



Lia Santis
Distribution Policy
Ofgem
9 Millbank
London
SW1P 3GE

Wales & West House
Spooner Close
Celtic Springs
Coedkernew
Newport NP10 8FZ
T. 029 2027 8500
F. 0870 1450076
www.wwutilities.co.uk

Tŷ Wales & West
Spooner Close
Celtic Springs
Coedcernyw
Casnewydd NP10 8FZ

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Dear Lia,

Ofgem Consultation on cost recovery approaches for determinations

Wales & West Utilities Limited (WWU) is a licensed Gas Distribution Network (GDN) providing Gas Transportation services for all major shippers in the UK. We cover $\frac{1}{6}$ th of the UK land mass and deliver to over 2.4 million supply points. WWU is one of only two Licence Operators that focus solely on Gas Distribution in the UK.

We responded to Rebecca Langford on 12th January 2010 in response to your Open letter of 1st December 2009. We welcome some of the developments in Ofgem's thinking for example that the proposed power for Ofgem to refuse an oral hearing has been dropped. It seems that, in respect of determinations, Ofgem is acting as a tribunal within the meaning of Section 6 of the Human Rights Act 1998. Ofgem should therefore have regard both to the rules regarding costs pronounced generally by the Courts and the operation of such tribunals in the interests of consistency between the various tribunals available to the parties before it. Within that general comment our response to the questions in the consultation is given below.

Chapter 2 Circumstances in which we propose to recover costs and cost recovery principles

1) Should the circumstances listed below constitute the basis for recovering costs from a party

Parties actions cause unnecessary and unreasonable delays to the determination process

It is reasonable to recover costs in the circumstances described namely where a party has imposed costs that could have been reasonably avoided were it not for the deliberate actions of one of the parties involved. However it may be difficult in practice to assess these matters.

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Wales & West Utilities Limited
Registered Office:
Wales & West House, Spooner Close, Coedkernew, Newport NP10 8FZ
Registered in England and Wales: No. 5046791

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

We do not think that it is generally appropriate to recover costs where Ofgem has had to incur more than one round of external technical advice unless a party raises a new issue that should have been raised earlier. The need for further technical advice may arise quite normally during the course of the determination and may also arise if Ofgem endeavours, reasonably, to minimise the costs of such advice by focussing on a certain issues but then realises that other aspects need to be investigated. In this context it is important to remember that determinations can range from domestic connection to complex over 7Bar connections.

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

Ofgem should use its powers to refuse to make a determination if it believes the applicant has not exhausted other avenues. It is not appropriate to force a party to forgo its rights merely because it has been unwilling unreasonably to concede. There should be consistency with the Courts over the failure to entertain the Alternative Dispute Resolution process.

We commented in our response to the Ofgem open letter that where a previous determination has been made on the issue Ofgem should inform both parties of this at an early stage and ideally before the issue has been accepted for a determination. To facilitate this previous determinations need to be much more accessible. The E-public register is easy to miss on the Ofgem web site, is difficult to use and the determinations are not listed in a way that enables users to easily find relevant determinations. Ofgem in the consultation has acknowledged that this needs addressing and we look forward to developments.

2) Are there other circumstances in which cost recovery should be considered

We do not have any others to suggest.

3) Is it appropriate to recover costs in the circumstance detailed in this chapter

It is reasonable to charge where parties' actions cause unnecessary and unreasonable delays to the determination process.

4) Do you think the cost recovery approaches are appropriate given the circumstances set out in this letter?

Given the constraints that Ofgem proposes around charging customers it seems likely that license holders are more likely to be charged than customers. While we understand the concerns about charging individuals we question whether there is a precedent for a legal process having an asymmetric principles for charging parties for costs.

We also question whether customers will be discouraged from asking for determinations by the potential for having to pay up to £5,000.

We do think that Ofgem should have provided information on the costs of determinations in the last few years at least broken down by individual determination together with a value of costs that it believes it would have sought to recover if the principles in this consultation were adopted. Respondents could then see the size of the issue. As no information has been provided it is impossible to see whether this issue is material or not.

While we agree that Ofgem should not have to incur additional costs, if the actual level of costs incurred is small, then we question whether the resources put into devising and managing a cost recovery process are appropriate. Cost recovery should be cost reflective and transparent. Within these parameters the proposals to have flat fee, external cost recovery and fixed standard fees seems reasonable.

Ofgem should also consider how it would handle complaints about the cost recovery it sought to make. In addition it also needs to consider what it would do if a party, for example an individual, refused to pay the costs Ofgem sought to recover. Ofgem would not be able to refuse to publish the determination until costs were paid and it may decide that the cost of legal action to recover its costs was too high.

Chapter 3 Factors and proposed implementation process

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

We note that Ofgem proposes not to charge fuel poor or vulnerable customers and to cap charges to domestic and small business customers at £5000. We accept that there are important considerations of affordability to be taken into account. We suggest that as Ofgem is in effect performing a legal function as a tribunal under Section 6 of the Human Rights Act then its policy on costs should be consistent with the policies of other bodies performing similar legal functions and the rules regarding costs pronounced generally by the Courts, particularly as regards small County Court claims.

2. Are there any additional factors that should be taken into account

Notwithstanding the point made in the answer to question 1, Ofgem should consider whether a cap set at £5,000 will discourage domestic and small business customers who have a legitimate issue from seeking a determination.

3. Are the implementation procedures comprehensive

Ofgem needs to consider what process it should put in place in case a party challenges the costs that Ofgem is seeking to recover. It should also consider what process it will put in place should a party refuse to pay the costs Ofgem seeks to

recover from it. It would not be reasonable for Ofgem to refuse to issue the determination until costs had been paid.

The proposal to name licensees but not applicants is potentially contrary to Section 6 of the Human Rights Act 1998 and Article 6(1) of the Convention because its effect or intention is to place pressure on one party to avoid the publicity of a determination. That is not the act of an independent tribunal.

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

As mentioned in the response to question 1 in Chapter 2, a major overhaul is required of the way previous determinations are published on the Ofgem website. We also suggest that Ofgem clearly states a list of issues over which it believes it has powers to make determinations and the justification. In the past Ofgem has issued “determinations” on gas service alterations even though it does not have the powers to make determinations on this work. Ofgem has powers to determine issues covered by Sections 9 and 10 (amongst others) of the Gas Act. Both these sections deal with new connections to the gas distribution system; however, a service alteration is a diversion of an existing service not a new connection and therefore is not covered by either Section 9 or 10.

Yours sincerely,



Steve Edwards
Head of Commercial and Regulation
Wales & West Utilities