

Ofgem guidance on the determination of disputes for use of system or connection to energy networks

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Overview

This guidance document sets out the procedure that Ofgem¹ will generally follow for determining disputes between licensed energy network companies (“network companies”) and their customers for use of system or connection to the gas or electricity distribution or transmission system. It replaces Ofgem’s Procedure for Determining Disputes published in 2003, provides more detailed guidance on what customers should do when they are in dispute with a network company and how we will handle those disputes if they are referred to us for determination. This guidance also sets out our approach to cost recovery and the particular circumstances in which it may be appropriate for us to recover some or all of the cost of our work on determinations from one or more of the parties in dispute.²

These procedures are in addition to any procedural requirements set out in the relevant Acts³ or licences.⁴ We are aware of the changing nature of legislation in this area and will review this guidance periodically.

1 The terms “Ofgem”, “the Authority”, “we” and “us” are used interchangeably in this document.

2 Note that we do not intend to recover the cost of our work on determinations from domestic and micro-business customers.

3 Principally the Gas Act 1986 and the Electricity Act 1989.

4 Note that any licence breach identified as a result of a determination may result in the Authority taking enforcement action against the licensee in certain circumstances. However, this would not necessarily stop the Authority from continuing with the determination.

Context

The Gas and Electricity Markets Authority (the "Authority") has the power to determine disputes between gas and electricity network companies (transmission and distribution) and customers (both commercial and domestic) in certain circumstances.

In December 2009 we started an internal review of our determinations procedure and published an open consultation letter seeking views on potential amendments to the procedure we have had in place since 2003. We followed this consultation with an update letter in July 2010 setting out our proposed approach, including our decision to recover some or all of the costs of conducting a determination from one or more of the parties in dispute in particular circumstances. In December 2010 we consulted on the particular circumstances where this would apply and our proposed approach to cost recovery.

Associated documents

Ofgem's procedure for determining disputes (24/06/2003)

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

Letter to Distribution Network Operators and Gas Distribution Network Operators regarding a change in Ofgem's involvement in connections dispute resolution (21/09/2009)

<http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=26&refer=domestic-consumers/ncamm>

Update letter regarding Ofgem's review of its procedure for determining disputes (29/07/2010)

<http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=49&refer=domestic-consumers/ncamm>

Consultation on cost recovery approaches for determinations (20/12/2010)

<http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=51&refer=domestic-consumers/ncamm>

Ofgem's complaints procedure (31/03/2017)

<https://www.ofgem.gov.uk/about-us/transparency/complaints-about-ofgem>

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Executive summary

There are circumstances in which a dispute between a network company and a customer may be referred to the Authority for determination. These circumstances are set out in statute, in particular, the Gas Act 1986 and the Electricity Act 1989 (“the Acts”) and in the licence obligations on network companies. When a dispute is referred to us we will assess each case individually to establish whether it is a matter that we can determine. We have a duty to determine a wide range of disputes.⁵

In this document we set out the procedure that all parties should usually follow when referring a dispute to us for determination.⁶ We also explain the procedure that we will generally follow for each dispute, although we may, at our discretion, depart from this procedure in certain circumstances. Additionally, this document sets out the alternative dispute resolution routes that are available to the parties in dispute.

This document sets out our procedure for network company disputes. We may apply this procedure to other disputes that we may determine as far as they are relevant to the dispute, for example, those that are set out in Appendix 1 of this guidance.

This document updates our approach to determining disputes involving the gas and electricity distribution companies and covers the approach we will take in determining disputes involving gas and electricity transmission companies. This includes disputes for use of system or connection to the National Electricity Transmission System (“NETS”) and the National Gas Transmission System (“NTS”).

We also set out the procedure we will follow in respect of certain commercial disputes that are referred to us under the European Directives (known as Article 37 or Article 41 disputes).⁷

Determination of disputes with gas and electricity distribution companies⁸

Disputes referred to us about a connection to the distribution system typically relate to the connection charges that the network company is levying on the customer concerned. We can also determine disputes about use of system offers.⁹ Where such

⁵ A non exhaustive list of our determination powers is provided in Appendix 1 of this guidance.

⁶ Note that a complainant can be represented by another party. We will correspond with the party referring the dispute to us for determination, provided we have the complainant’s permission to do so.

⁷ See Article 37 of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, and Article 41 of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0055:0093:EN:PDF>
The Articles 37 and 41 provisions have been transposed into section 44B of the Electricity Act 1989 and section 27B of the Gas Act 1986.

⁸ See Section 23 of the Electricity Act and section 27A of the Gas Act

⁹ See section 7(1)(a) and 7(2) of the Electricity Distribution licence

a dispute is referred to us we will generally follow the procedures set out in Chapter 2.

Determination of disputes with electricity and gas transmission companies

We approach disputes involving gas and electricity transmission companies in a similar way to disputes involving distribution companies. However, the procedure we would generally follow for disputes referred to us under the electricity transmission licence is different as there may be more than one transmission company involved in preparing an offer made by National Grid Electricity Transmission plc in its role as System Operator to an applicant. For this reason we will consider, amongst other things, the views of any affected transmission company. Chapter 3 of this document sets out our procedure for dealing with disputes with the transmission companies.

Determination of disputes arising under the European Directives

Disputes referred to us under the European Directives are defined in the Acts.¹⁰ Chapter 4 sets out a description of what constitutes an Article 37 or Article 41 dispute and the procedure that we will generally follow.

Ofgem's cost recovery approaches

We also describe the circumstances in which it may be appropriate for us to recover the costs that we incur in undertaking a determination from any party to the dispute and sets out the cost recovery approaches that we may apply in such circumstances.

Some determinations can take a significant amount of time. While this may be due to the complexity of the matter or other reasons, the determination process can also be delayed if the parties in dispute do not fully participate in the determination process. We therefore encourage all parties to co-operate fully with the procedure set out in this document and the network companies, in particular, to do all they can to resolve disputes as swiftly and as effectively as possible without recourse to a determination by Ofgem. We have the power to recover the cost of our work on determinations.¹¹ However, at present, it is not our intention to recover our costs from domestic or micro business customers. We will take affordability into account in all cases, and we have placed a ceiling of £5,000 on the costs that we will recover from small and medium sized business customers.

Chapter 5 sets out the specific circumstances in which it may be appropriate for us to recover the cost of our work on determinations from a party in dispute and describes the cost recovery approaches that we intend to follow and the factors that we will take into account.

We will keep this guidance under review.

¹⁰ Section 44B-D of the Electricity Act 1989 and section 27B-D of the Gas Act 1986.

¹¹ See section 23(5)(a) of the Electricity Act 1989 and section 27A(9)(a) of the Gas Act 1986. We also have the power to recover costs under paragraph 14 of the Electricity (Standards of Performance) Regulations 2010 and the Gas (Standards of Performance) Regulations 2005.

1. Introduction

Chapter Summary

This chapter explains what a determination is, when disputes can be referred to us for determination and the alternative dispute resolution routes that are available to domestic and micro business¹² customers, as well as to larger industrial and commercial customers.

What is a determination?

1.1. A determination is a binding decision by us, including our reasons, in relation to a dispute referred to us under the Acts or the relevant licence provisions.

When can disputes be referred to us?

1.2. When a dispute arises, we expect that the parties will seek to resolve it between themselves or consider one of the alternative dispute resolution routes available to them. If these efforts are unsuccessful, the dispute may be referred to us for determination subject to any time limits set out in the Acts or the licence (for example, a dispute relating to the making of a connection to an electricity or gas distribution system may not be referred to us after the end of the period of 12 months beginning with the time when the connection is made).¹³ We will examine each dispute that is referred to us in order to assess whether we have the powers to determine the dispute.

1.3. Once we have established that we have the powers to determine the dispute, we will review the facts of the case and the evidence provided by the parties before reaching a decision.

¹² A micro business is defined as a company which meets one of the following criteria:

- consumes less than 200,000 kWh of gas a year, or
- consumes less than 55,000 kWh of electricity a year, or
- has fewer than ten employees (or their full-time equivalent) and an annual turnover or annual balance sheet total not exceeding £2m.

¹³ Section 27A(2) of the Gas Act 1986 and section 23(1C) of the Electricity Act 1989

Alternative dispute resolution routes

When you have a dispute

1.4. Whilst disputes can be referred to us at any time, we would encourage the use of alternative dispute resolution routes before the matter is referred to us for determination. We have set out below a description of the alternative ways to resolve disputes that are available to domestic, micro business and small and medium sized business consumers, as well as to larger industrial and commercial customers.

Domestic and micro business consumers

1.5. Since the introduction of the Consumers, Estate Agents and Redress (CEAR) Act 2007 and the Gas and Electricity (Consumer Complaints Handling Standards) Regulations 2008, electricity and gas distribution companies are required to establish arrangements to handle complaints and disputes involving **domestic and micro business customers** more effectively. They are also required to belong to an Ombudsman scheme which offers recourse to their customers if they are unable to resolve a customer's complaint.

1.6. Consumers who have a dispute should first attempt to resolve their dispute with the company concerned. Domestic and micro business consumers are advised to follow the steps set out below-

- First, raise the dispute with the network company. A copy of the company's complaints handling procedure can be requested from the company by telephone, email or their website. You can also find a complete list of the network companies on the Ofgem website under the Networks section (Disputes with networks tab).¹⁴
- If the matter remains unresolved for more than eight weeks or reaches a point of deadlock¹⁵ where the network company cannot do anything more to resolve the complaint, domestic and micro business customers can take their complaint to the Energy Ombudsman.

The Energy Ombudsman

1.7. The Ombudsman was set up to investigate complaints from domestic and micro business consumers that the network company cannot resolve to the customer's satisfaction. The Ombudsman can normally deal with a complaint if it has

¹⁴ <http://www.ofgem.gov.uk/Consumers/ncamm/Pages/ncamm.aspx>

¹⁵ A deadlock letter is a final response from the network company to the customer in which the position of the network company is stated to be different from that of the customer.

been with the network company for eight weeks or if the network company has declared the complaint deadlocked (ie the company has said that it can do no more) whichever is the earlier. If the Ombudsman finds in favour of the customer, the Ombudsman can ask the energy company to apologise and/or direct a company to take practical action to resolve a complaint and, in some cases, make a financial award. The Ombudsman has the power to award customers up to £5000 in compensation, but the average award is much less, about £135.

1.8. The Ombudsman will investigate and reach a provisional conclusion on the dispute. If, at the provisional conclusion stage, either party is dissatisfied with the outcome of the Ombudsman's investigation, the Ombudsman will advise the party that they may refer the dispute to us for formal determination before a final decision, where relevant, is taken by the Ombudsman on the case. A referral to Ofgem will only apply where the dispute is still within the statutory time limit (within 12 months of the final connection for connection disputes).

1.9. If a determination is referred to us before the Ombudsman has reached a provisional conclusion, we may decide to defer taking any steps under our procedure until the Ombudsman has given his final decision.

1.10. For further details about how the Ombudsman service operates, including details about how and when to raise a complaint and the types of complaints the Ombudsman can handle, visit: <http://www.ombudsman-services.org/energy.html>

Energy advisory services

1.11. For domestic and micro business customers, the Government provides support and information on a wide variety of consumer issues through Citizen's Advice consumer services. They run a telephone and online service offering information and advice on consumer rights and issues. Their energy service includes advice on complaints, change of supplier and debt. For more information visit: <https://www.adviceguide.org.uk/>

1.12. Consumer Focus also provides information on a wide variety of energy related issues. Their focus is on assisting vulnerable customers with their energy queries. Its Extra Help Unit is able to help potentially vulnerable consumers by:

- providing advice, using arrangements to refer the consumer to an escalated team in the supplier's business; and
- signposting the consumer to the Redress Scheme.

1.13. For more information please visit: <http://www.consumerfocus.org.uk/energy-help-and-advice>.

Business customers

1.14. Business customers (small and medium sized businesses, industrial and commercial customers including generators) should also escalate a dispute through the network company's complaints handling process. Having done so, if the complaint remains unresolved, the dispute may be referred to us for determination. We would normally expect the companies to try and resolve the dispute between themselves before asking us to determine the matter.

Ofgem's Consumer Affairs team

1.15. Our Consumer Affairs team manage consumer based enquiries and referrals. The team ensures that matters are referred, where relevant, to the energy supply companies, network companies, Citizen's Advice consumer service or the Ombudsman as appropriate. Our Consumer Affairs team can be contacted by email at: consumeraffairs@ofgem.gov.uk or by telephone on: 0207 901 7295.

1.16. The Networks and Domestic Consumer section of the Ofgem website provides information for customers who wish to make a complaint against a network company. Under the Networks section and the 'Disputes with Networks' link, customers can find information about some of our work on determinations, our determination powers, and the alternative dispute resolution routes available to some customers. For more information, please visit: <http://www.ofgem.gov.uk/Networks/Pages/Ntwrks.aspx>

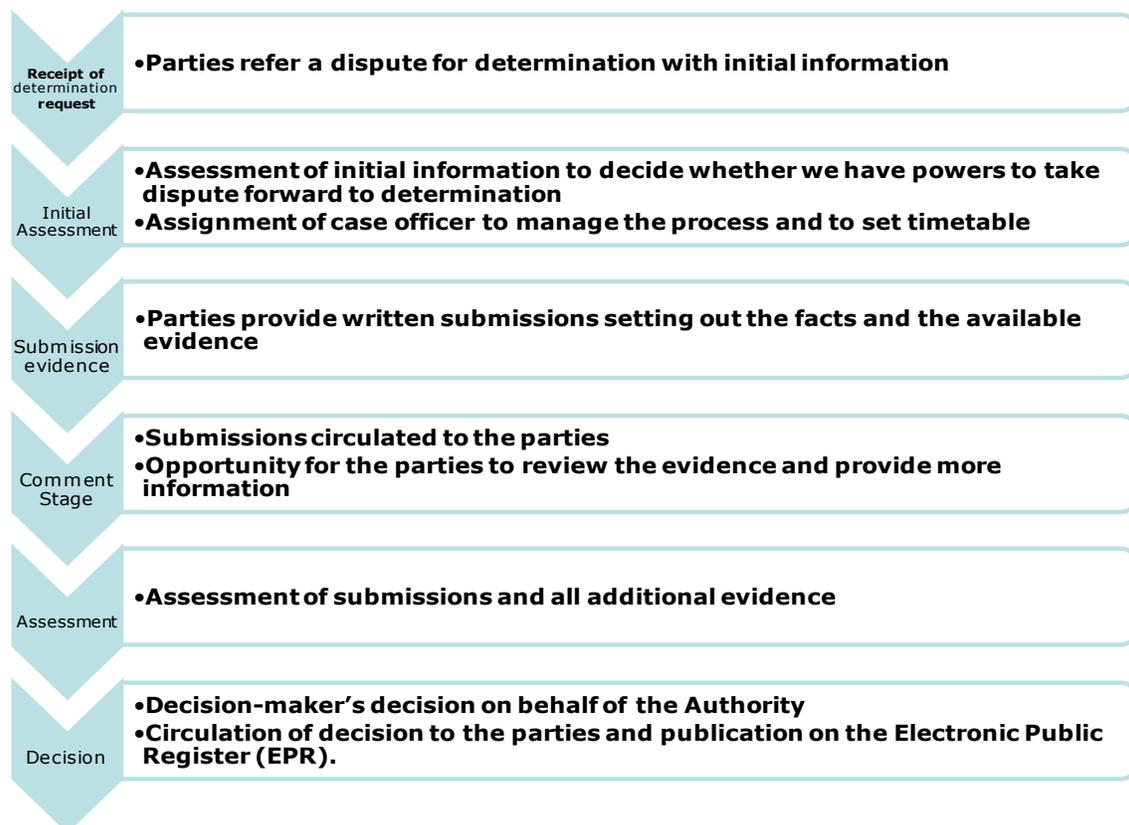
2. Ofgem’s procedure for determining disputes relating to gas or electricity distribution networks

Chapter Summary

This chapter sets out our procedure for determining disputes about use of system or connection to electricity or gas distribution networks.

Introduction

2.1. This chapter outlines the procedure that we will generally follow when asked to determine a dispute concerning use of system or connection to a gas or electricity distribution network. These procedures will also largely apply to transmission networks. These procedures are in addition to any procedural requirements set out in the Acts or the licences. The following flowchart sets out our procedure:



Determination procedure

Referring a dispute for determination

2.2. Customers or network companies who wish to refer a dispute to us for determination should address their dispute to the Distribution Policy team, Smarter Grids and Governance, Ofgem, 9 Millbank, London SW1P 3GE or send an email to the following address: connections@ofgem.gov.uk

2.3. The following documentation¹⁶ should be provided:

- details of the complainant;
- details of the other party or parties involved;
- a clear description of the complaint and what is being disputed, including any cost details and a copy of any quotation;
- dates of the completion of works (if relevant);
- copies of all correspondence relating to the complaint;
- explanation or evidence of the process that has been followed to resolve the dispute, for example, a deadlock letter from the network company, provisional conclusion from the Ombudsman (if relevant); and
- a description of any timing implications that the parties would like us to consider

Initial assessment

2.4. On receipt of a request for determination, we will consider whether we have the power to determine the dispute. We will then write to the parties to inform them whether we can take the dispute forward for determination or not. Where we are able to determine the dispute we will then set out a timetable within which we expect to reach a decision and will inform the parties accordingly. We may amend this timetable for various reasons, including the complexity of the case or if the parties request an extension and we consider that it is reasonable in the particular circumstances of the case to grant an extension.

2.5. We will write to the parties to inform them of the person who will be responsible for managing the determination process (the “case officer”), and the decision maker. We will inform the parties if the identity of either person changes.

¹⁶ We recommend that only copies of original documents are sent to us.

2.6. The case officer will be responsible for corresponding with the parties to ensure they are aware of the information expected at each stage of the determination process and will set and monitor the timelines for completing the determination.

Submission of evidence

2.7. Once we have established that we have the power to determine a dispute, we will invite each party to provide a written submission setting out the relevant facts and evidence relating to the dispute. We will provide a template for this purpose.¹⁷

2.8. The case officer will set a date by which written submissions must be received by us. We expect the parties to provide us with all of the facts of the case within the timelines set by the case officer. The length of the period allowed for preparation of submissions will depend on a number of factors, including the complexity of the matters in dispute and the availability of documentation.

2.9. We will provide a written notice to the parties before the date set by the case officer to receive information has passed. This notice will remind the parties that failure to provide the required information, in accordance with the timeline provided, may result in cost implications in line with the cost recovery approaches (as set out in Chapter 5). The case officer has the discretion to proceed with the determination based on the information available at that stage.

Comment stage

2.10. The case officer will review the written submissions and circulate a copy to the parties in dispute. This will provide the parties with an opportunity to comment on the other party's submission, and if necessary, provide further evidence. Parties should copy any correspondence addressed to us to the other parties and any Ofgem responses would usually also be similarly circulated.

2.11. We expect one round of comments on the submissions to clarify any outstanding issues. We would also expect any responses to be made by the parties within five working days of the receipt of the submissions. This period may be extended for complex cases or shortened in particular circumstances.

2.12. At any point in this process we may raise questions with the parties on matters arising from the responses received.

¹⁷ Parties are not obliged to use the template provided by us but they are asked to answer the questions included to facilitate our understanding of the facts of the dispute.

2.13. We will bring together each party's submission of facts and comments on the other party's submission into one document which will form 'the statement of facts'. The statement of facts will form the main body of evidence that will be considered by the decision maker. It will be attached as an Appendix to the main decision document. In more complex cases, the case officer will consider if external technical advice is required. The case officer will write to the parties informing them of the advice requested, if any, together with any subsequent impact on the timelines for the determination process.

Oral hearings

2.14. Information provided as part of the determination procedure should be largely in writing. We understand, however, that in some cases a party may wish to present their case in person to the decision maker. Any party can request an oral hearing which we will chair.

2.15. We expect that any such hearing will normally take place only after the written process has been completed. We envisage that the hearing should be formal and it will not be usual for there to be cross examination, although each party will be permitted to comment in brief on the other parties' representation. All parties to the dispute will normally attend such hearings but, in some cases, it may be appropriate that parties appear separately, for example, where information is confidential.

2.16. We do not expect the parties to present new information as evidence at the oral hearing. In the event of new evidence arising, we will require the party to confirm the evidence in writing within a specified period. In the event that only one party is present at the hearing, we will disclose any new information we receive at the hearing (provided it is not confidential) to the other party for comment.

Assessment

2.17. Each dispute is assessed by us based on the following material and other relevant considerations:

- initial submissions received when the dispute was first referred to us;
- the statement of facts (together with a summary of the statement of facts) submitted by the parties and any oral hearings which have been held;
- any new additional evidence submitted by the parties;
- any external technical advice obtained;
- if relevant, the company's charging statement; and
- if relevant, submissions from third parties.

The Decision

2.18. In reaching our decision, we will consider carefully all of the information listed above at paragraph 2.17, our statutory powers and any relevant licence

requirements. The decision and the reasons for it will be recorded in writing and the case officer will provide a copy to each party.

2.19. In cases where cost recovery is appropriate we will give the party or parties notice of this within the decision.

2.20. Where we decide that a party should bear some or all of the cost of our work on the determination, a Costs Order will be made at the end of the process. The Costs Order will set out a breakdown of the costs to be recovered from the party concerned. Our decision shall be final.

2.21. If a customer is unhappy with the way in which we have dealt with their complaint or is unhappy with the way in which we have reached a decision or how we operate, please refer to the complaints section on the Ofgem website:
<https://www.ofgem.gov.uk/about-us/transparency/complaints-about-ofgem>

Correction of administrative errors and accidental slips

2.22. Where a published decision or Costs Order contains minor errors, such as a typographical error or an accidental slip or omission, a party may write to the relevant case officer for it to be corrected no later than 30 days from the date of publication. Where any error is corrected, a revised copy of the Order or decision, together with a letter setting out the correction/s made shall be sent to the parties by the Authority and published on the EPR section of our website.

Timelines for the determination procedure

2.23. We will aim to reach a decision within a reasonable timeframe. However, there may be delays caused by factors, such as the late submission of new evidence which may affect the timelines set for the determination. We therefore encourage all parties to submit the required information in a timely manner.

2.24. It is envisaged that where only one round of comments is required after written submissions, it may typically take three months from the date of receipt of the dispute to the publication of the Authority's determination. In more complex disputes, the timelines may be longer.

2.25. As set out at paragraph 2.6, the case officer will write to the parties to inform them of the timelines and the relevant information expected at each stage of the determination process. The case officer will also keep the parties informed of the timelines to be observed throughout the case and monitor them.

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

The case officer will consider the admissibility of late submissions, which will be considered on a case by case basis and may, exceptionally, be accepted.

Confidentiality

2.27. If any party wishes to provide confidential information to us at any stage of the process, they should notify the case officer and explain why the information is confidential. We will seek to determine any dispute referred to us in an open and transparent manner so that each party has an opportunity to put their case. Any submission made by a party should be set out in writing to the other party(ies). As such, it is recommended that a party should clearly and comprehensively explain the basis of any request for confidentiality. Where possible, the case officer will require the submitting party to prepare a non-confidential summary to be disclosed to the other party(ies) to the dispute.

2.28. In reaching our decision, we will consider what weight, if any, to attach to information which has only been disclosed to one party and on which the other party has not had an opportunity to comment. Unjustified requests for confidentiality may be refused.

2.29. Network companies will normally be named in published determinations,¹⁸ but we will consider whether this is appropriate on a case by case basis. The name of the customer will be omitted from the published version of the decision. If any party to a decision wishes any matter to be excluded from publication, it should make representations to the case officer within 14 days of the issue of the decision (and any Order for Costs). After this period the decision will be placed on the EPR or otherwise made publicly available in the form in which it was issued to the parties.

Access to determinations

2.30. We publish our determinations on the EPR section of our website. One of the benefits of publishing our determinations on the EPR is that they can be accessed by parties in dispute to assist in resolving issues. Referring to previous determinations could potentially avoid the need to refer the matter to us for determination.

¹⁸ See our Update letter on Ofgem's review of its procedure for determining disputes - <http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=49&refer=domestic-consumers/ncamm>

3. Ofgem’s procedure for determining disputes regarding use of system or connection to the NETS¹⁹ or the NTS²⁰

Chapter Summary

This chapter sets out our procedure for handling disputes that are referred to us in respect of an offer for connection to and /or use of the National Electricity Transmission System (“NETS”) or the National Gas Transmission System (“NTS”). We will generally follow the procedure set out in Chapter 2; however, there are some differences which are set out in this Chapter.

Introduction

3.1. National Grid Electricity Transmission plc (“NGET”) owns and operates the electricity transmission assets in England and Wales and is also the National Electricity Transmission System Operator (“SO”) for Great Britain. NGET is required²¹ to provide offers to parties seeking connection to and/or use of the NETS. Any party wishing to connect to and/or use the NETS must apply to NGET in its role as the SO.

3.2. Scottish Hydro Electricity Transmission Ltd (“SHETL”) owns the transmission system in the north of Scotland. SP Transmission Ltd (“SPTL”) owns the transmission system in the south of Scotland. Offshore Transmission Owners (“OFTOs”) are identified and granted licences through a tender process to own transmission systems in offshore waters. SHETL, SPTL and OFTOs are Transmission Owners (“TOs”).

3.3. National Grid Gas (“NGG”) owns and operates the gas transmission network known as the NTS. NGG is required to offer access to the NTS system.²² The

¹⁹ The National Electricity Transmission System consisting (wholly or mainly) of high voltage electric lines owned or operated by transmission licensees within Great Britain, in the territorial sea adjacent to Great Britain and in any Renewable Energy Zone and used for the transmission of electricity from one generating station to a substation or to another generation station or between substations or to or from any interconnector and includes any electrical plant or meters owned or operated by any transmission licensee within Great Britain, in the territorial sea adjacent to Great Britain and in any Renewable Energy Zone in connection with the transmission of electricity.

²⁰The National Gas Transmission System. This is the high pressure gas network which transports gas across Great Britain from the entry terminals to gas distribution networks or directly to power stations and other large industrial users.

²¹ By standard condition C8 of its electricity transmission licence.

²² By standard condition section B, 4F (Access to the system) of its gas transporter’s licence.

framework that governs how applicants may apply to connect to and access the NTS is defined in the Uniform Network Code ("UNC").²³

Electricity Transmission

3.4. If the offer is for a connection to and or use of part of the NETS where NGET does not own the transmission assets, the offer may reflect conditions contained in a Transmission Owner Construction Offer(s) ("TOCO") that has been made by a TO to NGET.

3.5. NGET will contact each TO that may need to carry out works on its transmission system to accommodate any proposed connection and/or use of system request. The timing of this contact will depend on whether the offer is for a connection to the onshore transmission system or an offshore transmission system.²⁴

3.6. The TO (or TOs) will provide NGET with the details of the necessary works needed for the connection. NGET will collate this information and incorporate it into the connection and/or use of system offer for the applicant. This offer will include a connection date and details of any transmission works which are needed before power can begin to flow. The applicant then has the option to sign, reject, or refer the offer to us for determination.

3.7. If an applicant for connection to and/or use of the NETS and NGET are unable to agree the terms of an offer that NGET as the SO has issued, either the applicant or NGET can refer the disputed matters to us for determination.²⁵

Gas Transmission

3.8. The UNC contains a process for the resolution of certain disputes between the parties under or in connection with the UNC, or any other UNC based agreements between the users and NGG.²⁶ The dispute resolution process has been established to provide all users with a route to settle a dispute using either mediation or via an expert determination.²⁷

3.9. If the relevant dispute resolution mechanisms under the UNC have been exhausted either the applicant or NGG is able to refer the dispute to the Authority for

²³ Section B: System Use and Capacity - <http://www.gasgovernance.co.uk/TPD>

²⁴ The OFTO can only be contacted once it has been identified through the tender process.

²⁵ See Condition C9 (Functions of the Authority) of the electricity transmission licence

²⁶ Section A: Dispute Resolution -http://www.gasgovernance.co.uk/sites/default/files/01_11_GTA.pdf

²⁷ When a dispute is to be referred to or resolved by expert determination; this means the dispute will be determined by an expert who has been selected to resolve this dispute from a 'list of experts' (comprising 6 experts nominated by gas transporters and 6 experts nominated by Users).

determination.²⁸ The scope of our determination powers are defined in section 27A of the Gas Act 1986. Disputes referred to us under this provision of the Act will generally follow the procedure set out under this Chapter. Disputes referred to us under section 27B-D of the Gas Act will follow the procedure set out under Chapter 4 of this guidance.

Determination procedure

Referring a dispute for determination

3.10. Where a dispute arises about an offer for connection to and/or use of the NETS or the NTS, we expect that the parties will have first attempted to resolve the dispute by way of commercial negotiation or, in the case of the NTS, through the UNC's dispute resolution process before referring the matter to us for determination. At the time of referring the dispute for determination, the parties should be fully aware of the specific issues in dispute so as to facilitate the provision of focused submissions.

3.11. In the case of a dispute arising under the transmission licence, a request for a determination should, as a minimum, contain the following information:

- details of the complainant;
- details of the other parties involved;
- a clear description of the complaint and what is being disputed;
- the factual background;
- details of the negotiations covered by the dispute (if the parties are content to disclose this information);
- a copy of the relevant offer;
- a description of any timing implications that the parties would like us to consider; and
- any request for confidentiality

Initial assessment

Electricity Transmission

²⁸ Note that where the UNC or any agreement between the User and NGET provides or the parties have agreed that a dispute is to be referred to or resolved by expert determination, the expert's final determination shall be final and binding on the parties except in the event of fraud or where it is so clearly erroneous on its face that it would be unconscionable for it to stand, in which case another expert may be appointed in accordance with the provisions of paragraph 2 of Section A of the UNC- Dispute Resolution.

3.12. If an offer is referred to us for determination by an applicant for a connection to and/or use of the NETS, we will ask NGET to confirm if the disputed matters relate to conditions within any TOCO(s) which are associated with the offer that has been made to the applicant and, if so, to provide details of the relevant TOCO(s) to us.

3.13. If the offer is referred to us by NGET, we expect that a copy of any relevant TOCO(s) would be included in the initial determination request as well as a detailed description of which parts of the TOCO are in dispute.

3.14. In both these instances, we anticipate that NGET will refer the relevant TOCO(s) to us for determination.²⁹

3.15. Where we are asked to consider a TOCO, we will contact the relevant TO(s) and invite them to provide a written submission setting out their views on the matters in dispute.

Submission of evidence and statement of facts

3.16. We will follow the same process as that set out in paragraph 2.7 of Chapter 2. In the case of electricity transmission disputes, the parties are asked to note that we will not disclose a copy of NGET's offer to any relevant TO unless NGET consents to this. In addition, we will not disclose a copy of any relevant TOCO to an applicant unless the relevant TO consents (this may be in a redacted form).

3.17. The submission containing a party's views on the matters in dispute should be sent to us both as a hard copy and electronically³⁰ and copied to the other parties to the dispute, failing which we will copy the information to the other relevant parties unless it contains confidential information.

3.18. Gas and electricity transmission disputes will follow the approach set out in Chapter 2 relating to-

- Initial assessment
- Comment Stage
- Oral hearings
- Assessment
- The Decision
- Correction of administrative errors and accidental slips
- Timelines for the determination procedure
- Confidentiality
- Access to Determinations

²⁹ In accordance with SLC C9(2)(c)

³⁰ This should be sent to the case officer.

4. Ofgem's procedure for determining disputes referred to us under the European Directives

Chapter Summary

This chapter sets out our procedure for handling disputes that are referred to us under section 44B of the Electricity Act 1989 and section 27B of the Gas Act 1986 (known as Article 37 and Article 41 disputes).

Introduction

4.1. This Chapter outlines the procedure that we will generally follow when asked to determine a commercial dispute concerning an obligation of the person complained against under any relevant condition or relevant requirement imposed for the purposes of implementing the Electricity or Gas Directive.³¹ A referral of this nature is not available to domestic customers who should follow the procedure set out in Chapter 2.

Article 37 (electricity) and 41 (gas) disputes

4.2. For a dispute to be considered an Article 37 or Article 41 dispute, the following conditions must be satisfied-

- In relation to electricity, it is a dispute involving:
 - the holder of a transmission licence,
 - the holder of a distribution licence,
 - the holder of an interconnector licence,
 - a distribution licence exemption holder, **or** made by a person certified on the ground mentioned in section 10E(5) of the Electricity Act 1989 ("the EA") in respect of a transmission system or electricity interconnector against a person designated under section 10H(3) of the EA in respect of the transmission system or electricity interconnector mentioned above, **and**
 - the dispute is wholly or mainly a dispute regarding an obligation of the person complained against under any relevant condition or relevant requirement arising under the Electricity Directive.

³¹ See footnote 6.

- In relation to gas, it is a dispute involving:
 - a gas transporter,
 - the holder of a licence under section 7ZA of the Gas Act 1986 ("the GA"),
 - the owner of an LNG import or export facility,
 - the owner of a storage facility,
 - a person carrying out an activity described in section 5(1) (a), or (aa) of the GA who has been granted an exemption under section 6A(1) of the GA, **or**
 - made by a person certified on the ground mentioned in section 8G(5) of the GA in respect of a pipe-line system or gas interconnector against a person designated under section 8J(3) of the GA in respect of the pipe-line system or gas interconnector mentioned above, **and**
 - the dispute is wholly or mainly a dispute regarding an obligation of the person complained against under any relevant condition or relevant requirement arising under the Gas Directive.

- In relation to both electricity and gas:
 - the dispute is not made by a person as a household customer or potential household customer³² (ie the dispute is a commercial dispute);
 - the complaint must not be about a modification or failure to make a modification of a term or condition of a licence held by the person complained against or an obligation or right contained in any code or other document and having effect by virtue of such a term or condition; and
 - it is a dispute between the complainant and the person complained against.

4.3. The dispute must be sent to us in writing with sufficient information about the nature of the matter being complained about. We would expect the dispute to have been first raised with the other party to the dispute and only after failing to resolve the matter should the dispute be referred to us for determination.

4.4. If the subject matter of the dispute raises other concerns, for example, matters which could be dealt with under competition law, the industry codes,

³² "household customer" means a customer who purchases electricity or gas for consumption by the customer's own household (section 27B(3) Gas Act 1986 and section 44B(3) of the Electricity Act 1989).

enforcement³³ or through modification to the licences, we may advise the complainant to withdraw their dispute and have the matter considered through the means already established to consider such issues.

Determination procedure and timelines

4.5. Under these provisions, we are required to make a determination within two months.³⁴ The two month period will, subject to paragraph 4.10 below, begin on the day on which the dispute is referred to us for determination.

4.6. In certain cases, we may need further information from the party referring the dispute in order to assess:

- whether the dispute is covered by the above provisions; and/or
- whether there is a dispute that we can determine.

4.7. Within 10 working days of the receipt of a dispute, we will inform the party referring the dispute,³⁵ in writing, whether the issue will be investigated by us as an Article 37 or Article 41 dispute and give an indicative timeframe for the dispute to be determined. The indicative timeframe may need to be extended if we require additional information to enable us to consider the dispute.

4.8. If the dispute does not meet the relevant requirements for being an Article 37 or Article 41 dispute (for example, it does not relate to an obligation of the person complained against under any relevant condition or relevant requirement imposed on that person by the Gas or Electricity Directive), we will send a letter within 10 working days advising the referring party of the reasons why we do not consider their complaint to be an Article 37 or Article 41 dispute.

4.9. If the dispute does meet the relevant criteria for an Article 37 or Article 41 dispute, we will assess the issues raised and will advise the parties that we will determine the dispute or, where appropriate, make a request for further information.

³³ We published our Enforcement Guidelines on Complaints and Investigations in June 2012. The guidelines describe Ofgem's usual processes and policies for enforcement.

³⁴ This period can, in certain circumstances, be amended

³⁵ Note that a complainant can be represented by another party (the referring party). We will correspond with the party referring the dispute to us for determination, provided we have the complainant's permission to do so.

Request for further information/ extension of time

4.10. The two month time limit for determining the dispute may be extended by two months where we require additional information. That period may be further extended with the agreement of the complainant.

4.11. A request for further information may be made of anyone (eg the referring party, the party that is the subject of the complaint or a third party expert). Under the Acts we can issue formal information requests if necessary.³⁶

4.12. Where we have requested further information, the two month time period will not start to run until the requisite information has been provided. Therefore, the dispute will not be treated as referred to us until we have received the information we have requested. An extension of the overall determination timeline beyond four months may be necessary, for example, where further information is required or where an oral hearing has been requested. Any extension to the timetable will be notified to the parties. We will also confirm to the parties the date on which the two month time period will start to run.

4.13. Where we consider there is no dispute to determine, we will confirm our position to the referring party. Where we consider there is a dispute but that the dispute may be referred to us by virtue of another provision of the Acts or the licence, we will follow the procedure as outlined in Chapter 2 or 3 of this guidance as appropriate.

4.14. Disputes referred to us under this Chapter follow the approach set out in Chapter 2 or Chapter 3 (where appropriate) relating to-

- Oral hearings
- Initial assessment
- Submission of evidence
- Comment stage
- Oral hearings
- Assessment
- The Decision
- Correction of administrative errors and accidental slips
- Confidentiality
- Access to Determinations

³⁶ See section 28 of the Electricity Act 1989 and section 38 of the Gas Act 1986.

5. Ofgem's approach to recovering the cost of its determinations

Chapter Summary

This chapter sets out our approach to recovering the costs of our work on determinations from one or more of the parties in dispute.

Circumstances in which we would consider recovering our costs from the parties

5.1. We would only expect to recover our costs in cases where costs have been incurred that we consider could have been avoided were it not for the actions of one or more of the parties in dispute.

5.2. In deciding whether to recover such costs, the decision maker will consider all of the evidence, including the information submitted by the parties, as well as our statutory powers, the company's licence requirements and the relevant provisions in the Acts.

5.3. We do not intend to routinely charge for our determinations and we do not currently intend to recover our costs from domestic and micro business customers. We will review this from time to time as part of our overall review of this guidance.

5.4. We have considered the responses to our December 2009 and December 2010 consultations and have decided that cost recovery may be appropriate³⁷ in certain circumstances, including where:

- the parties' actions cause unnecessary and/or unreasonable delays to the determination process;
- the parties' actions result in Ofgem incurring the costs of more than one round of external technical advice; or
- the matter could have been resolved by the parties before it was referred to us.

5.5. Each of these circumstances is explained further below.

³⁷ 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.

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

5.6. We consider that it may be appropriate to recover our costs from one or both of the parties where their actions cause delay, including circumstances where the parties:

- fail to submit the full facts of the case available to them within the agreed timelines;
- change their case significantly part way through the determination process without justification;
- withhold information which is relevant to the case; or
- bring forward new and important evidence late in the process without justification.

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

5.7. Once the determination procedure has started and the written submissions, comments and any further evidence have been received, we may seek external advice. In the past, complex commercial cases have required a second round of external technical advice. We do not intend to charge for the additional external advice in cases where we consider that this is a necessary step to clarify the facts of a dispute.

5.8. However, there may be circumstances in which new information is provided by the parties after the submission and comment stages have been completed and all technical advice has been received. This new information might require us to request an additional round of external technical advice in order to establish the merits of the new information provided. In these circumstances, we may consider that it is appropriate to recover all or part of our costs from the party responsible for the emergence without justification of new information late in the process.

Other circumstances which mean the dispute could have been resolved by the parties before it was referred to us

5.9. We expect that the network companies will have taken all reasonable steps to resolve a dispute before it is referred to us. To this end, we expect the parties to provide us with evidence of the process that has been followed to resolve the complaint prior to the matter being brought to us.

5.10. As part of the written submission, non-domestic customers should include evidence of their engagement with the company's complaints handling process and, where relevant, include a copy of the company's deadlock letter. We would also expect the complainant to have approached the Ombudsman, if relevant, and include a copy of the Ombudsman's provisional conclusion with the written submissions. The

information/documentation to be sent to Ofgem at the start of the determination is set out in Chapter 2.

5.11. If the 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 recover costs from one or more of the parties involved.

5.12. We also consider that it may be appropriate to recover our costs from network companies in situations where:

- the dispute arises from poor communication from the network company to the customer; and
- the dispute has not been resolved due to a failing in the company's complaints handling process.

Factors to be taken into account before recovering costs

5.13. Before we decide to recover costs, we will review all of the circumstances of the parties to a determination on a case by case basis, including affordability.

5.14. Our decision to recover our costs from the parties is not in any way intended to reduce the parties' access to a determination by the Authority. In seeking to recover our costs, we will observe the following principles:

- We have decided that, currently, we will not seek to recover our costs from domestic and micro business customers.
- We have placed a ceiling on the costs that we will recover from small and medium sized business customers, of £5,000.

Small and medium sized business customers

5.15. We anticipate that we will only recover our costs from small and medium sized businesses where we are satisfied that they have caused unnecessary and unreasonable delay to the determinations process.

5.16. We recognise that small and medium sized business customers may not normally be involved in a determination more than once and they might face circumstances that make it difficult for them to comply with our required timescales. Whenever a party informs us of any special needs or circumstances, we will endeavour to provide assistance and grant extensions, where appropriate, to the process.

Cost recovery approaches

5.17. Where we decide that cost recovery is appropriate we will do so on the following basis-

- **Flat rate:** a flat daily rate for each day that the process is delayed because (a) the party concerned does not provide all of the information required at each stage of the determination process within agreed timelines; or (b) because extra time is needed to review any new information that is submitted to us late in the process where the delay could reasonably have been avoided.
- **External advice cost recovery:** for external technical advice when the parties' actions result in the need for additional external advice which could reasonably have been avoided. This may arise in circumstances, such as where a party submits new information late in the process, requiring a second round of external advice which could reasonably have been avoided.
- **Standard fees:** a standard fee representing the full cost of a determination, where the determination could reasonably have been avoided.

Flat rate

5.18. Under this approach our costs would be recovered at a flat rate of £200 per day³⁸ in cases where we consider that the party's action has delayed the determination process. The following are examples of such circumstances:

- Where a party submits information after the agreed timelines, we would recover costs from the point at which they exceed the timelines as established by the case officer at the beginning of the determination process (or as extended by agreement).
- Where new information is submitted to us 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 rate of £200 per extra day taken to review this new information and any follow up action required.

5.19. We have set a cap of £5,000 on the amount we will recover from small and medium sized³⁹ businesses under this approach. The recovery of these costs would

³⁸ A flat rate of £200 represents the average cost of a day's work on determinations based on staff salaries. The rate is calculated based on staff salaries for information provision and technical advisory roles.

³⁹ Commission Recommendation 2003/361/EC of 6 May 2003 defines a small business as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million. A medium-sized business is defined as an enterprise which employs fewer than 250 persons and whose annual turnover does not exceed EUR 50 million or whose annual balance-sheet total does not exceed EUR 43 million.

be uncapped for large business customers, other large industry participants and network companies.

External advice cost recovery

5.20. We propose to recover the cost of any additional round of external technical advice required, for example, as a result of the emergence of new information that could reasonably have been expected to have been made available earlier. We understand there might be circumstances in which new information emerges as a result of our assessment process and we will not seek to recover costs in these circumstances.

5.21. The party(ies) responsible will be charged for all associated costs up to a cap of £5,000 for small and medium sized business customers. The recovery of these costs would be uncapped for larger business customers, other larger industry participants and network companies.

Standard fee

5.22. Where a matter has been referred to us that we consider could have been resolved without a referral to Ofgem, we may decide to recover the full cost of the determination process through a standard fee.⁴⁰ Where this is the case, we will inform the parties (other than domestic and micro business customers) that a standard fee may apply as soon as this is established.

5.23. The amount of the standard fee will depend upon the nature of the dispute and is based on the cost of a straightforward connection determination concluded within reasonable timescales. Our standard fees are:

- £3,500 for straightforward disputes, typically involving small and medium sized businesses and network companies.
- £10,000 for disputes involving large business customers and network companies.

5.24. The standard fee for disputes involving large business customers reflects the additional time and the likelihood of incurring supplementary costs related to external advice costs.

5.25. We may, in exceptional circumstances, recover higher costs than the standard fee where the cost of the determination exceeds these amounts. We will review this from time to time as part of our overall review of this guidance.

⁴⁰ We have based our calculation on the hours and associated staff salaries involved in resolving a straightforward connections determination within a three month timeframe.

5.26. The flat rate and standard fees may be revised from time to time as part of our overall review of this guidance.

5.27. We have set a cap on the amount of the costs that we will recover from small and medium sized business customers of £5,000. We will review this cap from time to time as part of our overall review of this guidance.

Keeping parties informed during the process

5.28. At the start of the determination process, the case officer will write to inform the parties of the timelines and relevant information expected for each stage of the determination procedure. We will also provide a copy of this guidance and draw attention to this chapter. The case officer will keep the parties informed of the timelines to be observed throughout the case and monitor them closely.

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

5.30. The case officer will provide written notice to the parties prior to the deadline established to receive information and explain that if we do not receive the information we have requested by the date given this may result in cost recovery. This might be a flat rate which we would recover from the party concerned from the day after the deadline to receive the information has passed until the information is received by us.

5.31. In cases where there is a need for an additional round of external technical advice due to the late submission of new information or other circumstances, the case officer will inform non-domestic complainants, other than micro business customers, that we may recover costs for the additional external advice, subject to the maximum thresholds outlined in this Chapter.

5.32. In cases where the parties have not requested an extension and have failed to meet the timelines set, a flat rate may apply. The case officer would be responsible for keeping a record of the charges to be recovered on each day and prepare an estimate of the total costs to be recovered from the party(ies) at the end of the determination process.

5.33. In cases where we consider that the full cost of a determination could have been avoided, the case officer will provide written notice to the relevant party(ies) that Ofgem may recover the full cost of the determination from that party (ies). The notice will include a reminder of the standard fees as set out in this Chapter. At that stage we will provide the parties with an opportunity to explain why it has not been possible to resolve the dispute without Ofgem's involvement.

The decision to recover costs

5.34. In deciding whether to recover our costs, the case officer will present the case to the decision maker, who will act on behalf of the Authority, and a decision will be made, taking into account all the relevant circumstances, including the following:

- the extent to which one or more of the parties have contributed to the reasons why we are seeking to recover our costs;
- the individual circumstances of the case (ie the complexity of the issue, familiarity of the party concerned with the issues underlying the determination, and the ease of obtaining the material required to support the party's submission to Ofgem);
- whether the parties were given prior notification of the causal factors that might result in cost recovery;
- the factors outlined in this section, such as affordability and type of customer; and
- any other relevant considerations.

5.35. In considering cost recovery, we will review the circumstances of the parties on a case by case basis before we decide whether or not it is appropriate to recover our costs. We are aware that each determination turns on its own facts and there may be disputes which, due to their complexity or through no fault of the parties concerned, exceed the estimated timelines. We do not intend to recover our costs from the parties in these circumstances.

5.36. Where Ofgem decides some or all of the cost of the determination should be recovered from a party, a Costs Order will be made. The Costs Order will contain a breakdown of the costs we intend to recover from the party concerned and the reasons why we have sought to recover the amount in question. Our decision to recover our costs shall be final.

5.37. We also have the power⁴¹ to make an award of a party's own costs against the other party(ies) to the dispute. We may decide to exercise this power in exceptional cases.

⁴¹ Section 27A(9)(a) of the Gas Act 1986 and section 23(5)(a) of the Electricity Act 1989.

Appendix 1– Other dispute resolution powers

1.1. This guidance does not cover all of the Authority’s powers to determine disputes. The following is a non-exhaustive list of some of the Authority’s other dispute resolution powers:

- disputes arising under section 19 of the Gas Act 1989 (Acquisition of rights to use pipe-line systems);
- disputes arising under the various industry codes and framework agreements;⁴²
- disputes relating to the provision of emergency services to or on behalf of another gas transporter;⁴³
- disputes relating to the requirement to offer terms for the provision of gas entry points;⁴⁴
- disputes arising under Schedule 2ZA of the Electricity Act 1989⁴⁵ which imposes new duties on persons who are exempt from the requirement to hold an electricity distribution licence;
- disputes arising under Schedule 2ZB of the Electricity Act 1989⁴⁶ imposes new duties on persons exempt from the need for an electricity supply licence;
- disputes arising under Schedule 2AA of the Gas Act 1986 which imposes new duties on persons who are exempt from the requirement to hold a gas distribution licence;
- disputes arising under Schedule 2AB of the Gas Act 1986 which imposes new duties on persons exempt from the need for a gas supply licence;

42 For example, under the Balancing and Settlement Code (“BSC”), see Section A, paragraph 2.3 and see Section H, paragraph 8 and under the Connection Use of System Code (“CUSC”), see Section 7.

43 See Standard Special Condition A41 of the Gas Transporter Licence: Emergency Services to or on Behalf of Another Gas Transporter

44 See Standard Special Condition D12 of the Gas Transporter Licence: Requirement to offer terms for the provision of gas entry terms

45 The Third Electricity Internal Market Directive 2009/72 has given the Authority new powers to determine disputes. The relevant transposing regulations insert schedule 2ZA into the Electricity Act 1989 which contains the new powers.

46 The Third Electricity Internal Market Directive 2009/72 has given the Authority new powers to determine disputes. The relevant transposing Regulations insert schedule 2ZB into the Electricity Act 1989 which contains the new powers.



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- disputes arising under section 39 and 39A of the Electricity Act 1989 and 33A or 33AA of the Gas Act 1986, as well as disputes arising under regulations made pursuant to any of the above named sections. These provisions relate to certain standards of performance required of suppliers, electricity distributors and gas transporters; and
- disputes under section 27A of the Gas Act 1986 covering disputes arising under paragraphs 2, 3, 15 and 16 of Schedule 2B (the Gas Code).