

## **Decision of the Gas and Electricity Markets Authority to accept commitments pursuant to section 31A(2) of the Competition Act 1998**

### **1. Decision**

1.1 Following an investigation under the Competition Act 1998 the Gas and Electricity Markets Authority (the "Authority")<sup>1</sup> has accepted commitments from SP Manweb. SP Manweb is an electricity distribution network operator, and as such is the only provider of non-contestable connections services in the areas including Chester, Liverpool and Wrexham. The Authority identified competition concerns relating to the provision of point of connection (POC) information, design approval and work associated with connections to the distribution network. In particular, the Authority was concerned by the delays that Independent Connection's Providers (ICPs) experienced in receiving these services from SP Manweb, which were not experienced by SP Manweb's affiliated connections provider, Core. The Authority was concerned that the delays experienced by ICPs undermined their ability to compete in the market for providing non-contestable connections services to SP manweb's electricity distribution network.

1.2 The commitments offered by SP Manweb are intended to ensure that POC information and design approval are provided within recommended timescales. The commitments provide that SP Manweb shall offer all ICPs the same access to relevant I.T. systems, on the same terms. SP Manweb shall ensure that it does not pass any information relating to the other ICPs to Core. SP Manweb shall also ensure that POC information is provided in an industry format and is adequate and accurate. With regard to work associated with connections to the distribution network, where SP Manweb fails to perform the work on the date agreed, it shall offer a new day within 5 working days and perform the work no later than 10 working days thereafter and at no extra cost. As a result of these commitments, Core should not have a material advantage in terms of access to information or in terms of being able to bid for or complete projects.

1.3 On 6 October Alfred McAlpine plc announced the sale of its shares in Core to Scottish Power UK. As a result Core is now a fully-owned subsidiary of Scottish Power plc. At the time of investigation, SP Power Systems, a fully-owned subsidiary of Scottish Power UK plc held the majority of voting shares in Core. Therefore, Ofgem considers that the acquisition does not materially alter the circumstances in which the commitments were offered by SP Manweb. SP Manweb has also undertaken to notify Ofgem in the event of any transfer of part of Core to a connected undertaking, any sale of shares in Core to another person or in the event that SP Power Systems awarding a contract for the provision of non-contestable services to another entity. In such circumstances, Ofgem would consider whether there are grounds for continuing its investigation into SP Manweb's conduct<sup>2</sup> or, if offered, whether to accept a variation of the commitments.<sup>3</sup> SP Manweb has made some drafting amendments to the commitments pursuant to the acquisition of shares in Core. However, the Authority considers that the changes were not sufficiently material to require further consultation. The Authority has decided to accept the revised proposals as they now stand and has accordingly closed its file.

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<sup>1</sup> The Authority has concurrent powers with the Office of Fair Trading to apply and enforce Chapter I and II prohibitions of the CA98 and Articles 81 and 82 of the EC Treaty in relation to the gas and electricity sector in Great Britain.

<sup>2</sup> Competition Act 1998 section 31B, subsection (4)(a)

<sup>3</sup> Ibid section 31A(3)

## 2. Ofgem's Investigation

2.1 In October 2002, the Office of Gas and Electricity Markets (Ofgem)<sup>4</sup> received a complaint from an ICP alleging that SP Manweb, which is wholly owned by Scottish Power UK plc Group, had engaged in anti-competitive behaviour when providing non-contestable electricity connection services.<sup>5</sup>

2.2 The complainant alleged that SP Manweb had engaged in anti-competitive behaviour in relation to SP Manweb's treatment of its requests for non-contestable services compared with the services provided by SP Manweb to Core Utility Solutions Limited (Core), a connections provider which is affiliated with and partly owned by the Scottish Power UK plc Group. Specific concerns raised with Ofgem relate to delays by SP Manweb in the provision of POC information, delays by SP Manweb in carrying out works associated with connections onto the existing electricity network, delays in the provision by SP Manweb of design approval for connections and discrimination by SP Manweb in its process for handling requests for information from ICPs unaffiliated with the Scottish Power UK plc Group.

2.3 As a result of allegations made by the complainant and information provided informally by SP Manweb and the complainant, the Authority in August 2004 decided that there were reasonable grounds for suspecting an infringement of the Chapter II prohibition<sup>6</sup> of the Competition Act 1998 ('CA98'). As a consequence, Ofgem, on behalf of the Authority, commenced an investigation into SP Manweb's conduct.

2.4 On 25 October 2004, Ofgem wrote to SP Manweb to notify it that Ofgem was conducting an investigation and to outline its concerns in relation to SP Manweb's conduct. In November 2004, SP Manweb met with Ofgem to discuss the processes it had put in place for the provision of non-contestable connections services. At the meeting SP Manweb indicated that it wished to make proposals to address Ofgem's competition concerns and advised that it would submit these proposals to Ofgem during December 2004.

2.5 In December 2004, SP Manweb wrote to Ofgem offering to provide commitments to alter its conduct, and thereby address Ofgem's competition concerns.

2.6 After carefully considering the guidance issued by the Office of Fair Trading<sup>7</sup>, Ofgem decided that it was appropriate to enter into discussions with SP Manweb on its offer of commitments. In February 2005, Ofgem wrote to SP Manweb acknowledging its willingness to explore any formally binding commitments that SP Manweb wished to offer. In order to aid discussions, Ofgem sent SP Manweb a statement of its initial competition concerns (the contents of that document mirrors the information contained in section 5 below).

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<sup>4</sup> Ofgem exercises certain functions under the CA98 on behalf of the Authority in accordance with the Authority's Rules of Procedure.

<sup>5</sup> Non-contestable services are those that the ICP must obtain in order to bid for a connections contract or to provide connections work where the contract is awarded to them. 'Non-contestable services' are defined in paragraph 3.8 of this Notice.

<sup>6</sup> After examining the information available, the Authority concluded that the alleged conduct is unlikely have an effect on trade between Member States. Therefore it was not necessary for the Authority to apply Article 82 of the EC Treaty. The Authority will assess whether conduct or an agreement has an effect on trade between Member States on a case-by-case basis, and may, therefore, reach a different conclusion in relation to alleged conduct of DNOs in future cases.

<sup>7</sup> The guidance approved by the Secretary of State on 21 December 2004 titled 'The OFT's guidance as to the circumstances in which it may be appropriate to accept commitments'. This guidance is contained in the annex of the competition law guideline: *Enforcement*, OFT 407, 21 December 2004.

2.7 Following discussions between Ofgem and SP Manweb, SP Manweb sent a finalised set of commitments to Ofgem on 8 June 2005. The Authority informed SP Manweb that it was minded to accept the commitments and to close its investigation, subject to a formal consultation.

2.8 On 27 June 2005, Ofgem commenced a public consultation in respect of the proposed commitments. The consultation was completed on 22 July 2005. Ofgem received four responses. Two respondents indicated that the commitments addressed the competition concerns. One respondent agreed with all of the proposals but suggested an additional commitment. One respondent raised a number of points. These are dealt with in section 10 of this paper.

### 3. The Regulatory Framework

3.1 Section 4 of the Electricity Act 1989 ('the Electricity Act') prohibits the distribution of electricity by a person unless they are authorised to do so by a licence or are exempt from the requirement to have a licence. SP Manweb is licensed by the Authority under section 6 of the Electricity Act to distribute electricity on behalf of suppliers and generators throughout Great Britain and has specific obligations within its Distribution Service Area ('DSA'). Holders of such licences are referred to as Distribution Network Operators ('DNOs').

3.2 The Electricity Act imposes a duty on DNOs to provide connections to their distribution systems<sup>8</sup>. Subject to certain exceptions (such as where breaches in safety may occur), a DNO has a duty to offer terms for the provision of a connection between its distribution system and any premises, or between its distribution system and another distribution system. The obligation relates to the provision of a complete connection between the licensee's network and the customer's premises: it does not refer to the provision of part of a connection or to the inputs necessary to design a new connection. This obligation applies to DNOs within their respective distribution service areas (DSA). Ofgem has issued directions to each DNO to specify their DSA, which correspond to the areas for which each of the former Public Electricity Suppliers had licences following privatisation.

3.3 There is no regulatory provision prescribing the timing of the provision of information which is used to design a connection.

#### ***Description of a connection***

3.4 A connection is a physical extension of the distribution system which is required to connect a premise to an electricity distribution system. A distribution system is "... a system which consists (wholly or mainly) of low voltage lines and electrical plant and is used for conveying electricity to any premises or to any other distribution system" (see section 4(4) of the Electricity Act).

#### ***Types of Connections***

3.5 Connections can be grouped into four broad categories:

- *Industrial and commercial*: includes retail parks and industrial premises such as manufacturing plants;
- *Housing*: includes connections to single domestic premises, as well as to housing developments;
- *Un-metered services*: includes supplies to street furniture such as street lights;
- *Generation*: where an electricity generator (such as a wind farm or a fossil-fuelled power unit) is connected to the distribution system.

#### ***Obtaining a connection***

3.6 An end customer (such as a housing developer) requiring a connection to the distribution system has two options:

- it can ask the DNO to carry out the connection; or

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<sup>8</sup> Electricity Act 1989 section 16(1).

- it can ask an ICP, approved by the DNO or Lloyds Register<sup>9</sup> to provide connection services within the DSA, to carry out the connection. In this situation the ICP will need to procure certain connection services from the DNO. These services are termed 'non-contestable'.

3.7 A customer seeking a connection to the distribution system, for example for a new housing development, will usually seek a quote for the cost of the connection from the DNO and at least one other company providing connections services such as an ICP.

3.8 To provide a quotation for a connection and if awarded the contract to provide the electricity connection, the ICP requires certain services from the DNO. Whilst there is no statutory or other definition of those services which only the DNO can provide, DNOs classify the different parts of this work as non-contestable. The ICP or end customer must procure these non-contestable services from the DNO, as only the DNO can provide these. These non-contestable services (POC information, design services, and connections to the distribution system) are described below.

***Point of connection (POC) information***

3.9 POC is defined as the point at which an extension for a new load or generation connection can be connected to the existing electricity distribution network. POC information is any information that describes the POC in terms of its technical and physical characteristics, parameters and geographic location.

3.10 Determining POC information involves:

- assessing the location, type and size of the new load to be connected to the network; and
- assessing the available capacity on the existing distribution system to identify the most appropriate point of connection. This entails:
  - identifying the location and voltage level of the existing network;
  - analysing the network, including calculating the thermal and voltage drop;
  - for larger loads, assessing fault levels, effects on the quality of supply to other connected customers and implications for the overall design of the network (calculations for Low Voltage (LV) connections are less detailed as design standards provide for less detailed fault level assessment).

3.11 POC information is an important input to the calculation of the cost of providing a connection. This cost forms the basis upon which a connection provider will provide a quote to a potential customer. Connection providers can, in theory, provide quotes to developers without POC information, or with estimates obtained from other sources. However, they are unlikely to do so. This is because POC information will identify if there are reinforcement works associated with a particular POC and other important design inputs which need to be considered, for example whether the connection is to a

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<sup>9</sup> Lloyds Register is the body that undertakes assessment of contractors wishing to be approved for national accreditation for contestable works associated with the installation of electrical connections on green field housing estates.

High Voltage (HV) or Low Voltage (LV) system. Connection providers need to know where the POC is and its voltage. If it is a HV POC for a domestic development then a substation will need to be built into the design and the cost added to the electricity connection charge.

3.12 If the POC on which the quote is based is different from that ultimately designated by the DNO, the connections provider is likely to have his design rejected by the DNO and may be unable to provide a connection within the amount quoted. POC information is only valid for 28 days, reflecting the constantly changing structure of the distribution network.

### ***Design approval***

3.13 Section 9(1)(a) of the Electricity Act requires a DNO to maintain an efficient, co-ordinated and economical system of electricity distribution. To comply with this duty, the DNO must be satisfied as to the suitability of new connections to its network. The DNOs have adopted the practice of requiring designs by ICPs to be submitted so that they can be checked. The DNO will then notify the ICP as to whether their design is approved so that the ICP may proceed with the proposed connection. Where the ICP has appropriate accreditation from Lloyds Register this process will generally be less involved than if the ICP has no accreditation<sup>10</sup>. All DNOs make available to ICPs, by way of the Energy Networks Association's G81 document<sup>11</sup>, the necessary technical specifications to enable the ICP to prepare an appropriate design. In instances where a DNO rejects an ICP design the DNO is required, under the terms of the process agreed by the Ofgem Electricity Connections Steering Group (ECSG), to explain the reasons for the refusal.

### ***Connections to the distribution network***

3.14. The connection of a new development to the electricity distribution network is work that can only be undertaken by the DNO, in this case SP Manweb. However, all DNOs have agreed to comply with Ofgem's November 2004 decision document "Competition in Connections to Electricity Distribution Systems Part A". This recommended that DNOs allow ICPs to carry out the connection of individual services to newly laid mains cables (including live mains cables) on new housing estate developments. Some licensees, including SP Manweb, are operating trials to allow live jointing, which is the activity whereby a service cable is connected to an energised (live) cable, to be performed by ICPs. Other DNOs have committed to commence trials during the course of 2005. The DNOs reserve the right to withdraw permission for ICPs to conduct live jointing if they consider that the ICP is unfit to carry out such works.

3.15 An ICP will only require SP Manweb to perform an '**initial make live**' connection to the electricity network where it is qualified and intends to perform its own low voltage live jointing works.

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<sup>10</sup> The Lloyds Register operates an independent registration scheme which assesses the competence of ICPs to undertake connections work. [Ofgem's Electricity Connections Steering Group (ECSG) encouraged the development of the registration scheme by Lloyds Register.

<sup>11</sup> The ECSG encouraged the development of the G81 document as a means to facilitate competition in connections. The Energy Networks Association maintains and makes available the G81 document on its website [www.energynetworks.org.uk](http://www.energynetworks.org.uk).

3.16 Where, after carrying out an initial make live connection, SP Manweb provides the live jointing works, this is known as the '**subsequent make live**'. An ICP will require SP Manweb to perform both an '**initial make live**' connection and '**subsequent make live**' where it is not qualified or is unwilling to perform live jointing works.

#### **4. The Parties**

##### ***SP Manweb plc / SP Power Systems Limited***

4.1. SP Manweb plc (company number: 02366937) is a company incorporated in the United Kingdom whose registered address is 3 Prenton Way, Prenton, CH43 3ET. It is wholly owned by the Scottish Power UK plc Group (company number: SC117120) whose registered address is 1 Atlantic Quay, Glasgow, G2 8SP.

4.2 SP Manweb is the holder of a licence, granted by the Authority under section 6 of the Electricity Act, which permits it to distribute electricity in the area described by its licence. This authorised area includes North Wales and the cities of Liverpool, Chester and Wrexham.<sup>12</sup>

4.3 As an electricity DNO, SP Manweb provides to ICPs a range of services including non-contestable connection services. These non-contestable connection services include POC information, design approval and work associated with final connections. SP Manweb sub-contracts the day- to- day operation of its distribution business to SP Power Systems Limited, which performs all work on behalf of SP Manweb. SP Power Systems Limited (company number: SC215841) is wholly owned by Scottish Power UK plc Group.

4.4 SP Power Systems Ltd (SPPS) is a member of the Scottish Power UK plc Group. SPPS provides asset management and operational services to SP Manweb under a contract effective from 1 October 2001. The arrangements were put in place with a regulatory consent given to the contracting arrangements pursuant to standard condition 29 of the SP Manweb Distribution Licence from the Authority, effective from 1 October 2001. The services provided by SPPS to SP Manweb include services in relation to connections and other general asset management and operational services. For example, the day- to- day operation of the SP Manweb distribution system is carried out by SPPS on behalf of SP Manweb.

##### ***Core Utility Solutions Limited***

4.5 At the time of Ofgem's investigation into the conduct of SP Manweb, Core Utility Solutions Limited (Core) was a connections provider which was affiliated with and partly owned by the Scottish Power UK plc Group. Core (company number: 04290066) is a company incorporated in the United Kingdom whose registered address is 3 Prenton Way, Prenton, CH43 3ET.

4.6 Core was formed in 2001 as a joint venture company between Alfred McAlpine plc (company number: 01367044) and SP Power Systems Limited. At the time of the investigation, SP Power Systems Limited held the majority of voting shares in Core. On 6 October Alfred McAlpine plc announced the sale of its shares in Core to Scottish Power UK. As a result Core is now a fully-owned subsidiary of Scottish Power plc.

4.7 SPPS has sub-contracted certain services to Core specifically in respect of delivery of certain connection services including the delivery of licensed connection projects and certain other non-contestable services as described in section 3.

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<sup>12</sup> Public Electricity Supply Licence for Manweb plc issued 26 March 1990.



## 5. The Authority's competition concerns

5.1 SP Manweb, as the DNO of the geographical area described by its licence, is the only provider of non-contestable connection services such as point of connection information and design approval in its distribution service area (DSA). The provision of POC information, design approval and work associated with final connections are all services required from SP Manweb for ICPs to compete in the connections market in the relevant distribution area and cannot be interchanged with equivalent services provided by other DNOs. Since non-contestable services from other DNOs are not substitutable with those provided by the DNO in the relevant area, it is the Authority's view that the relevant geographical scope of the market is SP Manweb's DSA. As SP Manweb is the only supplier of non-contestable connection services, it is the Authority's view that SP Manweb is dominant in the market for the provision of non-contestable connection services to ICPs in the SP Manweb DSA. The Authority is concerned that SP Manweb's conduct in this market has materially affected the related and closely associated market for the provision of electricity connections services.

5.2 The Authority will assess the relevant market on a case-by-case basis and therefore may reach a different view when assessing allegations of anti-competitive conduct by DNOs in future cases.

5.3 As explained in section 3, ICPs compete to provide end users (e.g. building developers) with connection services to the electricity network. To provide connection services, ICPs require certain non-contestable services from the DNO. The particular DNO service that will be required depends on the stage of the connection process. For example, at the initial stage ICPs require information about the point of connection and at the design approval stage ICPs will require the DNO to approve their connection design. Without specific point of connection information, an ICP may have difficulty in providing a quote for a development and without the DNO's design approval an ICP cannot commence on-site work to enable the customer to be connected to the DNO's DSA.

5.4 The Authority identified the following practices which give rise to competition concerns relating to SP Manweb's alleged conduct in providing non-contestable connections services:

### *Point of Connection information*

- (a) Delays with the provision of point of connection (POC) information by SP Manweb to ICPs, in circumstances where either delays were not experienced by Core or where Core was able to determine POC information without recourse to SP Manweb;
- (b) Inadequate and/or inaccurate POC information provided to ICPs, in circumstances where either Core was provided with more accurate POC information or was able to determine POC without recourse to SP Manweb;

### *Design approval*

- (c) Delays in the provision by SP Manweb of design approval to ICPs, in circumstances where these delays were not experienced by Core; and

*Work associated with connections to the distribution network*

- (d) Delays in the carrying out of works associated with connections to the distribution network for ICPs, in circumstances where either there was no delay in providing these services to Core or where Core was permitted to perform such works.

5.5 Consequently the Authority considered that it had reasonable grounds for suspecting that the alleged conduct of SP Manweb may infringe the Chapter II prohibition of the CA98 by:

- discriminating against connections providers not affiliated to SP Manweb by hindering them from obtaining non-contestable services necessary for bidding for, and performing connections work in the market for the supply of electricity connection services within SP Manweb's DSA (the relevant market), thereby placing them at a competitive disadvantage;
- distorting the level of competition in the market for the supply of electricity connections services; and
- resulting, over time, in the withdrawal by ICPs from SP Manweb's DSA, and thereby leading to a reduction or elimination of competition in the defined market.

## 6 Application of Article 82

6.1 Under Article 3(1) of the Modernisation Regulation<sup>13</sup> which is directly applicable in English law, the Authority is obliged to apply Article 82 of the EC Treaty (Article 82) when it applies national competition law to any abuse prohibited by Article 82. The investigation by Ofgem under the CA98 involves the application of national competition law. As a result, the Authority is required to consider whether the conduct investigated in this case may affect trade between Member States.

6.2 The Authority has reached a preliminary view that the alleged anti-competitive behaviour by SP Manweb has an insignificant effect on trade between Member States. In the Authority's view, the effect on trade will be in a specific geographic region of Great Britain, namely SP Manweb's DSA. The Authority considers that this view is supported by the European Commission's Notice on effect on trade<sup>14</sup>, which indicates that:

*"[a]s in the case of dominant positions covering the whole of a Member State (cf. paragraph 95 above), trade may not be capable of being appreciably affected if the abuse is purely local in nature or involves only an insignificant share of the sales of the dominant undertaking." (Paragraph 99)*

6.3 In this case, it is the Authority's preliminary conclusion that there is no material effect on trade between Member States and it has therefore decided that it is not necessary to consider the application of Article 82 of the EC Treaty. However, it should be noted that the Authority will assess whether conduct or an agreement has an effect on trade between Member States on a case-by-case basis, and may, therefore, reach a different conclusion in relation to alleged conduct of DNOs in future cases.

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<sup>13</sup> Council Regulation 1/2003 of 16<sup>th</sup> December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty.

<sup>14</sup> European Commission Notice on "Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty", (2004/ C 101/07)

## 7. The appropriateness of accepting commitments

7.1 The decision on whether to accept commitments is at the discretion of the Authority. The Authority's view is that it is appropriate to accept the commitments offered by SP Manweb. In coming to this view, the Authority has given careful consideration to the OFT's published guidance on the circumstances in which it may be appropriate to accept commitments, as required by section 31 D of the CA98.<sup>15</sup>

7.2 In this case, the Authority has identified specific competition concerns in relation to the conduct of SP Manweb. As a result of information submitted by the complainant and Ofgem's initial inquiries, Ofgem identified particular concerns relating to delays and discriminatory treatment with regard to the provision by SP Manweb of non-contestable connection services.<sup>16</sup>

7.3 The Authority considers that the acceptance of commitments in this case will not undermine deterrence. There are currently voluntary industry standards in place regarding the provision of POC information. However, Ofgem is also currently considering strengthening this voluntary standard by introducing a licence condition to specifically address discrimination in the provision of POC information by any DNOs.<sup>17 18</sup> Given this potential development<sup>19</sup>, the Authority concluded that the acceptance of commitments, which address other types of non-contestable services in addition to POC information, would be an appropriate and an efficient use of resources.

7.4 It is also the Authority's view that the acceptance of binding commitments is likely to send a signal to the connections industry on appropriate standards for the provision of non-contestable services. This may encourage other DNOs to comply with Ofgem's voluntary service standards and engage in other Ofgem policy initiatives (e.g. live jointing trials for ICPs). In this respect the acceptance of binding commitments may lead to wider compliance and deter possible anti-competitive conduct in the electricity connections sector.

7.5 The Authority has concluded that the commitments offered by SP Manweb are likely to fully address the competition concerns. The Authority's assessment of this issue is contained in section 9.

7.6 The Authority is also satisfied that these commitments can be implemented effectively and within an appropriate timescale. Most of the commitments will be implemented within 90 days of their formal acceptance of the commitments. The Authority does not envisage any difficulties in monitoring SP Manweb's compliance with the commitments. The Authority's view is that ICPs are well placed to monitor SP Manweb's future conduct and compliance. SP Manweb has also offered to report on a regular basis to the Authority as part of its commitments.

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<sup>15</sup> The guidance approved by the Secretary of State on 21 December 2004 "*The OFT's guidance as to the circumstances in which it may be appropriate to accept commitments*" contained in the annex of the competition law guideline "*Enforcement*" (OFT407) 21 December 2004.

<sup>16</sup> See section 4 for a description of the competition concerns identified by the Authority.

<sup>17</sup> Ofgem's consultation on the licence modification proposal closed on 26 October 2005.

<sup>18</sup> The intended licence condition will not address discrimination in the provision of other non-contestable services.

<sup>19</sup> If implemented, this will provide another tool for Ofgem to monitor and take action against similar behaviour to that alleged against SP Manweb. Given the Authority's sectoral enforcement powers, the Authority considers that the new licence condition will provide strong deterrence signals to the industry.

7.7 The Authority has assessed the appropriateness of accepting the commitments offered by SP Manweb in the specific context of the present regulatory environment. The Authority's decision to accept commitments in this particular case must not be taken as suggesting that the Authority or any other Competition Authority will be minded to accept commitments in future cases, whether or not similar facts are present.

## 8 The Commitments

8.1 The full details of the commitments offered by SP Manweb are contained in Annex 1. In summary the commitments offered by SP Manweb are intended to ensure that:

- Core and ICPs are treated in a non-discriminatory manner in relation to the provision of non contestable connection services;
- SP Manweb provides all ICPs with non contestable connection services within the recommended timescales;<sup>20</sup>
- all ICPs can be provided the same access on a non-discriminatory basis to IT systems as Core, SP Manweb's affiliated connections provider;
- POC information is provided to ICPs in accordance with agreed industry standards;
- an effective mechanism exists for Ofgem to monitor SP Manweb's performance against the timescales within which it has committed to providing its services.

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<sup>20</sup> See Ofgem's publication titled 'Competition in Connections – Standards of Service and the Contestable/Non-Contestable Split', 20 October 2003.

## 9 How the commitments address the competition concerns

9.1 To prevent the distortion, reduction or elimination of competition in the market for the provision of electricity connection services to end users within SP Manweb's DSA, it is essential that there is non-discriminatory access in the provision of non-contestable services. Where Core has been subcontracted to carry out certain works on behalf of SP Manweb, which are necessary for the preparation of POC information, it is critical that procedures are in place to address the Authority's competition concerns.

### Point of Connection information

*(a) Delays with the provision of point of connection (POC) information by SP Manweb to non-affiliate ICPs, in circumstances where either delays were not experienced by Core or where Core was able to determine POC without recourse to SP Manweb.*

9.2 The Authority is concerned that the delays in providing POC information to non-affiliated ICPs will materially affect the ability of Core's competitors to provide end-customers, such as developers, with electricity connections within the relevant market. As explained above, in order to submit a bid to a developer for connection work an ICP requires POC information from the DNO, in this case SP Manweb. If POC information is not obtained within a reasonable timescale, ICPs may miss the opportunity to bid for connections work or need to estimate the POC information themselves. Without the data used and provided by SP Manweb, such estimates of POC information are unlikely to be accurate.

9.3 The Authority is also concerned that the connection service provider affiliated to SP Manweb, Core, did not appear to experience similar delays. Furthermore, unlike the non-affiliated ICPs, Core had access to some of SP Manweb's IT systems which provide it with data on network capacity and potentially allow it to make a more accurate estimate of the POC information. Competing ICPs were therefore at a competitive disadvantage vis-à-vis Core because they were unable to receive POC information in a timely manner and had less information on which to estimate the POC information. Should a bid based on estimated POC information be accepted by a developer and the cost of the actual POC is greater, the ICP normally incurs the difference in cost. Consequently, non-affiliated ICPs also face greater financial risk than Core when competing for connections work in the absence of timely POC information.

9.4 SP Manweb has offered commitments that require it to provide POC information to all ICPs within recommended timescales.<sup>21</sup> Transparent procedures will be put in place to ensure that ICPs can track the progress of their POC request. SP Manweb will also be required to ensure that ICPs are fully informed of the reasons if a request for POC information is incomplete. SP Manweb will report to Ofgem on a quarterly basis on their performance in providing POC information within the recommended timescales and in processing incomplete POC requests.

9.5 SP Manweb shall also offer all ICPs the same access to its IT systems as currently enjoyed by Core. This access will need to be requested by an ICP and shall be subject to the same conditions (including access fees) as applied to Core. If SP Manweb replaces the IT systems or makes available new IT systems that could be used by an ICP or Core

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<sup>21</sup> See Ofgem publication "Competition in Connections – Standards of Service and the Contestable/Non-Contestable Split, 20 October 2003;

in the preparation of a draft POC quotation, it shall offer access on a non-discriminatory basis. Information on the availability of access to IT systems shall be made public on SP Manweb's website. This will place all connection providers on a level playing field in estimating POC information.

*(b) Inadequate and/or inaccurate POC information has been provided to non-affiliate connections businesses, in circumstances where either Core were provided with more accurate POC information or were able to determine POC without recourse SP Manweb.*

9.6 The Authority is also concerned by the alleged discrimination between Core and other ICPs with regard to the adequacy and accuracy of the POC information provided by SP Manweb. In order to provide connections providers with POC information, SP Manweb requires certain technical information about the proposed project and will produce different POC information depending on the information received. Although the Authority appreciates that for complex projects, it would be impractical to give the same POC information on the same projects since the competing connection providers will have designed the network for the project differently, competition concerns may arise where non-affiliated ICPs are provided with an inferior POC information service. Furthermore, Core has an advantage when requesting POC information because of its access to some of SP Manweb's IT systems, which may assist it in defining its POC request.

9.7 SP Manweb has offered the Authority a commitment not to discriminate between Core and the non-affiliated ICPs in the provision of POC information. SP Manweb shall also ensure that the information required from ICPs for the provision of POC information is clearly specified.<sup>22</sup> SP Manweb shall also ensure that POC information is accurate and adequate by providing the quote in an industry specified format.<sup>23</sup>

9.8 SP Manweb will also ensure that POC information requests are treated in a non-discriminatory manner and will follow the same procedure for each request.<sup>24</sup> Where the same or similar technical information is provided by any two or more connection providers, SP Manweb shall provide the same or similar POC information to all. As explained above, SP Manweb shall also ensure that ICPs can have the same access to its IT systems as Core. This will ensure that all ICPs can request equal access to the same information when preparing their POC information requests.

*(c) Core's role in the preparation of POC information to non-affiliated ICPs*

9.9 The Authority's concerns in relation to delays experienced by ICPs in the provision of POC information and the accuracy with which it is provided also arise with respect to the role of Core in the preparation of POC information. In order to provide POC information, it is necessary for SP Manweb to prepare a project design and to identify suitable points of connection. SP Power Systems has a subcontract with Core whereby SP Manweb is able to request Core to perform this work, as required. The Authority is concerned that this provides Core with the ability to influence both the timescales in

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<sup>22</sup> This information is contained in the SP Manweb document "Design and Planning Framework for Greenfield Low Voltage Housing Estates and Associated HV/LV Distribution substations" which forms an appendix to SP Manweb's commitments.

<sup>23</sup> See Ofgem August 2002 Decision Document "Review of Competition Gas and Electricity Connections – Report" which is appended to SP Manweb's commitments in Annex 1.

<sup>24</sup> The procedure is outlined in the SP Manweb document "POC Quotation Process" which forms an appendix to SP Manweb's commitments.



which the POC information is issued to competing ICPs as well as the nature of the POC information.

9.10 SP Manweb has made a commitment to put in place procedures when subcontracting the non-contestable design work to Core. Under this commitment, Core will be required to carry out the work within a timescale that allows SP Manweb to provide POC information to competing ICPs within the recommended timescales (explained in section 9.4). This means that Core will not gain any material advantage in terms of timing of POC provision since SP Manweb will be responsible for ensuring that POC information is issued in the recommended timescales. SP Manweb will be responsible for checking the design work as part of the approval process and for issuing the POC information to Core and the other ICPs. SP Manweb shall also ensure that Core does not provide POC information directly to competing ICPs and that it does not disclose to Core that an ICP has made a request for POC or is interested in any connection's project. SP Manweb will also ensure that Core will not have access to any additional IT systems that would enable it to carry out the non-contestable design work and thereby bypass SP Manweb's approval process.

9.11 By taking the steps outlined above it is the Authority's view that these commitments address its competition concerns in relation to the provision of POC information.

### **Design approval**

9.12 Once a connections provider has been awarded a contract from a developer, it must submit its design for approval by the relevant DNO, in this case SP Manweb. As noted above, the Authority's concerns relate to delays in approving the designs of non-affiliated ICPs, which did not appear to be experienced by Core. Although in certain instances the Authority understands that it will not always be appropriate for SP Manweb to approve designs by ICPs, for example where safety concerns arise, the Authority is concerned that unjustified delays may competitively disadvantage the ICPs affected. Unjustified delays in design approval can have a negative impact upon an ICP's reputation as a competent and efficient operator and therefore may influence the developer's choice of connections provider in future projects. For ICPs to be able to compete effectively with Core, it is critical that there are not unjustified delays in design approval.

9.13 SP Manweb has offered commitments to ensure that all designs are either approved or rejected within 10 days.<sup>25</sup> Where designs are rejected, SP Manweb is required to inform the ICP of the reasons for the rejection. SP Manweb shall also ensure that ICPs are informed about the information that SP Manweb requires to approve designs.<sup>26</sup> It will require the same information from non-affiliated ICPs and Core<sup>27</sup> prior to approving a design and will apply the same criteria in assessing a design by the ICPs or Core. SP Manweb will also report to Ofgem on a quarterly basis on its performance in approving designs within the recommended timescales.

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<sup>25</sup> As recommended by the Ofgem publication "*Competition in Connections – Standards of Service and the Contestable/Non-Contestable Split*", 20 October 2003;

<sup>26</sup> See SP Manweb document "*Design and Planning Framework for Greenfield Low Voltage Housing Estates and Associated HV/LV Distribution substations*" which forms an appendix to SP Manweb's commitments.

<sup>27</sup> Information is set out in SP Manweb document "*Design & planning Framework for Greenfield Low Voltage Housing Estates and Associated HV/LV Distribution Substations*" and is an annexe to SP Manweb's commitments in Annex 1.

9.14 By accepting commitments to approve ICPs' designs within certain timescales and to give full reasons for any rejection of any proposed design, it is the Authority's view that the competition concerns relating to the unjustified delay in design approval will be effectively addressed.

### **Works associated with connections to the distribution network**

9.15 A number of ICPs (including Core) are qualified to perform their own low voltage live jointing works and therefore require an initial make live connection from SP Manweb. Other ICPs that are not qualified to perform low voltage live jointing works will require all live jointing work on site to be performed on their behalf by SP Manweb, ( so-called subsequent make live connections). As a subcontractor and affiliated connections provider, Core is able to carry out the connection of new developments to the distribution network. This means that Core is able to perform initial make live connections for its own projects and also for other ICPs qualified to perform their own live low voltage jointing. Core is also able to provide subsequent make live connections for ICPs that are not qualified or choose not to perform low voltage live jointing.

9.16 Although the Authority acknowledges that the DNO is responsible for the safe operation of the distribution network and that it may be inappropriate for non-affiliated ICPs to perform initial make live or subsequent make live connections (in the case of the latter this applies where the ICP is not qualified to live joint), the Authority is concerned that unjustified delays in SP Manweb performing this work may competitively disadvantage the ICP whose work is delayed. Delays may affect a non-affiliated ICPs reputation as competent and efficient operators and thereby influence the developer's choice of connections provider in future projects. Delays in connection to the distribution network may in turn delay the construction and completion of the properties in a development.

9.17 SP Manweb shall ensure that dates for the completion of initial make live and subsequent make live connections are agreed, within a reasonable timescale, with the ICP. With regard to initial make live connections SP Manweb shall agree a date for the provision of this service with the ICP. In the event that SP Manweb is unable to meet the agreed date, SP Manweb will inform the ICP and offer a new date within 5 working days. The new date offered shall be as soon as is reasonably practicable, which will be no more than 10 working days after the 5 working day period and will be at no extra charge to the ICP. SP Manweb will report to Ofgem, on a quarterly basis, of their performance in providing initial make live connections on the agreed date.

9.18 Where an ICP requests a subsequent make live connection from SP Manweb, SP Manweb shall respond within 10 days to offer a date to provide such services. Once a date has been agreed, SP Manweb will take all reasonably practical steps to carry out the services on this date. In the event that SP Manweb is unable to carry out the live jointing on the agreed date, SP Manweb will inform the ICP and offer a new date within 5 working days. The new date shall be as soon as is reasonably practicable, which will be no more than 10 working days after the initial 5 working day period and will be at no extra charge to the ICP. SP Manweb has committed to reporting to Ofgem on a quarterly basis of its performance in agreeing dates for subsequent make live requests within the recommended timescales and reporting its performance in completing the subsequent make live on the agreed date.

9.19 SP Manweb shall also apply non-discriminatory procedures in permitting non-affiliated ICPs to undertake subsequent live low voltage jointing work within the boundaries of greenfield or brownfield new housing developments. SP Manweb shall publish on its website details of the criteria which an ICP is required to meet in order to carry out live jointing works.

9.20 It is the Authority's view that the adoption of a procedure for agreeing the timescales for work associated with connections to the distribution network will remove the competition concerns arising from unjustified delays.

## **10 Outcome of the consultation**

10.1 On 27 June 2005, Ofgem commenced a public consultation in respect of the proposed commitments. The consultation was completed on 22 July 2005. Ofgem received four responses. Two respondents indicated that the commitments addressed the competition concerns. One respondent agreed with all of the proposals but suggested one amendment. One respondent raised a number of points. All of these points and suggestions are summarised below. Ofgem has carefully considered the comments and assessed whether they give reason for Ofgem to believe that the competition concerns set out in section 5 have not been fully addressed.

### **Access to SP's utility records**

10.2 One respondent suggested that the commitments should specify access to SP Manweb's utility records including details of capacity, plant ratings and loadings as held on their plant and circuits IT system. This would enable ICPs to make an informed decision as to the preferred point of connection to the network prior to making a POC request. The respondent considered that this would ensure that information is provided on a non-discriminatory basis.

### **Ofgem's view**

10.3 SP Manweb has committed to make available on a non-discriminatory basis the same IT systems that it currently makes available to Core. If SP Manweb makes available any other system to Core or any ICP, it shall take all reasonably practicable steps to make such a system available to other ICPs. Therefore it is Ofgem's view that the commitments sufficiently address the competition concern and that specifying access to specific particular IT systems may go beyond what is required to address the competition concerns.

### **Non- contestable services**

10.4 One respondent suggested that Core should be prohibited from undertaking non-contestable services on the sites it has won by competitive tender. The respondent considered that the commitments overlooked the fact that Core, through the contractual arrangements with SP Power Systems, has the opportunity to gain an advantage over non-affiliated ICPs. Core may receive a section 16 connection request then offer to install water and gas as well, without the need for the adoption arrangements that other ICPs require.

### **Ofgem's view**

10.5 Where Core undertakes non-contestable work for sites won by competitive tender, it will require approval from SP Manweb for POC, non-contestable designs and project quotations. SP Manweb will ensure that POC information, design approval and work associated with connections to the network are provided to all ICPs within recommended timescales. SP Manweb will also ensure that Core is not given access to information regarding its competitors. Any access to IT systems relating to POC or design approval provided to Core shall be made available to other ICPs.

10.6 Ofgem considers that information on new developments is available, and that all ICPs (including Core) may approach developers to offer connections work. In this respect Core being contracted for section 16 requests does not confer on it any material advantage. The Authority, therefore, considers that no amendment to the commitments in this regard is necessary.

### **Standard of compliance**

10.7 One respondent considered that SP Manweb's commitment to respond within the timescales to requests for POC and for contestable design approval in 90 per cent of cases gave scope for delays in a high a proportion of projects. The respondent suggested that the commitment should relate to 98 per cent of projects.

#### **Ofgem's view**

10.8 Ofgem considers that the 90 per cent standard for compliance is appropriate. A 90 per cent standard has been used in relation to a number of energy network operators' performance standard, including those for gas connections. The Authority considers that no amendment to the commitments in this regard is necessary.

#### **Initial make live**

10.9 One respondent suggested that all initial make live connections should be carried out by SP Manweb and not subcontracted to Core unless SP Manweb permits all non-affiliated ICPs to perform this work.

#### **Ofgem's view**

10.10 As SP Manweb is responsible for the safety of the network, Ofgem considers that it would be not be appropriate to expect it to allow all non-affiliated ICPs to perform initial make live connections. However, the commitments ensure that unnecessary delays in completing this work should not occur. Where due to unexpected circumstances SP Manweb fails to perform the services on this date, it shall offer a new date within 5 working days. The new date shall be no later than 10 working days later than the date originally agreed. It is Ofgem's view that this will prevent ICPs from being materially disadvantaged by long delays. The Authority considers that no amendment to the commitments in this regard is necessary.

#### **Financial Penalties**

10.11 A respondent suggested that Ofgem should impose financial penalties if SP Manweb fails to comply with the standards of service provided for in the commitments.

#### **Ofgem's view**

10.12 In the event of non-compliance Ofgem is able to apply to the courts for an order to enforce the commitments<sup>28</sup> and/or reopen its investigation under the Competition Act 1998.<sup>29</sup> If Ofgem were to find an infringement of the CA98, it may impose a penalty of up to 10 per cent of worldwide turnover.

10.13 Ofgem is also considering introducing a licence condition to prohibit discriminatory behaviour by DNOs in regard to electricity connections services. In the event that delays with the performance of connections services constitute a breach of this licence condition, then Ofgem may in the future have the power to impose a financial penalty pursuant to provisions of the Electricity Act 1989.

#### **Reporting Obligations**

10.14 One respondent was concerned that information provided by SP Manweb, which will report on its performance with regards to Core and other ICPs, will breach Core's

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<sup>28</sup> Competition Act 1998, section 31E

<sup>29</sup> Competition Act 1998, section 31B subsection (4).

commercial confidentiality. The respondent was also concerned that if the reports were not made publicly available, ICPs would not be confident that they were being treated fairly.

#### **Ofgem's view**

10.15 SP Manweb shall report to Ofgem on a confidential basis. Ofgem is responsible for monitoring compliance. In the event of non-compliance Ofgem is able to apply to the courts for an order to enforce the commitments and/or reopen its investigation under the CA98.<sup>30</sup> Any party suspecting that there is a breach of the CA98 is advised to contact Ofgem directly.

10.16 If Ofgem decides to publish information relating to SP Manweb's compliance with the commitments this will be done in conformity with the restrictions on disclosure as set out in section 105 of the Utilities Act 2000 and Part 9 of the Enterprise Act 2002. The Authority, therefore, considers that no amendment to the commitments in this regard is necessary.

#### **Non-contestable Design services**

10. 17 One respondent considered unworkable section 5.7 of the commitments, which allowed SP Manweb to subcontract certain non-contestable design services where Core has made a request for POC information. The respondent was concerned that Core would gain information about its competitors' arrangements. The respondent suggested that SP Manweb should retain responsibility for non-contestable services.

#### **Ofgem's view**

10.18 SP Manweb has amended section 5.9 to clarify that SP Manweb shall not notify Core of the provision of any such designs or quotations to any ICPs or disclose, in any circumstances, that a ICP has made a request for a POC quotation or that an ICP is interested in any project relating to a connection. The Authority considers that this amendment should prevent Core from gaining intelligence over their competitors' arrangements and thus making section 5.7 workable.

#### **Subsequent make live**

10. 19 One respondent suggested that section 7.1 of the commitments needed further clarification. SP Manweb committed itself to apply non-discriminatory criteria in deciding whether an ICP can carry out such live low voltage jointing for as long as SP Manweb permitted "such" live jointing to take place. The respondent was concerned that the use of "such" could be interpreted to mean live jointing by ICPs (not Core), which could allow SP Manweb to withdraw the permission for ICPs to live joint yet still allow Core to do so.

#### **Ofgem's view**

10. 20 SP Manweb has amended section 7.1 to state that the live jointing trial may end for non-discriminatory and objective reasons such as a change in law or in the interpretation of the law. SP Manweb would also inform the Authority if the trial were brought to an end. This will allow Ofgem to consider whether to accept any variations to the commitments offered. The Authority considers that this amendment should address the concerns raised.

#### **Website**

10. 21 One respondent suggested that SP Manweb should provide all relevant connections documentation on its website.

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<sup>30</sup> Ibid

**Ofgem's view**

10. 22 SP Manweb has amended section 9.5 to confirm that any documents of general application to ICPs will be published on its website provided that it does not cause SP Manweb to breach any legal obligation.

## **11 Negotiations following the public consultation**

10.23 SP Manweb made some amendments to the commitments to reflect the comments arising from the public consultation. It also made amendments that clarify the commitments in light of Scottish Power UK plc's acquisition of shares in Core. Specifically these amendments are:

- SP Manweb has amended section 10.1 to confirm that the commitments will remain in force for three years. Previously, the proposal was that the commitments would remain in force for either three years or until the contract between Core and SP Power Systems Limited terminated, whichever date is later. To avoid confusion following the acquisition, SP Manweb clarified that the commitments would remain in force for three years.
- SP Manweb has amended the commitments to include the new section 10.2 that states any reference to Core shall mean a reference to any company affiliated to SP Manweb (as defined by the distribution licence) or in which SP Manweb has a participating interest (as defined by the distribution licence) which competes with ICPs to provide contestable connections.
- SP Manweb has amended the commitments to include the new section 10.3 that states it will notify Ofgem of any transfer of part of Core to a connected undertaking, of any sale of shares in Core to another person or if SP Power Systems awards a contract for the provision of non-contestable services to another entity. This will allow Ofgem to consider whether to accept any variation of the commitments in such circumstances.

10.24 The Authority considered that the changes made to the commitments pursuant to the consultation and the acquisition of Core are not sufficiently material to require further consultation. The Authority has therefore decided to accept the revised proposals as they now stand.

10.25 SP Manweb was asked by Ofgem to confirm its offer of the commitments by submitting a signed copy to Ofgem. This was done on 27 October 2005.