



Making a positive difference
for energy consumers

NeuConnect Britain Limited, cap
and floor interconnector projects
and other interested parties

Direct Dial: 020 3263 2795
Email: cap.floor@ofgem.gov.uk

Date: 9 August 2021

Dear colleagues,

NeuConnect Britain Limited – Decision on a request for a later regime start date for the NeuConnect interconnector project

In June 2021, we implemented regulatory arrangements enabling us to approve delays to the Regime Start Date (RSD) for cap and floor interconnector projects caused by events or circumstances of pre-operational force majeure.¹

These arrangements allow interconnector projects that encounter such delays to submit a request for a later RSD for the Authority's² consideration. The RSD is the date on which the interconnector project's cap and floor regime starts.³

NeuConnect Britain Limited (NBL) submitted a request for the RSD for its NeuConnect interconnector project to be adjusted by 30 months, from 1 January 2024⁴ to 30 June 2026.⁵

After careful consideration of NBL's request **we have decided to agree to NBL's request to specify a later RSD of 30 June 2026 for the NeuConnect interconnector project.**

This letter considers the events set out in NBL's request as constituting force majeure and provides the reasons for our decision.

¹ Cap and floor interconnectors: Decision on pre-operational force majeure arrangements:
<https://www.ofgem.gov.uk/publications/cap-and-floor-interconnectors-decision-pre-operational-force-majeure-arrangements>

² The words "Authority", "we", "our" and "us" are used interchangeably in this decision.

³ The start date of the floor is also subject to the successful completion of a proving period test that demonstrates that the interconnector was available to flow at its rated capacity for a period of 60 continuous days.

⁴ 1 January 2024 is the current 'backstop' date for cap and floor Window 2 interconnector projects on which NBL's cap and floor regime starts regardless of whether the project has started commercial operations.

⁵ If the interconnector is commissioned earlier than this date, the RSD will instead be that earlier date.

Background

NBL was granted a cap and floor regime in our second application window (Window 2) and is developing a proposed 1400MW electricity interconnector between Great Britain (GB) and Germany. In line with the eligibility criteria for Window 2 cap and floor projects, the start date of the cap and floor regime for NBL's interconnector project reflects an element of the minimum eligibility criteria⁶ for Window 2 projects. NBL's RSD was set to be the earlier of:

- (a) the date it starts commercial operations⁷; and
- (b) 1 January 2024, or such later date as may be specified by the Authority.

NBL notes that it has faced several external events and unprecedented challenges which were beyond its control and which have obstructed progress in some key areas. As a result, it was no longer possible for NBL to meet the RSD of 1 January 2024. It has therefore requested a later RSD.

Assessment route

Our June 2021 decision on pre-operational force majeure arrangements for cap and floor interconnector projects provides two routes for assessing a request for a later RSD:

- (a) **a licence mechanism**, set out in a new standard condition - for interconnector projects that have had their specific cap and floor regime implemented in their respective interconnector licences; and
- (b) **a complementary process set out in a policy decision document** (the Policy Decision Document) that largely mirrors the above licence mechanism - for interconnector projects that have been granted a cap and floor regime in principle, but have not yet had their cap and floor regime implemented in their respective interconnector licences.

On 18 June 2021, we published our decision on changes to the electricity interconnector licence held by NBL.⁸ These licence changes will take effect from the date of our decision on the Final Project Assessment of the NeuConnect interconnector.⁹

⁶ Decision on project eligibility for cap and floor Window 2 projects:
https://www.ofgem.gov.uk/sites/default/files/docs/decision_to_open_a_second_cap_and_floor_application_window_for_electricity_interconnectors_in_2016.pdf

⁷ Following the successful completion of such procedures and tests in relation to the interconnector that are in accordance with, at the time they are undertaken, Good Industry Practice for commissioning that type of interconnector in order to demonstrate that the interconnector is available for the use of conveyance of electricity at the rated capacity.

⁸ Decision on changes to the electricity interconnector licence held by Greenlink Interconnector Limited (GIL) and the electricity interconnector licence held by NeuConnect Britain Limited (NBL):
<https://www.ofgem.gov.uk/publications/decision-changes-electricity-interconnector-licence-held-greenlink-interconnector-limited-gil-and-electricity-interconnector-licence-held-neuconnect-britain-limited-nbl>

⁹ These licence changes will also not take effect earlier than 56 days from the date on which the NBL's licence modification was made and published on our website (as required by section 11A of the Electricity Act).

Given that the licence changes implementing NBL's cap and floor regime are yet to take effect, we have considered NBL's request for a later RSD in accordance with the process set out in the Policy Decision Document.

NBL's request for a later RSD

In March 2021, NBL submitted a request for the project's RSD to be adjusted to 30 June 2026. In its submission, NBL sets out eight events that it considers to constitute pre-operational force majeure events that were beyond its control, together with the specification of length of the resulting delay caused by each of these events and the mitigation measures taken to minimise the impact of the delays. Below, we have considered each of these events.¹⁰

1. Regulatory delays in Germany

In its request for a later RSD, NBL explains the following factors as having contributed to the regulatory delays encountered in Germany and which it considers were beyond its control. These issues include not being able to secure its preferred option of a comparable cap and floor regime in Germany to that granted in GB; the general political situation in Germany and associated slower than anticipated progress on legislative changes to allow for stand-alone interconnector projects; and a change in the form of regulation to be applied to NeuConnect (from the ARegV to StromNEV model).

Initial approach to securing a regulatory regime in Germany

We note that NBL hoped to transfer a cap and floor regime to Germany as the German regulatory framework did not include any specific stand-alone interconnector regime.

We further note the assumption made by NBL at the IPA submission stage was that the regime to be adopted in Germany would mirror the cap and floor arrangements in GB. However, it became clear in July 2017 that implementation of a cap and floor regime in Germany would not be possible.

We note that this clarity on a regulatory route comparable to our cap and floor regime not being possible in Germany was obtained by NBL in July 2017. This was relatively soon (9 months) after its Initial Project Assessment (IPA) submission to Ofgem in October 2016, and 5 months ahead of our decision on NBL's IPA in January 2018.

NBL attributes discussions on a possible cap and floor regime in Germany not coming to fruition and the resulting need for NBL to pursue a regulatory route based on the German standard model of regulation, on a number of factors, including Brexit-related uncertainties, parallel political negotiations on the European "Clean Energy for all Europeans" (CEP)

¹⁰ In accordance with paragraph 9 and 10 of the Policy Decision Document, we notified NBL of our minded-to position and have taken their response into account.

legislative package and uncertainties related to the system impacts of the NeuConnect interconnector on the German transmission network identified by the Federal Ministry for Economy and Energy (BMWi) and German Federal Regulatory Authority, Bundesnetzagentur (BNetzA).

We note that NBL has encountered delays to project development as a result of its assumption of a 'mirror' cap and floor regime in Germany not being realised. We also note that this approach was pursued on the basis of constructive discussions with the relevant authorities in Germany.

However, we have not been presented with any evidence of a firm undertaking made by relevant German authorities to develop a comparable cap and floor regime for NeuConnect in Germany, which was then withdrawn. We also consider the possibility that relevant German authorities may reject NBL's approach to secure a mirror cap and floor regime, in favour of an alternative form of regulation that is more aligned to the German standard model of regulation, to have always been a possible outcome.

We also consider the possibility that the NeuConnect interconnector may have needed to be included in the German network development plan (NEP), as a requisite requirement of developing an interconnector project under the standard German model of regulation, to be an issue that should have been anticipated and considered by NBL in parallel to its pursuit of a cap and floor regime in Germany.

For the above reasons, we do not consider that the delays related to NBL's initial approach to securing a regulatory regime in Germany (that would be similar to the cap and floor regime in GB) amounted to force majeure circumstances.

Delays to the introduction of German law facilitating operation of non-TSO interconnectors

We note that, for the NeuConnect interconnector project to progress in Germany, changes are required to German law to facilitate operation of stand-alone (non-TSO) interconnectors. In its submission, NBL explains how the progress on these legislative changes has been hindered by various factors, including political uncertainty in Germany.¹¹

We accept NBL's position and agree that the progress of the legislative timetable in Germany was beyond NBL's control in this case due to specific developments that themselves were beyond NBL's control.

Change in form of regulation (from the ARegV to StromNEV model)

¹¹ Such as the delays in forming a Government after German elections - elections were held in August 2017 but a government was not formed until March 2018. Similarly, the position of Secretary of State for Energy Policy not appointed until February 2019 (11 months after the government was formed).

NBL states that since July 2017, discussions with BNetzA on the appropriate regulatory arrangements for NeuConnect have progressed on the basis that the expected form of regulation in Germany would be an incentive-based form of regulation known as ARegV.

NBL further states that it was not until October 2019 that it received an indication from BNetzA that the ARegV form of regulation would no longer be applicable and that the standard StromNEV form of regulation would need to be adopted.¹² This revised view was subsequently confirmed by BNetzA in late 2020.

NBL considers this shift in approach to the proposed regulatory arrangements for NeuConnect, as well as the delays associated with ongoing discussions to agree revisions with BNetzA to the StromNEV regulation to facilitate project finance, as being force majeure events that are beyond its control. We agree with NBL's view that these developments and change in approach to the regulation of NeuConnect were beyond NBL's control.

2. Offshore Permitting Authority delays (Germany)

NBL attributes 36 months of delays experienced in submitting the necessary offshore cable permit applications in Germany to BSH's (the German offshore planning authority) requirements and the resulting need to make material changes to the previously approved offshore cable route for the project.

We note that four potential options were identified for the offshore cable route for NeuConnect, with the options being known as variants 1 to 4. We also note that, although there was a difference in preference between NBL and BSH on the four available options, BSH initially accepted NBL's preferred option of variant 3.¹³ We further note that, in Q2 and Q3 of 2018, NBL concluded a complete survey of the agreed variant 3 offshore cable route.

NBL explained that, in October 2018, BSH requested adjustments to the variant 3 cable route be made to facilitate further offshore developments, and additional adjustments were requested by BSH in late 2019. NBL's submission includes substantive details on the cable route options and a number of supporting exhibits to illustrate the series of meetings held with BSH with a view to finalise the cable route whilst also trying to minimise the need for any additional costly and time-consuming surveys. We note that these discussions culminated in the final agreement with BSH on the cable route being reached in July 2020 and the relevant offshore permit applications being submitted by NBL in December 2020.

We agree with NBL's view that the delays in reaching the agreement with BSH on the cable route, due to the need for amendments to the initially agreed route, and the subsequent

¹² Due to the proposed changes to German primary legislation not facilitating the use of ARegV for new interconnectors.

¹³ With some specific conditions relating to cable route's proximity to windfarms and pipelines.

knock-on impact of this on its offshore permit application timeline, were beyond the reasonable control of NBL.

3. Connection offer delays (Germany)

We note that this part of NBL's request is comprised of two elements. Firstly, delays in receiving a connection offer from TenneT, and secondly, delays in reaching an agreement with TenneT on that formal connection offer. We consider each of these elements in turn below.

Delays in receiving a connection offer

We note that NBL attributes a 21-month period to delays in receiving a connection offer from TenneT. NBL received a 'connection capacity reservation letter' in August 2017; however, this lacked the relevant technical and commercial details on which to base subsequent activities.

We also note NBL's explanation indicating reluctance on the part of TenneT to provide a full and formal connection offer in light of NBL not having TSO status nor being included in the ENSTO-E Ten Year Network Development Plan (TYNDP) or German NEP. We further note that a draft formal connection offer was only received from TenneT in December 2018, once NeuConnect had been included in the TYNDP.

We consider TenneT's position and perceived or real reluctance to provide a formal connection offer to a party that does not have TSO status in Germany or, alternatively, is not included in the TYNDP or NEP, to be an issue that should have been reasonably anticipated by NBL - as TenneT's position is a reflection of the current regulatory arrangements in Germany that TenneT is obliged to comply with (until such time that the relevant legislation is amended). We therefore do not consider this delay to have been an event or circumstance beyond the reasonable control of NBL.

Delays in reaching agreement with TenneT on the connection offer

We have carefully analysed the relevant information contained in NBL's main submission, related exhibits and further information that we have requested from NBL. We noted that the commercial negotiations between NBL and TenneT in respect of the connection agreement have taken longer than NBL anticipated and that these negotiations have not yet been concluded. We noted NBL's concerns that TenneT might have been acting unreasonably and/or insisting on proposals that might not be compatible with the applicable laws. At this point in time, we consider, based on the information and evidence submitted by NBL, that we have not received enough information to conclude that TenneT has acted unreasonably and/or insisted on proposals that are incompatible with applicable laws. Further, at this point in time, and based on information and evidence provided, we have not been able to conclude

that any other aspects raised by NBL in relation to commercial negotiations of the connection agreement with TenneT have amounted to force majeure circumstances.

4. Land purchase delays (Germany)

NBL explained that it has experienced delays of 17 months associated with securing the necessary land parcels at the connection location. We note that these delays have some interactions with the above delayed receipt of a connection offer from TenneT (specifying the connection location), in that appropriate land parcels could not be identified and secured by NBL until the connection location was known. Our view on this point is as stated above – we consider that the delay in receiving a connection offer could have been reasonably anticipated by NBL, as issues surrounding the implications of NBL not having TSO status in Germany were known to NBL from the outset of the project development. We therefore do not consider this delay to have been an event or circumstance beyond the reasonable control of NBL.

NBL also attributes a delay of 6 months to protracted negotiations during the course of reaching agreements with incumbent tenants of the required land parcels. Having reviewed the detailed information provided by NBL on the nature of these negotiations, we agree with NBL that this delay was beyond NBL's reasonable control.

5. COVID-19 pandemic

In its request, NBL explains the impact of the COVID-19 pandemic on its interconnector development programme during the course of 2020 – specifically, the impact of the pandemic on EPC bidding timescales and associated site visits. We reviewed the supporting exhibits included in NBL's request that evidence the delays caused by the need to postpone EPC supplier visits and the delays experienced by EPC bidders preparing their respective bids. NBL attributes a delay of 6 months to the development phase of the interconnector project to the Covid 19 pandemic. We agree with NBL's view that these delays were beyond its reasonable control.

6. Acquisition of survey data (and impact on construction timetable)

We note from NBL's request that there are number of caverns under the proposed connection location in Germany in which strategic oil reserves are stored. This makes the development of any land above the caverns subject to reaching agreement with EBV (German National Petroleum Stockpiling Agency).¹⁴ We note that the existence of the caverns necessitated NBL having to secure survey data from both EBV and the incumbent tenants and landowners.

We further note that NBL has, through the EBV survey data, identified the need for 18-month extension of the construction in order to carry out land stabilisation works and also have

¹⁴ The Erdölbevorratungsverband (EBV): <https://www.ebv-oil.org/cmse/cms2.asp?sid=57&nid=&cof=57>

attributed a 6-month delay to the time needed to secure access to the site to conduct early site investigation works.

We agree with NBL's view that it could not have known about the geological characteristics of the area until the connection location was identified and confirmed. As such, we agree that the resulting delays due to the existence of the caverns at the connection location, and the subsequent need for additional surveys and works beyond those originally anticipated, were beyond NBL's reasonable control.

7. Environment laws - change in interpretation in the Netherlands

NBL has provided detailed explanation and evidence illustrating how the new interpretation of environmental protection laws, set by the Supreme Court of the Netherlands¹⁵, significantly delayed its permit applications in the Netherlands. NBL experienced a 16-month delay due to having to work with the Dutch environmental protection organisations as well as the Dutch permitting authorities to significantly revise relevant permit applications prior to their submission, to factor in stricter requirements related to the emission and deposition of nitrogen oxides. We agree with NBL's view that this change in interpretation of environmental legislation in the Netherlands was beyond NBL's reasonable control.

8. Supply chain constraints

In its submission, NBL explained various supply chain constraints. We have analysed the information contained in the main submission, the related evidence contained in exhibits, the additional information we received from NBL upon our requests and the supplemental information that NBL submitted on its own initiative. As to the delays related to COVID-19 pandemic, we have agreed that these were beyond NBL's control. This matter is addressed under point 5 of this decision. As to other aspects, particularly those related to cable manufacturing capacity, the limited availability of specialised vessels as well as other resource availability, we were unable to establish force majeure events or circumstances, based on the information and evidence available to us at this point in time.

¹⁵ The decision by the Supreme Court of the Netherlands in the case of "*Urgenda Foundation v. State of the Netherlands*", dated 20.12.2019 (which upheld the earlier decision of the Hague Court of Appeal, dated 9.10.2018).

Our decision

Whilst we do not consider all the events set out in NBL's request to constitute an event or circumstance of pre-operational force majeure, we do consider that some of them qualify as force majeure events that were beyond the reasonable control of NBL. We also consider that NBL has provided sufficient explanation and evidence to justify the requested later RSD.

Therefore, after careful consideration of NBL's request (and taking into account the resulting delay periods specified by NBL, any overlap and/or interactions between those time periods, and the mitigating actions deployed by NBL to minimise these delays), **we agree to NBL's request to specify a later RSD of 30 June 2026 for the NeuConnect interconnector.**

Next steps

As noted above, this decision has been made in accordance with the assessment and decision-making framework set out in our published Policy Decision Document for pre-operational force majeure requests.¹⁶ We will issue a formal licence direction to reflect this decision in NBL's electricity interconnector licence, once the relevant licence conditions¹⁷ have taken effect in NBL's licence.

If you have any questions in relation to this decision letter, please contact Aliabbas Bhamani (Aliabbas.Bhamani@ofgem.gov.uk).

Yours sincerely,



Stuart Borland

Head of Interconnectors

¹⁶ Policy Decision Document for pre-operation force majeure requests:
https://www.ofgem.gov.uk/sites/default/files/2021-06/annex_1_-_pre-op_fm_policy_doc%20%281%29.pdf

¹⁷ By issuing a direction under paragraph 6(a) of SLC 26A (Delay to Regime Start Date caused by Pre-Operational Force Majeure) that updates the date specified in the definition of Regime Start Date in special condition 1(Definitions and Interpretation) of NBL's electricity interconnector licence.