Smart Metering Implementation Programme
Regulation Team
Department of Energy and Climate Change
3 Whitehall Place
SW1A 2AW

7th January 2013

Dear SMIP regulation team

Smart Energy Code stage 1 - URN 12D/406

Thanks for the opportunity to respond. Our responses to the individual questions are below. We would like to make some high level points:

Panel and Change Board - Whilst we understand the reasoning behind the proposal to establish a Panel with both Panel and Change Board responsibilities for the interim we believe that this is not appropriate. The roles and responsibilities of the Panel and Change Board require different skill-sets, knowledge and experience. We believe that it would be better for both the Panel and Change Board to be established at the earliest opportunity in a manner that would fulfil enduring arrangements. This approach would have the advantage of establishing a change control process that could be used to fully assess any early urgent or fast-track modifications that may be identified during the crucial early stages of the Programme. A clear and unambiguous set of Terms of Reference are also required for both groups to ensure clarity with regard to roles and responsibilities from the outset.

DCC liabilities - we recognise that the liabilities of the DCC should not be of such disproportionate size as to deter the entry of actors who are well qualified to execute effectively the core functions of the DCC. At the same time it is important to point out that those liabilities germane to the Communications Services Providers (CSPs) and Data Services Provider (DSP) should be backed off to them. The industry (mainly suppliers) should not be unduly exposed to shortcomings of the DCC by backing off inappropriate liabilities to it. Where this is proposed to be the case it should be viewed as a shortcoming in the business model, that should be addressed.

DCC as Data Controller - We believe that the DCC is a Data Controller under the definitions provided under the DPA and that the SEC should recognise this fact.

Charging Methodology - Whatever final charging methodology is employed it must provide predictable and transparent charges and include sufficient supporting data for suppliers to be able to forecast these charges and develop appropriate tariffs for its customers

Funding– If the proposed initial funding arrangements are approved, we support a market share approach to funding these initial stages of the DCC, as we believe that this is the only fair and equitable approach that can be developed. Further it ensures that all parties are fully engaged on an equal footing at the outset. Since cost reflectivity provides the most efficient

RWE npower
Trigonos
Windmill Hill Business Park
Whitehill Way
Swindon
Wiltshire SN5 6PB

T +44(0)1793 87 77 77
F +44(0)1793 89 25 25
I www.rwenpower.com

Registered office:
RWE Npower plc
Windmill Hill Business Park
Whitehill Way
Swindon
Wiltshire SN5 6PB

Registered in England
and Wales no. 3892782

outcomes for consumers, then any cross subsidy from one set of consumers to another should be fully justified on a case by case basis.

Pay now, dispute later principle - We disagree with pay now, dispute later. Historically this method of ensuring invoice payment was introduced to safeguard the continued running of the Balancing and Settlement processes, we do not therefore believe that there are sufficient grounds to implement the same approach for DCC Services. We have experience of protracted and inconclusive issue resolution under a 'dispute later' approach to settling outstanding issues and are therefore sceptical that any new process could be invoked that would improve the resolution of payment issues of this nature.

Uncertainty/ Response caveat - As there is a current 'state of flux' with regard to the final drafting of the SEC as this will now be undertaken in 3 stages, there is a transition section (L) drafted into the first stage that switches on and off certain sections and that key decisions have still to be made with regard to Security arrangements and the adoption of metering equipment we reserve the right to change our responses to any of the consultation questions posed here or in other consultations past, present and future, as these external developments and decisions made may alter our position significantly;

Timely decision-making - We are sure that the Government recognises and understands the requirement for timely decisions to be made and a clear understanding of the end to end process that includes the new security arrangements in order to develop appropriate systems and processes and put in place appropriate governance framework and that that is not a trivial piece of work;

Estimated bills – On a more general point, we should note that estimated bills should be dramatically reduced by the introduction of smart meters but that there are scenarios where an estimated bill may be required. It would helpful if the rhetoric were not absolute regarding estimated bills.

Yours sincerely

General question on SEC legal drafting

1. Do you agree that the Government conclusions are appropriately reflected in the SEC Stage 1 legal drafting? Please provide a rationale for your views, and any further comments on the draft legal text.

Yes

We agree that the Governments conclusions are generally reflected in the current draft of the SEC Stage 1 document, however we do have some specific comments and queries on certain sections of the draft SEC.

Accession - The current accession requirements for Stage 1 of the SEC deal with Credit Cover arrangements and whilst this may be appropriate for this first stage we do not believe that it will set the correct level of accession requirement to the further stages of development that are currently envisaged. We therefore suggest a form of staged accession to the SEC to be considered that is appropriate for each stage as they are introduced. Such an approach would better ensure governance of and compliance with the increased functionality and roles and responsibilities that these subsequent stages will bring as they are introduced;

Section H - Consideration as to how to deal with the Data Protection Act (DPA). This section needs to make reference to DPA and perhaps to specific clauses but ideally should not be a copy of it. This allows for more appropriate management of DPA related issues and Code maintenance;

H1.3(b) – this clause should be reworded to clearly and unambiguously state that parties must comply with the prevailing draft of the DPA. The statement of 'no obligation' should be removed;

H1.10 – Remove 'final and binding' reference, as we believe that appeals are necessary and so should be allowed;

Sections H1 and H2 provide details of the entry requirements for the User Entry Process and Supplier Nominated Agents respectively. However section H2.2 does not require Supplier Nominated Agents to have to provide any form of Credit Cover. We would ask for clarification around this point as we believe that it is appropriate for participating parties to provide some form of assurance such as Credit Cover. If the government does not believe that this is a necessary requirement we would like to understand the reasoning behind this decision.

H2.7 – remove 'final and binding' reference, as per H1.10 above

H2.10 – We believe that gas and electricity processes should be aligned, and indeed this is one of the core purposes of the SEC. We therefore do not support the enshrinement of Meter Operator and Meter Asset Provider bundling in the form of Meter Asset Manager (MAM).

Section H3 needs to incorporate or appropriately reference the Data Transfer Catalogue/ Data Transfer Network (or the chosen communication methodology, if different), to ensure that these systems and processes are appropriately captured by the SEC, ensuring the appropriate management of co-ordinated, change control activities going forward;

H6.3 (f) – We seek clarity over the meaning and intention of this clause, which on paper appears 'open-ended'. A User is currently defined as any party that has completed the User Entry Process which itself has not yet been fully defined. We do not believe that it is appropriate at this stage to introduce a clause that could potentially undermine access control and security arrangements, that themselves remain the subject of detailed debate to establish robust and secure processes. What data can other DCC Users gain access to? How will they be charged for these services? What Credit Cover arrangements do they need to have in place? Do 'Other Users of Core Services' have to accede to the SEC, how will they be governed?

H7.8 – Detailed evaluation – We suggest that this should be via a pre-determined template, managed by SEC. This approach would ensure clarity and provide robust change control around the provision of elective services.

H9: Replacement of Smart Metering Systems (to be drafted) - How are Smart Metering Systems and associated DCC Services to be identified and managed where there is more than one supplier involved in providing services to a customer? What are the roles and responsibilities of these two parties across a range of scenarios? For example, one meter with import/ export capabilities managed by two different suppliers. How do we withdraw Smart Metering Systems where different suppliers have been registered for each fuel?

H10 – Error Reporting/ Fault Management (not yet drafted) - Should this include Theft of Energy?

H12 – Business Continuity (not yet drafted) – this is an important section that should be considered as part of the stage 1 drafting and cover a range of potential continuity breaches from faulty firmware updates to disaster recovery provision.

Supplier and Network Operator data access - We ask that consideration is given to the inclusion of Supplier and Network Operator processes for access to data within section I of the SEC, as outlined in the Government's recently published response to the Data Access and Privacy consultation "7225-gov-resp-sm-data-access-privacy.pdf". For the avoidance of doubt, the processes under consideration here are outlined for supplier and network operator access in sections 3.39 and 4.16 of the above document respectively. We can see that consideration has been given as to how permissions are obtained but the approval of the underlying processes must also be governed in a clear and transparent way. By including these within section I of the SEC will additionally ensure that an appropriate governance framework is also in place. Consequential amendments within the DCUSA may also be required in order to better distinguish between legacy and smart arrangements

Third Party data access – again with reference to the Government's recently published response to the Data Access and Privacy consultation URN 12D/024 and sections 5.13, 5.17 and 5.18, we question the rigor of allowing third party data access processes to be self-certified. Suppliers are being asked to comply with Licence conditions to ensure that records are maintained in an auditable fashion and that data access is strictly controlled. Data security is acknowledged as a vital part of the new smart processes currently being developed and as such is fundamental to the success of the programme. It will only take one instance of breach to undermine the programme and we therefore believe that it is appropriate that reciprocal arrangements are put in place for third parties if they are allowed to self-certify their

own processes, as breaches will affect all parties involved in the Programme and not just the breaching, third party itself. In this regard we see the following as absolute minimum requirements that should be put into effect and managed under Section I: Data Privacy of the SEC:

- All third parties must be able to demonstrate that they have taken all reasonable steps to identify a consumer;
- Third parties must maintain accurate and up-to-date records of all permissions and refusals;
- Records must show that permission has been obtained before any attempt to access the data is made;
- Explicit permission must be obtained and third parties must be required to prove this on request of an auditor or Authority;
- Third parties must remind consumers of the permissions that they have granted at regular intervals;
- Third parties must cease any data collection activity on a Change of Tenancy event; and
- SEC Panel can appoint an independent auditor to oversee the requirements listed above.

DCC Charges

2. Do you have any comments on format of the DCC's Charging Statement for Service Charges?

We generally support for the Charging Statement as provided.

We do have some further comments on charging in general that we wish to raise here for further consideration and clarification.

Change control - Whilst we generally agree with the proposed statement format and content we would also ask that consideration is given to the change control mechanism(s) that support its development and that all parties are fully considered during any change or update.

Cost predictability - It is important to recognise that suppliers will need to pass these charges through to customers. In the non-domestic market, most customers are on contracts covering a minimum one year period. In the domestic market, customers will be on tariffs as determined by the Retail Market Review (RMR). The charging methodology therefore needs to be set up to provide suppliers with certainty, predictability and transparency as to how these charges will be calculated. This will allow suppliers to pass through the charges in a cost - reflective manner to consumers. Providing suppliers with more cost certainty also reduces the need to apply wider risk margins, which is clearly beneficial to consumers

Final tariff publication level and date - It is difficult to determine from this document what the level of these charges will be. It is also unclear when final tariffs will be published. We are concerned that the DCC can charge prior to 'go-live' date and that there has been no indication of the amount that may be required. These uncertainties are destabilising, at best;

In terms of the process that needs to be developed we see the following as a minimum requirement for Suppliers:

Access to DCC charging models - Suppliers need full access to DCC charging models. This currently occurs under Distribution Connection and Use of System Agreement (DCUSA) and Connection and Use of System Code (CUSC) where charging models are made available at the beginning of the regulatory charging year to suppliers;

Update reporting - DCC must provide regular (quarterly) updates on: Estimated Allowed Revenues; latest recovery position; market factors and inputs to models etc. This is similar to Change Proposal DCP066 in DCUSA and Modification MOD186 in gas. This will cover years 2 and 3 and will help to explain the Indicative Budgets (J4.4 and J4.5) and Indicative Charging Statements being provided. We need to see this information well in advance of charges commencing in order to provide forecasts into domestic tariff and SME contract pricing (1-2 yrs advance notice?).

In addition, we have the following points that we wish to raise for further consideration and clarification:

K9 – We do not support or see the need for within year adjustments. Whilst we understand that the provision granted in DCC Licence Condition 19.3(c) to provide Users with the ability to be able to reasonably estimate their Service Charges, this Condition does not cater for the disruption that frequent revisions and adjustments can have on Suppliers who must account for these changes as part of their customer tariff assessments. Suppliers must be allowed to have a predictable and transparent charging regime in place, in a timely manner, in order to fulfil their Licence Conditions and manage their customers appropriately. The correct balance between maintaining the DCC allowed revenue and DCC Users' ability to forecast their charges and credit cover requirements needs to be established and maintained at the earliest opportunity. If there is an unavoidable reason for the need for such an adjustment then this should not be allowed to happen unless a full Ofgem consultation process with the Industry is carried out.

Fixed charges – Charges for initial funding should be based on appropriate market share calculations that include all Supply and Distribution parties both large and small. We believe that funding based on market share is appropriate and proportionate for all party categories. Further, this approach ensures that all parties are treated equally and establishes the concept of a 'vested interest' into the development and operation of the Smart Programme and best ensures that cost-effective and efficient systems and processes are developed

Socialisation of bad debt – We do not believe that this is an appropriate method for dealing with bad debt as it does not incentivise either the debtor or the DCC to progress collection of these outstanding debts and undermines the need to provide appropriate Credit Cover arrangements and merely disadvantages all other paying parties. The DCC, as well as other industry parties, must accept an appropriate share of the responsibilities and liabilities associated with the setting up, establishment and smooth running of the new systems and processes required in order to ensure the success of the Smart Programme. Without this commitment costly inefficiencies will be introduced that will ultimately be passed on to end consumers

Timing – the timing of any tariff change needs to be aligned with those of the Retail Market Review (RMR). The regulatory year envisaged appears to be January – December, whereas every other charge and RMR is April - March)

Lessons learnt - Recommendations from Ofgem's - *'Decision in relation to measures to mitigate network charging volatility arising from the price control settlement'* (17/10/12) should be reviewed and overlaid where practical and appropriate into DCC charging methodology to ensure that optimum systems and processes are developed from the outset, e.g. lagging on adjustments. Further, we would ask that consideration is given to DCP102, a change raised by npower in an attempt to improve the DCUSA arrangements around calculating the Value at Risk (VAR) and the information that feeds into this process. This modification is nearing its conclusion and any lesson learnt here may prove useful;

J3.1: Obligation to provide credit support – this provision should include a Parent Company Guarantee (PCG) as a form of credit support under this section;

J3.3(b): User's Value at Risk – states *"...The Charges that the DCC reasonably estimates are likely to be incurred by the User in the period until the next Invoice for*

that User is due to be produced by the DCC..." The proposed wording is too vague and needs to be redrafted to provide the necessary details of a more specific and clearer methodology to explain exactly how this calculation is made. For example, what data is used? covering which period? Further consideration also needs to be given to the VAT implications of establishing future charges/ forecast invoices for the next period. i.e. VAT is only chargeable for services rendered, which will not be the case here

Suppliers need to be able to calculate accurately and model their view of indebtedness in order to establish efficient credit cover arrangements, this must be catered for.

DCC Charges

3. Do you agree with the thresholds applied to the 'first comer / second comer' principle (Five Year Rule for costs over £20,000)? If you disagree please set out the reasons for your preferred approach.

We support the principle of recharging and refunding as outlined, with certain suggested improvements.

We understand and support the principle of recharging and refunds between the initial and subsequent users of an elective service. Whilst we agree with the initial assessment that has concluded that a 'five year rule' should apply and that the threshold value be not less than £20,000, we believe that these should form general guidelines that can be applied for most situations but should not be applied rigidly. We would ask that as part of elective service monitoring these initial assumptions are appropriately revisited from time-to-time, perhaps as part of the annual review to ensure that these base assumptions remain appropriate. For example:

- The five-year rule does not take account of the scale of investment and as such five years may be too soon for some larger investments. We therefore suggest that consideration is to be given on a case-by-case basis, for these larger investments;
- We understand the consideration being given to smaller parties when setting the £20,000 level, however we consider it more appropriate to wait to see what types of elective services are being proposed before setting any level;
- We have assumed that second-comer here also covers any subsequent DCC User who opts - in to taking a specific elective service and is therefore subject to similar arrangements; and
- We also remain mindful of the need to balance core and elective services and particularly as we have yet to see a baseline version of the anticipated core services.

SEC Panel

4. Do you think the members of the Panel nominated by industry should be drawn from and elected in equal numbers by Party category OR be elected by all Parties (as set out in the legal drafting). Please give reasons for your answer.

We support the Option A approach to nomination of Panel members. Panel nominated by industry should be drawn from and elected in equal numbers by Party category.

We support the approach that ensures Panel members are elected in equal number by Party category, namely option A.

Fairness-We believe that this is the most appropriate method for ensuring that the constitution of the Panel is fair and equitable when considering the roles and responsibilities and decision-making that is required of the Panel, particularly during the early stages of the Programme.

Clarity and effectiveness - we consider that this will be most effectively established by the timely drafting of a clear, agreed and unambiguous terms of reference

Transition - Whilst we understand the need to cater for a transitional period as the Programme develops, we believe that the most appropriate approach to establishing and developing a Panel is to keep the Panel and Change Board roles and responsibilities separate. The Panel can then be established as the relatively small number of members envisaged and that these are representative of the cross-section of industry party categories with the relevant experience and expertise to undertake Panel-specific tasks, commensurate with the Terms of Reference for the Panel, which have still to be drafted

Timely establishment of Change Board - We believe that in order to establish appropriate working processes, the Panel should establish the Change Board, via due process, at the earliest opportunity

Option B – provides for the possibility of an 'over-representation' by one party category to be progressed, which we do not consider is an appropriate foundation on which to base a large-scale Programme such as this

Accession of panel members - Current proposed arrangements allow for certain party groups to become Panel members without being required to accede to the Code as they will not be using any DCC services. Whilst we understand the reasoning behind this approach we do not believe that such an approach provides for the solid foundation on which the Panel should be established providing as it does a large proportion of any vote for these parties who will not be impacted by any of the changes being developed. We would go further and reference Panel objective C2.2 (c) that requires that the code be given effect in a fair manner without undue discrimination between parties or classes of parties

Panel size - Although we agree with the principle to establish a manageably sized SEC Panel we believe that at this stage there is no strong argument to restrict the number of Panel members. We believe that it is more important to establish a robust, democratic and fully functioning Panel than to engineer a small Panel that can be easily managed. We therefore suggest that we maintain a flexible approach at this stage

Accession arrangements – these are extremely light, currently only requiring Credit Cover arrangements to be in place. Whilst we understand the argument that accession to the new code should not be too onerous for the smaller parties it must be recognised that a balance must be struck to ensure that accession arrangements are stringent enough to ensure effective and efficient management of the code going forward. We believe that the current arrangements for accession are not sufficient and need to be revisited, this is particularly important as stages 2 and 3 are introduced that gives more effect to the code and the parties that have acceded to it. Suggestion – to establish the SEC Panel responsibilities in a 'flexible' way to ensure that the code can be appropriately developed as stages 2 and 3 are introduced. Further, we also suggest that those acceding are required to undertake appropriate staged accession to ensure alignment with and compliance to, the Code as it is further developed

Stalemate decisions to be rejected – we do not feel that this is appropriate. Decisions may not be reached due to issues around the timing of a change or how it is to be implemented, for example. This does not mean that the proposed solution is not fit-for-purpose. Provision should therefore be made to cater for the deferment of such changes. Further, stalemate decisions themselves may be an indication that the change control process itself is flawed and as such should be monitored and used to further improve the change processes where appropriate

Urgent changes can be vetoed by the Secretary of State (SoS) – We do not support this and in general oppose vires and interventions for the SoS that can operate outside of a governance process. We do not agree that this is an appropriate use of SoS powers. It is highly likely, in our view, that urgent modification will only have been raised during the early stages of the Programme to remedy a defect that is likely to adversely impact the Programme itself. By vetoing such changes can have the potential impact of effectively forcing suppliers to implement flawed systems and processes that could lead to a breach of licence Conditions etc. We believe that provision should be made to allow for the deferment or re-dating of certain urgent modifications that have been raised but cannot be implemented for other practical reasons, especially where the Industry and the Regulator have previously agreed to the change. Further, this clause has no end date and whilst this remains the case the uncertainty that this will generate can potentially undermine the change control process

Authority powers – A request for clarity - Does the Authority have the power to appoint a party to a category that has failed to elect a member?

Modifications

5. Do you support the proposed composition of the Change Board and its decision making arrangements?

Yes

We fully support the composition of the Change Board and its decision making arrangements. We do however have additional points that we wish to raise at this stage.

Precedent for the role of the change board - We support the concept of establishing a Change Board as the most appropriate way in which to manage and control change to the SEC. This model has been utilised for other Codes, e.g. the MRA, where responsibility for change control activities has been successfully devolved away from the Panel

Composition of the Change Board - We support the proposed composition of the Change Board, providing as it does a wide and balanced level of industry knowledge and experience

Delegation of Code modifications - We fully endorse the delegation of Code modifications responsibilities to the Change Board who we believe will be the most appropriate body to manage this workload

Role separation - We reiterate here our view that good governance indicates the separation of the roles and responsibilities between the Panel and the Change Board being made clear and unambiguous from the outset, as the workload for these two activities requires a different skill-set, knowledge and experience base

Timing - We do not believe that there is any reason why the Change Board cannot be established soon after the Panel to ensure that appropriate Change Control arrangements are in place at the earliest opportunity and this should include representation and voting. This approach would ensure that any urgent modifications identified have a 'due process' established in order to progress these in an appropriate manner;

Party category majority The concept of a party category majority being required in order to progress a change seems sensible. However, it should noted that these voting arrangements may not automatically indicate that a particular change is not required and as such we would suggest that change progression and the change control process itself is closely monitored particularly during the early stages to ensure that these processes are effective

Audit trail - Processes developed must provide clear audit trails to appropriately align impacted parties and voting to ensure that parties not impacted do not skew votes, this is particularly important where the more 'vertically-integrated' parties could align their individual votes when only one party is impacted by a change

Impact assessment by the originator - We believe that once the change control processes have been fully established that it is appropriate for the originator of a change to provide the first view of impacted parties, with these considerations then

being reviewed by the Code Administration once submitted. Whilst we understand the need for the Panel to oversee the change process we do not believe that the Panel is best placed to determine impacted parties. This approach will only serve to develop a sub-optimal change process.

Modifications

6. Do you think that the SEC should provide for Parties and the consumer representative to appeal Change Board recommendations before they are submitted to Ofgem? If so, what is the appropriate mechanism for determining such appeals?

Yes

We support the concept of party appeal of Change Board recommendations.

Appeals process - We believe that an appropriate appeals process is essential in order for robust Change Control systems, processes and mechanisms to be developed. Without checks, balances and safeguards a change process can quickly falter with inappropriate decisions being progressed that jeopardise the effective and efficient operation of a Code. An appeals process allows for further consideration to be given to establishing appropriate solutions to contentious issues;

Appeals escalation - We would like to see this form of appeal become part of an appeals process that can be escalated where appropriate to the Panel and then Authority, if required

Appeal timeliness - Appeals should run to clearly defined time-scales in order to ensure effective and efficient processes are established and to avoid any abuse, accidental or otherwise, by parties involved;

Appeals committee - We suggest that the appeals process could involve the Panel establishing an appeals committee, with appropriate terms of reference, that would be convened to hear any appeal

Appeals guidance - We further suggest the drafting of a guideline document(s) is required for clarity of the envisaged appeals process prior to commencement of stages 2 and 3. In case of conflict, these documents would be sub-ordinate to the SEC.

Modifications

7. Do you have any further comments, or views on the cost implications to SEC Parties, regarding the proposals for governance, the modification process and the approach to appeal rights set out here and reflected in the legal drafting of Stage 1 of the SEC?

Yes

Appropriate governance framework and modification processes should be developed that align with the general SEC objectives to ensure that effective and efficient systems and processes are developed

Development - Optimum developments should be encourage to ensure 'value-for-money' whilst ensuring that a flexible approach is established in order to facilitate and manage any future requirements appropriately

Funding of development - These developments should be funded proportionally by those parties who use the resultant services based on market share for example

DCC role - We would not wish to see the DCC becoming responsible for any aspect of the SEC governance or change control process. Instead we would envisage the DCC to be treated as any other party that needs to accede to the Code. In this way the DCC will retain an element of independence. We envisage that Code administrators, directed through the Panel will be responsible for overseeing the funding arrangements for the SEC

Party representatives – we do not support the need to include the facility to fund the travel arrangements of representatives to SEC meetings. This approach socialises the travel costs that only benefits those parties travelling the furthest. If this is deemed an issue we suggest that further consideration is given to establishing a 'rolling location' for the certain meetings.

Liabilities

8. Do you agree that liability provisions for intellectual property rights and confidentiality should be included in the SEC. If so, do you agree that they should be unlimited?

We support the need for liability provisions to be included in the SEC, but would argue against certain unlimited liabilities.

Limitation of liabilities - We agree that liabilities must be included in the SEC, but would argue against unlimited liabilities unless imposed by law, for example death, personal injury, fraud etc;

- If these unlimited liabilities are to remain we suggests that provision should be made to ensure that parties are fully aware of the circumstances that trigger their coming into effect;
- We understand that certain liabilities have been drafted to be unlimited to ensure that un-licensed parties are required to conform to Confidentiality and IPR concepts but would ask that these are reconsidered and that in addition, liabilities are regularly reviewed to ensure that they remain appropriate and do not create perverse incentives or behaviour

Scenarios - It would be useful to understand exactly what is envisaged would be covered by these liabilities particularly as the data handling role of the DCC has been significantly affected as a result of new security arrangements.

DCC infringement - We believe that although there is an argument that the DCC does not have any direct relationship with its end Users it is possible that the DCC could become the infringing party. As such, any liabilities here should be 'backed-off' as part of suitably drafted contractual arrangements with its Service Providers and an appropriate set of liabilities be established for the DCC by way of a reciprocal arrangement to those already in place for all other participating parties

DCC as data processor - With reference to the DCC as a Data Processor we would like to see consideration given to the following additional requirements to Section I1.5:

- A requirement for any breaches relating to a Suppliers' data to be passed on to Suppliers – this should extend to accidental or unauthorised access;
- The DCC should be obliged to tell Suppliers about any request made directly to them by a data subject regarding the data that they are ultimately responsible for;
- When consideration is given to the liabilities that are being imposed on Suppliers we believe that it is reasonable that some form of reciprocal arrangements should be in place. For example, we suggest that it is appropriate to specify a minimum level of standards (e.g. ISO) to be established with regard to DCC processes and procedures in order to ensure protection of supplier data from this source and that this should be contained in the SEC. We do not believe that reference to 'good industry practice' is either appropriate or sufficient to cover the DCC activities;

- There should be a requirement to ensure and demonstrate that the DCC's systems, processes and personnel are compliant with prevailing data protection and privacy requirements and that appropriate security and training measures are in place;
- A requirement that any subcontractors are bound under a written agreement to comply with the obligations set out in clause I 1.5 and that they have to obtain the users written consent before such sub processors are appointed;
- I1.5(d) – We do not consider that the DCC to provide "reasonable assistance" for an ICO enquiry is an appropriate approach for a Data Processor, particularly where such breaches impact Suppliers as Data Controllers who must take responsibility – we suggest that the requirement should read "...any and all assistance..." if there has been a breach by them;
- We would expect an indemnity for any breach caused by the DCC as Suppliers can potentially be fined at 2% of their global turnover under current EU Regulation; and
- In order to establish a level of certainty and hence stability for the Programme, particularly during the early stages of development we would suggest that Clause I1.8 should specify that audits are restricted to one audit per year unless there are grounds to carry out an audit with greater frequency.

Liabilities

9 Do you agree with the Government's proposal that in instances where the DCC is exposed to liabilities that exceed what it can claim from the person causing the original breach, the net liabilities for the DCC will be recoverable from SEC Parties by way of an increase in the DCC's fixed charges?

No - We disagree strongly with this proposal.

Placing obligations to cover shortfalls in either the DCC or third party liability practices resulting from poorly designed arrangements and/or contracts on innocent parties with no control, quite clearly misaligns incentives and creates a high risk of seriously adverse outcomes that would be experienced by consumers.

We do not agree that this proposal appropriately incentivises the DCC to develop, initiate and manage appropriate contracts with its service providers. We believe the opposite is the case.

DCC activities define it as a Data Processor for DPA purposes. Therefore any breach by them will make suppliers, as Data Controllers, liable under the Act. We therefore suggest that certain reciprocal liability arrangements be established for the DCC.

Dispute resolution

10. Do you agree that the Government's proposal to allow DCC to link service provider and SEC disputes in the arbitration process?

Yes, with qualification

We agree that linking the processes could be beneficial, but would seek assurances that the process is not only fit-for-purpose but that it could not be used to cover disputes arising from poorly drafted contracts as these issues should be heard under provisions of contract law.

Contract integrity - We recognise that by linking the arbitration process in this way it will become a more effective and efficient process overall. However, we would not wish to see this used as a vehicle to address DCC - Service Provider contractual shortfalls, resulting from poorly designed contracts

Fitness for purpose - The industry before embarking on this joint approach needs to be sure that the arbitration process envisaged is 'fit - for – purpose' when hearing disputes that are likely to be of an industry-specific, technical nature

The role of the Panel - When linking the arbitration process in this way some initial consideration should be given to the anticipated disputes that can and should be heard and we believe that this is a role for the Panel to undertake. We further suggest that the use of this process is monitored and reviewed in order to inform any further developments and improvements that may be required to ensure that the service remains both appropriate and optimal.

Code co-ordination

11. Do you agree that the proposed legal drafting covering change co-ordination with other codes meets the requirements as set out in chapter 5?

Yes

We agree that the drafting covers change co-ordination with other codes, with some further suggested areas of improvement and points for consideration.

We believe that the drafting, although 'light-touch', makes appropriate reference to other codes and as such should work in practice

Other codes impacted - When finalising the design of the change control systems and processes we suggest that specific reference to 'other codes impacted' is provided on the change form to initiate cross-reference at the earliest opportunity, that appropriate mechanisms are then established with the other codes to ensure that the issue/ defect under consideration is then appropriately assessed and addressed by other Code Administrators where necessary and that appropriate monitoring and reporting arrangements are established to capture any processing anomalies

Request for clarification - The considerations provided above give rise to the following questions that require clarification:

- Is there a need to consider consequential references in other codes and agreements to the SEC, both in terms of the Code and Agreement drafting themselves and the Change Control processes that have been developed?
- In the event of a clash of obligations which code takes precedence - should this depend upon or be driven by the metering arrangements present?
- Is there a need to ensure that there are consistent definitions in place between the Codes to ensure that full co-ordination of Change Control activities is possible?

Passing registration information to the DCC

12. Do you agree that the proposed legal drafting for the SEC covering obligations on SEC Parties to pass registration information to the DCC is appropriate? Please provide a rationale for your views.

Yes

We support the need for section E to be in place to facilitate the passing of registration data to the DCC. We do however have some points for further consideration.

Access by Agents - Providing registration information to DCC should not automatically allow access to this information by Party Agents who previously had access, as these arrangements change under the SEC

The master record - Whilst the data provided by the Meter Point Administration/Registration Services (MPAS/sites and meters) Service Providers and Xoserve form what is effectively the master record, it should be noted that the information that these systems contain cannot be guaranteed to be wholly accurate

DCC/CSP/DSP immunity - We do not believe that the DCC or its service providers should be afforded full immunity as could be the case with the current drafting of E1.3, with regard to provision of data. We accept that the DCC should not be liable for any problems that may result from passing on inaccurate or incomplete data that they do not have the ability to validate. However, this immunity should not extend to situations where they or their contracted parties have failed to provide information that they are responsible for in a timely manner as these activities form part of the roles and responsibilities of the DCC and its service providers. Further, the impact on Suppliers could result in breach of Licence Condition which must be taken into account when setting appropriate levels of liability for all parties involved; and

Non domestic sites - Consideration may also need to be given to the fact that electricity systems are not currently able to readily distinguish between domestic and non-domestic customers in the manner required for DCC charging purposes?

Transitional arrangements

13. Do you agree with the proposed variation to the SEC modification regime in the transitional period, including a right of veto for the Secretary of State?

No

We disagree with the restrictions on Code modifications that the provisions for the transition period provide and the powers of the Secretary of State

Supporting Information

We understand and support the need for the SEC to become a stable platform on which to manage the new smart arrangements and as a result the need to restrict modifications to this code – part suspension

However, we also believe that it is highly likely that during the early stages of implementation of the Smart Programme that serious system and process issues are identified which will require urgent modifications in order to rectify the defect(s) and that in-the-limit these may impact Programme deadlines and time-scales. We would not wish to see the SoS utilising powers of veto for these changes as this will place an unnecessary burden on Suppliers who would be obliged by Licence Conditions to maintain and operate defective systems and processes

The Change Board - We believe that it is appropriate to establish the Change Board at the earliest convenience after the Panel is in place to ensure that Panel and Change Control business can be progressed effectively and efficiently, overseen by two appropriately appointed and representative bodies. This is the only approach that will ensure efficient and effective management of the Code

Right of appeal - We seek clarification as to the rights of appeal to Authority decisions that would be granted under the current draft arrangements as this is not yet clear to us.

Further questions for consideration:

- Why do we need to provide Credit Cover requirements for a period where no DCC Users exist and so are therefore not taking any services that need to be covered?
- Why do the current Credit Cover arrangements not include Parent Company Guarantees (PCGs), is this an oversight or is there a reason for this? and
- (251, p68): "..until such time as the overall modification process is activated..". Clarification required on the definition/ meaning behind this - What is envisaged by the overall modification process and at what point is this process activated? The current drafting could be interpreted to preclude the establishment of the Change Board, rendering the change control process ineffective during the critical early stages of the Programme. When will the right of veto end and what will trigger its removal? Further we would not anticipate, as is suggested, that any fast-track or urgent modifications could be progressed without an Authority decision, which seems to be the main reason behind the consideration for the SoS to have this additional right. Why is there a need to draft this power at all, doesn't the SoS have sufficient powers under Energy Act 2008 (Section 88 (4))?

Transitional arrangements

14. Comments are invited on the approach to transition as set out in this chapter and section L of the SEC. Please provide rationale to support your views.

Whilst we understand the need for Section L to be drafted to cover transitional arrangements there are additional points that we wish to raise at this stage for further consideration.

We acknowledge and understand the purpose for drafting this Section L

Urgent modifications - We agree that only urgent and fast-track modifications should be raised but as the SoS right of veto is currently open-ended we would ask that consideration is given to establishing an appropriate and clearly defined time-scale for this condition, as without it true innovation and development could be stifled

Decision on urgency - We believe that any modification that is raised as urgent or fast-track but subsequently established not to be by the Authority is not automatically cancelled but allowance given that it can be deferred until such time that the modification can be heard in a more appropriate context. Further, current drafting is silent on whether or not such decisions can be appealed. Clarification on this aspect is required in order to establish a more complete and robust change control process during the early stages of the Programme

Early establishment of the Code Administration and Secretariat (CAS) - We understand that from a legislative perspective it is not possible to establish a Panel until the CAS is appointed and that the Government's current intention is that it will facilitate the procurement of these services. We understand that the Government will engage with the Industry as part of this procurement activity but as the details are still to be made available we continue to have concerns that this approach may not provide an open and transparent process to establishing key roles (and hence responsibilities) for a key participant under the proposed new, enduring arrangements. It is vital that roles, responsibilities, systems and processes are established on a collaborative basis in order to establish a sound foundation to ensure the Programme gets off to a good start. We would therefore ask that clarity is provided as to how the Code Administration and Secretariat (CAS) will be established at the earliest opportunity

277, p74 – Whilst we understand the legal difficulties that arise due to the timings associated with the designation of the SEC itself and the processes required to establish both the SEC Panel and the Code Administration and Secretariat (CAS) functions, careful consideration needs to be given as to how this is achieved. We understand and support that in a practical sense it is appropriate for the Government to provide the administrative assistance required but would ask that any interim arrangements are developed openly. However, as these arrangements have yet to be drafted we cannot comment fully on this important aspect of the interim drafting of the SEC, at present. We would ask that clarity is provided in this area as soon as possibly as our current understanding as to what is involved would suggest that this is not a trivial task; and

Tender process for CAS- What Competitive Tender process is envisaged for the procurement of the Code Administration and Secretariat functions? We believe that the Government have under-estimated the amount of work that is required to establish the CAS for this Code when set against the proposed time-scales. We suggest that a Programme risk is raised to ensure that the procurement process is appropriately set against the critical path for the Programme and to ensure that this process is initiated with the full involvement of Licensed Industry Parties who are expected to become involved with and utilise these services and functions, once established.

Licence conditions

15. It is the Government's intention to introduce a regulatory obligation on suppliers to enrol SMETS-compliant domestic meters with the DCC and that this obligation would apply in relation to smart meters installed (from a specified point in the future). Do you agree with this intention? Please provide a rationale for your views.

No, we disagree

Although we do understand the intention we do not support the mandating of the adoption of SMETS-compliant meters.

Please also see our response to Foundation Smart Markets consultation

Whilst we understand the intention behind the introduction of this obligation we do not believe that we are in a position to be able to comment fully on these proposals when a number of key decisions still need to be made at the Programme level. Without these timely decisions a great level of uncertainty exists which will influence commercial strategies.

Suppliers are being asked to agree to an approach without a complete understanding of either:

- the equipment that will be on an approved Product List i.e. which items of equipment will be deemed SMETS-compliant and hence be able to be enrolled by the DCC; and
- The timing of when this obligation would take effect and hence the prevailing approved equipment that may be available at that time;

By way of an example:

- From a technical and security perspective the only SMS enrolment that can be supported by placing such a regulatory obligation on Suppliers, at present, is for SMETS2 compliant meters, installed where only DCC compliant communication hubs are present and this can only be achieved at DCC Go-live, at the earliest.

Licence conditions

16. Do you agree in principle with the placing of a licence condition on gas and electricity suppliers to accede to and comply with the SEC?

Yes

We agree with the principle of placing a Licence Condition on gas and electricity suppliers to accede to and comply with the SEC. We do however have further points of clarification that we wish to raise.

Whilst we agree with the principle of placing the Licence Condition on gas and electricity suppliers to accede to the SEC (as this is a fundamental requirement that is needed in order to progress the development of the Programme), we do not however feel that it is appropriate to impose this as an early condition on Suppliers for the sole purpose of establishing pre go-live funding for the DCC who we believe should be funding their own development as a profit making organisation

In addition, we would further argue that the proposed date is not required as DCC Services cannot be taken from this time and ask that consideration be given to aligning this date with Stage 2 when the inclusion of registration data will facilitate the need to take DCC Services

If the early implementation of this Licence Condition is to proceed we would urge that this Condition is applied equally to all Suppliers and that this should include the resultant recovery of fixed costs. We believe that market share is an appropriate and reasonable way to establish any proposed fixed-cost arrangements.

Licence conditions

17. Do you agree that the licence conditions as drafted meet the policy requirements as set out in the chapter? Please provide a rationale for your views.

Yes – subject to clarity on derogations

We are in general agreement that License Conditions meet the policy requirements. We note that the approach that has been adopted is one of a 'light-touch' drafting for the Conditions and as such these work well for all parties that are required to accede from day one.

However, we would ask that further information is provided to explain the purpose behind the derogation clauses (EE.2 and GG.2) and the scenarios that have been envisaged where these clauses would come into effect. We note that these clauses are currently vague in their drafting and open-ended in their effect.

Licence conditions

18. Do you agree in principle with the placing of a licence condition on gas and electricity network operators to accede to and comply with the SEC?

Yes

We agree with the principle of placing a Licence Condition on gas and electricity network operators to accede to and comply with the SEC.

As the drafting of these Licence Conditions are identical to those that place obligations on Suppliers and that the effect of the drafting is to ensure accession to the SEC we agree with and support the principles that they place on Network Operators.

Licence conditions

19. Do you agree that the licence conditions as drafted meet the policy requirements as set out in the chapter? Please provide a rationale for your views.

Yes, subject to clarification around the proposed derogations.

Our response to this question mirrors our views expressed in response to question 17, in that we agree that the Licence Conditions as drafted meet the policy requirements for network operators, but would like to better understand the derogation clauses that have been included.