

Consultation on cost recovery approaches for determinations

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Target audience: DNOs, GDNs and Transmission Companies, network users and customers, other interested parties.

Overview:

Ofgem has a duty to determine disputes between network companies and their customers across a wide range of issues. We are in the process of streamlining our Procedure for Determining Disputes. We are also working to provide more detailed guidance on what customers should do when they are in dispute with a network company and how we will handle determinations that are referred to us. As part of our review, in July this year we decided that there are circumstances in which it may be appropriate for us to recover some of the costs of our determination work from one or both parties involved in a dispute.

This paper consults on our proposed approach to cost recovery. We seek views on the circumstances in which it may be appropriate to recover costs from parties and the factors we should take into account before we seek to recover costs.

We seek respondents' views on the most appropriate cost recovery approach proposed in this document based on their envisaged implementation as part of the determination's process.

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Context

There are a number of circumstances in which a dispute between a customer and a licensed network company may be referred to the Gas and Electricity Markets Authority for determination. These may arise under statute (particularly the Gas Act 1986 and the Electricity Act 1989) or under the provisions of licences. Many of our determinations relate to connections issues but we are also able to determine on other matters such as use of system charging arrangements.

Last year we commenced an internal review of Ofgem's current determination procedure in order to streamline and update the existing process. In an open letter consultation published in December 2009¹ we set out some high level options and sought views on potential amendments to our current procedure. We followed this consultation with an update letter in July 2010 setting out the Authority's decision regarding amendments to the current procedure. The July letter included our decision that it is appropriate for Ofgem to recover some of the costs of the determination process from parties to the dispute in particular circumstances.

This paper sets out potential approaches to cost recovery and seeks respondents' views on the following issues:

- circumstances where it would be appropriate to recover costs from parties;
- basis on which the costs will be calculated; and
- factors we will take into account before seeking to recover costs from parties.

This consultation will inform our work on the updated determinations procedure document which we aim to publish in spring 2011. We are also enhancing our website in order to facilitate access to information related to connections and determinations.

Associated Documents

Ofgem's Procedure for Determining Disputes

<http://www.ofgem.gov.uk/Consumers/CI/ncamm/Documents1/3866-ProcedureforDeterminingDisputes.pdf>

Consultation on Ofgem's proposal to amend its procedure for determining disputes.

<http://www.ofgem.gov.uk/Consumers/CI/ncamm/Documents1/Determinations%20consultation%2030%20November%20final.pdf>

Update letter regarding Ofgem's review of its procedure for determining disputes

<http://www.ofgem.gov.uk/Consumers/CI/ncamm/Documents1/Update%20letter%20procedure%20for%20determining%20disputes.pdf>

¹<http://www.ofgem.gov.uk/Consumers/CI/ncamm/Documents1/Determinations%20consultation%2030%20November%20final.pdf>

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Summary

During the past few years, we have seen an increased number of disputes between network licensees and their customers being referred to the Authority for determination. In some instances, matters are brought to us that we consider could have been resolved without recourse to determination if the energy network company had done more to handle the customer's complaint.

Determinations can take many months and sometimes years to conclude. While this may be due to the complexity of the matter in hand, the determination process can also be delayed if we do not get full co-operation from one or other party involved in the dispute. In particular, we are dependent on parties providing us with a full and accurate set of the information they hold relating to the dispute, and on meeting associated timescales.

We are keen to streamline our processes and our timeliness in dealing with determinations. Our aim is to encourage parties to co-operate fully with the determination process and to encourage the network companies in particular, to do all they can to resolve disputes swiftly and effectively where possible without recourse to determination by Ofgem.

Procedure for Determining Disputes

Last year we commenced a review of our current Guidance for determining disputes². As part of this review we have decided to name licensees in our published determinations and update our procedure document to improve the information given to customers, including how they can contribute to a more efficient process.

Our updated determination procedure will set out the avenues of dispute resolution that are available to customers, including recourse to the Energy Ombudsman for domestic and small business customers. Our expectation is that such avenues of dispute resolution should be pursued before a matter is referred to us for determination.

We have also decided that there are circumstances in which it may be appropriate for us to recover our determination costs from one or other of the parties concerned³. This decision is not, in any way intended to reduce parties' access to the determination process. In no circumstance will we seek to recover costs from fuel poor or vulnerable customers. We will take affordability into account in all cases and we have placed a ceiling on the costs we can recover from domestic and small business customers of £5,000.

² A document approved by the Gas and Electricity Markets Authority. It sets out, at a very high level, the steps we follow in cases which require determinations. This document can be found here: <http://www.ofgem.gov.uk/Consumers/CI/ncamm/Documents1/3866-ProcedureforDeterminingDisputes.pdf>

³ Update letter regarding Ofgem's review of its procedure for determining disputes

With these important caveats, we will consider recovering determination costs namely where:

- parties' actions cause unnecessary and unreasonable delays to the determination process
- parties' actions result in Ofgem unnecessarily incurring the costs of more than one round of external technical and legal advice
- other circumstances which mean the matter could reasonably have been resolved by the parties in question before it was referred to Ofgem.

In cases such as these, we have decided it may be appropriate to recover from the party concerned those costs that could reasonably have been avoided if they had co-operated with the process. We propose an approach to recovering the avoidable costs we incur in certain circumstances, as follows:

- Flat rate: Charge a flat daily rate for each day that the process is delayed because the party concerned does not provide input to the determination process within agreed timeframes, and this delay could reasonably have been avoided.
- External advice cost recovery: Charge for external legal and technical advice when the parties' actions result in the need for additional external advice, and this could reasonably have been avoided.
- Standard fees: Charge a standard fee representing the full cost of determination, where the need for the determination could reasonably have been avoided.

This paper seeks views on the circumstances in which we would seek to recover costs from the party concerned and on the appropriate cost recovery approach to follow. It also looks at the factors to be taken into account by the Authority before seeking to recover such costs and sets out general implementation guidelines which will underpin our approach.

Way forward

We seek views on the issues set out in this consultation by January 31 2011.

Further to the responses to this consultation, we will then set out the most appropriate cost recovery approach as a section of the updated determinations procedure document. We will not look to recover determination costs from any party until we have set out our cost recovery approach in the updated Guidance for determining disputes.

We expect this document to be published in spring 2011. As part of our work on determinations, we will also look to provide enhanced information on our website regarding connections and improve access to our published determinations.

1. Background

Chapter Summary

This chapter summarises our current work on determinations and provides a brief overview of the scale and costs of our current determinations work.

What is a determination?

1.1. There are circumstances in which a dispute between a licensed energy network company and its customer may be referred to the Gas and Electricity Markets Authority ("the Authority") for determination. These circumstances are set out in statute (particularly the Gas Act 1986 and the Electricity Act 1989) and in the provisions of licences. Ofgem will examine each case referred to us to assess whether we have powers to determine.

1.2. Disputes referred to us typically relate to the connection or use of system charges that a network licensee intends to levy on the customer concerned. Where the customer is a domestic or a small business customer, we expect the matter should be referred in the first instance to the Energy Ombudsman Service (EO) who should investigate and reach a provisional conclusion. If, at the provisional conclusion stage, any party is dissatisfied with the outcome and it is within the statutory limit (within 12 months of the final connection for connection disputes) then the EO can refer the matter to Ofgem for formal determination. Ofgem expects that where applicable, the parties will have tried to resolve the dispute through the relevant company complaints procedures or via the EO.

Ofgem's power to recover costs

1.3. The Authority has the power to recover its costs/expenses incurred in determining a dispute under the Gas Act 1986 and the Electricity Act 1989. The Authority can order "such incidental, supplemental and consequential provision (including provision requiring either party to pay a sum in respect of the costs or expenses incurred by the person making the order⁴) as that person considers appropriate"⁵ The Authority also has the power to recover costs under paragraph 14 of the Electricity (Standards of Performance) Regulations 2010 and the Gas (Standards of Performance) Regulations 2005.

⁴ Emphasis added for clarification purposes

⁵ Section 23(5)(a) of the Electricity Act 1989 and section 27A(9)(a) of the Gas Act 1986.

1.4. Before considering whether to recover costs from any party to a dispute, the Acts require us to "have regard to the conduct and means of the party and any other circumstances". As to "conduct" the Authority considers it implicit in section 23(6) that it should assess whether the parties have, for example, acted unreasonably, obstructively, in a vexatious or dilatory manner in the proceedings to justify the recovering costs. We discuss later in section 2 how we propose to take the conduct into account in our decision making process.

1.5. When having regard to means, the Authority will have regard to its principal objective to protect the interests of customers and its general duties to vulnerable customers. For this reason, we have already decided that we will not in any circumstances levy charges on fuel poor or vulnerable customers, we will take affordability into account in all circumstances and we have capped the amount we would ever charge a domestic or small business customer at £5,000.

1.6. Although we have the power to recover costs related to a dispute, it has not been our practice to do so to date. We intend to set out our approach in the updated Procedure for determining disputes document, and will only introduce this new practice when this document has been published.

Scale and cost of determination work

1.7. We typically get about ten to fifteen connections cases to determine within a year, although there have been periods when the volume of work has been significantly greater⁶ particularly in recent years. The scale of the matters we are asked to determine varies significantly, from multi-million pound disputes related to large grid-connected power stations, through to single domestic premises where the amount of money involved may be relatively small.

1.8. Some determinations can take many months and sometimes years to conclude. While this may be due to the complexity of the matter in hand, determinations can also take a long time due to difficulties in obtaining information from parties involved. Information provided at the outset may not be complete or parties may introduce new evidence late in the process. Additionally, some determinations can require specialist technical or legal input which may lengthen the process further.

1.9. Table 1 provides examples of the types of determinations referred to the Authority in the past two years by customer type. It provides an estimate of the time spent and the associated costs.

⁶ For example, a large number of transmission and distribution connection offer disputes were referred for determination in the transition to the British Electricity Trading and Transmission Arrangements (BETTA) in 2005.

Table 1 – Estimation of time and costs associated with determinations

Determination by type/Party who referred Determination	Timeline	Associated Cost
Domestic Determination (Small customer)	40 working days	Around £8,000 (Staff salaries and £1,500 external costs)
Commercial Determination 1 (Network Company)	260 working days	Around £150,000 (Staff salaries and £50,000 external costs)
Commercial Determination 2 (Large business customer)	80 working days	Around £14,000 (Staff salaries and £2,100 external costs)

Review of our determinations procedure

1.10. Over the past two years we have considered ways in which we could streamline the current determinations process, assist parties and encourage them, whenever possible, to resolve matters amongst themselves.

1.11. This includes, working with the Energy Ombudsman in providing guidance on the handling of current disputes, with a view to increasing the number of unresolved complaints they are able to handle and resolve.

1.12. We have also written to network operators urging them to do more to manage customer complaints (reminding them of the complaints handling standards which relate to domestic and small business customers and the role the Energy

Ombudsman plays in such matters). We have made it clear that we expect matters to be referred to us only where they cannot be resolved this way⁷.

1.13. Last year we commenced a review of our current procedure for determining disputes since we believe there is scope to streamline the process and provide additional information to customers on what to do if they have a complaint against their energy network company. We are planning on publishing an updated Guidance document that will clarify that:

- the network companies have their own complaint procedures that are available to customers and which should be the first recourse in any dispute
- consumer advisory services⁸ are available to assist domestic and small business customers, and
- the Energy Ombudsman⁹ can play a role in resolving certain disputes for domestic and small business customers.

1.14. Additionally, to assist parties who refer a matter to Ofgem, our updated determinations procedure document will provide more detailed information on:

- the general procedure we intend to follow
- the information we require from parties in dispute
- our expectations on the time it should take each party to provide us with their submissions
- cost recovery principles

Responses to our consultation

1.15. In a consultation we issued in December 2009¹⁰ we set out our initial proposals for cost recovery. We considered that there may be circumstances where using our ability to recover costs will encourage parties to co-operate with the determinations procedure and to use it for the purpose it was intended. We think this is an important part of our efforts to streamline the process and to provide a better service to parties concerned.

1.16. The majority of respondents understood Ofgem's preference to recover at least some costs from parties to a determination, although there was no consensus on

⁷ Letter to Network companies from July 2009

⁸ Consumer Direct and Consumer Focus offer advice on a wide range of consumer issues.

⁹ The Energy Ombudsman is a redress scheme approved by the Authority pursuant to the Consumer, Estate Agents and Redress Act (2007)

¹⁰ Consultation on Ofgem's proposal to amend its procedure for determining disputes.

<http://www.ofgem.gov.uk/Consumers/CI/ncamm/Documents1/Determinations%20consultation%2030%20November%20final.pdf>

whether this was or was not appropriate. There were divergent views on which costs should be recovered, and under what circumstances, as well as from which parties they should be recovered. No objections were raised on our proposal to charge for external technical advice in certain situations. Most respondents agreed on the need to provide clear guidance if we decided to move ahead with the cost recovery proposal.

This Consultation

1.17. In Chapter 2 of this consultation document we set out the circumstances approved by the Authority in which it is appropriate for us to consider recovering our costs. We also propose relevant cost recovery approaches which would apply under each circumstance and provide a table which summarises our approach.

1.18. In Chapter 3 we provide an overview of the factors we propose to take into account before recovering costs. We also provide general implementation procedures to ensure customers are properly informed of the process.

2. Circumstances in which we propose to recover costs and cost recovery approaches

Chapter Summary

This chapter provides an overview of the circumstances in which we may decide to recover costs from the parties and the proposed cost recovery approaches.

Question 1: Should the circumstances listed below constitute the basis for recovering costs from a party?

Question 2: Are there are other circumstances in which cost recovery should be considered?

Question 3: Is it appropriate for us to recover costs in the circumstances detailed in this chapter?

Question 4: Do you think the cost recovery approaches are appropriate given the circumstances set out in this chapter?

Circumstances in which it would be appropriate to recover costs from parties

2.1. It is not our intention to routinely charge for determinations. We would only expect to recover costs in cases where costs have been placed on Ofgem that we think could reasonably have been avoided were it not for the deliberate actions of one or other of the parties in dispute.

2.2. In determining disputes and deciding whether to recover costs for our work, we will have regard to our principal objective and general duties. For this reason, we will not in any circumstances levy charges on fuel poor or vulnerable customers, and we will take affordability into account in all cases. Further detail on this point is given in Chapter 3.

2.3. In December 2009 we consulted on the circumstances that we considered might result in potential cost recovery, including where:

- parties' actions cause unnecessary and unreasonable delays to the determination process
- parties' actions result in Ofgem incurring the costs of more than one round of external technical and legal advice.
- other circumstances which mean the matter could have been resolved by the parties in question before it was referred to Ofgem.

2.4. We have taken into account all responses to our December 2009 consultation and the Authority has decided that cost recovery may be appropriate¹¹ in the circumstances listed above.

2.5. We will review the circumstances of the parties to the determination on a case by case basis before we decide whether or not it is appropriate to recover costs. We are aware that each determination turns on its own facts and there will be certain cases, which due to their complexity, through no fault of either party to the dispute, will exceed our estimated timelines and costs. We do not intend to recover costs from parties in these instances.

Parties' actions cause unnecessary and unreasonable delays to the determination process

2.6. Once a dispute has been referred to us and our power to determine has been established, the case officer will inform the parties in writing about the timeframes to be observed throughout the process. Parties are expected to submit their full and accurate statement of facts and all required evidence within the established timeframes.

2.7. Parties must present the full facts of their case in the format requested by the case officer and endeavour to provide all relevant evidence to substantiate their case. We expect full cooperation from both parties by providing us with all of the facts of the case within the established timeframes.

2.8. In cases where either party is unable to meet the timeframes, an extension can be requested in writing to the case officer. This should state the reasons and provide a date by which the full submission should be received. The case officer will then review the timeframes and inform both parties of the new agreed timeframes.

2.9. We consider that it may be appropriate to consider recovering costs from parties that cause delay. This includes circumstances in which one or the other party: fails to submit the full facts of the case available to them within the agreed timeframe; changes its case considerably part way through the determination process without justification; where the party has wilfully withheld information relevant to the case; or brings forward new and important evidence late in the process without justification.

¹¹ In July 2010 we published an update letter to the industry summarising the responses to our consultation and the way forward regarding cost recovery and the determination procedure review

2.10. Our intention is to recover costs only where a party has behaved unreasonably, obstructively or in a vexatious or dilatory manner, not when there are good reasons why they have not been able to comply with the determination process. In considering whether these failures are reason for us to consider recovering costs from the party concerned we will take into account:

- complexity of the issue, and the familiarity of the party concerned with the issues underlying the determination
- ease of obtaining material required to support the party's submission to Ofgem
- other relevant circumstances of the parties which could have prevented them from meeting deadlines

Parties' actions result in Ofgem incurring the costs of more than one round of external technical and legal advice

2.11. At the start of a determination dispute, there is opportunity for the parties to present the relevant facts of the case by submitting the full facts to the case officer. The case officer will review submissions and circulate these to all parties to the dispute. This provides the parties with an opportunity to comment and provide further evidence, when they have seen all submissions. All of this information is then considered by Ofgem and if necessary external advice may be sought.

2.12. There may be circumstances in which new information is provided by the parties only after the initial and comment stages have been completed. This information might require us to request another round of technical or legal external advice in order to establish its merits. We may consider it appropriate to recover costs from the party responsible for any additional round of technical or legal external advice needed as a result of the emergence of new information late in the process.

2.13. We expect parties requesting a determination, in particular network licensees, to be clear about the basic facts of the dispute. We will make sure that at the outset of the determination process they are made aware of the importance of disclosing this information in a timely manner. We may consider it appropriate to recover costs from parties who are acting unreasonably by initially withholding relevant information and releasing it at a later stage of the process.

Other circumstances which mean the matter could have been resolved by parties prior to referral to Ofgem

2.14. A dispute can be referred to us for determination at any time subject to time limits defined by the nature of the dispute (for example, within 12 months of the

final connection for connection disputes). Given the introduction of the CEAR¹² Act 2007 and the Gas and Electricity (Consumer Complaints Handling Standards) Regulations 2008¹³, we would expect that the network company will have taken all reasonable steps to resolve the matter before it is referred to us.

2.15. To this end, we expect both parties to a determination to provide us with evidence of the process that has been followed to resolve the complaint prior to bringing the matter to Ofgem.

2.16. As part of the initial submission, the parties should include all correspondence available between the parties. This should include evidence of engagement within the complaints handling procedure including a deadlock letter¹⁴, if relevant and provisional conclusion from the EO, if available.

2.17. One of the benefits of publishing our determinations within the Electronic Public Register¹⁵ on our external website is that they can be used by the parties to assist in resolving issues. Referring to previous determinations could potentially avoid the need to refer the matter to Ofgem. We would expect the network companies in particular, to use this resource where appropriate.

2.18. If parties have not explored other avenues of dispute resolution prior to referring the matter to us, this may be considered a relevant factor in our decision to seek to recover costs.

2.19. We will have regard to the conduct and means of the party and any other circumstances relevant to the case.

Cost recovery approaches

2.20. In developing our approach to cost recovery we have considered the Authority's principal objective to protect the interests of existing and future gas and electricity consumers as summarised in Appendix 3 and the reasonableness of charges to be levied.

2.21. We have considered how other regulators¹⁶ recover costs and have also taken into account standard government cost recovery procedures for charging for

¹² Consumers, Estate Agents and Redress Act

¹³ Letter to Distribution Network Operators and Gas Distribution Network Operators regarding a change in Ofgem's involvement in connections dispute resolution published in August 2009

¹⁴ Company has sent the complainant a letter saying that it is unable or unwilling to resolve the complaint to the complainant's satisfaction and providing details of the existence of the Energy Ombudsman Service and appropriate contact details for the Ombudsman.

¹⁵ Electronic Public Register - Determinations Folder

¹⁶ For example Ofwat's "Process for handling disputes and appeals"

Freedom of Information Act 2000 ("FOIA") requests. Central government has set a limit for FOIA requests of £600 worked out at a rate of £25/hour. This represents the cost of one person spending 3.5 working days in locating, retrieving and collating information.

2.22. We have also considered the associated costs of our determinations work by type of determination as detailed in Table 1.

2.23. The main aim of our cost recovery approach is to recover costs that could have been avoided but were incurred due to the behaviour of one or more of the parties. The circumstances in which we would seek to recover costs are outlined above.

2.24. In cases such as these, and subject to the exceptions noted in Chapter 3, we have decided it is appropriate to look to recover those costs that could reasonably have been avoided if the parties concerned had co-operated with the process. We propose the following approach to recovering costs incurred in different circumstances:

- Flat rate: Charge a flat daily rate for each day that the process is delayed because the party concerned does not provide the full amount of information required at each stage of the determination process within agreed timeframes; party submits new information late in the process and this situation could reasonably have been avoided.
- External advice cost recovery: Charge for external legal and technical advice when the parties' actions result in the need for additional external advice, and this could reasonably have been avoided.
- Standard fees: Charge a standard fee representing the full cost of determination, where the need for the determination could reasonably have been avoided.

2.25. We welcome respondents' views on our proposed cost recovery approach. Table 2 provides a summary of the circumstances and the proposed cost recovery approaches.

Flat rate

2.26. Under this approach parties would be charged a flat rate fee of £200 per day in cases where we consider the party's action has delayed the determination process. Where a party submits information later than agreed deadlines, we will charge from the point at which they exceed established timelines as provided by the case officer at the beginning of the determination process (or as has been extended by agreement).

2.27. In cases where new information is submitted late in the process and we establish that it could reasonably have been expected to be made available earlier,

we will consider charging a flat fee of £200 per extra day taken to consider this new information and take any other follow up action required.

2.28. A rate of £200 represents the average cost of one member of staff for a day's work on a determination. The rate is calculated based on staff salaries for information provision roles.

2.29. We have set a cap on the amount of costs we can recover from domestic customers under this approach at £5,000.

External advice cost recovery

2.30. We propose to recover costs associated with additional rounds of external technical and legal advice required as a result of the emergence of new information that could reasonably have been expected to be made available earlier. The parties responsible will be charged for all associated costs up to a cap of £5,000 for domestic customers and small business customers.

2.31. The recovery of these costs would be uncapped for large business customers, other larger industry participants and network licensees.

Standard fee rate

2.32. Where a matter has been referred to us that we believe could have been resolved by the parties in question, we propose to recover the cost of the determination process through a standard fee. This fee is based on the cost of a straightforward determination¹⁷ concluded within reasonable timescales.

2.33. The standard fee charges will depend upon the nature of the dispute. Our proposed standard fee rates are shown below:

- Straightforward disputes, typically involving domestic customers and small businesses: £3,500
- Disputes involving large business customers and network licensees: £10,000

2.34. The potential higher rate for disputes involving large business customers reflects the additional time and likelihood of incurring supplementary costs related to external advice fees.

¹⁷ An estimation of time and costs associated with determinations is provided in Section 1, Table 1 of this document.

2.35. We reserve the right however, to charge a higher amount where the true cost of the determination far exceeds these amounts.

Table 2 - Cost Recovery Approaches by Circumstance

Circumstance	Impact/ Avoidable Costs	Cost Approach	Implementation
Parties' actions cause unnecessary and unreasonable delays to the determination process.	Time related costs covering internal staff time due to delays	Flat Rate Per Day	£200 per day from the point at which they exceed established timelines set out in the guidelines and by the case officer Rate of £200 represent average cost of one member of staff for a day's work on a determination Cap of £5,000 to be observed for domestic customers
	Additional external costs	Charge for extra round of external legal and technical advice	Provide a cap £5,000 for domestic customers Uncapped for network companies
Parties' actions result in Ofgem incurring the costs of more than one round of external technical and legal advice	Additional external costs	Charge for extra round of external legal and technical advice	Provide a cap £5,000 for domestic customers Uncapped for network companies
Other circumstances which mean the matter could have been resolved by the parties in question before it was referred to Ofgem	Costs for internal staff for the full determination and external legal and technical advice	Standard Rate	Straightforward disputes, typically involving domestic customers and small businesses: £3,500 Disputes involving large business customers: £10,000

3. Factors and proposed implementation process

Chapter Summary

This chapter provides an overview of the factors to be taken into account before recovering costs, including our treatment of fuel poor and vulnerable customers within the determination procedure. We also provide general implementation procedures to ensure customers are properly informed of the process.

Question 1: Do the factors set out in this chapter fairly assess when we should recover costs?

Question 2: Are there any additional factors that should be taken into account?

Question 3: Are the implementation procedures comprehensive?

Question 4: We welcome views regarding additional procedures that would facilitate the determination process.

Factors to be taken into account before recovering costs

Background

3.1. The Authority will consider affordability before seeking to recover costs along with any other relevant factors. We will review the circumstances of the parties to the determination on a case by case basis before we decide to recover costs.

3.2. Our decision to recover determination costs from parties in some circumstances is not in any way intended to reduce parties' access to the determination process. In seeking to recover costs we will observe the following principles:

- We have decided that in no circumstance will we seek to recover determination costs from fuel poor or vulnerable customers.
- We have placed a ceiling on the costs we can recover from domestic and small business customers of £5,000.

Definition of fuel poor and vulnerable customers

3.3. As stated above we will not, in any circumstances, levy charges on fuel poor or vulnerable customers.

3.4. We regard 'fuel poor' customers as those who spend more than 10 per cent of their annual income to have an adequately heated home¹⁸.

3.5. Classifying which customers might be termed 'Vulnerable' is slightly less straightforward. In meeting its principal objective to protect the interests of existing and future consumers, the Authority has particular responsibility towards those who are disabled or chronically sick, of pensionable age, on low incomes or residing in rural areas. We recognise that a number of other groups may also be classed as vulnerable, including those:

- with low levels of literacy and numeracy or without a good command of English, which makes it difficult for them to engage with suppliers;
- without a bank account and hence very restricted in their payment method and unable to access many of the more competitive tariffs;
- without easy internet access and so less able to use energy advice sites or sign up to an online email service;
- living in poorly built housing that is hard to heat.

3.6. We also recognise that many of those who may fall into the definition of vulnerable customers under our remit are not, in fact, vulnerable in any way relevant to the matter in dispute. For example, many of those of pensionable age are physically fit and/or well off and those living in rural areas may only be vulnerable in certain circumstances (because of lack of access to services).

Domestic customers and small businesses

3.7. We anticipate that we will only recover costs from domestic customers and small businesses where there is clear evidence that they have acted deliberately to disrupt or prolong the process, or they are vexatious in bringing matters to us to determine.

3.8. We recognise that domestic customers may not normally enter into a determination more than once and they might face circumstances that make it difficult for them to comply with the timescales. Whenever the party informs us of any special needs or circumstances, we will endeavour to provide assistance and grant extensions to the process.

¹⁸ Our definition of fuel poor is based on the Energy Supply Probe - Initial Findings Report published in October 2008: [Energy Supply Probe - Initial Findings](#)

3.9. If we believe there may be a need to recover costs from a domestic customer at any point in the determination process, we will contact the party to notify them of this possibility and provide them with an opportunity to come forward with evidence regarding their particular circumstances. We will provide guidance as to what evidence is relevant to us assessing their situation. We will then take any information they provide into account in our assessment of whether it is appropriate to recover costs and the rates that could potentially apply.

3.10. In cases where the customer has provided evidence to justify their categorisation as fuel poor and/or vulnerable, we will under no circumstance seek to recover costs for our determination's work.

3.11. As set out in Chapter 2, we have set a cap on the amount of costs we can recover from domestic customers at £5,000.

General implementation procedures

3.12. Further to our decision to recover costs in some circumstances, we have decided to put in place additional arrangements to ensure that customers are properly informed of the determination process. We will set out our approach in the updated determinations procedure document.

During the process

3.13. At the start of the determination process, the case officer will write to inform the parties of the established timelines and relevant information expected for each stage of the determination procedure. We will also provide a copy of the updated Guidance to the determination's procedure where we inform the parties of the circumstances in which we might look to recover costs, our cost recovery approaches and relevant factors we would take into account. The case officer will keep the parties informed of the timelines to be observed throughout the case and monitor them closely.

3.14. The case officer will provide written notice to the parties seven days before the deadline established to receive information. The warning would include a reminder that a particular behaviour may trigger a charge. This might be either a flat rate to be charged to the responsible party from the day after the deadline until the information is submitted and/or the cost of any additional round of external advice.

3.15. In cases where there is a need for an additional round of external technical or legal advice (subject to the circumstances in Chapter 2), the case officer will inform parties that they might be charged for all external technical and legal advice.

3.16. At any stage of the process, the parties will have the opportunity to request an extension to the deadline outlining their reasons for this request. We will then review the parties' circumstances, decide whether to grant the extension and review the timelines to the determination process accordingly.

3.17. In cases where parties have not requested an extension and failed to meet the established deadlines, a flat fee will apply. The case officer would be responsible for keeping a record of the fees levied by day and prepare an estimate of the total costs to be levied from the parties at the end of the determination process.

3.18. In cases where an extra round of external advice has been engaged as a result of parties' behaviour, the case officer will provide a written notice to the parties with an estimate of the costs involved. At the end of the process, the total cost of all external technical and legal advice would be billed to the responsible parties as invoiced, subject to the maximum thresholds outlined above.

3.19. In cases where we consider the full cost of a determination could have been avoided, the case officer would provide written notice at the beginning of the process to the parties concerned that they may be liable for the full cost of the process. The notice would include a reminder of the standard fee rates as set out in Chapter 2. At this stage we will provide parties with an opportunity to explain why it has not been possible to resolve this matter without Ofgem's involvement. They will also, at this stage, be afforded an opportunity to withdraw the determination request if they wish.

At the end of the process

3.20. In deciding when to recover costs, the case officer will present the case to the decision maker who acts on behalf of the Authority and a decision will be made taking into account the following information:

- extent to which parties have contributed to the circumstances in which we would seek to recover costs
- individual circumstances of the case
- the fact that parties were notified that they were likely to incur costs
- other relevant circumstances of the parties
- factors outlined in this section

3.21. Where Ofgem decides parties should bear some of the cost of the determination work, a Costs Order will be made. The Costs Order will contain a breakdown of the costs we are looking to recover from the party concerned.

3.22. Our decision to recover costs would be final under Section 23(5) of the Electricity Act 1989 and Section 27A(9) of the Gas Act 1986.

Appendix 1 - Consultation Response and Questions

→ Instructions: Please complete the following consultation response form and return by January 31 2011.

1.1. Ofgem would like to hear the views of interested parties in relation to any of the issues set out in this document

1.2. We would especially welcome responses to the specific questions which we have set out at the beginning of each chapter which are replicated below.

1.3. Responses should be received by January 31, 2011 and should be sent to:

Lia Santis
Distribution Policy
9 Millbank, London SW1P 3GE
020 7901 1856
Lia.Santis@ofgem.gov.uk

1.4. Unless marked confidential, all responses will be published by placing them in Ofgem's library and on its website www.ofgem.gov.uk. Respondents may request that their response is kept confidential. Ofgem shall respect this request, subject to any obligations to disclose information, for example, under the Freedom of Information Act 2000 or the Environmental Information Regulations 2004.

1.5. Respondents who wish to have their responses remain confidential should clearly mark the document/s to that effect and include the reasons for confidentiality. It would be helpful if responses could be submitted both electronically and in writing. Respondents are asked to put any confidential material in the appendices to their responses.

1.6. Next steps: Having considered the responses to this consultation, Ofgem intends to publish an updated Guidance for determining disputes. Any questions on this document should, in the first instance, be directed to:

Lia Santis
Distribution Policy
9 Millbank, London SW1P 3GE
020 7901 1856
Lia.Santis@ofgem.gov.uk

CHAPTER: Two

Question 1: Should the circumstances listed below constitute the basis for recovering costs from a party?

Question 2: Are there are other circumstances in which cost recovery should be considered?

Question 3: Is it appropriate for us to recover costs in the circumstances detailed in this chapter?

Question 4: Do you think the cost recovery approaches are appropriate given the circumstances set out in this chapter?

CHAPTER: Three

Question 1: Do the factors set out in this chapter fairly assess when we should recover costs?

Question 2: Are there any additional factors that should be taken into account?

Question 3: Are the implementation procedures comprehensive?

Question 4: We welcome views regarding additional procedures that would facilitate the determination process.

Appendix 2 – Ofgem’s Procedure for Determining Disputes

Introduction¹⁹

1. There are circumstances in which a dispute between an electricity supplier or distributor or a gas supplier or transporter and a consumer may be referred to the gas and Electricity Markets Authority for determination. These may arise under statute (particularly the Gas Act 1986 and the Electricity Act 1989) or under the provisions of licences.
2. This memorandum outlines the procedures that Ofgem will generally follow in such cases²⁰.

Initial steps

3. Where a dispute arises, Ofgem will expect that the parties will seek to resolve it between themselves. They may also, in appropriate cases, seek the assistance of energywatch. If these efforts are unsuccessful, the matter may be referred to Ofgem.

Start of the process

4. Where a matter is referred to Ofgem that may lead to a determination, Ofgem will first consider if the matter is one which Ofgem may determine. Once Ofgem has decided that this is a matter in respect of which it is capable of making a determination, Ofgem start the procedure by explaining to all the parties the procedures that it proposes to follow. It is expected that this will usually be done by providing a copy of this note, together with any additional guidance which may be relevant to the particular type of dispute.
5. At the same time Ofgem will ensure that all the parties know the identity of the Ofgem official who will:
 - o Be responsible for the conduct of the procedures (the ‘case officer’), and
 - o Make the final decision
6. These will never be the same people. If at any stage during the process, the identity of either official change for any reason, Ofgem will inform all the parties as soon as is practical.

¹⁹ This document was approved by the Gas and Electricity Markets Authority in 2003. It sets out, at a very high level the steps we need to follow in cases which require determinations.

²⁰ These procedures are in addition to any procedural requirements set out in the relevant Acts or licences.

During the process

7. It is Ofgem's intention that each party should have full opportunity to put their cases and that the case put by each party should be fully exposed in writing to all other parties, subject to appropriate safeguards in respect of commercially confidential information.
8. If any party wishes to provide confidential information, it should notify the case officer before doing so and explain why it is confidential. The case officer may require a non-confidential summary to be provided to the other party. In reaching its decision, Ofgem will consider the weight which it is appropriate to give to information on which any other party has not had an opportunity to comment.
9. Ofgem will invite each party in turn to provide to it a written submission setting out the relevant facts and reasons supporting that party's position. Ofgem may provide a guide as to be information which a party will need to provide to enable the matter to be decided. In connection disputes each party should complete the form in Appendix 1 and the Gas Transporter / Electricity Distributor should provide the technical information in Appendix 2. It is important that the parties only comment on the actual dispute. Ofgem will also indicate any information which it has already received, for example, from energywatch, which it would expect to take into account in reaching a decision. At the start of the process, the case officer will set a date by which written submissions must be received by Ofgem. The length of the period allowed for preparation of submissions will depend on a number of factors including the complexity of the matter and the extent to which the documentation already exists. Ofgem would not normally expect this period to exceed four weeks.
10. Ofgem will normally expect to copy its correspondence to one party to the other parties and for each party to copy any letter it writes to Ofgem to the other parties to the dispute. Ofgem may itself raise questions to the parties on matters arising from the responses received.
11. In the light of submissions and comments, the case officer will draw up a statement of the main facts of the case and each party's arguments. The parties will have an opportunity to comment on the summary of the main facts and Ofgem's summary of their own evidence. This is not intended to provide an opportunity to restart any dispute of facts or raise new arguments.

Oral hearings

12. While it is Ofgem's intention that the exchange of information leading to determinations should be largely written, any party to a matter to be the subject of a determination can, at its request, present its case in person to the decision maker. It is expected that any such hearing will normally take place only after the written process has been completed. Both parties will normally attend such meetings but, in appropriate cases, it may be directed that only one party may attend, for example for the purpose of putting confidential information before Ofgem. When both parties are present, it is not envisaged that the hearing should be formal and it will not be normal for there to be cross examination,

although each party will be permitted to comment in brief on the other's representations. When only one party is present, Ofgem will disclose any new information which it receives at the hearing but which is not in fact confidential to the other party for comment.

- 13.** The case officer will be responsible for setting time limits at all stages of the process. In connection disputes, the case officer will specify the proposed timetable in his initial letter to the parties. He may, in exceptional circumstances, extend time limits that he has set. He has complete discretion as to the admissibility of submissions received late. It is therefore important that all parties provide information in a timely and accurate manner in support of their case.

13A In cases where no additional information is required and the matter is a domestic connections dispute, it is envisaged that the procedure will take no longer than two months from the time that Ofgem receives the complaint and determines that it has jurisdiction to deal with it. In more complex matters the case officer will keep the initial timetable under review and advise the parties of any necessary revisions to it.

The decision

- 14.** The decision-maker will make his decision on the basis of the statement prepared by the case officer, the written submission of each party and any hearings which have been held. This decision and the reasons for it will be recorded in writing and the case officer will provide a copy to each party.
- 15.** During the course of the process the decision-maker may obtain advice from Ofgem staff, including guidance from the Ofgem management committee. The fact that he has done so, and the advice given will not generally be made public, but if any material new points are raised, the parties will be invited to comment on them.

Public register

- 16.** Ofgem is required to place on the public register maintained by it under the relevant Act a copy of certain types of decision and it is its normal practice to make all other decisions available to the public on request. The name and address of the customer will normally be omitted from the published version of the decision. If any party to a decision wishes any matter to be excluded from the publication, it should make representations to the case officer within fourteen days of the issue of the decision. After which it may be placed on the register or otherwise made publicly available in the form in which it was issued to the parties.

Appendix 3 - The Authority's Powers and Duties

1.1. Ofgem is the Office of Gas and Electricity Markets which supports the Gas and Electricity Markets Authority ("the Authority"), the regulator of the gas and electricity industries in Great Britain. This appendix summarises the primary powers and duties of the Authority. It is not comprehensive and is not a substitute to reference to the relevant legal instruments (including, but not limited to, those referred to below).

1.2. The Authority's powers and duties are largely provided for in statute (such as the Gas Act 1986, the Electricity Act 1989, the Utilities Act 2000, the Competition Act 1998, the Enterprise Act 2002 and the Energy Acts of 2004, 2008 and 2010) as well as arising from directly effective European Community legislation.

1.3. References to the Gas Act and the Electricity Act in this appendix are to Part 1 of those Acts²¹. Duties and functions relating to gas are set out in the Gas Act and those relating to electricity are set out in the Electricity Act. This appendix must be read accordingly²².

1.4. The Authority's principal objective is to protect the interests of existing and future consumers in relation to gas conveyed through pipes and electricity conveyed by distribution or transmission systems. The interests of such consumers are their interests taken as a whole, including their interests in the reduction of greenhouse gases and in the security of the supply of gas and electricity to them.

1.5. The Authority is generally required to carry out its functions in the manner it considers is best calculated to further the principal objective, wherever appropriate by promoting effective competition between persons engaged in, or commercial activities connected with,

- the shipping, transportation or supply of gas conveyed through pipes;
- the generation, transmission, distribution or supply of electricity;
- the provision or use of electricity interconnectors.

1.6. Before deciding to carry out its functions in a particular manner with a view to promoting competition, the Authority will have to consider the extent to which the interests of consumers would be protected by that manner of carrying out those functions and whether there is any other manner (whether or not it would promote

²¹ Entitled "Gas Supply" and "Electricity Supply" respectively.

²² However, in exercising a function under the Electricity Act the Authority may have regard to the interests of consumers in relation to gas conveyed through pipes and vice versa in the case of it exercising a function under the Gas Act.

competition) in which the Authority could carry out those functions which would better protect those interests.

1.7. In performing these duties, the Authority must have regard to:

- the need to secure that, so far as it is economical to meet them, all reasonable demands in Great Britain for gas conveyed through pipes are met;
- the need to secure that all reasonable demands for electricity are met;
- the need to secure that licence holders are able to finance the activities which are the subject of obligations on them²³; and
- the need to contribute to the achievement of sustainable development.

In performing these duties, the Authority must have regard to the interests of individuals who are disabled or chronically sick, of pensionable age, with low incomes, or residing in rural areas²⁴.

Subject to the above, the Authority is required to carry out the functions referred to in the manner which it considers is best calculated to:

- promote efficiency and economy on the part of those licensed²⁵ under the relevant Act and the efficient use of gas conveyed through pipes and electricity conveyed by distribution systems or transmission systems;
- protect the public from dangers arising from the conveyance of gas through pipes or the use of gas conveyed through pipes and from the generation, transmission, distribution or supply of electricity; and secure a diverse and viable long-term energy supply, and shall, in carrying out those functions, have regard to the effect on the environment.

1.8. In carrying out these functions the Authority must also have regard to:

- the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed and any other principles that appear to it to represent the best regulatory practice; and
- certain statutory guidance on social and environmental matters issued by the Secretary of State.

The Authority may, in carrying out a function under the Gas Act and the Electricity Act, have regard to any interests of consumers in relation to communications services and electronic communications apparatus or to water or sewerage services (within the meaning of the Water Industry Act 1991), which are affected by the carrying out of that function.

²³ Under the Gas Act and the Utilities Act, in the case of Gas Act functions, or the Electricity Act, the Utilities Act and certain parts of the Energy Acts in the case of Electricity Act functions.

²⁴ The Authority may have regard to other descriptions of consumers.

²⁵ Or persons authorised by exemptions to carry on any activity.

1.9. The Authority has powers under the Competition Act to investigate suspected anti-competitive activity and take action for breaches of the prohibitions in the legislation in respect of the gas and electricity sectors in Great Britain and is a designated National Competition Authority under the EC Modernisation Regulation²⁶ and therefore part of the European Competition Network. The Authority also has concurrent powers with the Office of Fair Trading in respect of market investigation references to the Competition Commission.

²⁶ Council Regulation (EC) 1/2003.

Appendix 4 - Glossary

A

ACB [Affiliated Connections Business](#)

A connections business which is a holding company of a distribution network operator, subsidiary of such a holding company or subsidiary of a distribution network operator (as defined within the Companies Act 1985).

D

DG [Distributed Generation](#)

Distributed generation is also known as embedded or dispersed generation. It is an electricity generating plant connected to a distribution network rather than the transmission network. There are many types and sizes of distributed generation facilities. These include Combined Heat and Power (CHP), wind farms, hydro electric power or one of the new smaller generation technologies.

DNO [Distribution Network operator \(Electricity\)](#)

There are 14 Electricity Distribution Network Operators who carry electricity from the transmission system and some distributed generators to industrial, commercial and domestic end users. They have distribution service areas which correspond to those of the former public electricity suppliers (before privatisation in 1990). They are owned by seven different corporate groups.

DPCR [Distribution Price Control Review](#)

The price review applicable to electricity distribution network operators. The fifth Distribution Price Control Review (DPCR5) was launched in April 2010.

E

EPR [Electronic Public Register](#)

The online register set up by Ofgem to store records of determinations, Exemptions, Industry Code Determinations, Licences, Metering and Standard Licence Conditions.

<http://epr.ofgem.gov.uk/>

G**GDN** **Gas Distribution Network (Operator)**

There are five Gas Distribution Network Operators who transport Gas from the National transmission system to final customers. Up until June 2005 all eight area networks in the country were owned and operated by National Grid Gas but at that time, four area networks covered by four licences were sold to three other corporate groups, whilst four were retained by National Grid Gas plc under one licence.

GS **Guaranteed Standard**

The Gas Act 1986 (as amended) ("the Gas Act") provides for the Authority to make regulations for guaranteed standards of Performance. In the light of these provisions, standards of performance for gas transporters were introduced for the first time in April 2002. Guaranteed standards of performance set service levels that must be met in each individual case and are made with the consent of the Secretary of State for Trade and Industry.

GT **Gas Transporter**

Another word to describe a GDN or IGT. Relates to the licence they hold, a gas transporter licence, which is the equivalent to an electricity distribution licence.

H**HV** **High Voltage**

Exceeds 1 kV but does not exceed 22 kV

I**IDNO** **Independent Distribution Network Operator (Electricity)**

In 2007-08 there were four independent electricity distribution network operators. IDNOs own and operate various small networks embedded within DNO networks. IDNOs do not have DSAs.

IGT **Independent Gas Transporter**

In 2007-08 there were eleven IGT licence holders. IGTs own and Operate various small networks embedded within GDN networks.

K**KPI** **Key Performance Indicator**

A set of benchmarks to be met by DNOs. These are not backed up with any specific licence conditions or financial incentives.

L

LDZ Local Distribution Zone

LV Low Voltage

Does not exceed 1kV

M**P**

POC Point of Connection

The point at which new works are connected to the existing distribution network.

R

Regulatory Year

From 1 April - 31 March.

S

SLC Standard Licence Condition

A Condition of either the Electricity or Gas Distribution licence.

U

UIP Utility Infrastructure Provider

An independent connections provider not affiliated to a gas distribution network operator

Appendix 5- Feedback Questionnaire

1.1. Ofgem considers that consultation is at the heart of good policy development. We are keen to consider any comments or complaints about the manner in which this consultation has been conducted. In any case we would be keen to get your answers to the following questions:

1. Do you have any comments about the overall process, which was adopted for this consultation?
2. Do you have any comments about the overall tone and content of the report?
3. Was the report easy to read and understand, could it have been better written?
4. To what extent did the report's conclusions provide a balanced view?
5. To what extent did the report make reasoned recommendations for improvement?
6. Please add any further comments

1.2. Please send your comments to:

Andrew MacFaul
Consultation Co-ordinator
Ofgem
9 Millbank
London
SW1P 3GE
andrew.macfaul@ofgem.gov.uk

