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Contact / Extension

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Dear Lia

### **Consultation on cost recovery approaches for determinations**

I am writing in response to the consultation paper issued on 20 December 2010.

I am afraid that we find it very difficult to see a strong argument for the charging proposals set out. There are a number of types of dispute that are open to determination by the Authority, including connection offer determinations provided for under Section 23 of the Electricity Act 1989. For the latter category of dispute either party has a right (subject to certain exceptions) to refer the matter to the Authority for resolution. The criteria set out for recovering costs appear to be extremely wide – for example, cost recovery will be sought for disputes that Ofgem believes “could have been resolved by the parties in question.” It is hard to think of any dispute that would not fall into this category under certain assumptions.

We are also puzzled why the volume of determinations dealt with by Ofgem are not set out in context. For example, electricity network licensees carried out more than 220,000 metered electricity connections in 2008/09 (the latest year for which figures are available). Formal determinations of disputed connection offers (both gas and electricity) amount to around 15 per year according to the paper, which appears to us to be a very low figure by comparison to the volume of work carried out by licensees. It should also be remembered that determinations can trigger significant resources being required by network companies, and they therefore already have a significant incentive to resolve disputes where possible prior to a determination.

We note that throughout the document similar provisions are described in a number of different ways that makes it hard to be sure under what circumstances cost recovery would be sought. For example, paragraph 1.4 refers to the Authority assessing whether the parties have acted ‘unreasonably, obstructively, in a vexatious or dilatory manner’ to justify recovery of costs. However, in chapter 2, which sets out the proposed approach, there is no reference to obstructive or vexatious behavior. It is also not clear how a party can avoid being deemed to have ‘caused’ more than one round of external advice being sought or to have caused an ‘unreasonable’ delay in the determination process.

We therefore think that the proposals as they stand are not very well thought out and will cause difficulties for both customers and licensees. We recommend that consideration is given to refining the proposals so that they apply in clearly set out circumstances such as, for example where parties are judged to have done little or nothing to resolve a dispute.

With this as background, our answers to the questions set out are as follows.

## **Chapter Two**

**Question 1:** *Should the circumstances listed below [in paragraph 2.3] constitute the basis for recovering costs from a party?*

For the reasons set out above, we believe that behaviour should be clearly dilatory or vexatious before cost recovery should apply. There is a significant risk that the criteria as proposed will cause parties to fear incurring costs despite their acting in good faith throughout. It would be wholly undesirable if customers were dissuaded from exercising their rights under the Act for fear of incurring penalties of up to £5,000 or more. There is also a risk that some customers may seek to exploit any penalty mechanism by attempting to extract payments from licensees in return for not pursuing a determination.

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

No. The circumstances should be clearly and narrowly defined for the reasons set out above.

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

We note that the criteria for recovering costs appear to be described differently throughout the document. For example, paragraph 3.7 says that

“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.”

This is rather closer to what we would consider a proportionate approach to cost recovery. We are not clear why it should not also apply to other categories of party.

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

It is not clear that the approaches set out have been fully assessed. For example paragraph 2.17 says that Ofgem “[W]ould expect that the network company will have taken all reasonable steps to resolve the matter before it is referred to us.” However, paragraph 2.24 says that a ‘standard’ fee may be charged, representing the full cost of determination, “...where the need for the determination could reasonably have been avoided.”

A company may take all reasonable steps to resolve a dispute, but find itself penalised when a referral takes place, and it is judged that the determination could “reasonably have been avoided” – e.g. through a financial payment. This is not proportionate in our view for the reasons given above, and should be reconsidered.

## **Chapter: Three**

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

Please see our comments above on the proposed treatment of cost recovery for domestic and small business customers.

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

Please see our comments above on the low volume of determinations, the costs that these currently impose on licensees, the risk of dissuading customers from pursuing determinations, and the scope for customers abusing a penalty process as proposed.

**Question 3:** *Are the implementation procedures comprehensive?*

No comment.

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

We think that consideration should be given to improving the transparency of judgements in determinations. There is at present a tendency for figures to be given with little or no indication as to how they have been derived or why they are considered reasonable by the Authority.

I hope that this is helpful but please contact me if you would like to discuss.

Yours sincerely



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