Dan Mount
ECC Consultation Team
Ofcom, 5th floor
Riverside House
2A Southwark Bridge Road
London SE1 9HA

Head Office
Inveralmond House
200 Dunkeld Road
Perth
PH1 3AQ

By email to: ecc.consultation@ofcom.org.uk

2 June 2017

Dear Dan

Electronic Communications Code
Digital Economy Bill: proposed code of practice, standard terms of agreement and standard notices

SSE has communications code operator companies within its structure of subsidiary companies and is very interested in the implementation of the revised Electronic Communications Code as set out in the Digital Economy Act 2017. Our relevant experts have reviewed the draft code of practice, as well as the proposed standard terms and notices and our comments on these, referring to the specific consultation questions, are attached as the appendix to this letter.

We hope these comments will be helpful as Ofcom finalises these documents.

Yours sincerely

Aileen Boyd
Regulation Manager

Appendix

Response to consultation questions

1. Do you have any comments in relation to the scope or drafting of the Code of Practice as set out in Annexes 4 and 5?

a) Footnote 21 – the reference to apparatus should include towers as well as telegraph poles.
b) 4.13 – Operators are rarely informed when occupiers or landowners change. It is not therefore within the Operator's control to ensure that occupiers and landowners have up to date contact details. Operators are likely only to become aware of changes when a payment is returned by the previous landowner. This element should be qualified so that Operators will try to comply with it by inserting either "so far as practicable" or "using reasonable endeavours". Ideally, landowners and occupiers would have an obligation to inform the Operator when they change; however, in practical terms a lot of Occupiers may not be informed by the Landowner which companies have apparatus on their land so that may not be practicable but without receiving notice the Operator will not know who is on the land without visiting the property regularly to ascertain this which would come at great cost.
c) 4.22 – It will be common for land agents to knock on doors to contact landowners or to call them to request a visit rather than making an application in writing. Discouraging less formal but direct contact does not seem advantageous and we would suggest "in writing" is removed only for access. We agree that formal offers for installation should be in writing.
d) 4.26 – Operators may in some circumstances wish to secure a site (perhaps via an Option Agreement) before going to the expense of applying for planning where it is necessary. This would avoid a landowner seeking to renegotiate once planning has been obtained.
e) 4.32 – The obligation to cause minimal disruption and inconvenience should instead be to cause minimal damage and disturbance. Inconvenience is too low a threshold and is very subjective so difficult to enforce. The obligation should also be limited so that the obligation is only insofar as it is reasonably practicable to do so because it will not be practicable in all circumstances and the practicalities of an Operator's operations must be taken into account and should not be heavily compromised.
f) 4.47 – There should be a caveat to the first sentence so that is clear there is no obligation to decommission a redundant site where there is a reasonable prospect of future use. Sometimes sites may become rebuilt but there is an intention to bring them back into use and that should be allowed for.
g) 4.52/3 – The Landowner should provide evidence of the Landowner's intention to redevelop and that the Landowner will be unable to redevelop unless the Operator moves its apparatus in order for the Operator to assess whether the notice is valid. This point is likely to be the subject of much debate between Operators and Landowners and both parties should be encouraged to put all their evidence to the others at an early stage in order to reduce the likelihood of disputes about whether there is a genuine intention to redevelop and whether retaining the apparatus in place will prevent development. This information should not need to be requested and it should be an obligation on the Landowner to provide this evidence with their notice.

2. Do you have any comments on the scope or drafting of the standard terms, as set out in Annex 6?

a) 4.1(a) & (b) - This should provide for reasonable prior notice rather than 7 days notice. There will be cases where urgent works are required in less than 7 days but it is not yet an emergency situation. With this drafting those works could be prevented from being carried out in the timescale they need to be until it becomes an emergency situation which is not in the interests of either party. No notice should be required in the event of emergency. If it is an emergency situation, then all efforts should be on remedying the emergency as soon as possible.
b) 4.1(d) – reasonable precautions should be sufficient, "All" reasonable precautions is too high a standard for operational activities which by necessity create damage, disturbance, nuisance and inconvenience. Nuisance and inconvenience should be deleted and replaced with disturbance. Possible should be replaced by practical. That sets realistic obligations for operational standards. The standards included are onerous for operational activities.
c) 4.1(g) – requests should be reasonable and it is somewhat impractical to suggest that consents must be presented upon demand. The consents should be provided as soon as reasonably practicable after written demand because it will take time for these to be assembled.
d) 4.1(h) – the obligation should be limited to "so far as the Apparatus is in use". It will not be maintained to that standard if it is not in use.
e) 5.1(c) – rather than an obligation to provide notice it should be an obligation not to do these things and it should be any effect on operation i.e. "continuous" should be deleted. Any effect on operation whether temporary or otherwise is a problem both for the Operator and the end user. The landowner must be prevented from doing anything which affects operation of the Apparatus. Otherwise this will create a considerable risk to the equipment and potentially a health and safety risk as well as affecting the service that will be provided to the end user.
f) 8.1 –the indemnity should be limited to cases of negligence (it being unreasonable to penalise an Operator where they have not done anything wrong).
g) 10 – Starting with 30 days is completely unrealistic. Most apparatus could not be removed in that timescale and certainly not with an alternative being provided. This would cause considerable disruption to customers if no alternative route is already in place. 18 months is prescribed in the Act and should be the starting point for notice to terminate.

3. Do you agree that Ofcom has identified all of the notices it is required to prepare under paragraph 89 of the New Code?

Yes

4. Do you have any comments on the scope or drafting of these notices as set out in Annex 7?

The counter-notices refer to the date of service rather than the date of the notice in the draft format. A lot of Operators will not have kept a record of the date of service due to the fact that they tend to be large organisations with a significant amount of post and post can

take time to reach the appropriate recipient within the Operator. There is no need to refer to a date at all because this creates room for costly administrative errors which is unhelpful for both parties. However, if it is deemed necessary by Ofcom then the date referred to should be the date of the notice itself not the date it was served because the date of the notice will be clear from the notice received.