

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

7 January 2013

Dear Sirs

**Smart Metering Implementation Programme: Stage 1 of the Smart Energy Code (SEC) –
Government response and consultation on the draft legal text**

Thank you for the opportunity to respond to the above consultation.

This response should be regarded as a consolidated response on behalf of UK Power Networks' four distribution licence holding companies: Eastern Power Networks plc, London Power Networks plc, South Eastern Power Networks plc, and UK Power Networks (IDNO) Ltd. The comments we have provided are not confidential and can be published via the DECC website.

Having reviewed the consultation document and appendices we have only one specific point to make, in relation to question 8 (Liabilities) on page 77:

We would propose amending the limitation of liability section of the draft SEC to provide for a wider exclusion in respect of indirect losses. As currently drafted, the limitation of liability clause (M2.2) excludes losses that do not directly result from a breach of the SEC and/or any bilateral agreement and that were not reasonably foreseeable as likely to occur in the ordinary course of events. This clause does not exclude liability for loss of profit, loss of revenue, loss of use, loss of contract or loss of goodwill. It is generally an acceptable commercial position to exclude liability for loss of profit, loss of revenue, loss of use, loss of contract or loss of goodwill and we consider it reasonable to do so in respect of the SEC.

We would therefore propose amending M2 by deleting clause M2.2 and replacing it with a new clause (M2.8) which excludes indirect loss; loss of profit, loss of revenue, loss of use, loss of contract or loss of goodwill in respect of all heads of liability except those for which liability can not be excluded. The proposed amendments should provide a commercially acceptable position for all parties to the SEC. Our proposed alternative drafting is set out in the appendix to this letter.

I hope that you will find our comments helpful. If you have any questions, please contact me in the first instance.

Yours faithfully

Appendix

Question Number	Question	UK Power Networks' Comments
8 (Liabilities)	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?	<p>It is reasonable that parties to the SEC should be liable for breach of confidentiality and intellectual property rights. It is reasonable to provide in the Smart Energy Code that liability will not be limited for <u>direct</u> loss arising from a breach of intellectual property and confidentiality. The following amendments are proposed to Section M2 (Limitations on Liability) to achieve this:</p> <p>M2 LIMITATIONS ON LIABILITY</p> <p>Unlimited Liabilities <i>M2.1 Nothing in this Code or any Bilateral Agreement shall exclude or limit a Party's Liability:</i></p> <ul style="list-style-type: none"> (a) for death or personal injury resulting from the negligence of that Party; (b) for fraud or misrepresentation; (c) to pay the Charges and any interest accruing in respect of the Charges in accordance with this Code; or (d) for any other type of Liability which cannot by law be excluded or limited. <p>Exclusion of Indirect Loss M2.2 No Party shall in any circumstances be liable to another Party for loss arising as a result of a breach of this Code and/or any Bilateral Agreement that does not directly result from such breach and that was not reasonably foreseeable as likely to occur in the ordinary course of events.</p> <p>Confidentiality and Intellectual Property Rights <i>M2. 23 Subject to Section M2.8 each Party's Liability for any breach of Section M4 (Confidentiality) shall be unlimited (save as provided in Section M2.2).</i></p> <p><i>M2. 34 Subject to Section M2.8 each Party's Liability for any breach of Section M5 (Intellectual Property Rights) shall be unlimited (save as provided in Section M2.2).</i></p>

Question Number	Question	UK Power Networks' Comments
8 (Liabilities) continued	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?	<p><u>Damage to Physical Property</u> <i>M2.45 Subject to Section M2.1 and Section M2.8, each Party's Liability for loss of or damage to physical property (including loss of or damage to Systems, and loss or corruption of Data) arising as a result of a breach by that Party of this Code and/or any Bilateral Agreement shall be limited as follows:</i> ... It is also proposed to delete Section M2.7 and replace it with the following after Section M2.8 (Exclusion of Other Liabilities):</p> <p><u>Exclusion of Indirect Loss</u> <i>M2.8 Subject to M2.1, no Party shall in any circumstances be liable to another Party for any of the following losses arising as a result of a breach of this Code and/or any Bilateral Agreement:</i> (a) <u>loss of profit;</u> (b) <u>loss of revenue;</u> (c) <u>loss of use;</u> (d) <u>loss of contract;</u> (e) <u>loss of goodwill; or</u> (f) <u>loss that does not directly result from such breach and that was not reasonably foreseeable as likely to occur in the ordinary course of events.</u></p> <p>It is also noted that the definition of SEC Materials in Section M5.1 is very wide and there is a risk that the use of the wording "in connection with the designation, administration, operation..." would extend the definition of SEC Materials to cover other Parties' intellectual property associated with the use of the data or devices used by such Parties in connection with the Smart Energy Code.</p>