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SECMP0043

‘Modification to Services Force Majeure Provisions’

Modification Report

Version 0.11

About this document

This document is the Modification Report for SECMP0043 'Modification to Services Force Majeure Provisions'. It provides detailed information on the background, issue, solution, costs, impacts and implementation approach. It also summarises the discussions that have been held and the conclusions reached with respect to this Modification Proposal.

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This document also has two annexes:

- **Annex A** contains the redlined changes to the Smart Energy Code (SEC) required to deliver the proposed solution.
- **Annex B** contains the full responses received to the Working Group Consultation.

1. Summary

In April 2018, Ofgem implemented the Data Communications Company (DCC) Operational Performance Regime (OPR) through modification to the Smart Meter Communication Licence (DCC Licence). The key principles underpinning the design of the OPR performance measures are consistent with the Performance Measures in SEC Section H13. The OPR places performance incentives on DCC by placing 100% of the value of DCC's smart meter related margin at risk.

Following a review of current regulation, the DCC believes that neither the OPR or the SEC provide an application process for the DCC to apply for relief for 'all categories' of exceptional events (events outside the DCC's control). In the absence of a process for a broader concept of exceptional events in the SEC, the DCC believes there is a risk that it will be unfairly penalised under the OPR for delayed or non-delivery of DCC services due to events outside its control. The alternative option for mitigating this risk would be for the DCC to invest in additional protections for exceptional events (further work would need to be done to identify potential options). Investigating and investing in additional protections is less efficient as an exceptional event may never arise, and less economical as overall it would introduce additional costs to industry.

An application process does exist under SEC Section M3 for Services Force Majeure (FM) under which the DCC can apply to the SEC Panel for relief for delayed or non-delivery of DCC Services. However, Services FM is narrowly defined and only applies to a limited number of exceptional events, such as acts of terrorism or war. It does not apply to all events outside the DCC's control (for example a power failure/blackout or access to an area being quarantined in connection with disease and illness).

The proposed solution is to introduce a new application process under SEC Section H, which the DCC and the Panel would follow if the DCC wishes to claim relief for exceptional events for its OPR reporting. This new process is distinct from the existing Services FM application process. It introduces a broader concept of exceptional event under a new definition of OPR Exceptional Event and sets out the relief application process. This solution would apply only to the DCC's reporting under the OPR, and not to the DCC service provider reporting under SEC Section H13.

The Proposer notes two key benefits of this modification are that the decision of whether the DCC is given relief is made by the SEC Panel (on behalf of the industry), and that it better enables the DCC to comply with the First Enduring General Objective in its own Licence.

This modification is a text-only modification that will only impact the DCC; there are no system changes required. Implementation costs are limited to Smart Energy Code Administrator and Secretariat (SECAS) time and effort in implementing the changes to the SEC. If approved, SECMP0043 is proposed for implementation in the February 2019 SEC Release or as soon as possible thereafter.

2. Background

The Operational Performance Regime

The DCC Licence contains a framework whereby Ofgem can establish an OPR that would place performance incentives on the DCC's operations. The OPR would place 100% of the value of the DCC's smart meter-related margin at risk. Ofgem issued three industry consultations between March 2016 and June 2017 on the design and implementation of the OPR.

On 4 September 2017, Ofgem issued its decision to implement the OPR. The regime and changes to Schedule 4 of the DCC Licence to reflect the new obligations took effect from 1 April 2018.

Part of Ofgem's considerations looked at how exceptional events in the DCC's performance reporting should remain consistent between the OPR, the SEC and Service Provider performance measures. Respondents to Ofgem's June 2017 consultation on the implementation of the OPR believed that this should be consistent but felt there was a lack of transparency and consultation with industry on the content of the DCC's Allowed Exceptions (SEC Section H13). The DCC also expressed concern that exceptional events should be managed through robust regulatory governance, and not treated in the same way as Allowed Exceptions.

In its decision, Ofgem stated:

> *"If SEC Parties believe that current processes can be improved, they should take actions to do so through SEC governance processes such as code modifications."*[1]

What is the issue?

Following a review of current regulation, the DCC believes that neither the OPR, the DCC Licence or the SEC provide a process for the DCC to apply for relief for 'all categories' of exceptional events.

An application process does exist under SEC Section M3 'Services Force Majeure', under which the DCC can apply to the SEC Panel for relief for delayed or non-delivery of DCC Services. However, Services FM is narrowly defined and only applies to a limited number of exceptional events, such as acts of terrorism or war. It does not apply to all events outside of the DCC's control, for example a power failure/blackout or access to an area being quarantined in connection with disease and illness.

The DCC is not able to recover margin lost under the OPR for exceptional events under contracts from its service providers. This is because the OPR and SEC performance frameworks work differently with respect to compensation. The performance regime in the SEC flows down to the service provider contracts, and the compensation element of the scheme is designed to compensate customers if service provider performance is below the SEC defined service levels via a reduction in the DCC's Internal and/or External Costs.

In the event of an exceptional event such as a blackout impacting DCC Services, compensation from service providers will be via a reduction in the DCC's Internal and/or External Costs. In parallel, the DCC will lose margin under the OPR, but is unable to recover the margin from service providers under contracts.

In the absence of a process for a broader concept of exceptional events in the SEC, the DCC believes there is a risk that it will be unfairly penalised under the OPR for delayed or non-delivery of

[1] Ofgem's OPR Decision, Page 5: https://www.ofgem.gov.uk/system/files/docs/2017/09/1._decision_on_dcc.pdf

DCC services due to events outside its control. To protect itself against this risk, the DCC may have to invest in costly mitigations..

The DCC's analysis of current regulation is set out in the table below. The table highlights that a robust governance framework for managing exceptional events (encompassing a broader set of relief events) does not currently exist.

DCC's assessment of current regulation			
Regulation	**Purpose**	**Application process for exceptional events**	**Applies to Performance Measures**
DCC Licence – Schedule 4 OPR	Places performance incentives on DCC's operations.	**No** Ofgem's recommendation is that current SEC processes are reviewed for this.	**Yes** SEC performance reporting will form the basis of OPR performance reporting.
SEC – M3 Services Force Majeure	DCC's rights and obligations in relation to claiming Services Force Majeure (for DCC Services).	**No** Services FM is narrowly defined and applies to a limited number of exceptional events such as acts of terrorism or war. It does not apply to all categories of exceptional events.	**Yes** However, this is not expressly stated and is limited to a narrowly defined set of exceptional events.
SEC – M3 Force Majeure	SEC Parties rights and obligations in relation to claiming FM.	**No** FM applies to all circumstances, however relief for DCC Services applies under Services FM.	**No** Services FM applies to DCC services.
SEC – H13 Performance Measurement Methodology	Methodology for calculating SEC Performance Measures.	**No** DCC is entitled to remove events or period of time from performance calculations (Allowed Exceptions). This is applied to exceptions relating to day to day operational issues (e.g. non-compliance with processes under the CHISIM).	**Yes**

SECMP0043 was raised by DCC on 18 November 2017 to address this issue.

3. Solution

Proposed Solution

The proposed solution is to introduce a new application process under SEC Section H, which the DCC and the Panel would follow if the DCC wishes to claim relief for exceptional events for its OPR reporting. The process put forward has been modelled on the existing Services FM process under SEC Section M3 but is distinct from this process.

The solution:

- Introduces a broader concept of exceptional events under the new definition of OPR Exceptional Event;
- Sets out the relief application procedure under Section H13; and
- Clarifies the existing Services FM application procedure in Section M3; and

This solution is applicable only to DCC's reporting under the OPR and not to the DCC service provider performance reporting under Section H13. Furthermore, the relief is not passed to the service providers.

This will be achieved through amendments to SEC Sections A1, H13, and M3 as follows:

- A1 – define the terms OPR Reporting and OPR Exceptional Event;
- H13 – explicitly set out that the DCC is entitled to apply for relief to the SEC Panel for an OPR Exceptional Event for its OPR Reporting; however, such relief shall not apply in respect of the SEC Performance Measures under Section H13.4; and
- M3 – make some procedural clarifications to the relief process for Services FM.

Legal text

The changes to the SEC required to deliver the Proposed Solution can be found in Annex A.

4. Impacts

This section summarises the impacts that would arise from the implementation of this modification.

SEC Parties

SEC Party Categories impacted			
	Large Suppliers		Small Suppliers
	Electricity Network Operators		Gas Network Operators
	Other SEC Parties	✓	DCC

The DCC will be able to claim for relief under the OPR for any exceptional events.

There are no direct impacts on any other SEC Parties in implementing this modification. Two Working Group Consultation respondents noted they could be consequentially impacted as a result of DCC claiming relief, with one noting the DCC Charges could be incurred even though the DCC has not met the required performance standards.

DCC Systems

There are no impacts on DCC Central Systems.

SEC and subsidiary documents

The following parts of the SEC will be impacted:

- Section A 'Definitions and Interpretations'
- Section H 'DCC Services'
- Section M 'General'

Other industry Codes

There are no other industry codes impacted by this change.

Greenhouse gas emissions

There are no Greenhouse Gas Emission impacts anticipated.

5. Costs

DCC costs

There are no costs to the DCC to implement this modification.

SECAS costs

The estimated SECAS implementation costs to implement this modification is two days of effort, amounting to approximately £1,200. The activities needed to be undertaken for this are:

- Updating the SEC and releasing the new version to the industry.

SEC Party costs

There are no costs to SEC Parties to implement this modification. Two Working Group Consultation respondents noted the potential to incur costs in the future as a result of Exceptional Events.

6. Implementation approach

Recommended implementation approach

The Working Group is recommending an implementation date of:

- **28 February 2019** (February 2019 SEC Release) if a decision to approve is received on or before 14 February 2019; or
- **10 Working Days following approval** if a decision to approve is received after 14 February 2019.

The DCC highlights that the OPR is already in force and that this process should be put in place as soon as possible, to mitigate any risks arising from an exceptional event.

The Working Group agrees that, if SECMP0043 is approved, it should be implemented as soon as possible. Respondents to the Working Group Consultation also supported this approach.

7. Discussions and development

Initial proposal and consideration

DCC's initial modification (submitted in November 2017) proposed amendments to the definition of Services FM and Section M3 'Services FM and Force Majeure' only. Under this modification, DCC proposed the following changes:

- Changes to the definition of Services FM to allow for a broader definition of relief events, and to clarify that a breach by another Party of its SEC obligations would constitute a circumstance beyond the affected Party's control; and
- Clarifications to the procedures in Section M3 which the DCC and the Panel are to follow if the DCC wishes to claim relief. For example, the Panel would be required to provide a decision within 10 Working Days of the DCC's application.

The Working Group considered this solution and expressed the following concerns with regards to the proposed legal text changes:

- The proposed legal text changes may result in unintended consequences: in particular they may give DCC the ability to seek relief against all of its obligations under the SEC, rather than being limited to assessing performance against the OPR performance measures;
- Members didn't believe there was any need for an extra definition on top of the existing ones as this would create a two-tier approach to Services FM events, depending on whether the affected Services fell under the OPR. This could potentially cause inconsistency across DCC services and;
- Members also questioned how the relief process would work in practice, and how confidential evidence would be shared.

DCC stated that Services FM is narrowly defined and does not capture all potential events outside DCC's control. DCC stated it simply wanted the ability to apply to the SEC Panel for relief for any events that were beyond its control, as some events cannot be foreseen or predicted. The following clarification points were made by DCC:

- The current SEC definition of relief events (under Services FM) is consistent with Service Provider contracts, the contracts will remain un-changed, and relief will be for OPR purposes only
- DCC is not able to claim relief for exceptional events for OPR purposes under contracts from its Service Providers. This is because the OPR and SEC performance frameworks are different with respect to compensation; and
- The relief position will be reported to Ofgem under DCC's reporting for the OPR.

Ofgem believes that the decision for whether DCC has relief should be made by the industry (therefore under SEC governance); however, the final decision in relation to OPR performance will be made by Ofgem

What potential events could relief under the OPR be needed?

DCC presented examples of potential events outside of its control to the Working Group, which are not captured by the current definition of Services FM. The scenarios included a power outage

(preventing meter reads in the region), a region being quarantined due to a foot-and-mouth disease outbreak (preventing DCC from accessing the region), and a SEC Party failing to comply with the SEC. DCC stated that these events may impact its ability to perform its obligations under the SEC. The examples were presented to demonstrate to the Working Group that the proposed modification would ensure governance is in place for DCC to apply for relief for events outside its control.

There was some support for the issue, but members felt that some of DCC's scenarios could fall under the existing FM definition, and noted that the relief process existed under Services FM and not FM. Therefore, there would need to be clarification around the difference between the two definitions. There was also concern that broadening the Services FM definition could potentially shield DCC's service providers from their contractual obligations. DCC clarified that relief would be for OPR purposes only, and would not be applied to service provider performance reporting under the SEC. DCC further noted that it should have the ability to apply to the SEC Panel to claim relief for events outside of its control, for the Panel to be able to make an informed decision, and not be limited by the current narrow definition of Services FM events, which would result in DCC being penalised due to a wording technicality under the SEC.

How has the legal drafting evolved?

DCC provided a set of proposed changes to SEC Section M3 with its original modification proposal which were presented to the SEC Lawyer. The SEC Lawyer reviewed the proposal and provided comments on the proposed amendments, which were issued for industry consultation. The SEC Lawyer's comments and the responses to the consultation were presented to the Working Group. It was concluded that alternative solutions for implementing the modification should be reviewed. The four options identified were:

- **Option 1:** Amend Section H13 'Performance Standards and Reporting', to introduce a mechanism for exceptional events for the OPR performance measures.
- **Option 2:** Introduce a Panel relief mechanism in the DCC Performance Measurement Methodology;
- **Option 3:** Establish a separate mechanism for the OPR performance measures under Section M3 'Force Majeure'; or
- **Option 4:** Proceed with DCC's original position which is a change to the current Section M3 Services FM definition and process.

The SEC Lawyer, SECAS and DCC reviewed the options, and Option 1 was agreed as the most suitable way forward. Working Group members felt they needed to better understand the development of this text and why only one option had been developed for consideration. They also considered whether a different approach should be taken with the legal text that would document the full process under Section H13, eliminating the need for any changes to Section M3 and the Services FM definition. One member considered that the proposed changes to the definition of Services FM seemed to go beyond the intent of the modification and noted that they could not support that change.

Justification for proceeding with Option 1

The SEC Lawyer established that the problem trying to be addressed is how best to give effect to the core objective of providing the DCC with the broader relief provided by the definition of Force Majeure when assessing performance against the OPR performance measures. The SEC Lawyer believed the

approach set out in the first drafting of the legal text for Option 1 seemed the most elegant way of achieving that end. During a meeting with the DCC and SECAS, it was confirmed that there are inherent problems with the DCC's original proposal that are difficult to avoid. For example, the Panel and the DCC would need to decide whether a particular event is just Services FM for measurement against the SEC Performance Measures, or Services FM for measurement against the OPR performance measures, or Services FM for the wider purposes of the SEC. In this context, the benefit of the approach is that it allows for a separate process under Section H13 for the OPR performance measures only, meeting the intent of the proposal.

A summary of the arguments as to why the other options were not pursued are as follows:

Option 1: Amend Sections H13 and M3

Rather than saying in Section H13.7 that the DCC gets relief for Services FM, the SEC Lawyer preferred to say that the DCC gets relief for "Exceptional Events" (which would be defined the same as Force Majeure). Existing SEC Sections M3.2 to M3.8 would be copied into Section H13 but changing "Services FM" to "Exceptional Events". Consequential changes would be required to Section M3.

There was still residual concern from the SEC Lawyer that it is odd to have two different concepts and processes for Force Majeure and adding a third would compound the position. Again, this is created by the original legal text produced for Option 1 (though here there are two different concepts, where one of those concepts has two sub-sets). Following discussions between the DCC, SECAS and the SEC Lawyer, it was clarified that the concept of Exceptional Events should apply solely to OPR reporting by the DCC using a discreet process under SEC Section H13. This has the benefit of leaving the existing SEC reporting against Performance Measures unchanged, and also leaves the relief mechanisms for Force Majeure and Service FM untouched.

Option 2: Amend the DCC Performance Measurement Methodology

The SEC Lawyer was concerned that this would relegate a key concept to a document that sits outside of the SEC, which would give the DCC too much control over the Performance Measures against which it is being assessed.

Option 3: Amend Section M3 more generally to introduce a mechanism specifically for OPR purposes

The intent of this is the same as under Option 1 above, but rather than adding the new "Exceptional Events" process in Section H13, it would be added in Section M3.

Option 4: Proceed with the DCC's original proposal to amend the definition of Services FM and process

This approach applied the broader concept of Force Majeure in all cases, not just assessment of the Performance Measures which has subsequently been dropped by the DCC.

Further developments of the legal text

Further amendments to the legal text facilitated additional discussions within the Working Group, and the version produced following these discussions is attached to this report.

SEC Section A

Members were against an amendment to the FM definition within the SEC that stated "it is agreed that a breach by another Party of its obligations under this Code is a circumstance beyond the Affected Party's control". The SEC Lawyer affirmed that this part of the definition is not required, with the main clarification point being that a breach by another Party will not affect the DCC and won't be an omission under the Code. The DCC agreed to keep the FM definition unchanged.

It was agreed that a more complete definition of 'OPR Exceptional Event' was required, possibly by adding " with respect to OPR Reporting" to the end of the originally proposed definition. The DCC and the SEC Lawyer agreed to amend the definition, and this revised definition is included in the attached legal text.

SEC Section M

Members questioned the addition of the statement "other than this code" in Section M3.3(b) and requested clarification as to what this would mean. One member felt that this clause could allow the DCC to claim Services FM where a service provider has failed to perform their obligations, essentially shielding the DCC from accepting responsibility where the real issue is a weak service provider contract. Other SEC Parties don't have sight of the DCC's contracts with its service providers, so it would be inappropriate to change the SEC to give the DCC cover that the contracts don't provide as the other Parties would have to deal with the consequences of this. The member thought it more appropriate for the DCC to have FM clauses in their service provider contracts as opposed to adding a clause within the SEC to have delineation between the two so there is no overlap.

The DCC confirmed that it is unable to claim Services FM because of a breach within its supply chain, and highlighted that it is Section M3.3(b) that states this. The addition of this statement was to clarify that the SEC itself does not count as a contract with the DCC for the purpose of this clause.

The SEC Lawyer confirmed that they were comfortable with the addition of the statement as it is not a substantive change and the DCC is unable to use subcontractor noncompliance as an excuse for failing to discharge its duties. The Working Group was content with this addition.

SEC Section H

One member questioned if OPR reporting was being equated to general reporting in Section H13, and whether it affects anything else in the DCC Licence or the SEC. The DCC confirmed that the relief is only for OPR reporting purposes, and that this clause would apply only where any OPR reporting is derived from other reporting under the SEC.

Members sought clarification on the number of claims the DCC will be able to make – will they be able to claim relief for OPR, Services FM and Force Majeure, and whether this would be one claim or multiple claims. The DCC stated that it can already claim Services FM as it is a current procedure in the SEC and would be able to claim for OPR Exceptional Events under the DCC Licence in regard to its reporting to Ofgem. Although it is possible to apply for both, this occurs at different levels.

If there is an event that applies to both OPR Exceptional Event reporting and Services FM, the DCC noted that both could be claimed for; however, if the DCC applies for Services FM, it wouldn't need to apply for OPR Exceptional Event relief, as the exclusion of the event due to Services FM would automatically apply to reporting under the OPR. The DCC agreed to add a clarification into the legal text that it would not need to apply for relief under the OPR if relief for Services FM was given.

The Working Group questioned what details will need to be provided to the SEC Panel about the exceptional event, as this has a knock-on effect on the Panel who would have 10 Working Days to provide a response. Without adequate data and information, the Panel may not have sufficient knowledge to do its job within the timeframe, leading the way for negative or unfavourable decisions. The DCC agreed that it was its responsibility to provide the correct details and would note this going forward. A Working Group member noted that it was their expectation that if the information provided was not adequate, the Panel would not grant the requested relief, and so it was in the DCC's interests to provide as much detail as possible and respond quickly to any further requests from the Panel. They felt this provided a sufficient level of protection.

A member questioned the usefulness of Section H13.13(b), as it essentially goes without saying that an exceptional event will result in non-performance. The DCC confirmed that the OPR Exceptional Event happens first, and non-performance is a result of that, stating that it would be helpful to industry for this clause to be included. The clause is intended to specify that the DCC needs to demonstrate that the event directly caused the non-performance in order to claim relief.

The Working Group queried whether it would be favourable to include timescales around when the DCC notifies Users about the end of exceptional events, as the value of relief may be dependent on the timescale of the exceptional event. The DCC clarified that it is unable to claim more relief than is specified in Section H13.12, and that there is not always a clear end date for when an exceptional event might finish – in theory, the last day of an exceptional event would be when the DCC service resumes. The DCC also stated that end dates for exceptional events will depend on the nature and type of event that occurs. Another member commented that the DCC should be able to resume services via another avenue before the event itself ends, and it is that point which Section H13.14 is referring to. Furthermore, the longer the DCC goes without resuming services, the more likely it is it wouldn't get relief due to not having followed all possible avenues.

One member noted differing views of the SEC Lawyer and the DCC around the number of reports that would be produced. The SEC Lawyer considered that there are two performance measures and if an event occurs that is only an OPR Exceptional Event then that will provide relief from the OPR measures but not from the performance measures, meaning there are two answers and two reports. The DCC countered this and agreed that although there are two outcomes, there is only one report as far as the SEC is concerned, with the OPR reporting sitting outside of the SEC. This modification does not intend to introduce any changes to the SEC reporting.

The group queried what exceptions the DCC may reference in the Performance Measures Exceptions List (PMEL) and the DCC agreed to feed these back at a later date.

What were the Working Group Consultation respondents' views?

Five responses were received to the Working Group Consultation. One respondent felt SECMP0043 would better facilitate the SEC Objectives, one felt it did not and the other three were neutral. A summary of the responses received is provided below, and the full responses can be found in Annex B.

Comments on the proposed solution

One respondent supported the modification overall, believing it appropriate that the DCC could claim relief for instances outside of its control for the purpose of OPR reporting. They felt the proposed 'application' process was better than having a prescriptive list of events that would qualify for relief.

Two respondents disagreed and felt that further work was required to implement a framework for relief. They felt that there were still too many uncertainties with the potential applications that the DCC could make, and thought that, as a minimum, this change should be deferred until after the issues relating to DCC Governance and the Price Control are resolved.

One respondent questioned the appropriateness of introducing a decision-making process into the SEC for a mechanism contained in the DCC Licence, noting these are two separate legal instruments. They also queried whether the proposed solution could allow the SEC Panel to reach a decision that could fetter Ofgem's decision under the OPR.

It was acknowledged by one respondent that this issue has arisen as an unforeseen impact of Ofgem's approach to developing the OPR framework. They believed it would be helpful to understand Ofgem's view as to how it would see the OPR working under an 'Exceptional Event', which may provide the DCC with the reassurances that it is looking for, or additional information on which to draft a Modification Proposal that is to the benefit of all SEC Parties.

The Working Group notes these comments. It believes the solution put forward by the Proposer is fully developed and that these comments relate more to whether it should be approved. It therefore believed that, other than any further evidence being provided by the DCC on how the modification better facilitates the SEC Objectives, there was no further work that it could do to develop the solution, and that this modification is ready to proceed to a decision.

Comments on the legal text

One respondent queried whether information was missing to clarify points around: the relevant artefacts to be given to the SEC Panel to claim relief; the criteria to be used by the SEC Panel to reach a decision; what will happen for each outcome (approval or rejection of claimed relief); if the DCC can appeal a decision; and who the decision will go to.

The SEC Lawyer reviewed these comments and advised that no changes were required. They noted that the process proposed under this modification is to provide a Panel view that informs Ofgem's decision regarding the OPR. They considered that while more detail could be added on what is to be provided to the Panel, there was no need to do so, and confirmed that the Panel would act in accordance with its usual objectives. They also highlighted there is no point in the DCC appealing the decision; if the DCC disagrees with the decision, it will make representations to Ofgem as part of the OPR process. However, because the intent has been to follow the Services FM process, the Panel's decision is technically capable of appeal to arbitration under SEC Section M7.4.

The Working Group noted the SEC Lawyer's views and agreed no changes were needed to the legal text.

8. Conclusions

Benefits and drawbacks

The Proposer and the Working Group have identified the following benefits and drawbacks in implementing this modification:

Benefits

- This modification makes the process of claiming for Force Majeure and OPR Exceptional Events fairer by allowing DCC the ability to claim for relief under the OPR without impacting on existing Force Majeure provisions.
- This change will hold the DCC more accountable for its actions, as if it does not do enough to resolve any non-delivery of service during an exceptional event then the Panel may choose not to grant relief.
- There will be a benefit to the industry as it is Parties (via the Panel) that makes the decision as to whether the DCC can be given relief with respect to the OPR.
- This modification aligns the SEC with the regulations set out in the DCC Licence with respect to the OPR.

Drawbacks

- This modification makes the process of claiming for Services Force Majeure, OPR Exceptional Events and the SEC more complicated as it adds in a further type of relief and accompanying process to be followed.

General SEC Objectives

Objective (b)[2]

The Proposer believes that SECMP0043 will better facilitate SEC Objective (b). This is because the modification further enables the DCC to comply with the First Enduring General Objective of its Licence:

> *'The First Enduring General Objective of the Licensee is to carry on the Mandatory Business in the manner that is most likely to ensure the development, operation, and maintenance of an efficient, economical, co-ordinated, and secure system for the provision of Mandatory Business Services under the Smart Energy Code.'*

In the provision of Mandatory Business Services, it is much more efficient and economical for the DCC to respond to an exceptional event as it arises, by making an application to the SEC Panel for relief. The alternative option for mitigating the risk of being un-fairly penalised would be for the DCC to invest in additional protections for exceptional events (further work would need to be done to identify potential options). Investigating and investing in additional protections is less efficient as an

[2] Enable the DCC to comply at all times with the General Objectives of the DCC (as defined in the DCC Licence), and to efficiently discharge the other obligations imposed upon it by the DCC Licence

exceptional event may never arise, and less economical as overall it would introduce additional costs to industry.

Objective (g)[3]

The Proposer believes that SECMP0043 will better facilitate SEC Objective (g). The proposed solution ensures there is robust Code governance for the treatment of events outside the DCC's control impacting the delivery of DCC Services. The procedural clarifications proposed are intended to improve current SEC processes. Overall the modification delivers improvements to SEC governance and better facilitates efficient and transparent administration and implementation of the Code.

Working Group members' views

The Working Group agrees that the solution developed during the Refinement Process is appropriate, and that SEC Objectives (b) and (g) are the relevant Objectives for this modification. However, members were unable to form a view as to whether the SEC Objectives are or aren't better facilitated.

Consultation respondents' views

One Working Group Consultation respondent agreed with the Proposer that SECMP0043 would, on balance, better facilitate Objectives (b) and (g). While creating additional processes is inefficient, the benefits of the minor procedural changes and the creation of a suitable framework surrounding claiming relief for Exceptional Events would outweigh this.

One respondent believed SECMP0043 would not better facilitate the objectives, believing the definition of 'Exceptional Event' is "open-ended" and creates a future financial risk to SEC Parties that cannot be adequately defined, or its impact be appropriately determined or accounted for.

The remaining three respondents were neutral on whether SECMP0043 better facilitates the Objectives, noting they could not see how any of these were better facilitated (the Proposer has since provided further rationale that has been included in this report). Two of these respondents felt that overall the modification should not be approved, while the third felt, based on the cost and impacts, that it should.

Panel's conclusions

The Panel will consider this report at its December 2018 meeting.

[3] Facilitate the efficient and transparent administration and implementation of this Code

Appendix 1: Glossary

This table lists all the acronyms used in this document and the full term they are an abbreviation for.

Glossary	
Acronym	**Full term**
DCC	Data Communications Company
FM	Force Majeure
OPR	Operational Performance Regime
PMEL	Performance Measures Exceptions List
SEC	Smart Energy Code
SECAS	Smart Energy Code Administrator and Secretariat

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SECMP0043 'Modification to Services Force Majeure Provisions'

Legal text – version 0.4

About this document

This document contains the redlined changes to the SEC that would be required to deliver this Modification Proposal.

The changes have been prepared against SEC Version 6.0.

Section A 'Definitions and Interpretations'

Add the following new definitions into Section A1.1 in alphabetical order:

OPR Exceptional Event	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.
OPR Reporting	means reporting in respect of the operational performance regime under schedule 4 of the DCC Licence (the Operational Performance Regime).

Section H 'DCC Services'

Add new Sections H13.7 to H13.14 as follows:

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 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'

Amend Section M3 as follows:

M3 SERVICES FM AND FORCE MAJEURE

Force Majeure affecting the Services - Services FM

M3.1 The concept of Services FM applies in respect of the obligations of the DCC to provide the Services pursuant to this Code (including pursuant to any Bilateral Agreement).

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 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).

M3.2 The DCC may claim relief from Liability for non-performance of its obligations in respect of the Services to the extent this is due to Services FM. To the extent that performance of the DCC's obligations is unaffected by the Services FM, the provisions of this Code and any Bilateral Agreement will continue to apply.

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).

M3.4 The DCC shall, as soon as reasonably practicable (and in any event within five (5) days of the occurrence of the Services FM), give to the Users that were due to receive the affected Services and to the Panel full details of the Services FM and any relief the DCC wishes to claim in connection with the Services FM.

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:

(a) the DCC could not have avoided the occurrence of the Services FM (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 Services FM 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 Services FM on the performance of the Services.

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.

M3.6 If the DCC is entitled to relief in respect of Services FM in accordance with Section M3.5, then:

(a) the DCC shall be relieved of Liability under this Code and any Bilateral Agreement in respect of the Services to the extent to which that Liability would otherwise have arisen solely as a result of the Services FM; and

(b) for the avoidance of doubt, the Charges (but not, for the avoidance of doubt, the Fixed Charges) payable by a User shall be reduced to the extent that the DCC does not provide the Services to that User as a result of the Services FM (and shall be calculated on the basis of the Services that are actually provided).

M3.7 The DCC shall notify the affected Users and the Panel as soon as reasonably practicable after the Services FM 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. Following such notification, the Services shall continue to be performed in accordance with the terms and conditions existing immediately before the occurrence of the Services FM.

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.

Force Majeure

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).

M3.10 Subject to Section M3.11, the Affected Party will not be in breach of this Code and/or any Bilateral Agreement or otherwise liable for any failure or delay in performance of any Relevant Obligations to the extent such failure or delay is caused by Force Majeure.

M3.11 An Affected Party may only rely upon Section M3.10 in respect of a failure or delay in performance of any Relevant Obligations to the extent that the Affected Party and the Party or Parties to whom the Affected Party owes the Relevant Obligations agree (or it is determined by arbitration) that the Affected Party:

(a) notified the Party or Parties to whom the Affected Party owes those Relevant Obligations of the matters constituting Force Majeure as soon as reasonably practicable following their occurrence;

(b) kept such Party or Parties fully informed as to the matters relating to the Force Majeure; and

(c) took all reasonable steps in accordance with Good Industry Practice to overcome the Force Majeure and/or minimise the consequences of the Force Majeure on the performance of the Relevant Obligations.

M3.12 The Affected Party shall notify the Party or Parties to whom the Affected Party owes the Relevant Obligations as soon as reasonably practicable after the Force Majeure ceases or no longer causes the Affected Party to be unable to comply with the Relevant

Obligations.

M3.13 Each Party hereby irrevocably and unconditionally waives all and any rights to claim any extension or allowance of time or other relief from performance of the Relevant Obligations other than to the extent caused by Force Majeure. Each Party hereby irrevocably and unconditionally waives all and any rights to claim compensation (including for breach of contract or in tort) for, or to seek to expel the Affected Party from this Code for, any failure by the Affected Party to comply with the Relevant Obligations to the extent caused by Force Majeure.

SECCo

M3.14 The provisions of this Section M3 (and the definitions used in this Section) shall apply to SECCo as if SECCo was a Party.

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SECMP0043 'Modification to Services Force Majeure Provisions'

Working Group Consultation responses

About this document

This document contains the full collated responses received to the SECMP0043 Working Group Consultation.

Question 1: Do you believe that the SECMP0043 proposed solution better facilitates the SEC Objectives and should be approved?

Question 1			
Respondent	**Category**	**Response**	**Rationale**
Western Power Distribution	Network Party	Neutral	Whilst we understand what the Proposer is trying to achieve, we cannot see how this Modification this better facilitates any of the SEC Objectives and therefore cannot agree that this Modification should be implemented.
npower	Large Supplier	No	We feel that this modification does not better facilitate the SEC objectives and should not be implemented. We do not believe the Exceptional Event examples provided are not adequately covered by the existing clauses and would argue that the FM clauses are not as narrowly defined as this modification suggests. In addition, the Exceptional Event definition, as it stands, is very 'open ended' that creates a potential future financial risk to all other SEC Parties that cannot be adequately defined or its impact be appropriately determined or accounted for. We acknowledge that a more rigorous approach to managing a DCC claim for relief under their OPR may provide some benefit to other SEC Parties in better understanding the Event(s) in question. We understand that any SEC Panel decisions that do not support a DCC claim can presumably be challenged and escalated to the Authority for determination
EDF Energy	Large Supplier	Neutral	We do not believe that clear evidence has been provided that the proposed solution better facilitates the SEC objectives. The consultation states that the proposed solution will 'ensure DCC's regulatory framework creates the correct incentives for DCC to efficiently discharge the obligations placed upon it'.

Question 1			
Respondent	**Category**	**Response**	**Rationale**
			We are not clear on how the change will provide the correct incentives to the DCC, how it will make achievement of their obligations more efficient, and how their Users (and ultimately consumers) will derive any benefit from this change. While we recognise and understand the reasoning for this change being raised, we do not believe that we could support approval of this change at this time.
SSE Retail	Large Supplier	Neutral	SSE believes that this modification is neutral on achieving the relevant SEC Objectives b &/or g. We cannot see how this would b) Enable the DCC to comply at all times with the objectives of the DCC and to discharge the other obligations imposed upon it by the DCC License. The SEC already has all relevant obligations in place to enable the DCC to comply with their Licence/Code Objectives, further the DMR does not express how the DCC believe this modification will further enable them to comply.
Centrica plc	Large Supplier	Yes	We believe the main relevant objective for this modification proposal is the seventh general SEC Objective (g). Creating additional processes to deal with OPR relief does not better facilitate this relevant objective. However, the minor FM procedural changes do better facilitate this relevant objective and on balance is overall positive. We also believe that this modification will marginally better facilitate the second general SEC Objective (b) by creating a suitable performance framework for DCC to work within and removing doubt as to how any exceptional events may or may not apply to Operation Performance Reporting framework.

Question 2: Will your organisation be impacted due the implementation of this modification?

Question 2			
Respondent	**Category**	**Response**	**Rationale**
Western Power Distribution	Network Party	No	-
npower	Large Supplier	Yes	Whilst there are no immediate impacts to systems and processes, consideration of potential future events could result in successful applications for DCC relief under a much wider, undefined 'Exceptional Event'. We still do not see why the current definitions around FM (Services or otherwise) do not adequately protect the DCC.
EDF Energy	Large Supplier	Yes	We would be impacted due to the implementation of this modification, as this change could result in DCC charges being incurred even though they have not met the required performance standards. We would also expect DCC to be impacted due to the implementation of this modification as it will be necessary to change the way that they undertake their reporting, and require them to take additional actions should they wish to claim relief from their performance obligations. While these impacts may not be material they should be included in the report, and the DCC's costs made transparent to their Users.
SSE Retail	Large Supplier	Don't know	Being unable to see the effect of an OPR performance reporting relief on the DCC Price Controlled revenue, it's hard to calculate or articulate if there would be any impact financially by the introduction of this modification under the SEC.
Centrica plc	Large Supplier	No	-

Question 3: Will your organisation incur any costs due to the implementation of this modification?

Question 3			
Respondent	**Category**	**Response**	**Rationale**
Western Power Distribution	Network Party	No	-
npower	Large Supplier	Neutral	We do not envisage incurring any considerable costs as a result of implementing this proposal, but do see a potential for large future costs, given the proposed wide definition that an 'Exceptional Event' will introduce.
EDF Energy	Large Supplier	No	While we will not incur any direct costs as a result of the implementation of this modification, as noted above we could incur charges even though DCC has failed to meet the required performance standards.
SSE Retail	Large Supplier	Don't know	Being unable to see the effect of an OPR performance reporting relief on the DCC Price Controlled revenue, it's hard to calculate or articulate if there would be any impact financially by the introduction of this modification under the SEC.
Centrica plc	Large Supplier	No	-

Question 4: Having considered the potential impacts and costs to your organisation, as well as the cost to deliver the modification, do you believe that SECMP0043 should be approved?

Question 4			
Respondent	**Category**	**Response**	**Rationale**
Western Power Distribution	Network Party	Neutral	Based purely on the impact and cost to our organisation, as well as the cost to implement this modification, we believe that this modification should be implemented; however we are unable to state overall that we believe that this modification should be approved as we cannot determine a direct benefit against any of the SEC Objectives.
npower	Large Supplier	No	We do not agree that this modification should be approved. We do not currently see why, given the suggested examples of an Exceptional Event, the current Service FM and FM clauses within the SEC do not adequately protect the DCC in the context of Ofgem's Operational Performance Review framework. For example, Network Operators have, and no doubt will again, successfully claim FM under severe weather conditions that prevent them from providing the Services that they are contracted to provide, by calling on the same FM clauses as currently provided in the SEC. As stated earlier, the inclusion of an 'open ended' Exceptional Event definition into the SEC could result in DCC claims for relief under the SEC, with SEC Parties paying for Services not received, that could / should be managed under the bi-lateral contracts that the DCC has in place with its Service Providers. It is unclear how the added complication of introducing Exceptional Events would work in practice and how, for a given event, which clauses within the SEC would take precedence, as there is the potential for these to compete in practice.
EDF Energy	Large Supplier	No	We do not believe that sufficient evidence has been provided that this change will better facilitate the SEC Objectives, and provide the correct incentives to the DCC that should ultimately result in consumers receiving a value for money service.

Question 4			
Respondent	**Category**	**Response**	**Rationale**
SSE Retail	Large Supplier	No	No. SSE Retail does not agree that implementation of this modification is legally appropriate. It seeks to introduce a concept and process to manage a decision on a regime held in a separate legal instrument.
Centrica plc	Large Supplier	Yes	It is appropriate that the DCC can claim relief for instances that are outside of their control for the purposes of OPR reporting. Rather than having a prescriptive list of events, or types of events, that would qualify for relief, we are supportive of the proposed 'application' process being used and the determination being made by the SEC Panel.

Question 5: Do you believe that the draft legal text changes deliver the intention of the modification?

Question 5			
Respondent	**Category**	**Response**	**Rationale**
Western Power Distribution	Network Party	Yes	-
npower	Large Supplier	Neutral	Whilst we feel that the draft legal text delivers the DCC's requirements, we do not yet believe that we fully understand all of the potential future implications for all SEC Parties.
EDF Energy	Large Supplier	Yes	We have not identified any issues with the draft legal text.
SSE Retail	Large Supplier	No	No, SSE believes the legal drafting is missing information to clarify; the relevant artefacts to be given to the SEC Panel to claim relief, the criteria to be used by the SEC Panel to reach a decision, what will happen for each outcome (approval or rejection of claimed relief), if the DCC can appeal a decision, and who the decision will go to.
Centrica plc	Large Supplier	Yes	We believe the draft legal text does now deliver the intent of the modification.

Question 6: Do you agree with the recommended implementation approach?

Question 6			
Respondent	**Category**	**Response**	**Rationale**
Western Power Distribution	Network Party	Yes	-
npower	Large Supplier	Yes	If the modification is approved we do not have any issues with the proposed implementation date.
EDF Energy	Large Supplier	Yes	If approved, we agree with the recommended implementation date.
SSE Retail	Large Supplier	Neutral	-
Centrica plc	Large Supplier	Yes	We are supportive of the proposed implementation date.

Question 7: Please provide any further comments you may have.

Question 7		
Respondent	**Category**	**Comments**
Western Power Distribution	Network Party	-
npower	Large Supplier	Unfortunately, there are still too many uncertainties with the potential application of DCC seeking relief under an Exceptional Event. This issue has arisen as an unforeseen impact of Ofgem's approach to developing the OPR framework, that we support. It may be helpful to understand Ofgem's view as to how they would see the OPR working under an 'Exceptional Event', which may provide the DCC with the reassurances that they are looking for or additional information on which to draft a SEC modification that is to the benefit of all SEC Parties.
EDF Energy	Large Supplier	We believe that, as a minimum, this change should be deferred until after we have sorted out issues related DCC Governance and the Price Control. We are already seeing DCC fail to comply with the established rules and claim additional costs for services which they have been pivotal in changing If this change goes ahead, we believe it is likely that we will be flooded with exceptional charges for events that DCC will try to argue are outside of their control. To allow such exceptional events a 'reasonable' approach to evaluating and approving such exceptional events needs to be agreed, and until we have responded to Ofgem's expectation with a better overall price control framework, we should not agree to change current arrangements.
SSE Retail	Large Supplier	SSE Retail would like to provide the following observations; • We question the appropriateness of introducing a decision-making process under the Smart Energy Code on the applicability of a methodology/mechanism contained within the Smart Metering Communications Licence, where each is a different legal instrument • It appears that, as drafted, the introduction of this modification could allow the SEC Panel to reach a decision which could fetter OFGEM's decision under the Licence OPR Performance Reporting regime.

Question 7		
Respondent	**Category**	**Comments**
Centrica plc	Large Supplier	-