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25 February 2008

Dear Andy

EDF Energy Comments on proposed “Contract for the Provision of Non-Code User Pays Services”.

Please see below for EDF Energy’s comments on xoserve’s proposed “Contract for the Provision of Non-Code User Pays Services”. In the interests of transparency EDF Energy will be providing an edited version of this document to the Joint Office for publication on their website.

It should also be noted that given the main issues this document does not set out all and every comment but concentrates on the most important issues only:

Main Issues

This document has very little to do with a contract. A contract is a document entered into by both parties on terms and conditions mutually agreed and not to be modified unless also mutually agreed; this set of documents may be modified unilaterally, at any time and at the absolute discretion of xoserve. This unreasonable and unfair right deprives the Customers from the basic and fundamental rights of a contract i.e. security of the terms entered into and predictability of the terms and conditions to govern the relationship ahead.

The analysis carried out on the document is of little (if any) relevance in so far as the xoserve may at any time modify its content.

Xoserve has a very limited (if any) liability, where the Customer is liable to xoserve on a wider range of circumstances and without any limitation or cap whatsoever. This contract would appear biased towards xoserve and is currently unacceptable to EDF Energy.

Contract

Clause 1.1: Definition of Conditions refers to the counterparty’s standard conditions “in force from time to time”. EDF Energy is not prepared to accept any reference to changes over which we may have no control whatsoever. This is contradictory to the fundamental idea of a contract.

Clause 3.3: The cross reference should be changed to 12.7.

Conditions

Clause 1.1: “Confidential information”. This definition make little sense and should be changed to a more standard definition: “*any information, facts, data, programs, formulae, opinions, comments, results or ideas expressed in any communicable form (including but without limitation computer programmes, software and related systems) and disclosed to a Party by the other Party or by a third party or agent for or on behalf of such other Party and shall include but not be limited to:*

- i. any information ascertainable by inspection or analysis;*
- ii. any information relating to the Disclosing Party’s business, operations, processes, plans, intentions, contracts, know-how, trade secrets, software, market opportunities, customers, employees, and business affairs; and*
- iii. any information which is derived from the disclosure of such Confidential Information.”*

Clause 1.1: “Service Request” and “Service Request Acceptance” these definitions are not fully consistent with the specific request dealt with individually under the Schedules. These definitions should be amended to include the specific requests and acceptances as set out in the schedules.

Clause 1.1: “Transporter’s Licence”, “Uniform Network Code” and others – these definitions are circular in so far as they are defined by reference to each other. As a number of important issues such as charges are dependant upon those concepts this must be clarified. As set out in the contract, it seems that xoserve has full authority and discretion to determine and change those figures at any time.

Clause 1.3.1: Order of priority of the contract documents: This provision makes no sense in so far as the first item on the list (the Contract) is defined as containing all the contract documents. There appears to be confusion between the title of the first document and its nature. This must be clarified.

A reference to Codes referred to in either the Conditions or the Schedules would help to clarify a confused situation.

Clause 2.2: It should be expressed that when xoserve is deemed to have accepted the relevant Service Request it is deemed to have issued a Service Request Acceptance “in respect of the Services required in the Service Request”.

Clause 2.3: This provision should also state “save that it shall not prejudice any other rights of the Customer, under any such terms and conditions previously notified to the Customer or otherwise.”

Clause 2.4: The meaning of this clause is not clear and requires clarification.

Clause 2.5: This provision should be clarified as to what extent the rejection of the representations and warranties constitutes an acceptance on the remaining of the Service Request or counter offer. It would be more practical to have representations or warranties on the Customer’s Service Request being applicable unless expressly rejected by xoserve in the Service Request Acceptance.

Clause 2.6: This issue should be dealt with under clause 10 only. It is confusing to talk about termination within a clause that deals with the ordering of services.

Clause 3.1: Any amendment made to the contract should be subject to both party’s agreement. A contract cannot be modified unilaterally. This is not acceptable as it makes the very principle of a contract meaningless.

Clause 3.2: It is not acceptable to leave the Customer with no option but to accept the changes or terminate the Service Request or Contract. No change variation or amendment may be valid unless agreed in writing by both Parties.

Clause 3.3: This makes the clause even more confusing between changes that are binding on the customers and changes that are not.

Clause 4: It would appear that under this clause xoserve bears no liability where it is the Party responsible for the provision of the Services and the Customer is fully liable for the support it provides to xoserve (see also comment under clause 9). This is unacceptable.

Clause 4.1: Performance of Services – xoserve only has to use reasonable endeavours to provide the services. There should be an obligation to perform and as a minimum this should be on a best endeavours basis, as expected of customers.

Clause 4.2: Where xoserve only has reasonable endeavours to provide the services, the Customer is due to provide any and all data and material as xoserve may request. This is unacceptable.

Clause 4.2.1: The customer is responsible for ensuring that all information, data and materials it supplies to xoserve is complete, accurate and up to date. However they may not be in a position to do this.

Clause 4.2.2: The customer undertakes to indemnify xoserve in respect of any losses incurred by xoserve as a result of any act or omission or the provision of insufficient or incorrect information, data or materials. This is unacceptable.

Clause 5.9: The obligation to pay should be limited only to “undisputed” amounts.

Clause 5.12: The meaning of this clause is not clear and requires clarification.

Clause 6.2: xoserve gives no warranties as to the accuracy, completeness of the reports provided or that they will meet the Customer’s particular requirements. This is unacceptable.

Clause 7.2: Shippers are not permitted to distribute any written material provided by xoserve as part of the services without xoserve’s prior approval. This is unacceptable as it would prevent us from disclosing such information to our Group companies.

Clause 7.5: EDF Energy should not be taking the responsibility to procure these consents. Any risks under the Data Protection Act arising as a result of xoserve distributing personal data outside the EEA should be at xoserve’s risk.

Clause 7.6: xoserve should indemnify us in respect of any loss of data arising as a result of xoserve’s negligence or breach of contract.

Clause 8: We would want the ability to disclose confidential information to our professional advisors, employees and Group companies.

Clause 8.2.5: This exclusion shall also cover disclosure during any legal process.

Clause 9.5: EDF Energy would question whether we would be able to obtain insurance in respect of our risks under this contract.

Clause 10.2: xoserve may terminate the contract on 6 months’ notice. This is unacceptable as the provision of these services is fundamental to our customer services. A minimum notice period of 12 months is required.

Clause 11.3: The concept of Force Majeur is not defined and therefore very difficult to assess.

Clause 12.1: The consent xoserve is entitled to give the Customer for any assignment should not be unreasonably delayed or withheld. Where the xoserve is entitled to subcontract any part of the Services, it must be made clear that it is responsible for the act and omission of such subcontractor as if such act or omission were its own.

Clause 12.4: What is the purpose of this clause where xoserve may change any term or condition of this contract at any time?

Schedule 2

Clause 2.2: This provision refers to “User” where the term is not defined.

Clause 3.1: This is unacceptable.

Schedule 3

Clause 1: Email Reporting Request and Email Reporting Request Acknowledgement seem to be different concept from the ones used in the Conditions. This is confusing.

Clause 2.2: There is no more than a reasonable endeavour to provide the results in due time. This is unacceptable when best endeavours requirements are placed on the customer.

Clause 2.3: This mechanism offers even more protection to xoserve as it provides it with further exclusion of its responsibility. This is biased and unacceptable.

Clause 3.2: Considering 2.3 there is absolutely no guarantee that late results may not be charged full price in any event. This is unacceptable.

Schedule 4

Introduction: Definition of working hours is not fully consistent with the definition of working days as set out in the conditions. For the sake of clarity, all related definitions must be harmonised.

Clause 2.1.3 (c) final paragraph: This provision is not consistent with the principle of a Request being formally made and accepted. It must be clarified.

Clause 2.2: Considering the requirements under SPAA a reasonable endeavours requirement is not acceptable to achieve these standards, and should be replaced by best endeavours.

Clause 2.3: The reference to the IAD Terms is extremely vague and confusing. The Customer seems to be bound thereby but no further definition or explanation is provided in that respect.

Clause 2.4: It seems that very little of the capitalised terms used in this provision are actually defined. In so far as they further restrict xoserve liability and therefore the customer's exposure, it may be worth having some clarifications in that respect.

Clause 3.1: This is unacceptable.

Clause 3.2.1: The burden of proof necessary for obtaining a reduction of the charge is (i) unlikely to benefit the Customer and (ii) refers to elements over which the Customer has no control whatsoever.

Clause 3.2.2 (a) and (b): See comment under the definitions of the conditions. In addition it seems that even though the unplanned downtime covers the entire Core Hours on a day, the Customer is still responsible for payments for that day. This is unacceptable.

Clause 3.2.2 (c): Data that has not been updated for a period up to 10 Business days (two weeks) is not relevant and not worth paying for? In addition it seems that the reduction is only made in respect of the tenth day and any subsequent one. This means that the full charge will apply in respect of 11 Business Days during which data have not been updated. This is not acceptable.

Schedule 5

Clause 2.1.3: The mechanism described herein is dependant upon documents that needs to be clarified in the first place (see comments under Clause 1.1 of the conditions).

Clause 3.5.2: The reduction in charges does not seem to be pro rata to the level of incompleteness and corruption. This is not acceptable.

Schedule 7

Clause 2.2: This mechanism of offer & acceptance of the services does not seem to be fully consistent with the Request - Acknowledgement principle as set out in the Conditions and also Clause 2.1 of this schedule.

Clause 2.5: This level of service is weak and unacceptable.



I hope you find these comments useful. However if you wish to discuss these in greater detail please contact either myself or my colleague Rosie McGlynn (rosie.mcglynn@edfenergy.com, 0207 752 2566).

Yours sincerely

A handwritten signature in black ink that reads 'Stefan Leedham'.

Stefan Leedham
Gas Market Analyst
Energy Regulation, Energy Branch