there was for suppliers (which function included distributors) under the Act

in its unamended form. The enforcement sections (25 to 27) provide significant support for this view.

16. In further support of this proposition is the fact that Parliament chose to set up, under UA schedules 4 (now schedule 6 of the 1989 Act as amended) and 7, two schemes for contracts to be deemed to exist in respect of what is now called supply but did not choose to do so in respect of what is now called distribution. Accordingly, pre-2001 supply that had not been negotiated under the old section 22 was statutory and not contractual, the distribution function remained under the amended sections 16 to 21 and therefore remained statutory and the now separate supply function was specifically made the subject of two separate schemes of deemed contracts.

19. This view is reinforced by a consideration of Hansard: in a debate on the passage of the amendments to the 1989 Act on 21 June 2000, Lord McIntosh of Haringey opposed an industry-sponsored amendment to section 21 by which it was proposed to include a reference both to negligence and breach of contract. He stated as follows:

> "Sections 16(1) to (3) place a duty on distributors to make a connection when required to do so. That duty encompasses not just the making of the connection but the subsequent maintenance of it for so long as the connection is required. The terms mentioned in Section 16(3) and 16A form the basis of a statutory agreement which governs the performance of and add a gloss to the statutory duties in Section 16(1) and (2). We would not expect any terms derived from these provisions to be regarded as terms of an ordinary and independent contract. As a result the distributor is under an obligation to make and maintain a connection once terms are agreed. Such terms may be determined by a third party – that is, [Ofgem] – in the event that the parties cannot agree the terms between themselves."

18. There is only one argument in support of the proposition that Parliament intended to replace the earlier statutory regime with a new structure, i.e. in effect three regimes namely (i) a new connection or a specific identifiable request to maintain an old connection, which would create a statutory relationship under sections 16 to 21, (ii) special connection agreement under section 22 which was wholly outside the statutory regime and outside section 23, and (iii) some form of self-standing contract with the majority of consumers which was not a section 22 special agreement. While the old section 16 was clear in ensuring that an obligation to supply included an obligation to

"continue to supply" and the new section 16 ensures that a duty to connect includes an obligation "to maintain the connection" the EA Amended has specifically added section 16A as the machinery to be followed when a person requires a connection to be made or maintained. However, it can never have been contemplated that the section 16A machinery was required for an incoming occupier who was taking over an *existing* connection. But it is difficult to imagine that Parliament intended 20 million connections to be unregulated by the statutory regime set up for the purpose of regulating connections and it is highly arguable that the court would hold that section 16A is not a gateway that wholly changes the meaning purpose of sections 16 to 23 but merely the machinery to be used when a new connection is required or an old connection requires identifiable work to maintain it.

19. If the court came to the same conclusion now as it came to under the 1989 Act then it is arguable that the justification for exclusions and limitations will be found in section 21 and not the law of contract. There is little doubt that the court will consider that it is one or the other, but it is safer to include a reference to section 21 in the NTC.

Proposal 2 Reasoning

20. EDF Energy submits that it is both logical and appropriate to introduce as much uniformity as possible into the application of the NTC. The application of the terms should not be dependent upon whether it is an owner or an occupier who actually seeks supply and so becomes bound by the NTC. EDF Energy has experience of claims for fire damage in circumstances where the tenant is bound by the NTC but the landlord is arguably not but where the landlord had the opportunity to insure and did insure, was a connected party elsewhere and was fully aware of the NTC. So, by way of example, if a customer is an owner at one property and bound by the NTC because he agreed to take the supply there, it is logical that he should be bound by the same terms in any separate property where he might be an owner but where the occupier has contract for the supply of electricity.

Proposal 3 Reasoning

21. This proposal is to be read with, and is justified on the same grounds as, Proposals 1 and 2.

Proposal 4 Reasoning

22. In many contexts, an exclusion of liability clause fashioned to exclude losses which are insured and only to permit losses which are uninsured or under-insured is common. Variations of this are also often seen in professional services where a professional has agreed a limit on his liability up to the level of his indemnity insurance in force from time to time. Most exclusion clauses are (at least in part) justified by the proposition that the claimant had the *ability* to insure and if that is reasonable then the clause leaves the claimant with the loss if he is foolish enough to be uninsured. EDF Energy's proposal therefore is a fairer reflection of commercial terms (whether with domestic customers or business customers).

Proposal 5 Reasoning

23. The law on what words of exclusion and limitation mean in the law of contract is not entirely clear but EDF Energy summarises it as follows:

    (1) The words "indirect" and "consequential" are probably synonymous: see *Hilton Services Ltd v Hilton International Hotels (UK) Ltd* 2000 BLR 235; *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA; *Croudace Construction Ltd v Cawoods Concrete Products Ltd* (1978) 8 BLR 20; *Deepak Fertilisers v Davy McKee* [1999] 1 Lloyd's Rep 387 (largely discounting the dicta of HHJ Thornton QC to the opposite effect in *Earl's Terrace Properties Ltd v Nilsson* [2004] EWHC 136).

    (2) The expression "indirect and consequential loss" is intended to cover (and therefore exclude) damages that fall within limb 2 of *Hadley*: see also *BHP Petroleum v British Steel* [1999] 2 All E.R. (Comm) 544.

(3) Loss of profits would not normally be excluded by the expression "indirect and consequential" and therefore need to be separately stated: see above cases plus *Motours v Euroball (West Kent) Ltd* [2003] EWCA 614 (QB) and *Leicester Circuits Ltd v Coates Brothers Plc* [2003] EWCA Civ 290.

(4) The expression "loss of profits *or* any other indirect losses or consequential damages" has been held to mean "loss of profits or indirect losses or consequential damages of any other kind" i.e. an exclusion of profits of any kind as well as losses falling within limb 2 of *Hadley*: see *BHP Petroleum*.

24. EDF Energy's concern is that the NTC wording does not follow the cases that have led to the last two conclusions. The NTC wording is *we will not be required to compensate you for any indirect, consequential, economic, or financial loss (including ... any loss of ... profit)*. If "indirect and consequential loss" is normally equated to limb 2 of *Hadley*, then it is certainly possible that the court would conclude that *economic and financial loss* is not to be treated as adding anything different: the word *loss* appears only once at the end of a compendium phrase that is likely to be construed as defining losses of a similar kind (the old eiusdem generis rule of construction). Accordingly, on this wording, the exclusion of loss of profits is then, as a matter of drafting, expressly stated to be part of or included within the limb 2 exclusion. Accordingly, if the court considered in the context of the case that any loss of profits in any particular case would have fallen within limb 1 then this exclusion may not work as it is intended to. The amendment is required to achieve this clarity.

Proposal 6 Reasoning

26. The current formulation is "used wholly or mainly for business purposes". In a number of cases EDF Energy has encountered a lack of clarity about this where a business has been run as part of or next to domestic premises with a significant overlap in use of both premises. The proposed new formulation is fairer.

Proposals 7 and 8 Reasoning

27. These amendments are self-explanatory and are consequential to Proposal 1.