

**Process for handling disputes under  
the SO-TO Code under BETTA**

**An Ofgem/DTI mini consultation  
document**

October 2003

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## Appendix

# 1. Introduction

1.1 In June 2003, Ofgem/DTI published 'The SO-TO Code under BETTA: Summary of responses and conclusions on Volume 3 and Volume 4 of the December 2002 consultation on the regulatory framework for transmission licensees under BETTA and further consultation on content of the SO-TO Code', 41/03 ("the June 2003 document"). This was the second consultation on the regulatory framework to apply to transmission licensees under BETTA and, in particular, on the establishment of a SO-TO Code (STC) which will set down provisions relating to interactions between transmission licensees. The June 2003 document proposed that, in progressing the drafting of the STC, a more streamlined and flexible approach be taken to soliciting wider industry views on matters through a number of "mini-consultations" on various sections of the STC and the STC subsidiary documents. Several respondents to the June 2003 document supported this approach and none objected. This is the first of several mini consultations to be issued by Ofgem/DTI over the coming months on the subject of the STC to apply between transmission licensees under BETTA. Respondents' views on the further issues raised in this document will be taken into account in further development of the detail of the STC.

1.2 The June 2003 document sets out the rationale behind consultations on the STC to apply between transmission licensees under BETTA. In the interest of brevity it is not repeated here but it can be viewed at the following location on the Ofgem website:

[http://www.ofgem.gov.uk/ofgem/work/index.jsp?section=/areasofwork/betta00&levelids=,1\\_3681#top3681](http://www.ofgem.gov.uk/ofgem/work/index.jsp?section=/areasofwork/betta00&levelids=,1_3681#top3681)

1.3 This mini consultation document explains Ofgem/DTI's thinking on the handling of disputes under the STC and provides initial drafts of legal text for discussion purposes only. It sets out the different options that exist for dispute resolution under regulated codes, considers issues in relation to where circumstances may give rise to disputes under both the STC and a user facing code and provides initial proposals on how disputes will be handled under the STC. Ofgem/DTI emphasise that the draft STC text included in the appendix to this document is, at this stage, work in progress. It is recognised that this text needs to be subject to further discussion and review, especially in light of the responses to this document, and work ongoing within the SO-TO Expert

Group ("STEG") and in the STEG Development Groups ("DGs"), to set down the detailed processes and procedures that will support the arrangements in the STC, as well as in the context of the STC as a whole.

## 2. Timetable and Responses

The proposed timetable and process for further development of the STC is as follows:

- ◆ responses to this mini consultation document should be sent by 21 November 2003 to Patrick Smart (details below)
- ◆ further developments of the STC will continue, with expert input from STEG and the DGs
- ◆ Ofgem/DTI are not currently minded to issue a separate conclusions document specifically dealing with respondents views on the further issues raised in this paper. Instead, Ofgem/DTI intend to publish a conclusions document in March 2004 that will summarise responses to the June 2003 document and responses to mini consultations.

### 3. Views invited

3.1 Parties are free to raise comments on any of the matters covered in this paper and in particular on the items requested. All responses will normally be published on the Ofgem website and held electronically in Ofgem's Research and Information Centre unless there are good reasons why they must remain confidential. Respondents should try to put any confidential material in appendices to their response. Ofgem prefers to receive responses in an electronic form so they can easily be placed on the Ofgem website.

3.2 Responses, marked 'Response to STC disputes mini consultation' should be sent no later than 21 November 2003 to:

Patrick Smart  
BETTA Project Office of Gas and Electricity Markets  
(Ofgem)  
9 Millbank,  
London SW1P 3GE,  
Fax: 020 7901 7479

Please e-mail responses to  
BETTA.consultationresponse@ofgem.gov.uk marked  
'Response to STC disputes mini consultation'.

3.3 If you wish to discuss any aspect of this document, please contact Patrick Smart, e-mail [patrick.smart@ofgem.gov.uk](mailto:patrick.smart@ofgem.gov.uk), telephone 020 7901 7350 or Gordon Armstrong at DTI, e-mail [gordon.armstrong@dti.gsi.gov.uk](mailto:gordon.armstrong@dti.gsi.gov.uk), telephone 020 7215 2779.

## 4. Resolution of STC Disputes

This section sets out proposals for dealing with disputes under the STC. Section 5 deals with the special but related areas of disputes of common origin arising under multiple codes.

### ***Proposals in the June 2003 document***

- 4.1 The June 2003 document identified that the potential for disputes between transmission licensees would appear to be greater under BETTA in comparison to that which exists today and the STC should therefore include a clear and robust procedure for resolving disputes. It then assessed the dispute handling arrangements in the current England and Wales versions of the Balancing and Settlement Code (BSC), the Connection and Use of System Code (CUSC) and the Grid Code and drew from this assessment some broad principles for determining the appropriate body to take a final decision on disputes.
- 4.2 These broad principles then formed the basis of the following proposals. Disputes under the STC:
- ◆ relating to matters of regulatory interest or those matters that would require the input of regulatory expertise in order to secure the most informed determination should be referred to the Authority for determination<sup>1</sup>; and
  - ◆ relating to technical matters should be referred to an independent arbiter.

Disputes involving contract breach or legal interpretation could also arise, and these are also considered below.

- 4.3 The June 2003 document acknowledged the subjective nature of these proposals and that this subjectivity may in turn place uncertainty around the dispute resolution procedures in the STC. It therefore proposed, in the interest of minimising such uncertainty, that the STC should contain provisions setting out dispute resolution procedures which will identify explicitly the determining body responsible for the

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<sup>1</sup> Note that unless otherwise indicated in the text, references to 'determination' in this document are to a determination by the Authority under provisions of the STC, rather than under a transmission licence.

resolution of disputes in relation to specific clauses. Ofgem/DTI undertook to provide an initial view of the dispute resolution procedures to apply in relation to each clause, or group of clauses, once a first full draft of the STC is available.

- 4.4 The June 2003 document stated that Ofgem/DTI were of the view that the STC will set out rights and obligations between the transmission licensees such that the GB system operator (GBSO) will be in a position to provide transmission services to users in accordance with other regulated codes. Such interactions could give rise to the possibility of a dispute relating to the provisions of more than one code and it would seem desirable to allow for a possible merging of determination procedures in certain circumstances. Ofgem/DTI undertook to give further consideration to the best way of handling disputes relating to the provisions of more than one regulated code and to publish further proposals in this area for consultation.
- 4.5 The June 2003 document also suggested that the STC may provide for Authority intervention in the handling of disputes. Ofgem/DTI recognised that there may be circumstances where a STC dispute which has been referred to an independent arbiter may raise matters of regulatory interest. This may arise because, on further investigation, a purely factual or technical dispute reveals such an issue. Ofgem/DTI suggested that, in such circumstances, it may be beneficial to transmission licensees for the STC to contain a provision that would grant the Authority the right to intervene in the handling of a dispute, which up to that point had been handled by an independent arbiter, further to the emergence of regulatory interest. Ofgem/DTI acknowledged that they were in the early stages of their thinking on this particular measure and undertook to share the outcome of their deliberations once the proposals had been worked up in greater detail.

### ***Responses to June 2003 Consultation and Ofgem/DTI further thinking on STC disputes***

- 4.6 Several respondents to the June 2003 consultation supported the Ofgem/DTI broad proposals to allocate technical disputes to an independent arbiter and disputes relating to matters of regulatory interest to the Authority on a clause by clause basis. With the qualification that there should also be a fall-back disputes resolution clause, Ofgem/DTI continue to be of the view that this will provide an efficient and transparent approach to



resolving disputes under the STC. Since the June 2003 document, Ofgem/DTI have given further thought to the detail of this arrangement and to the resolution of disputes in general under the STC.

### ***STC Dispute Escalation***

- 4.7 Ofgem/DTI envisage that different provisions of the STC may have their own associated escalation procedures designed to facilitate the parties trying to settle differences before they become formal disputes. If not resolved, disputes will have to go to an independent arbiter (i.e. the Authority or an arbitrator or independent expert) for determination or adjudication as appropriate. These discrete provisions are separate from the general dispute provisions (appended to this document) under the STC which establish a fall-back procedure for the resolution of disputes where there is a dispute which is not otherwise covered by specific clauses in the STC.

### ***STC Dispute Resolution Fora***

- 4.8 Since the June 2003 document, Ofgem/DTI have considered the various ways in which contractual disputes (i.e. regarding interpretation or breach) can be resolved. There are a limited number of independent 'fora' for which are typically available for the purposes of dispute resolution. These are, essentially, the courts, private arbitration, the regulator (in this case the Authority), and a technical expert.
- 4.9 There are advantages and disadvantages to each, and some mechanisms are more suitable for particular types of dispute. The courts have the advantage of tried and tested procedures, high quality judiciary, transparency and familiarity of use. Court proceedings can however be expensive and protracted.
- 4.10 Private arbitration, as the name suggests, has the advantage of confidentiality in that the proceedings are not public, very often QCs or former judges sit as the arbitrators, arbitrators may have the benefit of specialised or technical knowledge and the procedures can sometimes be speedier than the courts. However, this is not always the case, nor are the costs necessarily lower than for court proceedings. There is a precedent in the electricity industry for arbitration as the chosen forum, as used in the BSC. There are also various types of arbitration under the auspices of different bodies/associations and rules of procedure.

- 4.11 As suggested in the June 2003 document, the Authority would be an appropriate body for matters of regulatory concern and indeed the Authority may prefer to be able to intervene on such matters. Given, however, that the STC deals with some commercial/contractual matters, there may be areas where the Authority would not wish to intervene, nor be required to adjudicate and it would be more appropriate for the parties to be left to litigate or dispute a matter according to whichever forum and proceedings were selected in the STC.
- 4.12 A technical expert, such as an accountant or engineer, would often be the mechanism of choice for a financial or technical dispute, which involves a simple assessment and determination of, for example, the accuracy of a calculation or the correct carrying out of a technical process. Typically also the size of such a dispute is significantly smaller than in the case of one suitable for arbitration.
- 4.13 In any of the above cases, matters referred for determination by such an expert might be of regulatory concern and thus the Authority might have an interest in the resolution process and its outcome.
- 4.14 It should be noted also that there may not always be a clear demarcation of types, such as those that are 'hybrid', e.g. attracting the regulatory interest of the Authority as well as creating (potentially several) private rights. It may be necessary for the STC then to specify clearly how the dispute is to be dealt with, for example whether and how it should be divided up into component parts for separate resolution. (As an example, section 7.3.3 CUSC contains a procedure for ensuring that charging disputes are referred to the Authority where an arbitrator or arbitration panel finds itself considering such a dispute, whether or not part of another dispute. It set outs which questions need to be referred for resolution and what can remain for arbitration.)
- 4.15 The content of the STC is expected to be a mixture of technical, commercial and procedural matters which will give rise to a range of issues which would be suitable for treatment by any of the above, namely courts, arbitration, the Authority or an expert.
- 4.16 Although in many instances dealt with in the STC a particular choice of dispute resolution procedure and forum will be specified, there are likely to be some remaining areas where a general provision could be applied. For this purpose. the STC may adopt

a general or 'default' option specifying a particular forum to apply in the absence of specific provisions or carve-outs expressed in the STC.

- 4.17 Using this model, the choice of the courts, arbitration or the Authority (an expert not being suitable for determination of disputes generally) to apply as the general 'fail-safe' rule is required.
- 4.18 Ofgem/DTI are of the view that the courts may not be regarded as a suitable forum for a document of the nature of the STC, given its relative technical complexity, its close relationship to licence conditions and the need for streamlined resolution processes.
- 4.19 Therefore, in comparing the remaining choices of arbitration on one hand with the Authority on the other, the Authority will need to consider the extent to which it is appropriate for it to be involved in assessing and determining various potential types of dispute and the likelihood of this arising. If, for example, it was perceived that, in the majority of areas covered by the STC, the Authority would have a legitimate interest in being involved, it might make more sense for the Authority to be chosen as the (default) forum. This could be supplemented by the ability for the Authority to refer cases to another adjudicating or determining body where the Authority considered there was no regulatory element or which were otherwise more suited to arbitration/expert determination.
- 4.20 On the other hand, if in the majority of cases arbitration was seen to be the most appropriate forum, this could be the general option. Then, in order to preserve the ability for the Authority to intervene in cases where it was concerned to determine on a particular regulatory element, specific provisos and exceptions could be inserted to secure the opportunity and right of such intervention.
- 4.21 To summarise the above, therefore, it is initially proposed that the following principles would apply in the STC with regard to dispute resolution:
- ◆ the parties would first be required to use all reasonable endeavours to resolve disputes between themselves, according to a simple and expeditious escalation procedure;
  - ◆ specific sections of the STC would adopt the Authority, or private arbitration, or a technical expert, for particular dispute resolution;

- ◆ where no forum or expert was specified in a particular part of the STC, either:
    - the Authority would be the appropriate body chosen generally for dealing with disputes (perhaps with the ability to refer a matter to another adjudicating/determining body if it considered the matter not to be of regulatory concern); or
    - arbitration would be stated as the appropriate default mechanism, subject perhaps to some form of right of intervention for the Authority (see below).
- 4.22 In any event it is proposed that there would be an overriding obligation on the STC parties, and/or arbitrator or expert as the case may be, to refer a matter, or any element of it, to the Authority for its decision if and to the extent that it transpired that the dispute involved a matter of regulatory concern. Further consideration will need to be given to explaining and possibly defining the elements of such concern.
- 4.23 It is also possible, and Ofgem/DTI have not yet taken a final view on this, that it may be considered that all matters arising under the STC are *per se* of potential regulatory interest, leaving the Authority to decide in its discretion on a referral whether the particular matter could or should be dealt with by an alternative forum or the Authority should retain jurisdiction.
- 4.24 Another option for resolving issues is the establishment of, or provision of a means to create, a committee or panel for the specific purpose of determining disputes in a particular area. The BSC for example, provides for a Trading Disputes Committee, specifically delineating the extent of its powers. However, Ofgem/DTI are of the view that use of such a forum in the STC context would be lacking in independence and unlikely to provide a legally robust alternative.
- 4.25 Draft STC text that generally reflects the proposals set out above is contained in the appendix to this document.

### ***Intervention by the Authority***

- 4.26 As indicated above (at para 4.23) Ofgem/DTI might take the view that, at least in the first instance, all matters arising under the STC are potentially of regulatory interest. If that were the case, and any dispute unresolved through inter-party escalation fell to be

referred to the Authority for its determination, the issues raised in the following paragraphs of this section would fall away and not require discussion. (Of course the Authority might take the view, on analysis, that the matter did not raise a regulatory concern, or otherwise that it was a purely technical matter not meriting the Authority's involvement).

- 4.27 Since publication of the June 2003 document, Ofgem/DTI have considered further the proposal to allow the Authority to intervene in the handling of disputes under the STC that had been initially referred to arbitration or an expert. Ofgem/DTI continue to be of the view that the STC arrangements may be such that whether or not there is a regulatory interest in relation to any particular element may only be known on a case-by-case basis. Consequently, the STC arrangements are likely to justify the incorporation of the ability for the Authority to intervene in the handling of a dispute which would, by default, otherwise be referred to another body (court, arbitrator or expert) and instead have it referred to the Authority where there emerges a matter of regulatory concern.
- 4.28 Since the June 2003 document, Ofgem/DTI have also re-considered the proposal for the Authority to have a right to intervene and take over the process for resolution of a dispute on the grounds that the case involved is a matter of regulatory interest. Ofgem/DTI recognise that such a right, independent of the parties, could be thought to create uncertainty. An alternative approach would be to give any of the STC parties the right or even an obligation to request that the Authority itself intervene in the handling of a dispute, rather than the Authority having the right to intervene unprompted. The Authority would then decide whether on regulatory grounds it should assume control of all, or part, of the dispute or allow it to progress in accordance with the procedure being followed at the time of the request. However, such an approach might result in an inappropriate level of regulatory oversight for the Authority. Furthermore, such a procedure could also leave some costs (e.g. arbitrator's fees) associated with the proceedings up to the time of the Authority's intervention. This may need to be addressed in the detailed drafting of the relevant STC provisions.

## ***Views from Respondents***

- 4.29 Ofgem/DTI seek views on any of the matters raised in this section and in particular on:
- ◆ the question of whether, where no forum or expert was specified in a particular part of the STC, the Authority or an independent arbitrator should be the default body to whom disputes should be referred; and
  - ◆ the form of any arrangements for intervention by the Authority in STC disputes.

## 5. Disputes relating to arrangements covered in the STC and in user-facing codes ("cross-code disputes")

### *Proposals in the June 2003 document*

- 5.1 Under BETTA, users connected or wishing to connect to the transmission system in Scotland will be required to enter into a contract with the GBSO, the form of which will be set out in the GB CUSC. The CUSC will require compliance with the GB Grid Code. In order that the GBSO is in a position to deliver transmission services to users in accordance with those contractual terms, it will procure services from the transmission owners (TOs) in accordance with the STC. This contractual framework would appear to give rise to the possibility of disputes arising in separate codes (and associated agreements) relating to the same set of circumstances or event or otherwise related. The June 2003 document recognised this possibility and proposed that Ofgem/DTI come forward in the future with proposals on how such 'cross-code' disputes should be handled.
- 5.2 Several respondents to the June 2003 document agreed with the Ofgem/DTI view that the handling of disputes relating to matters covered in more than one code was an issue that required further consideration and one respondent in particular looked forward to Ofgem/DTI coming forward with proposals. Since publication of the June 2003 document, Ofgem/DTI have given further consideration to the various options associated with how to best handle disputes relating to matters covered in the STC and in the user-facing codes. This section sets out the different approaches to handling disputes arising under more than one code, the issues associated with those approaches and proposals.

### *Ofgem/DTI further thinking on cross-code disputes*

- 5.3 Ofgem/DTI are of the view that it would seem reasonable that disputes can be broadly categorised as:
- ◆ A failure to agree resulting in referral for determination by an independent body (e.g. the Authority, arbitration or expert). An example of this would be a dispute

as to terms of the provision by a TO of replacement assets, arising under both the CUSC and the STC.

- ◆ Breach of, or failure to perform under, contract resulting in referral for decision by an independent body (e.g. the Authority or arbitration). An example of such a dispute might be an incident whereby a generator breaches the site specific technical conditions set out in its bilateral connection agreement under the GB CUSC resulting in damage to transmission assets.

5.4 In both of the categories of dispute described above, in the absence of any merging arrangements, the two disputes would be left to progress independently of each other. This would result in the possibility of inconsistent or conflicting decisions by the relevant determining bodies in respect of what may, in some cases, in effect be a single matter or a single set of circumstances.

5.5 Such an arrangement (i.e. one in which seemingly linked disputes are potentially referred to different bodies) may in certain circumstances be appropriate; the services provided by the TO to the GBSO under the STC may not necessarily reflect exactly those provided by the GBSO to the user under the GB CUSC (given the different functions and interactions of the GBSO and the TOs). Also from a legal perspective, such an outcome may be entirely reasonable as individual matters will be interpreted in isolation against the relevant provisions and in the context of the code in question. The possibility of conflicting decisions may not be desirable from the perspective of establishing a stable regulatory framework that promotes efficiencies to the benefit of the end user but it may be an inevitable fact from a legal viewpoint. A merged dispute approach whereby a single decision to be binding through both codes is forced may, however, in certain circumstances be considered to have an adverse impact upon the rights of the parties to the individual codes if in fact those rights are subtly different.

5.6 Ofgem/DTI are of the view that there could be some circumstances in which separate disputes relating to a single matter or a single or related set of circumstances would be appropriate for merging into a single proceeding. For example, under the GB CUSC, there is a requirement (under section 3.2.3) that Users should ensure that their equipment is operated to keep within its Transmission Entry Capacity. If this obligation were breached, perhaps conceivably the transmission assets of a transmission owner may be damaged. It can therefore be reasonably anticipated that in the STC



transmission owners may seek equivalent undertakings from the GBSO or an indemnity from the GBSO for such damage. In either case, the cause of the damage and whether technical requirements have not been met would be common to any proceedings by the GBSO against the User under the GB CUSC and the transmission owner against the GBSO under the STC.

- 5.7 Ofgem/DTI are of the view that the ability to merge separate disputes, where the alleged cause of breach or of under-performance is likely to be in relation to the same set of facts, diminishes the risk of conflicting or inconsistent decisions and potentially reduces administration costs by running a single proceeding instead of two.

### ***Failure to Agree***

- 5.8 Areas where failure to agree might arise under the STC include new connection arrangements. However, Ofgem/DTI anticipate that these may also form the subject of dispute between the parties in relation to their licence obligations. Such a (licence) dispute would be referable by either party to the Authority for its determination: the Authority in its determination role would then be in a position to deal with both disputes in a consistent, coherent manner.

### ***Breach of Code***

- 5.9 Cross-code disputes that are not linked to connection determinations are likely to relate to breach of or failure to perform under the STC as a contract. As previously explained, the services provided by the GBSO to users may not reflect exactly those provided by TOs to the GBSO and therefore the extent to which it may be appropriate for disputes relating to a single set of circumstances or event covered by arrangements in more than one code to be merged may be limited.
- 5.10 In light of these factors, Ofgem/DTI are of the initial view that, in general, disputes not concerned with connections should, in most cases, be allowed to run separately in accordance with the procedures set out in each respective code.
- 5.11 However, there may also be cross-code disputes that relate to matters covered in the STC and user facing codes where it may be appropriate to merge into a single proceeding. For example, under the previously given example of a User operating its

equipment outside of its registered Transmission Entry Capacity, potentially resulting in damage to TO assets, it can be reasonably anticipated that the STC may provide TOs with equivalent undertakings from the GBSO for such damage to those provided for under the GB CUSC. The cause of the damage and the question of whether technical requirements had not been met would be common to any proceedings by the GBSO against the User and the TO against the GBSO.

5.12 Ofgem/DTI are of the view that, in such a scenario, the handling of the dispute through a single proceeding (merging of a dispute) would better facilitate a holistic view of the matters in dispute, thereby optimising the chances of a just and consistent set of outcomes for the parties involved. In addition, it would allow the realisation of a potentially more efficient dispute handling process.

5.13 However, as set out above, Ofgem/DTI do not expect cross-code disputes which are appropriate to be merged to be commonplace and it would therefore seem prudent to consider whether the perceived benefits merit the establishment of arrangements by which such merging can take place. Ofgem/DTI therefore consider that the way forward in this area could follow one of three options.

**(1) Do nothing**

5.14 Assuming that rights and obligations are appropriately set out in the respective codes and that determining or adjudicating bodies will undertake full and thorough investigations, there would appear to be minimal risk of cross-code disputes arising which might give rise to conflicting decisions. The issue of whether that risk, and the additional cost of running separate dispute proceedings, justified the cost of establishing and administering arrangements to facilitate the merging of cross-code disputes would need to be considered further. To the extent that, over time, such an arrangement proved unwieldy, an amendment to the STC (and possibly to one or more user-facing codes) could be proposed.

**(2) Best endeavours to resolve cross-code disputes in a consistent manner**

5.15 Placing an obligation upon parties in the STC and in the user facing codes to use best endeavours to progress the resolution of cross-code disputes in a consistent manner should increase the likelihood of balanced and appropriate outcomes to cross-code

disputes without the need to over-prescribe the associated administration arrangements in the relevant code or codes. The extent to which parties to these codes can take steps to bring about consistent outcomes from cross-code disputes may be limited by the dispute resolution provisions of the code in question and other legal considerations. For example, codes may not allow for any flexibility in the allocation of disputes to determining bodies in respect of certain provisions. However, to the extent that such flexibility exists or the parties are able to agree alternative procedures where necessary, then an obligation to progress the resolution of cross-code disputes in a consistent manner should reduce the risk of conflicting outcomes and dispute handling costs.

### **(3) Establish explicit cross-code dispute merging arrangements**

- 5.16 Three questions emerge in relation to the establishment of possible cross-code dispute merging arrangements; who should have the right, or even obligation, to initiate the merging of a cross-code dispute; what criteria should determine when disputes should be merged; and how they should be merged:
- 5.17 Ofgem/DTI consider at this stage that the proposed regulatory framework to apply under BETTA will dictate that cross-code disputes will always involve the GBSO and this makes it the prime candidate as proposer of a process to merge a cross-code dispute. Aside from liability limitations that may be included in the STC, it alone would appear to bear the risk of an imbalance in outcome of a dispute under the STC against the outcome of a dispute under a user-facing code. However, conceivably it could also potentially benefit from this imbalance so the incentive to initiate a merged dispute proceeding may not always be present. On this basis, it would seem more appropriate for the STC to impose an obligation, rather than confer a right, on the GBSO to initiate a merged dispute proceeding as and when it becomes aware of cross-code disputes. The detail of this remains to be worked out, but it may also be reasonable for TOs to have a right under the STC to dispute a proposal by the GBSO to merge disputes and for such an objection to be referable to the Authority for its determination.
- 5.18 The criteria that would determine whether cross-code disputes should qualify to be merged and the detail of such a process will need to be given further consideration. However, at this stage Ofgem/DTI would propose that, at the very least, cross-code disputes should be merged where the alleged cause of the breaches under the respective codes is the same.

5.19 There are only a very limited number of organisations with sufficient expertise to undertake arbitration in respect of disputes under regulated codes in relation to the transmission of electricity in Great Britain. Arbitration bodies to determine upon disputes under the STC are therefore likely to be the same as those that would determine upon disputes under user-facing codes. In addition, it should be noted that existing codes already make provision for resolution of disputes by referral to arbitration and these arrangements are unlikely to change as a result of BETTA. The least-change option may therefore be to oblige the GBSO, where appropriate, to propose to the other relevant STC party or parties that a STC dispute be merged with the equivalent proceeding under the user-facing code, with the Authority having the power to make the final decision where there is disagreement on the proposal.

### ***Views from Respondents***

- 5.20 Ofgem/DTI seek views on any of the matters raised in this section and in particular on:
- ◆ whether the STC should contain arrangements to allow for the merging of cross-code disputes;
  - ◆ if not, whether the STC and the user facing codes should contain best endeavours obligations to resolve disputes in a consistent manner; and
  - ◆ if the STC should contain arrangements to allow for the merging of cross-code disputes, the form that those arrangements might take.

# APPENDIX

## 1. ***Introduction***

- 1.1 This section sets out how Disputes under this Code are to be dealt with.
- 1.2 Subject to any contrary provision of the Act, any Transmission Licence and the Electricity Supply Regulations 1988 or any enactment or re-enactment thereof, and the rights, powers, duties and obligations of the Authority or the Secretary of State under the Act or Transmission Licence or otherwise howsoever, any Dispute or difference between the STC Parties shall be resolved as provided in the applicable section of this Code and this section [●].
- 1.3 For the purposes of this section [●]:

**"Dispute"** means as between the Parties: (a) a failure to reach agreement; or (b) a dispute as to proper performance or observance of this Code;

**"Dispute Parties"** means the Parties who are party to the Dispute;

**"Dispute Party Representative"** means the representative of a relevant Dispute Party who has proper authority to agree or settle the Dispute in question; and

**"Regulatory Interest"** means [●].

## 2. ***Referrals to Expert***

- 2.1 Where Disputes are referred to an Expert pursuant to any provisions of this Code, the Dispute Parties shall procure that the Expert shall act as an expert and not as an arbitrator and shall be required to decide those matters referred to or reserved to him under this Code by reference to Good Industry Practice using his skill, experience and knowledge and with regard to such other matters as the Expert in his sole discretion considers appropriate.
- 2.2 Referral of any Dispute for resolution by an Expert under this Code pursuant to this paragraph [●] shall not preclude subsequent referral of such Dispute for resolution by the Authority where this is specifically provided for elsewhere in this Code. In the absence of any such referral, the Expert's decision shall be final and binding.
- 2.3 Subject as provided in any section of this Code stipulating referral of any Dispute to an Expert, the Expert shall use his best endeavours to give his decision upon the matter before him as soon as possible following its referral to him.
- 2.4 Unless otherwise provided in any section of this Code stipulating referral of any Dispute to an Expert, the Parties to a Dispute referred to an Expert under this paragraph [●] shall share equally the fees and expenses of the Expert.
- 2.5 For the purposes of this paragraph [●] **"Expert"** shall mean: [*under review*].

### 3. ***Referrals to the Authority***

- 3.1 Where a Dispute arises under this Code that is designated for referral to the Authority, the Dispute Party Representatives shall first meet (including by telephone) within [10 Business Days] of a request by either Dispute Party (or within such longer period as may be agreed by the Dispute Parties, acting reasonably) and seek to resolve it. If the Dispute Party Representatives are unable to resolve the Dispute within [10] Business Days of the meeting (or within such longer period as they may agree within that initial 10 Business Day period, both Dispute Parties acting reasonably as to the length of the period), then the Dispute Parties' obligations under this paragraph [●] to undertake such discussion shall no longer apply in relation to that Dispute. Either Dispute Party may then refer the Dispute to the Authority.
- 3.2 *[Detail of Authority process for determination to follow.]*
- 3.3 The Authority's determination of a Dispute shall be final and binding.
- 3.4 It is expected that, in most cases, the Authority's determination of a Dispute will set out the effect of the determination in terms of any actions or other steps that the Dispute Parties should take. [To the extent that there is a Dispute between the Dispute Parties over the implementation of any such determination by the Authority (an "**Implementation Dispute**"), then any such Dispute Party may, subject again to the obligation to hold initial discussions in the same terms as under paragraph [●], refer the Implementation Dispute back to the Authority for determination.]

### 4. ***Intervention in Disputes***

- 4.1 Where, in pursuing an arbitration or Expert determination under the Code, it becomes apparent to any of the Dispute Parties that the Dispute concerns or includes a matter of Regulatory Interest [that Dispute Party shall, by justification in writing, request the Authority in its absolute discretion to take over and determine the Dispute or, where practicable, to determine the specific matter of Regulatory Interest].
- 4.2 If a Dispute required to be referred to the Authority pursuant to paragraph [●] above, contains issues which are entirely discrete from and can be determined without reference to issues of [Regulatory Interest] (the "**Discrete Issues**"), then resolution of the Discrete Issues may [subject to the approval of the Authority] continue in accordance with the relevant process under paragraphs [●] or [●] provided that if there are no Discrete Issues, the resolution of the Dispute shall be suspended until after determination by the Authority or otherwise as the Authority may direct.

### 5. ***Referrals to Arbitration***

- 5.1 Where a Dispute arises under this Code that is designated for referral to arbitration and in all other Disputes unless otherwise specified in this Code, where a Dispute arises, the Dispute Party Representatives to such Dispute shall meet (including by telephone) within [10 Business Days] of a request by either Dispute Party (or within such longer periods as may be agreed by the Dispute Parties, acting reasonably) and seek to resolve it. If the Dispute Party Representatives are unable to resolve the Dispute within [10 Business Days] of the meeting (or within such longer period as they may agree within that initial [10 Business Day] period, both Dispute Parties acting reasonably as to the

length of the period), then the Dispute Parties' obligations under this paragraph [●] to undertake such discussion shall no longer apply in relation to that Dispute. Either Dispute Party may then refer the Dispute to arbitration pursuant to the rules of the Electricity Arbitration Association in force from time to time.

5.2 *[Detail of arbitration provisions to follow.]*