Ofwat June 2017

Consultation on the Code for Adoption Agreements

Respondent: Patrick J Daly, Director, P N Daly Ltd.

Response Date: 8/8/2017

Summary of Main Points Raised In Our Consultation Response

1. Ofwat must not leave it to the Water Companies to produce national model adoption agreements and processes in isolation - Ofwat must lead the process of producing the new Adoption Agreement with full stakeholder engagement.
2. For the Water Companies, you must incorporate Level of Service Guarantees and penalties for failing to perform to ensure that there is a real balance of risk.
3. Timescales in the proposals are is too tight for proper consultation.
4. There should be no requirements placed on SLO.s and developers in published code that are not also specified in standard requisitioning documentation and incumbent upon the water company connection provider to fulfil.
5. SLP employees must not have to hold more onerous qualifications than Water Companies own employees.
6. The current Self-Lay COPs must not be incorporated into any Adoption Agreements
7. Re approach to deviation - The best arrangement which was ever used was that each electrical DNO had a CIC manager, any issue with line management or engineering which could not be resolved with operational staff was referred to him by the CIC contractor. The CIC manager would give an immediate determination and if the CIC contractor had sufficient grounds still could refer to Ofgem for a determination. I suggest you adopt this approach with the Water Companies.

Question 1

Do you agree with our preferred approach in terms of the content and scope of our Code?

Please explain your answer.

We disagree with your preferred approach.

We agree in part with the proposed content.

We disagree with the scope.

The Approach

In your consultation document you state that 'In 2014 Ofgem carried out a review of the market for new connections to the electricity distribution network in response to concerns about whether the market was effective.'

What you fail to refer to is that for 9 years prior to 2014 CIC companies had been contesting the terms of adoption for electrical networks offered by UK DNO.s and additionally contesting the extent of works in the contestable arena via the ECSG (Electricity Connections Steering Group) at Ofgem and the various other sub committees such as street lighting which were attached to that committee.

The extent of competition which prevailed in the electrical connections industry in 2014 cannot in any way be compared to that which prevails in the water industry in the current day, specifically with regard to the extent of activities which can be undertaken by SLO.s under competition in connections and the timely delivery of non contestable services by statutory undertakers.

In the current market the biggest obstruction to the development of effective competition in the utilities connections market are the statutory water companies. It is therefore telling that UK water did not consult with the biggest players in the UK connections market namely Brookfield (GTC, Innexus & Power On) or East Surrey Pipelines in the development of any of its 'industry documents.'

The Ofwat reference to the Ofgem 2014 Market Review in its consultation document is poorly made as we have already established the environment is entirely different. The reference is an over simplification of events which led up to the development of the electricity CIC Code of Practice. Prior to there being any thought of an electrical CIC Code of Practice Ofgem requested submissions from each DNO evidencing how and in which areas each DNO company believed it had made open previously non contestable activities to competition on a 'business as usual basis.'

These submissions were reviewed by the regulator who in turn requested the opinions of a number of stakeholders. Based on the review undertaken by the regulator and the opinions offered by stakeholders, Ofgem deemed in several cases that the evidence offered by some DNO.s was unrepresentative and in other cases DNO.s were judged by Ofgem to be failing to achieve the minimum required standards of free and fair competition in areas of work which were already fully contestable in the more progressive DNO areas of the country (North West and Midlands).

In order to remedy the situation the duty was placed on each individual DNO company by the Regulator to evidence how they each would achieve delivery of non contestable services on a like for like basis (requirements, timescales and standards of service) to both their licensed connections businesses and competition in connections contractors by the following June 2015.

In accordance with the guidance issued by Ofgem to each of the DNO companies failure to meet the above requirement would potentially be punishable by referral by Ofgem of the offending DNO to the OFT (CMA) for investigation for anti competitive practices.

Achieving the above goal would require each DNO.'s compliance with existing mandatory standards of service contained in;

- SLC15 mandatory Regulator enforceable timescales for delivery of constituent non contestable services in competition in connections (failures resulting in fines payable directly to CIC/SLO companies by DNO.s) – the water industry has no equivalent standards or enforcement policy just some ineffective voluntary guidance which the water companies ignore as a matter of course
- RIIO ED1 (price control mechanism operated by Ofgem based on target operating cost plus thousands of mandatory service standards each resulting in financial penalty or incentive based prescribed minimum levels of performance. Enforcement of fines and incentive payments is based on mandatory reporting of all performance metrics to Ofgem by the DNO.s on a quarterly basis, all metrics may be subject to third party audit)

In addition to the above Ofgem required that the DNO.s and stakeholders would (by the end of June 2015) have to come up with a code of practice which guaranteed that CIC/SLO contractors would be guaranteed delivery by DNO.s the same level of service for non contestable activities as that which was received by the DNO.s own licensed businesses.

The Code of Practice produced under this guise is a failure largely due to the fact that the production of this Code was hijacked by the DNO.s via the ENA (Electricity Networks Association).

There is no duty within the Code of Practice placed upon DNO.s to deliver non contestable services on a like for like basis or timescale to those upon which they are delivered to the DNO.s own connection businesses and for that reason it can reasonably be deemed a failure.

This fundamental failure is of itself a breach of Competition Law as the CIC Code imposes duties and potential punishments on independent connections providers without imposing any such requirements on DNO.s own connections businesses. The document was badly drafted and inadequately consulted on, the deadline for delivery was overshadowed by a general election and then cloaked by the country's subsequent descent into Brexit hysteria.

In the case of the electricity distribution industry what had been a well thought out regulatory process was reduced to a shambles by the regulator Ofgem relying on Statutory Authorities and their Industry Association to become the servants of the customer and competition, which they of course did not.

The ENA and the DNO.s in taking over the process of developing the Competition in Connections Code of Practice at the request of Ofgem and used this unexpected opportunity to develop a document which did not achieve its intended purpose but instead served strengthen the privileged position of DNOs and move competition backwards.

This manifest imbalance was typified by the DNO companies that belief that the Lloyds NERS system is paid for by them and should as such be their servant and not the servant of free and fair competition. As such the DNO.s believed that where they were unhappy with works by a Lloyds approved Connections Provider they should be allowed to request that Lloyds remove that companys authorised status. Northern Power Grid made just such a representation to Lloyds regarding works by GTC (Brookfiled), GTC successfully showed the veracity of the claims by NPG to

be questionable at best and produced evidence to Ofgem showing multiple NPG sites where minimum technical and safety standards were not being complied with by NPG.

Luckily for CIC companies the Electricity Code of Practice for CIC companies produced by the ENA is currently not a pre condition of any part of the Competition in Connections process. It is therefore, at this time, a White Elephant that has failed to achieve any of the objectives set for it by Ofgem and has only served to make DNO.s feel more secure than they should.

The reticence of Ofgem to bring action against any individual DNO for failing to deliver non contest=able services to ICP.s on a like for like basis with licensed connection providers this may be attributed to two facts;

- If Ofgem acts against one DNO on the basis that the CIC Code of Practice represents a breach of Competition Law then they have to act against all DNO.s. This is something which should perhaps have been thought about by Ofgem at the conceptual planning stage.
- The Electricity CIC Code of Practice does contain within it the provision that almost any activity other than DNO network maintenance or fully funded reinforcement may be undertaken on contestable basis initially as a trial and then as 'business as usual.'. DNO companies may therefore argue (and we would not accept) that that by this concession they have enabled competition to take care of those areas where DNO.s are failing to deliver services within reasonable or required timescales. (Provided the DNO can show activities are undertaken on a business as usual basis by CIC contractors then that area of non contestable activity will be freed from price control and excluded from SLC15 measurement-which ultimately is a benefit to the DNO. It is noticeable that DNO.s pushed to have those areas which they find hardest to resource and deliver on time as being open to competition.) – NB the water industry has no equivalent mechanism

The current proposal from Ofwat now is that in the absence of any meaningful regulation by Ofwat of either the standards of service offered by water companies for non contestable services or of the obstructions which water companies are allowed to introduce through an entirely one sided self lay code of practice, we accept the idea that a Code of Practice for Adoption agreements governed in large part by Water UK will represent a step forward towards free and fair competition in the connections market. We find this assertion to be entirely without merit.

If the objective of the Code of Practice for Adoption Agreements is to improve competition in water connections then we need to be clear that no water adoption agreement or any Code of Practice for Adoption Agreements which allows a statutory Water Company Adoption agreement to make compliance with Edition 3.1 of the Code of Practice for the Self Laying of Water Mains and Services-England and Wales-May 2017 a requirement of the agreement will ever serve the purpose of furthering free and fair competition to the benefit of the end customer.

Set against the preceding backdrop an overly complicated Code of Practice for Adoption Agreements will, we believe, prove counterproductive.

Ofwat in the options section of their consultation document refer to areas which may be covered by their code, namely;

- Code principles defining how water and sewerage companies should be delivering the relevant services.

Observation: In 2009 Ofwat produced 'Competition in providing new water mains and service pipes. Guidance to companies version 3.0.'

Principle 1 of that document states ***Water companies should have clear publicly available self lay policies on their web sites that reflect the principles below*** (they have policies but they do not reflect the principles below)

Principle 2 Water companies should have clear and reasonable criteria against which SLO's and their individual employees can be assessed for appropriate skills and qualifications (not achieved)

It is worth noting that the V1.01 April 2015 version of the UU Self Lay Agreement makes reference to the SLO either holding WIRS registration **or** Water Company Approval. Under the revised self lay code which Ofwat has refused to Act against the SLO must be WIRS registered **and** satisfy individual water company requirements. It is also worth noting that the 2015 Self Lay Agreement Version 1.01 refers to the Self Lay Code of Practice without making reference to what revision or date, which means we are already being made to comply with the requirements of a document which we disagree with at the most fundamental level

Principle 3. SLO.s should not be expected to meet higher or lower standards than contractors employed directly by water companies (not achieved) water company contractors not subject to SLO COP.s

Table 1 Page 15 of the consultation document makes reference to the Regulator making the water companies comply with the requirements of Sector Documents as a part of the enforcement procedure for the proposed Code of Practice for Adoption Agreements

The current Self Lay Code of Practice is an entirely one sided document acting against the interests of competition the end user and the SLO, thereby unfairly/illegally reinforcing the dominant position of the water companies in the connections market, and the model self lay agreement used by one water company dated April 2015 V1.01 does not make a single reference to the water company being under a duty to deliver any of the Service Levels outlined by Ofwat in its 2009 document. It is therefore safe to say that Principle 3 is dead in the water and unlikely to resuscitated by the proposals for this Code of Practice for Adoption Agreements.

Principle 23. Water companies should publish clear and reasonable timescales for each element of main-laying work they perform when providing new water infrastructure. The published timescales should follow the levels of service in Appendix 2 and set out what SLO.s must do in order for the water company to complete the work.'

Water companies may as well publish these timescales on the back of a lavatory door for all the use they are. The timescales must be included in the adoption agreement and must be binding upon the water company. Failure to meet timescales must result in automatic penalties eg. foregoing non contestable charges, at least this would provide some recompense to the end user who currently pays a premium for failure.

Our experience is that adoption agreements of the tri partite variety may themselves serve as a barrier to competition. The obligations placed upon a developer by an adoption agreement must be the same whether the developer uses a licensed water company connection business or a self lay organisation.

However if given the terms of the agreement the behaviour of the water or sewage company is 'as expected' in other words poor and unreliable (Ofwat adoption consultation document page 14) then as usual there will be little prospect of any action against the water company by Ofwat.

Given all of the above, we feel that in order for the water industry to move forward and promote competition in connections, there needs to be a change on a system wide basis. The underlying problem preventing this movement is the Legislation and the restrictions it places on the Regulator, Ofwat. If it is the job of the Regulator to develop and improve the new connections market, then they must have the necessary powers in order to do so. We feel that the current Water Act 2014 prevents the Regulator from taking the necessary actions in regards to competition and adoption agreements and as a consequence of this, Self-Lay Provider may be forced into accepting anti-competitive terms.

It is imperative therefore that any development of a code or model agreement must have the involvement of SLPs, Developers and end-customers. If Water Companies are left to their own devices to produce the aforementioned, then we will step back in time towards anti-competitive practices and can probably expect a deterioration in fair free competition to the detriment of the end-customer. Moreover, we have highlighted the need for penalties for failure to meet required levels of services. There are effective incentives implemented in the gas and electricity sectors which ensure compliance with mandatory delivery times scales as opposed to a reputational only risk as is currently implemented through the Water UK published metrics.

To conclude the above we feel that the current proposals offered by the Regulator are unjust in as much as they overly favour the water industry in detriment to the end-customer and will consequently not promote fair competition in connections. We feel that it is necessary for the Regulator to extend the consultation period in order to allow time for an effective and thorough consultation to be made.

No deal is better than a bad deal.

The real driving force required for promoting fair competition in the water industry must be undertaken by the Regulator whose soled purpose is to act as the independent arbiter of interests of all parties, not just the water companies.

Question 2

Do you agree with our proposed Code Principles and their definitions? Please explain your answer

We agree with your principles as drafted other than the question of balancing risks to water companies with the risks faced by their customers (SLO.s and end users).

When water companies fail to deliver non contestable services there is no commercial or reputational risk or for that matter ay possibility that an alternative service provider might be used to replace the sub standard monopoly undertaking. Given that the preceding are the risks faced by the SLO we look forward to seeing how the proposed principles will address this patently unjust imbalance which has been allowed to continue for far too long and ensure that water companies face the same risks in the delivery of non contestable services and when delivering connections in competition with SLO.s through their licensed connections businesses.

Our concern is that the water regulator Ofwat has failed for so long to support progress in competition in connections that currently water companies feel sufficiently confident to draft patently unbalanced (anti competitive) documents such as the SLO code of practice without the fear of there being any retribution from Ofwat. Against this backdrop it is hard to see that Ofwat will introduce the changes needed to increase the level of risk to water companies such that there is a true balance between the risks to customers (SLO.s and end users) and the water companies.

Question 3

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

The Sector guidance should in the interests of the level playing field referred to in the previous section be applicable to all infrastructure constructed for adoption by water companies regardless of the relationship of the constructor to the water company whether it be a third party or internal business unit.

The item 3.1.3 a should define not the levels of service that a customer can expect to receive but instead the minimum levels of service which a customer must receive and what the redress and penalty for individual and repeated failure is. The culture of failure and excuses in the water industry must be addressed.

As previously indicated we expect the proposal of using the sector body to produce sector guidance will result in guidance being indicated by the lowest common denominator and not sector leading performance. If demanding targets are to be met they first have to be set, the water industry sector body will not serve the interests of anybody other than its members.

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?

We do not agree there is no precedent to show that this type of arrangement works in the interests of anybody other than the sector bodys members.

When the press complaints commission was an industry run agency it protected the freedom of the press to the point at which it was out of control and enjoying unfettered access at the cost of individual privacy and freedom.

Allowing water companies to write their own rule book, whilst giving the impression they have consulted, will, as previously stated serve the interests of nobody other than the water companies.

Question 5

Do you agree with our proposed minimum requirements? Please explain your answer

No we do not agree with the minimum requirements.

The requirements must set forth the rights and redress for customers where water companies fail to deliver service in the required timescales, there can be no mitigation or excuse timescales must be enforced and failure punished.

Why would there be a schedule of design and technical requirements in the adoption agreement? The schedule you refer to should be the water company equivalent to an electrical G81 appendix and design manual which must available to anybody who is interested in pricing the construction of new networks. The adoption agreement cannot have any technical requirement other than those which are stated as wider technical and design policy, the reference within the adoption agreement itself will be to the approved design which has been approved for construction.

Question 6

Do you agree with our proposed approach towards deviations? Please explain your answer.

The proposal that the water and sewage companies constitute a panel each and by implication determine its membership (50% water company and 50% customer) does not inspire confidence.

In the event that the Code is unjust, illegal or simply nonsense this panel would represent a bureaucratic obstacle and delay to change.

If a customer expresses dissatisfaction with the Code and a lack of action to change it to the Regulator, we would expect that a response would come back saying that Ofwat had consulted with the panel and the issue is 'on the Radar' of the panel and will be dealt with when the panel next convenes.

Is it beyond the wit of Ofwat to understand that critical issue in construction are time critical and do not lend themselves towards being resolved by bureaucratic gatherings of third parties who have no direct involvement in the issue in question.

The best arrangement which was ever used was that each electrical DNO had a CIC manager, any issue with line management or engineering which could not be resolved with operational staff was referred to him by the CIC contractor. The CIC manager would give an immediate determination and if the CIC contractor had sufficient grounds still could refer to Ofgem for a determination.

The best in class model of this now features fully empowered Area Distribution managers in WPD and SP who can determine matters and marshall the physical resources to deliver solutions.

The lowest common denominator approach of the ENA and the Competiton in Connections Code of Practice reflects the backward mindset and behaviour of the worst in class which would be SSE and Northern Power Grid, curiously these are the areas which are devoid of CIC activity and where end customers have no choice other than to be treated with contempt.

We suggest you abandon lowest common denominator and go for best in class model.

Question 7

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

Yes we think the ideas proposed by Ofwat are naïve and overly reliant upon the water companies acting counter to their own interests, we would suggest that the outcome of this path, if followed, will be predictable and unsatisfactory for all water company customers.

Question 8

Do you consider the timeline for submitting the Sector Documents and Model Adoption Agreements to us for approval to be realistic and achievable? If not what do you consider a suitable timeline?

The timeline is achievable but the outcome will be a backward step from the current situation in those areas where competition has thrived due to best practice ie. United Utilities, this is already a concern for developers who have not been consulted. The process of consultation needs to be extended with each individual company being responsible for canvasing the views of developers and SLO.s in its area which it can easily do checking self lay agreements and requisition requests. One consultation pre quarter, one report to Ofwat per quarter and copied to Water UK and all stakeholders/customers.

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?

Assurances given by water companies breed excuses for failures to deliver upon those assurances which range from re-organisation to short staffing to. In those areas where service delivery is particularly poor an assurance form a water company will not convince a developer to use a multi utility service provider, he will get water installation by the statutory licence holder. The status quo will remain and the deliverer of the balance of the utilities (gas and electric) will then be forced to wait on the licensed water network operator and the benefits in cost and delivery will be lost.

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?

References to contestable and non contestable work need to be expanded and clarified