

## **Utility Regulator Policy on Cost Recovery for Dispute Settlement Role**

### **Introduction**

The Utility Regulator (**UR**) has, under a number of pieces of legislation<sup>1</sup>, been given the role of acting as dispute resolution authority in relation to certain types of dispute which may be referred to it for determination.

In most cases, the UR has the power to recover the costs or expenses incurred by it in determining these disputes.<sup>2</sup>

This policy statement concerns how the UR will exercise those powers when it makes determinations in the future. We wish to state clearly our intended approach to the recovery of the costs incurred in determining any dispute which has been referred to us.

### **Policy**

The UR's policy is that, other than in exceptional cases, whenever it determines a dispute in respect of which it has a power to recover its costs, it will also make an order which requires one or both of the parties to the dispute to pay an amount equal to the specified costs incurred.

In determining which party is required to pay the UR's costs, or (in a case in which both parties are to bear some part of the costs) the proportion to be paid by each party, the UR will take into account all the circumstances of the case. This will include, without limitation, the outcome of the dispute, the reasons for reaching that outcome, the conduct of each party in the period giving rise to the dispute, the conduct of each party during the dispute process, the extent to which each party has or has not (for instance through the clarity, or lack of it, of submissions and evidence) contributed to the efficient disposal of the dispute, and the financial means of each party.

The costs that the UR is entitled to recover may, without limitation, include internal staff costs and overheads, costs incurred on external advisors and consultants, costs incurred by those advisors and consultants, and disbursements (including for example costs of reports and studies and travel costs).

In determining the circumstances of each individual case, the UR may choose either not to make a costs order, or not to make an order in respect of the full amount of its costs. The UR does not intend to set out an exhaustive list of such cases, since each situation will be considered on its merits in the light of the circumstances prevailing at the time.

However, the type of situation that the UR would be likely to regard as exceptional is one in which the person referring the dispute has been unsuccessful but lacks the financial means to pay the costs in

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<sup>1</sup> Primarily the Electricity (NI) Order 1992, the Gas (NI) Order 1996, the Energy (NI) Order 2003, the Water & Sewerage Services (NI) Order 2006, the Gas Directive (Directive 2009/73/EC) and the Electricity Directive (Directive 2009/72/EC).

<sup>2</sup> By way of an example see Article 26(7)(a) of the Electricity (NI) Order 1992.

full (for instance if that person is a domestic customer), and where it would be either inappropriate or inequitable for any other party to the dispute to be required to pay those costs.

### **Reasons**

The UR has not adopted this policy when determining previous disputes that have been referred to it. However, the number of disputes which are being referred for determination, while unpredictable, has been increasing over the past few years. This is particularly so in respect of disputes relating to the rights and obligations of electricity network companies.

The UR cannot know in advance how many disputes will arise in any year, and it is not efficient for it to carry the internal resource required to deal with all possible eventualities. In a given year, the number of disputes being referred may therefore place demands on the UR which are in excess of the capacity the UR has available to it for its general regulatory workload. It is often neither possible nor appropriate to divert staff from the work that they are already carrying out in order to participate in the dispute process, in particular since most determinations must be made by tight statutory deadlines.

In consequence, the experience of the UR is that it is often necessary for it to use external advisors and consultants to assist it to manage the dispute workload. In addition, the issues that are raised in some disputes are of a complex legal or technical nature, and would, regardless of the time deadlines and issues of capacity, merit external legal, technical or other assistance being obtained.

Moreover, the costs incurred by the UR have to be defrayed by one means or another. If the costs relating to a dispute are not met by one of the parties to that dispute, they will need to become part of the costs recovered through licence fees from the wider industry. The UR's general position is that, in principle, the parties to a dispute, rather than other parties in the industry, should pay for the costs occasioned by the dispute. This approach accords with general fairness. It should also provide an incentive for parties to consider whether they can resolve disputes through dialogue and negotiation, without the need for a referral to the UR, which the UR encourages.

### **Implementation**

The policy will be implemented with immediate effect.