Consolidation Group Meeting - Wednesday 7th September 2005

Further considerations on the outstanding issue of clause 3.6, for review

Npower have now revisited the proposed draft clause 3.6 issue in the hope of providing (for some) additional clarity of the issue, where the clause came from and an understanding of the differing points-of-view and hopefully helping to formulate a way forward.

Background/ history

- **2nd March 2001** – Ofgem Letter Outlining its thoughts on amendments to DUoSA:
  Ofgem notes that Distribution Businesses believe it is logical and appropriate to make generic changes to the DUoSA under a single programme of work. Ofgem recognises that this approach ensures a degree of consistency in the terms offered to suppliers – approach endorsed by Ofgem. Ofgem also noted the importance of ensuring agreement between all parties at an early stage to minimise potential disputes;
- **24th April 2001** – Draft DUoSA version 1.3 removes (old) clause 3.5 as this obligation placed upon suppliers ended 31st March 2000. In addition, condition 2 of the 2nd Tier Supply Licence removed and the term 'Tariff Customer' removed from the Act.
  - All work appears to have stemmed from a DCG meeting the outputs of which are detailed in DCG 040-01 V4 dated 06/04/01; and
  - Comments requested by DCG (Bob Morris) on how to take SCA work forward by 15/05/01 in letter drafted 1/05/01.
- **22nd June 2001** – Proposed Licence and Utilities Act Changes to the DUoSA
  - Proposed deletion of the then existing Section 3 entirely to be replaced with several new clauses including:
    - A new clause 3.2 that stipulates the users will not enter into any SCAs with customers after a date six months after the Utilities Act comes into force;
    - A new clause 3.4 that stipulates that the User shall not make or permit any variations to the terms set out in Schedule 2 without the written consent of the Company….; and
    - 3.6 (renamed from 3.5) that the User shall upon request and as soon as reasonably practical make any variations to the terms of the Supply Contract that the Company reasonably requires. The words (in connection with the distribution of electricity) were apparently added as a result of a suppliers' comment. Further words have since been added.
    - All proposed changes can be found in: DCG081-01-Summary-22June2001-legal1-937933-04; and
- **23rd August 2001** – Updates highlighted above included in new draft to stem from DCG discussions and contained in that meetings output DCG 108-01

From this activity I have been able to uncover the 'when' and by 'whom', but I have not been able to establish 'why' these changes were drafted to Section 3. In themselves they appear to go beyond any suggestions or directives Distribution Businesses had been given by the Regulator at that time.

Progress to – date

As is now common knowledge this issue has been around since the DCG drafting dated 23/08/01 and although certain suggestions have been made no agreed solution to this problem has as yet been identified. Those current solutions that have been proposed include:

- **Removal of clause 3.6** – DNOs seem reluctant to do this and at least two Supply Businesses will not sign any DUoSA that contains this clause. This stalemate situation renders it practically impossible for the industry to draft an agreed, consolidated DUoSA at present;
- **Replace clause 3.6 with a reference to Clause 17 Variations** - ensures that Suppliers have the same rights and control over their contracts with customers. It is envisaged that such a process would allow for the inclusion to discussions and an appeal/ indemnity process should any such proposed variations have a detrimental impact upon any Supply Business, in the same way that clause 3.4 provides for DNOs. The latest draft from the sub-group provides an additional clause 3.7 that references the Variations clause and links clause 3.6 to this, but does not remove it, so leaving the same stalemate situation to that outlined above; and
- **Referencing the Connection Terms in supply contracts, coupled with use of internet technologies as a way of managing changes to Connection Terms –** all DNOs 'publish' their Connection Terms on a mutually agreed web-site. Such a web-site is referenced on Suppliers' Contracts, as well as a telephone number for supply of hard copies for customers without internet access. This seem to be a fairly neat solution in itself as it means that both DNOs and Suppliers can manage their respective areas of the agreements and contracts independently. It has been suggested that, there may be a legal issue with this as a customer must be allowed to view all terms before signing a contract. This is puzzling if you regard Roger Barnard's analogy of the railway ticket that when purchased by a customer deems that customer to be obliged to follow the current National Rail Conditions of Carriage. These conditions are not presented to the customer when purchasing the ticket but are merely referenced on the reverse.
  This possible solution seems worthy of further investigation.

The facts:

- The clause 3.6 issue has now remained unresolved for five years despite the best attempts of industry participants to broker an agreement on several occasions;
- We are not aware of any DNOs making any changes to their Connection Terms since clause 3.6 was drafted;
- No DNO has felt strongly enough about the clause 3.6 issue to present this problem before Ofgem for a determination to be made; and
- Npowers' opposition to any draft DUoSA that contains the clause 3.6 can be summarised as follows:
  - The large-scale impact on a supply business of being obliged to alter its contracts in an 'uncontrolled' manner. The business would have no control over the length or wording of the terms, even though the terms might be considered legally questionable, excessively lengthy or conflict with the supplier's customer care or other policies. Notification of changes would cost in excess of £1m just to communicate the changes. This estimate does not allow for any differences (if allowable under a standard industry agreement) of

Connection Terms that may result or the possible multiple terms that would need to be managed for different areas of the country and the 'ad-hoc' timings of such change;

- Npower must (subject only to licence requirements and general consumer law) reserve the right to determine the terms of its contracts with its customers, and only be required to vary those terms if agreed or in accordance with a determination following a fair dispute resolution process. The presence of a clause 3.6 within any DUoSA will always carry with it, from a legal perspective, the possibility that it may take precedence over any variations clause or reference thereof.

The Way Forward:

- Distributors review the need for 3.6.
- Agree on the proposed solution that it is made explicit that changes to the connection terms embodied in the supply agreement are subject to the variation provisions of Clause 17.6;
- Develop a new solution; or
- Make a formal referral to Ofgem for determination

Recommendation:

Npower wishes to see this issue resolved as quickly and as equitably as possible. The longevity of this particular issue proves that in itself it is not detrimental to the smooth running of the industry and the processes and communication methodologies that DNOs and Suppliers currently enjoy. It does however have a major impact on the development of a consolidated Agreement that at present it is generally agreed is the most appropriate and acceptable way forward to improve industry processes and standards.

We therefore recommend that in light of the current situation outlined above that if the proposed solution is unacceptable to the group seek then a formal determination is sought from Ofgem in order to progress the development of a consolidated Agreement.