



Fair Water Connections

An association seeking a fair deal in water supply provision

Response to Ofwat Consultation on the Code for Adoption Agreements – August 2017

1. Introduction and Overview

This response is made by Fair Water Connections (FWC) which is an association set-up to represent the interest of Self-Lay Providers (SLPs) who wish to ensure that there is fairness in the way competitive water connections are offered as an alternative to statutory water company provision. Because it relates to the specific interest of our members our focus is on the adoption of new water supply infrastructure.

We are heartened in the direction being taken by Ofwat to now set a framework for new water infrastructure adoption agreements and that they appear to have been listening to the lobbying we, and we are sure others, have made to them over many years. We however have a number of concerns about whether the challenging implementation timescale (which we fully support) will be achieved and urge Ofwat to give greater direction about what happens if the envisaged timescale is not met in the published Code.

Although it is apparent that water companies rarely use current adoption agreements to control behaviour we recognise that this is not their purpose and that the imbalance in the present document, because in our view it is not 'fit for purpose' in a functioning competitive market place, urgently needs to be addressed. To illustrate the way that the current agreement is heavily weighted towards water company control our counting shows that it contains twice as many SLP "shalls" to water company "shalls" (79 to 40). Furthermore many of the "shalls" the water company signs up to are actually "shall nots" (i.e. shall have "no obligation", or "no responsibility", or "not adopt", or are not particularly binding, such as "use reasonable endeavours", or "as soon as reasonable practical" etc.).

Whilst supporting much of what is set out in the proposed Code there is, to us, a major omission with Ofwat not looking to require the incorporation of Level of Service guarantees in future Adoption Agreements. Without these, and some form of compensation when performance targets are not achieved, we cannot see how Self-Lay Providers can have the confidence necessary for them to assure developers that they can deliver against their customers programmes (unlike water companies who fully control their own delivery). So, with water companies demonstrating (against their published Developer Service Performance Data for Quarter 1 2017-18) an average performance achievement of 97.5% we firmly believe that Ofwat should now require delivery commitments, against relevant performance targets, in future adoption agreements. Furthermore we believe that PR19, with the Ofwat D-MeX proposals, provide the means for any cost implications of introducing guaranteed standards to be handled.

Against provision compatibility criteria another significant issue for our SLP members is the differences between the criteria imposed, particularly on developers, in adoption agreements compared to what is formalised should mains and services be provided by the water company themselves. This disadvantages Self-Lay, by stressing responsibilities for controlling what gets constructed above new water infrastructure and around post adoption duties etc. (which water companies argue apply when they install apparatus but is not routinely included in any requisitioning documentation). We therefore urge Ofwat to address this factor in the published Code by specifically not allowing any requirements in adoption agreements that are not specified in standard requisitioning documentation.

2. Commentary on Ofwat Implementation Approach

Whilst commending Ofwat for pushing the industry to quickly produce new adoption agreements we have concerns about the practicality of what is being suggested as clearly it will effectively place control in the hands of Water UK (as the trade body for water companies). Our experience of the way Water UK functions (based on recent involvement with them over service standards, new connection charging and the implementation of a new Self-Lay Code of Practice) flags a number of issues which we sense will adversely impact on the industry being able to produce agreed adoption frameworks by April 2018. Hence we recommend that Ofwat addresses this by taking the lead themselves in engaging with the industry on producing new adoption agreements, after all our members could already invoke WIA Section 51B.1.b and refer (assuming that they object to terms, which they could easily do) all new adoption agreements to Ofwat and require them to set 'reasonable terms'. With the requested Ofwat direction we sense that April 2018 implementation would be possible and that distractions companies may well cite, around new charging implementation etc., could be contained.

Our unease about the role we sense that Water UK will take is that, our experience indicates, that they will seek to:-

- Operate as a 'protectionist' body and although they outwardly look to have stakeholder engagement it will very much be 'an arm's length' relationship; and,
- When the going gets serious all their members will want to be directly involved which, in our view would make a steering panel very unwieldy; and,
- Come up with reasons for wanting more time but then not take advantage of the delayed implementation to deliver their promises and work up standardised approaches, or whatever, (what is, perhaps not, happening with new connection charging is a good illustration of this); and,
- Appear to have limited understanding of what is important to their members customers (as illustrated by the extensive suite of Developer Service Standards) and, as demonstrated by their recent audit of Developer Standards, leaving them unable to give the level of assurance customers seek; and,
- (Based on what we learn from both sides) not have good working relationships with developer bodies (such that agreeing representation and engaging with developers, rather than always their advisors) which, in our view, will compromise the functioning of the proposed panel; and,
- Avoid recognising that the frustrations of WIRS members is an issue for them to address.

Against this we know that Water UK have recently recognised the need to update the Self-Lay Code of Practice and that the drafting (probably because, uncharacteristically, they allowed SLPs to take a lead) of this has happened reasonably quickly. However, despite assurances about implementation, water companies have been slow (currently only 3 mention the document, which has been with them for 3 months, on their websites) and the Water UK management of other stakeholders has been an issue. Hence we cannot see how sector leading guidance is ever going to freely evolve from companies, or their trade body, who simply do not look to grasp how their behaviour is holding back competition. This reinforces our call, see below, for Ofwat to select their Option 5.

3. Our Responses to the Consultation Questions

Our responses to the questions posed by Ofwat are given below.

Question 1 - Do you agree with our preferred approach and the content and scope of our Code?

We commend Ofwat on the direction they are taking with the implementation of this Code and that they are now giving (much needed) direction to improve the fairness, and thereby the functioning of the competitive water connections market place, with what they are proposing to implement.

Our preference would however be for Ofwat to select implementation Option 5 as we have concerns that the sector will be able to work together to successfully achieve the collaborative working which underpins Option 4. (Options 1, 2 and 3 being dismissed by us as not giving the push needed to rectify current imbalances in the way water companies currently seek to control Self-Lay provision).

Question 2 - Do you agree with our proposed code principles and their definitions?

We largely support the proposed Code principles and their definitions. We however comment that proposed section 3.3.3(c) looks, to us, to not be compliant with WIA Section 51D(1) which prescribes that “no water undertaker may permit that water main or service to become connected with its supply system unless it vests in a water undertaker”.

To us there are 3 omissions in the proposed principles:-

1. We do not consider that it is now acceptable for water companies to just indicate envisaged minimum levels of service. Instead we regard it as essential that minimum service standards are guaranteed with default compensation when target times are missed. (This being necessary to give SLPs the confidence that they can successfully function in a competitive market and deliver in the way that their customers expect); and,
2. Whilst supporting the standards and confidence WIRS accreditation provides we are dismayed that water companies continue to insist that SLPs holding WIRS have to use operatives who hold much more onerous competence qualifications than water companies require for their own contractors. This prevents freedom of movement of personnel (from companies to SLPs) and thereby restricts SLP expansion. This, to us, is a key competition compliance issue which needs to be addressed in the proposed Code principles; and,
3. The disparity between the simple agreements, often just an exchange of letters, water companies use on requisitioning terms and the, somewhat onerous/bulky, self-lay agreement needs to be addressed. This is because the self-lay agreement can be off-putting to developers (in terms of risk ownership) and requires them to (post construction) commit to actions which are not formally required when water companies do the work themselves.

We also note, in the Definitions and Interpretations (in Appendix A) that WIRS is linked directly to Lloyd's Register. Whilst we have no views on LR continuing to operate this scheme it is surely for the water industry to decide on their contractor (which could in the future change) so should the wording "operated on behalf of the Lloyd's Register Group" used by Ofwat be deleted?

Question 3 - Do you think our proposed minimum information and publication requirements are appropriate and sufficient?

The (currently lack of) provision of minimum information and publication standards is a continuing frustration to SLPs. In particular our membership is dismayed that despite Ofwat prompts it can be very difficult (and looks to be getting worse) to find the 'material information' to support self-lay awareness and delivery on many water company websites.

Hence this is a matter that urgently needs to be addressed so, even if other envisaged Code implementation times get deferred, we urge Ofwat to set an early date for this principle to be achieved. Our view is that this should now be no later than 1 February 2018 (when the new local charging arrangements need to be published).

Even when information is published by companies it can be difficult to find on their websites and we therefore ask that Ofwat looks for standard 'search engine' terminology be introduced.

Question 4 - Do you agree with our proposed approach of requiring companies to develop Sector Documents and Model Adoption Agreements in consultation with Developer Service Customers, according to a set of minimum requirements?

As discussed under Question 1 we favour Ofwat taking a lead in the production of adoption agreements. To us this would better recognise the imbalance which exists between the legal resources available to water companies against the expertise which their customers, particularly, SLPs, can readily access.

We also have concerns about how a panel approach would function in ways which enable the views of the various parties to be balanced. There are 2 aspects to this concern:-

1. The water sector differs to electricity in so far as there are many more companies and, if all sought to get involved (as could well happen), the panel would be too large to function, particularly as a focused drafting body; and,
2. The views of different customer groups need to be represented but there appears to be no controls over the stakeholder make-up. So would, on the customer side, a single SLP in a panel of developers be acceptable? Hopefully not but this looks to us something that, unless checked, could well arise.

From what we have seen working well we ask Ofwat to stipulate both a management panel (along the lines currently being proposed and with a monitoring and oversight role) and for specialist task groups of practitioners to work up the detail (for approval by the management panel). This, to us, would create a wider, more meaningful, engagement with people who have the working experience to progress the necessary documentation and process standardisation but would ensure the necessary wider stakeholder sign-off before anything gets presented to Ofwat.

We also believe that there needs to be some mechanism for stakeholders to veto the panel arrangements, and refer issues to Ofwat, if they do not have confidence about what water companies/Water UK set up will work.

Based on our experiences of working collectively with water companies we can well envisage a situation where agreement cannot be reached through a panel and do not see anything in the Ofwat proposals as to how such a situation would be remedied (without Ofwat getting directly involved, which is surely Option 5 anyway!).

We also comment that the route into Ofwat is not defined and, for transparency and clarity, ask that Ofwat specify which department will take ownership of any adoption agreement related matters.

Question 5 - Do you agree with our proposed minimum requirements?

Our view is that the matters discussed above need adding to the proposed minimum standards, especially our call for the introduction of Guaranteed Standards, see Question 2.

Question 6 - Do you agree with our proposed approach to deviations?

We are of the view that any 'deviations' should be kept to a minimum and should only arise in 'exceptional circumstances'. From what we have seen from the recently published audit of water company Developer Services performance there are too many instances of companies saying they have 'customer agreement' for delayed delivery for us to have confidence that adoption 'deviations' will be kept to a minimum. Hence we call on Ofwat to require all companies to routinely report all occasions when they introduce 'deviations'.

Because the outcome of the recent Ofwat consultation on modifications to their Charging Rules is not known we do not know if there will be increased pressure from water companies to apply bonds to self-lay work. This is a concern to our members as we cannot see, given the agreement controls themselves, that anything other than security against non-contestable works can be reasonably required. We therefore ask Ofwat to also introduce a requirement to report all instances where any form of bond is applied to self-lay work.

Question 7 - Do you have any comments on our proposed approach to governing the initial approval of and subsequent changes to the Sector Documents and Model Adoption Agreements?

We regard the proposed implementation timescale as very challenging but urge Ofwat to continue with their proposals.

The omission, to us, is that (see Consultation 4.5) Ofwat is proposing to allow water companies to submit adoption agreements without these being first reviewed by a 'panel'. This looks to be merely endorsing the types of (unbalanced) agreements that are currently in place so we urge Ofwat to insist that no documents get submitted to them without the views of a panel being first sought.

We cannot see any reference in the Ofwat documents to the event arising where either water companies fail to submit documents or what is presented does not meet Ofwat expectations. We regard this as an oversight and therefore feel that Ofwat should prepare for the industry not delivering.

Question 8 - Do you consider the proposed timeline for submitting the Sector Documents and Model Adoption Agreements to us for approval to be realistic and achievable? If not, what would you consider to be a suitable timeline?

As discussed above we recognise that the proposed implementation timescale is challenging but that this needs to be achieved before the competitive water connections market can fully function.

We however recognise that there is much currently happening, with changes to water connection charging arrangements etc., so propose that, if implementation dates were to be slipped, submissions to Ofwat should be no later than 1 August 2018. This date being selected as it is 6 months from when local charging arrangements need to be published (so issues around charging should have been settled and it retains the 6 months lead time envisaged as necessary by Ofwat).

Whilst new adoption agreements will take time to develop our view is that supporting (process and technical) information should now be available and that it is unreasonable for any deferment of a requirement to publish such information to be considered.

To simplify the adoption agreement process we support the development of an ongoing (annual or biannual) agreement and, a simple, site specific document. This could however take a while to work the supporting processes through so ask that Ofwat are flexible towards such innovations following soon after a standalone document template gets developed.

Question 9 - Do you have any comments on the assurances the sector will be required to provide to us when submitting the Sector Documents and Model Adoption Agreements to us for approval?

Rather than Ofwat just being led by a water company response we feel that the non-water company representatives on each panel should be tasked with providing their own commentary on what is being submitted. This, to us, would support the role of a 'joint chair' of each panel and help ensure that Ofwat is kept aware of any minority views that have been discounted.

Question 10 - Do you have any comments on our proposed transitional arrangements to enable companies to comply with the Sector Documents and Model Adoption Agreements?

Apart from the matters raised in the above comments we have no comments on the Ofwat proposals regarding transition arrangements.

Follow Up Queries

Any questions that arise from this response should be sent to:-

Martyn Speight
Fair Water Connections Managing Coordinator
Email: martyn.speight@fwconnections.org
Phone: 07889187717.