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Jack Presley-Abbott
Deputy Director for Connections Reform
Ofgem
10 South Colonnade
Canary Wharf
London
E14 4PU

National Energy System Operator
Faraday House
Gallows Hill
Warwick
CV34 6DA

James.Norman@neso.energy

www.neso.energy

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Request from NESO and all 3 GB Transmission Owners (i.e. SSEN Transmission, SP Transmission plc and National Grid Electricity Transmission) (“TOs”) in relation to the Connections Network Design Methodology (“CNDM”) Protections

Dear Jack

Overview and Context

The CNDM sets out a process to be followed by NESO and the TOs (the “Parties”) when preparing offers to enter into or modify existing connection agreements.

In the context of the Gate 2 to Whole Queue (“G2TWQ”) process there is a potential for misalignment between the customer protections afforded by the CNDM and the Parties’ respective licence, code and contractual obligations. We require Ofgem to consider and confirm agreement with our proposed approach by providing relief from certain obligations in the methodologies, licences and codes.

Under the G2TWQ process, the Parties are obliged to provide certain offers (Transmission Owner Construction Agreement (“TOCA”) Variation Offers and Gate 2 Modification Offers) in respect of Users’ projects which have met the Gate 2 Readiness Criteria and Gate 2 Strategic Alignment Criteria (both as described within the Gate 2 Criteria Methodology).

For the purposes of G2TWQ, the CNDM (at paragraph 5.4.2a) provides that projects which meet specific criteria are eligible for certain protections (“Protected Projects”).

These protections are set out in section 6.2 of the Gate 2 Criteria Methodology.

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For certain Protected Projects (i.e. those which fall under Protection Clause 1 and Protection Clause 2a (but only in respect of the additional protection for projects contracted to connect on or before 31st December 2027; “Additional Protection” hereon)) the CNDM (and Gate 2 Criteria Methodology) state that the contracted connection date and point of connection are protected.

However, for a number of these Protected Projects (noting a list of such projects will be provided separately and subsequently to this letter, once it is available), the existing contracted connection date is no longer realistic or achievable and/or in a limited number of cases a change in the point of connection is required.

The underlying cause of the delay to the connection date and/or (in some cases) change to point of connection is not for reasons directly to do with the G2TWQ process itself or connections reform generally, but primarily¹ due to a customer driven delay and/or network driven delay (and in the case of the latter, as stated in Footnote 1 in 6.2 Protection Clause 1 and Protection Clause 2a). There are a variety of underlying reasons why this is the case in practice e.g. issues with obtaining planning consents or due to supply chain issues, etc. Such delays are not uncommon for projects in delivery and are normally dealt with through proactive stakeholder engagement and unilateral variation rights awarded to the Parties, or via bilaterally negotiated changes to agreements. However, as a result of agreements not being updated as regularly, and prior to TMO4+ implementation, some Protected Projects will only have the delay included in their contract as part of the TOCA Variation Offer / Gate 2 Modification Offer, rather than it having been done shortly after the previous receipt of a delay notice from the TOs.

Furthermore, it is worth noting that in some cases TOs attempted to submit delay notices and NESO did not issue these to customers for a variety of reasons, including ‘the Pause’ and because of the protections within the methodologies and the uncertainty associated with the extent to which they apply (which is now being resolved by this request).

Consequences of the Status Quo

If the Parties are obligated to make a TOCA Variation Offer / Gate 2 Modification Offer with a protected but unrealistic connection date and/or point of connection in compliance with the methodology documents, this raises compliance issues for the Parties under the terms of their respective licences, CUSC, STC and connection agreements. This has been set out in more detail in an impact assessment in Appendix 2.

¹ However, it is worth noting that the general level of change associated with connection reform (including disruption to normal contractual update processes under ‘the Pause’) was also a contributing factor in some cases.

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Additionally, licence, code and contractual issues aside, if the Parties were to issue TOCA Variation Offers / Gate 2 Modification Offers with unrealistic connection dates and/or points of connection, those TOCA Variation Offers / Gate 2 Modification Offers would need to be shortly followed up with a further variation with corrected and realistic connection dates and/or points of connection. This would not be in customers' or consumers' interests as it would be an inefficient process with potential for confusion and increased consumer costs. The best outcome for customers is to issue one offer containing a realistic connection date and/or connection point. Taking a two-stage approach (i.e. issuing an initial, incorrect, offer to be followed by a corrected offer) could be seen as perpetuating contractual uncertainty (when G2TWQ is intended to help this, especially as regards to connection dates and points of connection). To mitigate the risk of misalignment and customer uncertainty, the Parties intend to issue TOCA Variation Offers / Gate 2 Modification Offers with realistic connection dates and points of connection.

To enable the Parties to achieve this, they are now seeking confirmation and recognition from Ofgem of the relief/comfort set out in Appendix 1 required to address conflict between the provisions of licences and/or codes and the requirements of CNDM in relation to certain Protected Projects and assurance that no enforcement action will be taken by Ofgem regarding this position².

Ask for Ofgem

Making a TOCA Variation Offer / Gate 2 Modification Offer with a connection date and point of connection which the Parties are aware is unrealistic and undeliverable raises several potential regulatory and contractual issues and concerns as set out above and in detail in the impact assessment in Appendix 2.

TOCA Variation Offers / Gate 2 Modification Offers should reflect the realistic connection date and point of connection. For a small group of customers, this will involve issuing a TOCA Variation Offer / Gate 2 Modification Offer with a connection date and/or point of connection contrary to the protections (as set out at CNDM paragraph 5.4.4 and within Footnote 1 of Protection Clauses 1 and 2a of Section 6.2 of the Gate 2 Criteria Methodology³) afforded to the existing contracted connection date and/or point of connection.

To enable the Parties to achieve this, we are therefore seeking the relief/comfort from certain obligations related to and in the CNDM from Ofgem. This has been set out in detail in Appendix 1. The relief/comfort requested in this letter is required to last for the duration of the G2TWQ process.

² And noting that the original intention of the protections related to ensuring a queue position and that the connection date and point of connection would be unchanged by G2TWQ network design, rather than it also being intended to cover the deliverability of the existing connection date and point of connection, with this being outside of the scope of G2TWQ.

³ And continuing to note that conversely, as set out elsewhere in this letter, not taking this proposed approach results in other potential licence and code compliance risks.

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It should also be sufficient to allow the Parties to amend the connection dates and/or points of connection, where necessary and to the extent necessary, for the relevant Protected Projects falling under Protection Clause 1 and Protection Clause 2a (Additional Protection).

As part of this relief/comfort (as set out in Appendix 1) the Parties would also ask that Ofgem confirm their view that the relevant TOCA Variation Offers / Gate 2 Modification Offers should apply the position as generally required in the Codes to “make detailed provision regarding” the connection, which includes providing accurate and realistic connection dates. We would also ask that Ofgem reinforce that the protection offered in Protection Clause 1 and Protection Clause 2a (Additional Protection) is limited to the context of connections reform only, and that protection of the existing contracted connection date and point of connection is subject to any normally permissible network company driven changes. Furthermore, we would also ask that Ofgem confirm that no enforcement action will be taken against the Parties in respect of issuing TOCA Variation Offers / Gate 2 Modification Offers in this regard.

Finally, it is worth noting that whilst the connection date (and in some cases point of connection) of such Protected Projects would be amended within the TOCA Variation Offer / Gate 2 Modification Offer, such Protected Projects would continue to benefit under the protections from the queue formation aspects of being a Protected Project within the CNDM and there would be no risk to them of not being classified as a Gate 2 Existing Agreement (as a result of the above).

If Ofgem is supportive of this approach and provides the relief/comfort set out in Appendix 1, the Parties will communicate the proposed approach and the reasoning to the affected Protected Projects as soon as practicable.

Yours sincerely

James Norman

Head of Connections Strategy

Appendix 1: Relief/Comfort Requested

Document and parties affected	Section	Wording	Request
TOs- Transmission Owner Licence	Standard Licence Condition D18, Paragraph 18.1	“The licensee shall cooperate with the ISOP to produce and maintain the Connections Network Design Methodology. The licensee shall also comply and act consistently with the Connections Network Design Methodology.”	Relief (via Letter of Comfort) from complying with the obligation to comply with the CNDM in relation to certain Protected Projects (with a list to be provided separately and subsequently to this letter) and specific CNDM clause 5.4.4 detailed below.
NESO- ESO Licence	Standard Licence Condition E12, Paragraph E12.3	“On application made by any person or any Authorised Electricity Operator the licensee must (subject to paragraph E12.12) offer to enter into a Bilateral Agreement and/or a Construction Agreement in accordance with the Connections Process defined in the CUSC and the Connections Methodologies.”	Relief (via Letter of Comfort) from complying with the obligation to comply with the CNDM and CUSC in relation to certain Protected Projects (with a list to be provided separately and subsequently to this letter) and specific CNDM clause 5.4.4 and CUSC section 18.11.1 detailed below.
TOs- STC	Section D Part Two, Paragraphs 4.5 and 6.4.	“4.5 A Transmission Owner shall prepare each TO Construction Offer (where The Company Construction Application	Relief (via Direction ⁴) from complying with the obligation to comply with the CNDM in relation to

⁴ Request for direction under B12.15 of their respective licences relieving them of their obligations to comply with these paragraphs of Section D, Part Two of the STC:

B12.15: “The Authority may (following consultation with all affected STC parties) issue directions relieving the licensee of its obligations to implement or comply with the STC in respect of such parts of the licensee’s transmission system or the national electricity transmission system or to such extent as may be specified in the direction.”

		<p>corresponds to a Gate 2 Application under the Gated Application and Offer Process or is for Reservation) in accordance with the Connections Network Design Methodology</p> <p>“6.4 The Connections Network Design Methodology shall be applied by the Transmission Owners and The Company in developing TO Construction Offers.”</p>	<p>certain Protected Projects (with a list to be provided separately and subsequently to this letter) and specific CNDM clause 5.4.4 detailed below.</p>
NESO-CUSC	Section 18 paragraph 18.11.1	<p>“Where a User has submitted an EA Request in respect of Existing Agreements for a Project and the EA Request meets the Gate 2 Criteria the EA Request will be processed in accordance with the Connections Network Design Methodology and the Project Designation Methodology.”</p>	<p>Relief (via Letter of Comfort) from complying with the obligation to comply with the CNDM in relation to certain Protected Projects (with a list to be provided separately and subsequently to this letter) and specific CNDM clause 5.4.4 detailed below.</p>
TOs and NESO - CNDM	5.4.4	<p>“Projects eligible for Protection Clause 1 and Protection Clause 2a (where their connection date is on or before 31st December 2027) will retain their existing connection date and PoC...”</p>	<p>Relief (via Letter of Comfort) from complying with the obligation to comply with the CNDM in relation to certain Protected Projects (with a list to be provided separately and subsequently to this letter) where a change in connection date and/or connection point is necessary.</p>

Appendix 2: Impact Assessment

Regulatory Impact Assessment – Issuing Offers with undeliverable connections dates and/or points of connection

The ESO Licence (E12 paragraph E.12.5) and Transmission Licence (D4A paragraph D4A.1) require that offers by NESO to applicants and offers by TOs to NESO “make detailed provision regarding” a number of items. This includes, in the case of the TO offer to NESO (D4A.1(d)) the date of connection by which the works to facilitate access “shall be completed” and in the case of the NESO CUSC offer (E12.5(e)) the date of connection by which works to permit access “must be completed”. In each case “time being of the essence” unless otherwise agreed. Providing a TOCA Variation Offer / Gate 2 Modification Offer with a connection date which is not realistic would run contrary to the stated aim and purpose of these licence conditions.

Arguably, requiring the Parties to make a TOCA Variation Offer / Gate 2 Modification Offer with a date which is not realistic falls within the exception to the requirement to make an offer (ESO E12.12 and TO D4A.5). This is due to the potential compliance risk to the Parties’ licence conditions/duties.

The process and terms upon which TOCA Variation Offers are to be made is both a matter of licence (D4A) and the STC. Compliance by TOs (and NESO) with STC is a licence condition (TO B12.9 and ESO E4.24). The process and terms upon which CUSC offers are to be made is again a matter of licence (E12) and CUSC. Compliance by NESO with CUSC is a licence condition (E2.25).

TOCA Variation Offers and Gate 2 Modification Offers have to be in substantially the form as per the STC/CUSC (Section A paragraph 2.2.1/Section 1 paragraph 1.3.4 (a)). The intent of the G2TWQ process (as any offer process) is to make an offer reflective of the standard offer considerations, contractual expectations and norms and the terms in the STC/CUSC.

Under STC (Schedule 8, paragraph 1.1.3.4) the TOCA Variation Offers “shall also include...an Appendix setting out the TO Construction Programme, including the date on which the Transmission Construction Works shall be completed.” The CUSC proforma construction agreement (ConsAg) (CUSC Schedule 2 Exhibits 3 and 3A) also provides for a completion date for the transmission works. Additionally, Paragraph 12.3 in Schedule G, notes that each Party “shall use all reasonable endeavours to ensure that all information provided from that Party to another is accurate and complete and submitted in good faith”.

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Contractual Impact Assessment - Issuing Offers with undeliverable connections dates and/or points of connection

Considering the STC/CUSC processes and the more general contractual principles (e.g. good faith and misrepresentation), programmes in contracts are framed on the basis of what is deliverable/realistic at that point. Obligations and consequences flow from any contractual commitments given (e.g. breaches can result in liquidated damages and customer milestones are based on the programme) and the date of delivery of the obligations (in this case the connection) is a key date for the purpose of any connection contract.

Having a date/programme in the contract which a party knows is not realistic or achievable results in a potential for breach of contract from day one and invites the possibility of claims from the other party. This is a significant risk which the Parties should not be forced to carry.

In particular in the context of TO offers and so Gate 2 Modification Offers, there is an express contractual term for a party to commission its works in accordance with commissioning programme (STC Schedule 9, Part A clause 2.9 / CUSC Consag Schedule 2, Exhibit 3, Part 1, clause 2.7) with contractual obligations (STC Schedule 9, Part A / CUSC Schedule 2 Exhibit 3 Part 1, clause 3) to “forthwith notify” of any delay in carrying out works. By offering the existing connection date, the Parties would be entering into an obligation under TOCA Variation Offer / Gate 2 Modification Offer that cannot be met and would potentially be in breach regarding the notification of delay.

Impact on Customers

Taking a two-stage approach could be seen as perpetuating contractual uncertainty (when G2TWQ is intended to avoid this). It could also feel disingenuous and contractually confusing to offer the existing connection date and point of connection in the Gate 2 Modification Offer (especially if the customer is already aware of the delay/change), which is to be shortly followed with a further offer to provide the realistic connection date and point of connection. Due to this uncertainty there is a risk that the Gate 2 Modification Offer is not accepted/is referred prolonging the period before which the reformed queue is contractually established. This approach would also increase the administrative burden of G2TWQ on all parties and, from a customer viewpoint, could cause frustration/complaints regarding the continuing contractual uncertainty.