Department of Energy & Climate Change

Government response

Necessary Wayleaves Regime

Consultation on proposed reforms to the Electricity Act process

July 2013

Contents

Government response to consultation on proposed reforms to the Electricity Act process

INTRODUCTION

1. On 17 October 2012 the Government launched a six week consultation on possible reforms to the existing necessary wayleaves regime under Schedule 4 to the Electricity Act 1989 in England and Wales and to consider workable improvements to the Electricity (Compulsory Wayleaves) (Hearings Procedure) Rules 1967 ("the 1967 Rules") to bring them in line with more streamlined, modern day dispute resolution procedures.

2. We were pleased to hear from anyone with an interest in the impact these proposed changes might have on licence holders, businesses, land agents and on private individuals. In addition to being published on the DECC website, the consultation was emailed to a number of parties known to the Department with a particular interest in the proposed reforms. An open stakeholder event took place on 12 November 2012 at the Institution of Engineering and Technology in London to outline the proposals and give attendees more information. Twenty seven people attended the event representing the electricity industry, interested organisations and land agents. Thirty one responses were received to the consultation. The Government would like to thank all those who took time to respond to the consultation and to attend the stakeholder event.

3. The consultation document indicated that the Government's aim was to introduce any new provisions on 6 April 2013. However, in light of the responses received and desire to implement the best workable solution, it is intended that the new measures will now come into force at the next Common Commencement Date of 1 October 2013.

EXECUTIVE SUMMARY

4. Consultation responses indicated a strong swell of support to modernise the 1967 Rules, particularly to streamline the hearings process through the introduction of a written representations procedure, rather than an oral hearing in every case; the requirement for a statement of evidence to be provided by both parties; and for the introduction of formal procedures to conduct hearings for tree lopping and vegetation management orders. The Government has decided to adopt such measures through the introduction of new Hearing Rules that will be known as "The Electricity (Necessary Wayleaves and Felling and Lopping of Trees) (Hearing Procedures) (England and Wales) Rules 2013". From 1 October 2013 all hearings requested for necessary wayleaves and tree lopping orders will be heard under the new Hearing Rules. At the present time the Government has decided that it will not be taking forward any proposals for wayleaves that require changes by primary legislation, although this will be kept under review.

5. Most responses supported the introduction by Government of application fees for processing necessary wayleave applications and tree lopping orders. From 1 October 2013, an application fee of £34 per wayleave application and/or tree lopping order will be introduced and payable to DECC by licence holders. The consultation document also signalled DECC's intention to explore with the Planning Inspectorate (PINS) whether they may carry out necessary wayleave and tree lopping order hearings on behalf of the Secretary of State. Discussions with PINS have been productive since the consultation has ended, and a Service Level Agreement to implement this measure is now in place. A daily rate will be payable by licence holders for the services of PINS Inspectors to conduct any pre-hearing and hearing on behalf of the Secretary of State plus the Inspector's travel and subsistence costs. These rates will accumulate from the date the Inspector commences any work for a hearing and will also apply to those hearings conducted by written representations procedure. The daily rate or pro rata for part of a day will be £1,000 per Inspector day for any hearings conducted by PINS England and £742 per Inspector day for those conducted by PINS Wales. The new fees regulations will be known as "The Electricity (Necessary Wayleaves and Felling and Lopping of Trees) (Fees) (England and Wales) Regulations 2013".

6. Any necessary wayleave applications submitted to the Department with requests for a hearing already made, but without allocated hearing dates being notified, may now be referred by DECC to PINS for the appointment of one of their Inspectors to hear the application. On and after 1 October 2013 requests for hearings received will be referred by DECC to PINS.

7. Regarding other proposals for wayleave reform, DECC has decided that the default period of fifteen years for validity of a necessary wayleave when granted should remain, although the Secretary of State would consider granting the validity term on a case by case basis if parties requested either a shorter or longer period.

8. DECC also decided that given the differing views of consultation responses regarding the viability and policing of a voluntary code of practice for negotiations, that we would not look to introduce such a measure at this stage but will keep this option under review.

SUMMARY OF RESPONSES AND THE GOVERNMENT'S RESPONSE

Question 1: Do you agree that the necessary wayleaves regime in Schedule 4 to the Act should be retained in some form? Yes or No?

All but one of the respondents answering this question agreed that the necessary wayleaves regime in Schedule 4 to the Electricity Act 1989 should be retained. Many indicated that it continued to have an important role to play in the discharge of the licence holders' statutory obligations, whilst others considered that the process should remain but with a better balance between commercial interests and legitimate property rights in order for the process to remain accessible, proportionate and accountable.

The Government's response:
The Government agrees that Schedule 4 to the Electricity Act 1989 should be retained. It does not plan to take forward at the present time any proposals in the consultation document that would require changes to primary legislation, but this will be kept under review.

Question 2: Do you agree that there is scope to improve the operation of the current necessary wayleaves regime? What improvements might you like to see?

A number of respondents suggested that one of the areas for improvement would be to correct the imbalance between obligations of both parties to the hearing, introducing accountability to discourage misuse of the process. Another suggestion was to introduce a defined timetable for communication between parties and reasonable timescales for the removal of equipment. Others considered that there should be separate hearings processes for applications for new lines and those for existing lines, with a fast track procedure for the latter. This would be where the case for proving the need for the line and to show alternative routes or sources of supply are unnecessary. Faster decisions by the Secretary of State on tree lopping orders and certain categories of new construction such as for new customer connections would also be welcomed, and more clarity in terms of serving notices and active participation in the process by both parties were also proposed.

The Government's response:
The Government was pleased to note that a number of the improvements to the current regime suggested by respondents had been addressed in its original proposals within the consultation document. In considering the responses, the Government has however decided to produce only one new set of Hearing Rules for applications relating to both new lines and retention of existing lines. We have also decided to formally introduce a written representations procedure instead of an oral hearing in every case if this is acceptable to both parties. An oral hearing would take place if any party did not agree to proceed with the written representations procedure. Whilst noting requests for defined timescales for the removal of equipment from land, there is already provision within the Electricity Act 1989 (Schedule 4 para 8(4)) that the equipment should be removed within one month or longer as specified by the Secretary of State, and representations can be made to the Secretary of State to specify a longer period where appropriate. We will be producing new or updated guidance on the necessary wayleaves process to accompany the new Hearing Rules.

Question 3: Do you consider that a voluntary code of practice on wayleave negotiations that may result in fewer necessary wayleave applications being sought, would be useful? Why? What do you consider are the benefits or disadvantages?

The responses to this idea were mixed. Some respondents felt a code of practice would be a very good idea in principle provided it could be drawn up and agreed by all interested parties. There were concerns that an "industry led" code as suggested in the consultation document would not be ideal. Whilst the code would help focus negotiations on the key areas of disagreement between parties in a clear and structured manner, it was thought the practicalities of administering such a voluntary code might prove problematic given Government's preference for it to be industry lead. For instance who would ensure that the code would be binding on parties, and who would police the code to ensure compliance whilst ensuring fairness for the licence holder and duty of care to protect the landowner? Who would administer any penalties for non-compliance with the code and how would these be reported? One respondent suggested that any code should not be like the Telecommunications Code which they considered gave the landowner virtually no opportunity to resist. In general it was felt by respondents that whilst a code of practice was a good idea in theory, it would only really work in practice if it were to be a mandatory code of practice rather than voluntary one.

The Government's response:
The Government has decided not to take forward this proposal at this stage in view of potential problems with drafting the code of practice, monitoring and enforcement. We will however monitor implementation and the effectiveness of the new Hearing Rules and keep this option under review.

Question 4: Do you think the Secretary of State's general policy of granting necessary wayleaves with a duration of 15 years is reasonable? Should it be changed? If so: why, what alternative duration and how?

A larger number of respondents considered that the current 15 year duration for the grant by the Secretary of State of a necessary wayleave was reasonable and should remain unchanged. Others considered that 15 years is too long as the average house ownership is 6-7 years and suggested the period should be revised to either 5 or 10 years. One respondent suggested that the term should be no more than 15 years but that there should be a provision within the grant of the necessary wayleave to allow apparatus to be moved at the landowner's request if planning consent is achieved by the landowner for other schemes such as housing. Two other respondents suggested that 15 years was not long enough and that the term if granted should be linked to asset life of say 40 years or more. Many felt that there should be discretion by the Secretary of State to consider representations for a longer or shorter duration than 15 years on a case by case basis, but that any longer than 15 years was considered by a number of respondents to risk the grant of a necessary wayleave becoming indistinguishable from compulsory purchase rights under Schedule 3 to the Electricity Act 1989.

The Government's response:

The Government has decided that there is not a compelling case to change the current default period of 15 years for the validity of a necessary wayleave when granted by the Secretary of State. The Secretary of State will continue to consider on a case by case basis amending the term of the necessary wayleave to either a shorter or longer period than 15 years taking into account all relevant facts if requested to do so.

As for the suggestion that a necessary wayleave, if granted, should contain a provision within the grant of that wayleave to allow apparatus to be moved at the landowner's request if planning consent is obtained for schemes such as housing. The Secretary of State considers that in general, when consent for an overhead line is given by him under s37 of the Electricity Act 1989 there is a degree of permanence in that consent in order to provide the licence holder with some certainty in regard to security of supply for their network. Any modification requested by the landowner to relocate or underground any existing line would be at his expense, and the landowner would still need to demonstrate to the licence holder why the proposed development cannot take place with the existing overhead line in situ without adversely affecting the development potential of the site. Any landowner is already able to terminate the existing wayleave and request such a modification from the licence holder, and the Secretary of State therefore sees no reason why this provision should be made as a direction in the grant of any necessary wayleave.

Question 5: Do you agree with our proposals to make provision in new hearing rules for pre-hearing meetings, written representations and vegetation management?

The overall consensus of responses was in favour of the introduction of a written representation procedure where it was agreed to proceed in such a way by both parties, retaining the right of parties to fall back on the oral hearing process if sought by either party. A pre-hearing meeting was considered by some as a necessary part of the negotiation process acting as a catalyst towards settlement before the hearing itself took place. A number felt that there should be a formal obligation placed by the Secretary of State on both parties to attend. One respondent suggested the period between pre-hearing and full hearing dates should be fixed at a maximum of 60 days with maximum time for completion of the hearing to decision to be 90 days. The reasons for suggesting such a measure was in their view to increase certainty in the process and prevent precautionary Notices to Remove being served. The formal introduction of provisions to hear tree lopping and felling order applications was welcomed by all respondents.

The Government's response:

The Government will be introducing provisions that pre-hearing meetings are held where necessary at the Secretary of State's/Inspectors' discretion. We have decided that it is not always necessary for such meetings to be face-to-face, so our intention is to enable such meetings to be conducted by teleconference for instance where agreed between parties and the Inspector. The Secretary of State does not have powers to compel the parties to attend any hearing. Procedures for hearing tree lopping and felling orders will be put in place as a component of the new Hearing Rules.

Question 6: Do you think that new provisions should be introduced to ensure that the landowner and/or occupier or their land agents produce a Statement of Case or Statement of Evidence before any hearing convenes, and that they should be compelled by the Inspector to attend any hearing? If not, why not?

In response to this question, the "for" and "against" representations for the introduction of such a provision were fairly even. A number of respondents considered that requiring the landowner to produce a statement of case would not be unreasonable and would correct the current imbalance in the system by placing equal responsibility on each party. One respondent suggested that the evidence currently submitted by licence holders should be reviewed with a view to reducing the volume. For those against such a measure, they felt that if the landowner was compelled by Government to produce evidence for submission ahead of any hearing, then the licence holder should pay the landowner's costs for producing this evidence. The reason given for this view was that it was for the licence holder to prove their position in regard to the installation and/or retention of a line, and not for the landowner to disprove it. Many felt that there should be no compulsory attendance at a hearing by landowners if they had submitted written evidence ahead of the hearing as required by the Inspector and in some cases, conducted a pre-hearing by teleconference. One respondent also commented that whilst they agree landowners should submit a Statement of Case, landowners should also be able to make a simple statement if they so wish, and that they have only run the matters to a hearing as part of the process to access the Upper Tribunal (Lands Chamber) for settlement of compensation. A further view expressed was that if the landowner or his representatives did not attend any hearing that there should be an automatic award of a necessary wayleave to the licence holder.

The Government's response:

The Government has decided that it will strongly encourage all parties to provide evidence in the form of a Statement of Evidence within a defined timeframe as set out by Inspectors before any hearing convenes. This evidence may be provided and exchanged electronically in accordance with the Inspector's direction. The Government will not be reducing the evidence currently submitted by licence holders to a hearing as the need and expediency for a new line or the retention of an existing line still needs to be examined thoroughly by Inspectors. Whilst the Secretary of State is unable to compel parties to attend any hearing he does not agree that there should be an automatic award of a necessary wayleave to the licence holder if the landowner does not appear as the Electricity Act 1989 requires the Secretary of State to determine if the line is necessary or expedient before granting a necessary wayleave.

Question 7: Do you think the Secretary of State should be entitled to recover the Department's costs against the landowner and/or occupier if a pre-hearing or hearing is arranged and they or their representative agent fails to attend (or provide evidence to the Inspector as agreed) without reasonable excuse? If you agree, please state why, and if not, why not?

A number of respondents considered the Department should be able to recover costs against landowners/agents where they had either failed to attend any hearing or provide evidence to the Inspector as directed. Others felt that landowners should not be made to attend a hearing if they had agreed to the written representations procedure, submitted a

statement of case to the Inspector and a pre-hearing had been conducted in person or by teleconference. Some respondents said that landowners cannot afford the expense to be represented at hearings and this was caveated with the point that in general as there was (in the landowners' view) little prospect of a successful outcome for the landowner against the licence holder's interest, why should they go to the time and expense to attend any hearing? One respondent indicated that many agents only use the hearing process as a stepping stone to the Upper Tribunal (Lands Chamber) to assess compensation. If the recovery of the Department's wasted costs were to be introduced then a valid schedule and proper cancellation procedure should be implemented.

The Government's response:

The Secretary of State has no power to compel the parties to attend any hearing. The Secretary of State has decided that he would not incur any wasted costs even if the landowner failed to attend as, under the new legislation to be introduced, any landowner would be strongly encouraged to provide a written Statement of Evidence ahead of the hearing date and it would be for the Inspector to consider that evidence and to test the licence holder's further evidence if required at the hearing. Therefore we do not propose to impose a charge on anyone who fails to attend.

Question 8: Do you agree that DECC should introduce fees that are applicable to licence holders for processing necessary wayleave applications? Are our proposals reasonable and fair? If not, why not?

Most had no objection to a fair and reasonable fee structure being introduced and felt that by introducing fees payable by licence holders it would make them consider acting more reasonably and to use their compulsory powers only as a last resort. A large number of respondents accepted that Government has to recover its costs and agreed that DECC should introduce processing fees. Some licence holders felt that by introducing processing fees however, this could unintentionally increase the number of landowners wishing to terminate agreements with licence holders in the knowledge that licence holders would face additional costs. One licence holder suggested DECC should refrain from introducing such fees until the effectiveness of the new Hearing Rules was known as they do not know what impact the proposals would have on their regulated expenditure and there could be the prospect of shifting the burden from taxpayers to electricity consumers. Others were not convinced the introduction of fees will discourage misuse of the applications process and may instead have the effect of replacing the current process with an identifiable and disproportionate premium on compensation settlements.

The Government's response:

The Government will be introducing fees for processing necessary wayleave applications and tree lopping orders as indicated in its consultation document. Since the consultation has ended, the Department has concluded discussions with PINS and a Service Level Agreement is now in place to facilitate their Inspectors conducting hearings on behalf of the Secretary of State. The Department will be introducing an application fee of £34 payable to DECC as indicated in the consultation Impact Assessment, but does not intend to take forward the tiered structure as previously outlined for hearings. Instead, any pre-hearing and/or hearing will be conducted by PINS in accordance with the Service Level Agreement. The current basis for these services is per day or pro rata for part of a day for the Inspectors' time, including making their recommendations to the Secretary of State, plus any travel and substance incurred by PINS Inspectors on an actuals basis. The fee of £1,000 per day will be payable by licence holders for hearings conducted by PINS England and £742 per day for hearings conducted by PINS Wales. PINS has confirmed that these are appropriate rates for their Inspectors to conduct hearings in England and Wales. The final hearings costs payable will inevitably be variable depending on the number of days required by Inspectors to conduct any hearing procedure. These charges will come into effect from 1 October 2013 and will apply to any application submitted to the Department on and after that date.

Question 9: Do you have any ideas for other wayleave reforms that you might wish the Department to consider? If so, please explain below and what benefits if any you consider they might accrue.

A number of licence holders would like to see the current imbalance between burdens on parties in the process addressed e.g. a reduction in evidence required from the operator, the requirement for transcripts of hearings to be removed etc. Other representative parties would like to have more prescriptive timescales for the wayleaves process and a better understanding of how operators interpret the legislation and transpose it into their own company policy. One suggestion was that the current text utilised by DECC when granting a necessary wayleave was too vague about what rights were being granted during the length of the term (and in some cases this has led to further dispute with landowners). It was suggested that in future, rights and responsibilities should be more clearly conveyed and that perhaps a new document format should mirror the standard wayleave documents used by operators with the addition of a fixed term clause. Some respondents suggested that as, in their view, necessary wayleaves affect the title to the property they should be required to be registered with the Land Registry.

The Government's response:

The Government considers that strongly encouraging landowners and/or their agents to produce a statement of evidence before any hearing takes place will go some way to addressing the imbalance currently experienced by parties. We will not however be reducing the required level of evidence submitted by licence holders to a hearing, as the need and expediency for a new line or retention of an existing line still needs to be examined thoroughly by Inspectors. We agree that there is scope to improve the current text we include in our documentation when the Secretary of State grants a necessary wayleave to licence holders and will be reviewing this, taking on board any best practice used by the industry.

We consider that it would also be helpful to provide clearer guidance on the hearings process and interpretation of the new Hearing Rules, including a pro-forma document that sets out the minimum evidence required from the licence holder and from the landowner/representing agent when an application is submitted to DECC and what evidence is required at a hearing. We anticipate that new guidance will be published in time to accompany the entry into force of the new regulations.

In response to the view that necessary wayleaves should be required to be registered with the Land Registry. To implement such a measure would require a change to primary legislation which we have indicated we will not be taking forward at the present time.

Question 10: Once the Department has considered response to this consultation and decided how to proceed, would you like to see/comment on any draft statutory instruments relating to the new hearing rules and introduction of processing fees applicable to licence holders, before they are laid before Parliament? Please indicate below: Yes or No?

All respondents indicated that they would like to see the draft statutory instruments relating to the new Hearing Rules and introduction of processing fees applicable to licence holders.

The Government's response:
DECC has prepared two statutory instruments to bring the measures for new Hearing Rules and the introduction of a fee structure for processing necessary wayleave and tree lopping applications to enter into force at the 1 October 2013 Common Commencement Date. We have circulated the draft statutory instruments informally to interested parties and will consider any observations before finalising and laying these before Parliament.

NEXT STEPS

The Government intends to implement those measures as indicated in this Government response, for the Common Commencement Date of 1 October 2013.

LIST OF RESPONDENTS TO THE CONSULTATION

Below is a full list of respondents to the consultation. Their responses have been summarised in this Government response and have helped to clarify, formulate and inform the Government view and its proposals moving forward.

- BLB Utilities
- Country Land and Business Association (CLA)
- Carter Jonas LLP
- The Central Association of Agricultural Valuers (CAAV)
- Compulsory Purchase Association (CPA)
- Cambridge Land Consultants
- Dalestone Energy
- Mike Evans (Farmer and landowner)
- Electricity North West
- Farmers Union of Wales
- Paul Gent (Individual)
- Isobel Gordon (Individual)
- Gillenden
- Hamer Associates Limited
- House Builders Federation
- Irwin Mitchell LLP
- National Grid
- National Farmers Union
- Northern Power Grid
- Property Compensation Consultants
- Antoinette Sandbach AM (Shadow Minister for Rural Affairs for Wales)
- Ernie Sherwin (Independent land agent)
- Seraph Surveying
- SP Energy Networks
- Southern Electric Power Distribution plc
- Squire Sanders LLP
- Thomson Broadbent Land Agents
- UK Power Networks
- Wayleaves.com
- West Coast Energy
- Western Power Distribution

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