IWEA Response to CER10136 consultation on ESB Networks Distribution connection contracts

24th September 2010

IWEA welcomes the opportunity to comment on the consultation on ESB Networks Distribution Connection Contracts. Our comments to the various sections of the consultation document are outlined below:

Appendix 1

This is an undertaking and indemnity to reflect contestability which will be attached to the connection offer letter. It contains a reference to accepting leasehold rather than a freehold interest where the connecting party does not have a freehold interest on the site of the terminal substation. IWEA request that this option should be properly scoped either here or elsewhere with the requisites for approval or denial of such a request defined.

Appendix 1a

This is a checklist which sets out ESB's requirements for site transfer and the transfer of rights of easements, wayleaves and rights of way from the IPP to ESB. A new requirement is that a Contract for Sale must be entered into between the IPP and ESB. Where the customer wishes to retain ownership of the assets, this is at the discretion of the CER and will negate the Contract for Sale should the CER approve the retained ownership.

Where a build is contestable, ESB's preference is for the IPP to agree a Deed of Grant with the landowner. However, alternatively, a S53 wayleave is acceptable once the IPP acquires the relevant license from CER to serve such wayleave notices. IWEA would like to request clarification from the regulator and the ESB as to the approval process for issuing such S53 wayleave notices.

We also note that Section 4 of this document should reference section 5 and not itself.

Appendix 3

This deals with Contestable construction commissioning and connection. Site survey, conditions and responsibility define the site survey and investigation works to be carried out by the client. This leaves all the risk of ground conditions, toxic contamination etc. with the customer. IWEA would like to request that this be limited to a 5 year period as per the warranties which are

included in this appendix. They are based on existing non-contestable warranties: all equipment 24 months from handover, all installation works 12 months from handover, all civil works 5 years from handover. All contestable equipment shall be free from corrosion for 5 years from handover. Should any defect arise an extension of 24 months from addressing the issue shall apply. Annex 1 of appendix 3 deals with wayleave and easement requirements. IWEA would also like to again request for the MV and 38kV wayleave widths to be documented.

Quotation letter:
Section 5 deals with project management costs for contestable offers. While we believe that the conditions laid out here in relation to these charges are practical we should reserve the right to contest the costs for these charges. We would also like to note that we consider that the contestable project management estimates which have been seen to date are extremely high.

Section 12.19.5.2 states that where a customer wishes to retain ownership of any of the contestable assets they have to inform the DSO. There is only one opportunity to do so at acceptance of offer or else they have to accept transfer of ownership. IWEA would like to query the reasons for this requirement and request that the ownership of the assets should be decided at any point up to connection effective date.

TSO Interface Agreement:
IWEA has engaged on this issue on a number of occasions in recent months and more recently have held discussions with the CER, EirGrid and ESB Networks. We have now outlined below a summary of the key comments outstanding.

General Comment
IWEA would like clarification on where the statutory/contractual obligation on the DSO to obtain this undertaking on behalf of the TSO is? The DSO/DAO relationship is in the operating agreement between DSO/DAO and that provides for the indemnity from DSO to DAO. Where is the underlying obligation on DSO to procure the indemnity in favour of the TSO?
We note that the TSO and the DSO both attempt to rely on the “general duty to co-operate” with each other.

We again would like to stress that the customer's contractual relationship is with the DSO as counterparty to the connection agreement. There is no contractual relationship between the TSO and the customer.

We note it was queried in previous discussions as to why IWEA has issue with the TSO Interface Undertaking when there is an undertaking given in favour of ESB. IWEA would like it noted that we see a distinct difference.

Under the Operation Agreement entered into between ESB and ESB Networks, clause 3.1.2 requires the Applicant to the Connection Agreement to give an undertaking (Interface Undertaking) in favour of the DSO, which is to be enforceable by DSO and which will contain

terms to protect the interests of the ESB as the owner of the Distribution System. The form of undertaking in contained in Schedule 2 of the Operating Agreement.

Clause 15 of the Standard Connection Agreement (Dec 2009 version unexecuted) requires the Customer, in accordance with clause 6 of the Operating Agreement, to give an Interface Undertaking in the form of Schedule 4. The undertakings contained in Schedule 4 of the Connection Agreement and Schedule 2 of the Operating Agreement are largely identical. Therefore, we can understand why the DSO is seeking an Interface Undertaking in favour of the ESB within the Connection Agreement. However, when we examine the relationship between the DSO and the TSO, there is no agreement in place which requires the DSO to have an undertaking executed in favour of the TSO.

Paragraph Specific Comments

Paragraph 1 - Is this not already covered in the Connection Agreement? In any event the banks will ask what this requires beyond compliance with the requirements set out in the Grid Connection Agreement and Grid/Distribution Code. As there is no certainty on the requirement and there is no way that the equipment manufacturers or turbine suppliers will accept a pass down of this risk so assuming it is an ongoing requirement it will primarily manifest itself through potentially a greater cost contingency required to be provided by the sponsors. The principal in relation to this clause is accepted but it is the reference to the Transmission System that will cause questions to be raised by the finance parties i.e. what extra will need to be done? The effect of this is that there is another hurdle being put in front of the project. The finance parties together with the project developers are simply looking for price certainty. Therefore the TSO's technical requirements should be dealt with in their agreements with the DSO, after all the customer's agreement is with the DSO. We note that EirGrid accepted these points and were happy to amend the clause so that it referred to compliance with the Grid Code.

IWEA requests clarification on what the relationship is between paragraph 1 and the G10 testing? Does G10 certification confirm that this requirement has been met?

Paragraph 2 – It appears that this contradicts paragraph 6, 7 and 8 which envisages liability up to the connection liability cap for acts or omissions. We note that EirGrid have stated that will amend this clause to refer to "without prejudice".

Paragraph 4 – It should be noted that the TSO might expect a plethora of merited or unmerited notifications from the number of smaller wind farm developers who would not necessarily have a real sense of how their embedded generation might affect the ESB Transmission System.

Paragraph 5 - While the liability cap isn't extended, however developers could expect premia to rise as there is another potential claimant on the insurances.
I note in discussion it was unclear as to why this would be the case. It is simply due to fact that there is an additional potential claimant on the insurances, the insurance market will need to be comfortable with the additional risk profile of the TSO's inclusion which will necessitate an

understanding by the insurers of the TSO's role, obligations and responsibilities in respect of the connection. We would be concerned re the expectation and ability of our members to get the extended insurance and at what cost to get it and also bearing in mind that these insurance requirements are for the lifetime of the wind farm and insurance availability and costs vary wildly over time. We would highlight the point that a finance party's due diligence on this insurance point will flag the issue of extra claims on the insurance policy. This may result in an increase in the costs of financing the project.

Paragraph 6 – There is a lack of understanding of this paragraph and would be difficult for lenders to know what the intention or effect of this is, in particular the language about the TSO assuming a position as a counterparty to the connection agreement. Indeed paragraph 7 explicitly allows certain claims. There are also concerns that paragraph 6 would operate to make the liability caps aggregate as between the TSO and the DSO and not separate as perhaps intended. Furthermore and as stated at the meeting claims can only be made in respect of death and personal injury. Under the Connection Agreement the customer waives the right to make a tortious claim. In short the Connection Agreement says a customer cannot sue the DSO for non-contractual claims. In discussions it was noted that EirGrid agreed that this clause required amending.

Paragraph 7 – IWEA would like to have the defined terms checked as are unsure the Connection Liability Amount and Connection Liability Cap are correct. The TSO may be constructing deep works which are for the benefit of a number of developments in the sub-cluster? What happens to the liability in these cases where e.g. the loss to the TSO is suffered as a result of joint development works by the sub-cluster.
Also as previously communicated, if it is correct to say that the waivers are similar to those granted to the DSO then there maybe no issue. However, they seem extremely broad. For example, 7(d) excludes the Customer from suing the TSO if the TSO acts negligently or in breach of its statutory duties. Generally, this waiver would be regarded as most unusual. We note that EirGrid have agreed to amend this clause.

Paragraph 8 – IWEA requests that the wording in this paragraph is reviewed in particular the 'without prejudice' language.
Also concerns remain re paragraph 8 as such whereby a direct consequence of the TSO actions might be a loss in revenue. We note that EirGrid have agreed to amend this clause.

IWEA also request an additional paragraph limiting the Customer's liability to the TSO to that liability to the DSO under the connection agreement. IWEA would also query how the customer's non-contractual liability is limited?