WESTERN POWER DISTRIBUTION

INNOVATION

NEXT GENERATION NETWORKS

Comparison of price incentive models for locally matched electricity networks.

Appendix C:
Private Wires - Legal Definitions

Report Title	:	Comparison of price incentive models for locally matched electricity networks Appendix C: Private Wires – Legal Definitions
Report Status	:	Final
Project Ref	:	VPW
Date	:	19.01.2017
Prepared for WPD by	:	Open Utility with Lux Nova partners.

Disclaimer:

This note was produced in accordance with, and subject to the terms of, the appointment of Lux Nova Partners Limited by Open Utility Limited, to inform work being undertaken by Open Utility Limited for Western Power Distribution. It does not provide advice, or recommend any approach or decisions, specific to any particular project or circumstance and legal advice should always be sought on the specific facts and circumstances of a particular project. Lux Nova Partners Limited accepts no responsibility to anyone other our client, in accordance with and subject to the terms of our retainer. Lux Nova Partners Limited excludes, to the fullest extent permitted by law, any liability where this note is relied on by any other person.

Executive Summary

In common usage, *'private wires'* is a term used to describe an electrical connection between a point of generation and a point(s) of consumption that does not involve use of a licensed Distribution Network Operators (**DNO**'s) distribution network.

The legal definition of *'private wires'* is much narrower and is used in a very specific context. In the context in which the law uses it, *'private wires'* is an alternative to *'same site'*. Consequently, both of these concepts are explained further below.

The concepts of *'private wires'* and *'same site'* derive from the *Electricity Act (Class Exemptions from the Requirement for a Licence) Order 2001* (the ***'Class Exemptions Order'***).

'Private wires':

- are defined by reference to *ownership* of the wires; but
- only have legal relevance in the context of two classes of electricity *supply* activities which are exempt under the Class Exemptions Order;
- essentially, only in the context of *distribution* which is exempt under the Class Exemptions Order; and
- only where the electricity supplier is involved in some level of electricity *generation* itself.

'Same site':

- is used by the Class Exemptions Order as an alternative justification for exemption of electricity supplies in equivalent circumstances where, whilst generator and consumer are not connected by *'private wires'*, they are on the *'same site'*;
- appears to be defined by reference to property boundaries and land ownership.

Therefore, both concepts have a legal definition which is much narrower than any ordinary English meaning. The legal definitions are explained further in this note.

This note also distinguishes some kinds of *'self-supply'* which may look like private wire or same site supply but may not involve *'supply'* at all within the meaning of the Electricity Act 1989.

The key attraction to supply over private wires or on the same site is commercial – it does not attract various charges normally due on electricity supply. This is because:

- the supply of electricity generated by the supplier itself to a consumer over *'private wires'* or on the *'same site'* has not used the licensed distribution and transmission networks so does not attract various use of system charges; and
- the supply of electricity by a licence-exempt supplier also does not attract various supplier levies.

NB: This note only gives summaries of some of the relevant legislation and exemptions. It does not give, nor should anyone reading this note rely on it as, legal advice. Specific legal advice should always be taken, based on the specific facts applying, before setting about any new business seeking to take advantage of a Class Exemption.

Background: the Electricity Act 1989 (the 'Act')

The Act prohibits the generation, distribution or supply of electricity without a licence, unless the person carrying out that activity benefits from a specific exemption granted by the Secretary of State or falls within a class exemption under the Class Exemptions Order. These class exemptions cover, amongst other things:

- generation, distribution or supply below certain thresholds;
- distribution or supply involving only limited or no domestic supplies;
- generators making on-site supplies or supplies over private wires; and
- re-sellers of electricity.

Some of these exemptions are subject to convoluted definitions and complexity.

Nonetheless, carrying on a prohibited activity (without a licence or exemption) is a *criminal offence*:

- even though it can sometimes be difficult to determine with a high degree of certainty whether a particular activity is compliant or non-compliant;
- regardless of the intentions of any person committing an offence, technical non-compliance identified by a professional advisor in a transactional context can trigger an obligation on the advisor to notify potential 'proceeds of crime' or face potential personal criminal liability him/ herself.

Legal definition of *'private wires'*

The legal definition of *'private wires'* is found in the Class Exemption Order and is as follows:

"private wires" means electric lines owned by—

a) the supplier in question;

b) consumer who receives a supply from the supplier in question from the generating station;

c) the owner, lessor or lessee of the generating station or of one of the premises to which a supply is made by the supplier in question; or

d) any of the persons described above jointly with any other of the persons described above,

provided that the owner of those wires is not a licensed distributor.

It should be clear from the above that *ownership* of the wires is the first defining requirement.

However, this definition sits within and has relevance to the electricity *'supply'* class exemptions. Yet, the proviso that the owner of the wires is not a licensed distributor necessarily means that, to be lawful, the activity carried on over the relevant private wires is either:

- '*distribution'* which falls within an electricity distribution class exemption; or
- some other conveyance of electricity which does not constitute '*distribution'*.

Consequently, in order to understand the legal significance of *'private wires'*, it is also necessary to understand both:

- the exemptions under which electricity *distribution* can be carried on without a licence, as a key component of the definition of *'private wires'*;
- what other conveyance of electricity, which does not constitute '*distribution'* might be relevant; and
- the use made of the term *'private wires'* within the relevant electricity *supply* exemptions.

1. **What is licence-exempt electricity distribution?**

1.1. Definition of 'distribution' under the Act

What is *'distribution'* and, therefore, requires either to be carried on under a licence or under one of the above class exemption all turns on the definition of *'distribution'* given in the Act. The Act defines electricity *'distribution'* as follows:

> *"distribute by means of a distribution system, that is to say, a system which consists (wholly or mainly) of low voltage lines and electrical plant and is used for conveying electricity to any premises or to any other distribution system"*

The definition of *'distribution'* is, therefore, somewhat circular but the use of the word *'distribute'* (without further explanation) within the definition of *'distribution'* suggests an ordinary meaning should be given to the word. *'Distribute'* may, therefore, imply some sharing of electricity between consumers or, perhaps, premises.

This suggests that a single-wire, point-to-point connection between a generating plant and a point of consumption all owned by the same person on the same premises is not, of itself, capable of being regarded as a distribution system if no-one else is also connected. This is important when we return to the question of *'self-supply'*.

The voltage of the network is also important. *'Low voltage*' is defined as 132kV or lower in England and Wales (or under 132kV in Scotland). Above that voltage is *'transmission'*.

1.2. Distribution exemptions under the Class Exemption Order

There are three class exemptions relevant to electricity distribution. Any of them may be used in the context of private wires.

1.2.1. Class A: small distributors – this exempts those who distribute less than 2.5MW of electrical power for the purpose of giving (or enabling) supply to domestic customers. This 2.5MW domestic supply limit is applied on an aggregate basis across sites operated by a person or operated by any member of the same corporate group. However, it would exclude distribution in another part of a corporate group, if that falls under the Class B distribution class exemption, described below.

1.2.2. Class B: on-site distribution – this exempts those who distribute:

- any amount of electricity for commercial purposes; and
- not more than 1MW of electrical power for the purpose of giving (or enabling) a supply to domestic consumers from a generating station embedded in the same distribution system.

This class exemption allows for electricity to come from other 'standby' sources on a temporary basis when the generator is not actually producing the power itself or is producing less than normal due to generating plant outages, etc. However, it does not allow 'top-up' above the normal level of output of the generating station. So, for example, for a 500kW generating plant, it only allows up to 500kW of distribution for domestic supply.

1.2.3. Class C: distribution to non-domestic consumers – this exempts those who undertake any amount of distribution to commercial customers only. This exemption is not available if the distribution network is used at any time to distribute any electrical power at all for the purpose of giving (or enabling) a supply to domestic consumers.

1.3. The three class exemptions summarised above set out the key boundaries of what electricity distribution activity can be undertaken without needing to hold an electricity distribution licence.

2. What other forms of conveyance of electricity that do not constitute '*distribution*' could be relevant?

2.1. As explained above, the '*private wires*' definition is used in the context of an exemption from the requirement to hold a licence to 'supply' electricity. Therefore, the definition of supply is

also key.

2.2. Definition of 'supply' under the Act

The Electricity Act 1989 defines electricity *'supply'* as follows:

> *"supply" in relation to electricity, means its supply to premises in cases where—*
>
> *(a) it is conveyed to the premises wholly or partly by means of a distribution system, or*
>
> *(b) (without being so conveyed) it is supplied to the premises from a substation to which it has been conveyed by means of a transmission system,*
>
> *but does not include its supply to premises occupied by a licence holder for the purpose of carrying on activities which he is authorised by his licence to carry on"*

Consequently, to constitute *'supply'*:

- there must be physical delivery of electricity to premises;
- it must be:
  - conveyed over a low voltage distribution system; or
  - delivered from a sub-station connected to the high voltage transmission system; and
- it must not be delivered to a person holding a generation, distribution or supply licence for purposes ancillary to their licensed activity.

2.3. Therefore, the requirement of the definition of '*supply*' that relates to the wires themselves could also be met by a high voltage (over 132kV in England and Wales or 132kV or over in Scotland) direct line or network of connections that are directly connected to a transmission-connected substation.

2.4. In this context, the distribution exemptions are not relevant.

2.5. However, in practice, we believe this is likely to represent an extremely small number of situations so we do not consider it further.

3. **Which supply-licence exemptions are relevant?**

3.1. Relevant supply exemptions under the Class Exemption Order

There is only one supply exemption that is directly relevant to private wires – that is the Class

C exemption, which is summarised below.

The Class B exemption permits on-supply of Class C and other electricity. However, since it is only relevant to private wires to the extent there is Class C supply, in the interests off brevity, it is not summarised in this note.

Class C: on-site supply

This exempts those who only supply electricity which:

- they generate themselves or which they generate themselves together with electricity which they receive from a licensed supplier; and
- is consumed by eligible consumers.

The Class C supply exemption sets out a list of eligible consumer types by reference to consumption scenarios. Many of these are overlapping and complex. However, there two consumption scenarios which are of particular relevance and which are loosely summarised as follows:

- *'additional group consumers'* each of whom:
    - occupies the ***same site*** as the generating station or receives the electricity over ***private wires***; and
    - consumes all the electricity at those premises (other than where they make Class B exempt on-supplies); and
    - total power supplied is less than 100MW, of which not more than 1MW is for domestic supply;
- a *'remote consumer'* or *'remote qualifying group'* [this is a single consumer or consumers in the same corporate group] that, in either case:
    - receives at least one third of the output of the generating station at premises they occupy on the ***same site*** as the generating station or which is connected by ***private wires***;
    - consumes all the electricity at those premises (other than where that they make Class B exempt on-supplies).

To understand the above, the Class Exemptions Order provides definition of 'private wires' (as given above, by reference to ownership).

'Site' is not defined nor are *'premises'* or *'same site'* (in the context of these consumers) but some guidance may be drawn from the treatment of generating sets being on the *'same site'* as each other if they are—

- on the same premises;
- on premises immediately adjoining each other; or
- on premises separated from each other only by a road, railway or watercourse or by other premises occupied by the supplier or a member of the same group.

It is important to understand that a privately owned electrical connection between generator and consumer may fail the ownership test for the purposes of the definition of *'private wires'* but that failure may not be fatal to the exemption because generator and consumer may still be considered to be on the *'same site'* as one another. Equally, the *'private wires'* definition may rescue a situation where the *'same site'* test is not quite met.

From the above, it should be apparent that:

- the Class C supply exemption is potentially very useful for operators of generating plant which they wish to use to meet some of the electricity demand of customers on the *'same site'* or connected by *'private wires'*;
- what constitutes a *'private wires'* connection or being on the *'same site'* has a very particular legal definition which turns largely on property ownership and boundary issues so it may be tempting to jump to a favourable conclusion that proves to be incorrect on closer enquiry;
- what is and what is not therefore exempted under Class C is far from straightforward and requires a good understanding of property ownership, corporate group structures, commercial supply arrangements and the point or points at which *'supply'* actually takes place.

4. Supplies of private connections that are not 'same site' or over 'private wires'

Electricity supplies which are made over a distribution system not belonging to a licensed Distribution Network Operator and which are not made by generator-supplier to a consumer on the same site or connected by private wires are not necessarily unlawful. They may still be permitted without a licence provided:

- the distribution activity still meets one of the distribution licence exemptions described in section 1 above; and

- the supply activity falls within one of the other limbs of the Class C exemption or under the Class A (small supplier) or Class B (re-sale) exemptions.

5. How is 'self-supply' different?

Self-supply has different meanings in different contexts.

In terms of the Electricity Act and the requirement to hold a licence or fall within an exemption, it is important first to determine whether any given self-supply scenario actually involves an Electricity Act *'supply'* or if *'distribution'* even arises. Each scenario needs to be assessed on its facts.

Two different example scenarios are given below.

Scenario A: a generator generates electricity on one premises and consumes that electricity itself on the same premises. It may be neither distributing that electricity nor supplying that electricity within the definitions given by the Act. Where that is the case, neither a licence nor an exemption is needed in respect of the carriage or delivery of that electricity.

Scenario B: a generator generates electricity on one premises and conveys it at 11kV to multiple consumers on an industrial site. There is low voltage *'distribution'* and physical delivery. Consequently, there is also *'supply'* for the purposes of the Act. Both the distribution and the supply must either be licensed or fall within an exemption. However, parasitic load of the generating station (that is, electricity consumed within the process of generating) would not be delivered to premises nor distributed so neither a *'supply'* nor *'distribution'* arises in respect of that parasitic load and it requires neither a licence nor an exemption.

Certain other legislation uses the term *'self-supply'* (or uses similar terms) but may or may not define this by reference to the Electricity Act definitions. Therefore, it does not have a consistent meaning or capture across legislation and care should always be taken when assessing the treatment of self-supply.

6. What is the commercial relevance of private wire or same site supply?

The key attraction to private wire or same site supply is commercial – it does not attract various charges normally due on electricity supply. This is because:

- when a Class C-exempt supplier generates electricity and supplies it to consumers (or a Class B-exempt on-supplier) who are connected via private wires or who are on the same site and they are not using the licensed distribution and transmission networks - that supply of electricity does not attract various use of system charges; and

- the supply of electricity by a licence-exempt supplier does not attract various supplier levies.

However, it should be noted that electricity that the Class C-exempt supplier imports to top-up (where customer demand is higher than its generation output) or as back-up (when its generating plant is not operating) will be delivered to it over the licensed transmission and distribution networks and be supplied to it by a licensed supplier. Consequently, that top-up and back-up supply attracts all regular use of system charges and supplier levies. Similarly, all surplus power above customer demand that the Class C-exempt supplier-generator exports will be carried over licensed networks and will also attract regular charges (although it may enjoy certain embedded benefits).

Lux Nova Partners

8 September 2017