



Draft Legal Text

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SECMP0043:

Modification to Services Force Majeure Provisions

Summary

This modification aims to introduce a process to allow DCC to claim relief under the Operational Performance Regime (OPR) for any exceptional events that are beyond its control.

About this document

This document contains the draft SEC legal text that will deliver the intent of SECMP00043.

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Legal Text

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1. Draft Legal Text

This section sets out the draft Legal Text Changes for SECMP00. These changes have been drafted against the Smart Energy Code (SEC) version 6.00¹.

Section A ‘Definitions and Interpretations’

Add the following new definitions into Section A1.1:

<u>OPR Exceptional Event</u>	<u>means Force Majeure for which the DCC is the Affected Party and which occurs in relation to the matters which are subject to OPR Reporting.</u>
<u>OPR Reporting</u>	<u>means reporting in respect of the operational performance regime under schedule 4 of the DCC Licence (the Operational Performance Regime).</u>

Section H ‘DCC Services’

Add the following new sections H13.7 to 13.14:

OPR Exceptional Events

H13.7 Sections H13.7 to H13.14 shall apply only to the extent that the OPR Reporting established under the DCC Licence applies by reference to reporting under this Code. OPR Exceptional Events shall not apply in respect of Performance Measure reporting under Section H13.4.

H13.8 For the purposes of OPR Reporting, in measuring performance for each Performance Measure, the DCC shall exclude from the Service Level calculation any and all instances of delayed or non-performance for which the DCC has relief for an OPR Exceptional Event by virtue of Section H13.12.

H13.9 The DCC may claim relief for the purposes of OPR Reporting in respect of the Performance Measures to the extent this is due to OPR Exceptional Events. Where the DCC also wishes to claim relief in respect of its obligations under this Code, the DCC

¹Note that if a new version of the SEC is designated before the submission of the Final Modification Report to the Change Board or Authority, the drafting will be checked to make sure there are no consequential impacts. Our current understanding is that the specifications that SECMP0006 is amending are not expected to change as part of any forthcoming designations.

must also separately claim relief for Services FM under Section M3 (Services FM and Force Majeure).

H13.10 The DCC cannot claim an OPR Exceptional Event has occurred:

- (a) in relation to any wilful act, neglect or failure to take reasonable precautions against the relevant OPR Exceptional Event by the DCC or its servants, agents, employees or contractors (including the DCC Service Providers);
- (b) in relation to any circumstances resulting from a failure or delay by any other person in the performance of that other person's obligations under a contract with the DCC other than this Code (unless that other person is itself prevented from or delayed in complying with its obligations as a result of OPR Exceptional Events); and/or
- (c) as a result of any shortage of labour, material or other resources unless caused by circumstances which are themselves OPR Exceptional Events,

and in any event, the DCC shall not be entitled to relief for the purposes of OPR Reporting if and to the extent that it is required to comply with the BCDR Procedure in accordance with Sections H10.9 and H10.10 (the Business Continuity and Disaster Recovery Procedure) but has failed to do so (unless this failure is also due to OPR Exceptional Events affecting the operation of the BCDR Procedure).

H13.11 The DCC shall, as soon as reasonably practicable (and in any event within five (5) days of the occurrence of the OPR Exceptional Event), give to the Users that were due to receive the affected Services and to the Panel full details of the OPR Exceptional Event and any relief for the purposes of OPR Reporting which the DCC wishes to claim in connection with the OPR Exceptional Event.

H13.12 The DCC shall be entitled to relief for the purposes of OPR Reporting in respect of OPR Exceptional Events to the extent that the Panel agrees following consultation with any relevant Sub-Committee that the requirements of Sections H13.9 and H13.10 are met, and that:

- (a) the DCC could not have avoided the occurrence of the OPR Exceptional Event (or its consequences or likely consequences) by taking steps which the DCC was required to take (or procure) under this Code and any Bilateral Agreement or might reasonably be expected to have taken;
- (b) the OPR Exceptional Event directly caused the non-performance of the Services for which relief is claimed;
- (c) the time lost and/or relief from the obligations under this Code and any Bilateral Agreement claimed by the DCC could not reasonably be expected to be mitigated or recovered by the DCC acting in accordance with Good Industry Practice; and
- (d) the DCC is taking all steps in accordance with Good Industry Practice to overcome or minimise the consequences of the OPR Exceptional Event on the performance of the Services.

H13.13 The Panel shall reach a determination as to whether the DCC is entitled to relief for the purposes of OPR Reporting in respect of an OPR Exceptional Event in accordance with Section H13.12 within 10 Working Days after the DCC notifies the Panel of the OPR Exceptional Event under Section H13.11.

H13.14 The DCC shall notify the affected Users and the Panel as soon as reasonably practicable after the OPR Exceptional Event ceases or no longer causes the DCC to be unable to comply with its obligations under this Code and/or any Bilateral Agreement in respect of the Services.

Section M ‘General’

Add a new sections M3.1A as follows:

M3.1A The concept of Services FM is in addition to the concept of OPR Exceptional Events which applies under and in accordance with Sections H13.7 to H13.14 (OPR Exceptional Events). It is possible for an event or circumstance to constitute both an OPR Exceptional Event and Services FM, in which case the DCC may seek relief

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under both Sections H13.7 to H13.14 (OPR Exceptional Events) and this Section M3. Notwithstanding any other provision of this Section M3, relief for the purposes of OPR Reporting will only arise under and in accordance with the process for OPR Exceptional Events in Sections H13.7 to H13.14 (OPR Exceptional Events).

Amend sections M3.3 as follows:

M3.3 The DCC cannot claim Services FM has occurred:

- (a) in relation to any wilful act, neglect or failure to take reasonable precautions against the relevant Services FM event by the DCC or its servants, agents, employees or contractors (including the DCC Service Providers);
- (b) in relation to any circumstances resulting from a failure or delay by any other person in the performance of that other person's obligations under a contract with the DCC other than this Code (unless that other person is itself prevented from or delayed in complying with its obligations as a result of Services FM); and/or
- (c) as a result of any shortage of labour, material or other resources unless caused by circumstances which are themselves Services FM, and in any event, the DCC shall not be entitled to relief if and to the extent that it is required to comply with the BCDR Procedure in accordance with Sections H10.9 and H10.10 (the Business Continuity and Disaster Recovery Procedure) but has failed to do so (unless this failure is also due to Services FM affecting the operation of the BCDR Procedure).

Amend section M3.5 as follows:

M3.5 The DCC shall be entitled to relief in respect of Services FM to the extent that the Panel agrees following consultation with any relevant Sub-Committee (or it is subsequently determined by arbitration) that the requirements of Sections M3.2 and M3.3 are met, and that:

Add a new section M3.5A as follows:

M3.5A The Panel shall reach a determination as to whether the DCC is entitled to relief in respect of Services FM in accordance with Section M3.5 within 10 Working Days after the DCC notifies the Panel of the Services FM under Section M3.4.

Amend Section M3.8 and M3.9 as follows:

M3.8 The DCC hereby irrevocably and unconditionally waives all and any rights to claim any extension or allowance of time or other relief from performance of its obligations in respect of the Services other than to the extent caused by Services FM (but without prejudice to the process applying to OPR Exceptional Events). Each User hereby irrevocably and unconditionally waives all and any rights to claim compensation (including for breach of contract or in tort) for failure by the DCC to provide the Services to the extent caused by Services FM.

M3.9 The concept of Force Majeure applies in respect of:

- (a) all obligations of the DCC pursuant to this Code and any Bilateral Agreement other than the obligations of the DCC to provide the Services; and
- (b) all obligations of the other Parties pursuant to this Code and any Bilateral Agreement,

all such obligations together being in this Section M3 the “**Relevant Obligations**”. For clarity, OPR Exceptional Events (which are defined by reference to Force Majeure) also apply in respect of the DCC claiming relief in respect of its obligations to provide the Services for the purposes of OPR Reporting under Sections H13.7 to H13.14 (OPR Exceptional Events).