

RIO-ED2 Informal Licence Drafting Consultation response

Annex 1: Response to Consultation Questions

October 2022



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1 Introduction

Q1. Do you have any views on the RIIO-ED2 licence drafting principles, set out in Appendix 1?

Whilst the drafting principles are clear we note that these have not been followed in all circumstances and are not applied consistently in the licence draft shared for this informal consultation. It is clear to see that different authors have different styles and do not always follow the drafting principles or common wording or defined terms.

Where we have seen this, we provide comments within our Annex 4 issues logs or our Annex 5 Definitions spreadsheet.

We set out below issues concerning the principles set out in the consultation document and provide examples to highlight why we have concerns regarding the application of these in earnest.

A1.3 relates to the principle of “We [Ofgem] will aim for consistency in common drafting and create templates to make that easier”. Whilst we acknowledge that templates have been developed and shared, when these have been used in earnest, deviations between common conditions has occurred and some significant differences included within drafting which have meaningful impact on the conditions themselves. For example, we have reviewed 3.2 conditions for re-openers and found some fundamental inconsistencies. This has been set out in greater detail in “Annex 2: Supporting document for material issues” and we would urge that Ofgem consider the representations made here on inconsistencies and differences in drafting that relates to broadly commonly structure re-opener mechanisms. It is crucial that unintended consequences for licence application do not occur as an unintended consequence of inconsistency of drafting.

We continue to disagree that A1.1 omits obligations on Ofgem that were contained in the ED1 licence. Seeking to remove all obligations on Ofgem removes key items that maintain a workable licence for all stakeholders. The view of Ofgem, as we understand it, is that the licence should not contain requirements on Ofgem’s elements of Licence processes and obligations as the Licence is the companies. In order to preserve in ED2 the equivalent level of regulatory clarity and risk as in the ED1 licence, we suggest Ofgem produces a document/ guide for Ofgem processes and considerations. This document/ guide would allow DNOs to achieve their licence obligations cited with how Ofgem’s parts of processes will be taken forward, and so that all consumers and companies have transparency and certainty of how regulatory outcomes will be achieved.

With regards to A1.12, we believe this should apply to Associated Documents and guidance (AD) as well. Further we are currently unclear why the majority of the drafting principles more broadly don’t apply to the ADs which is not explicit as currently drafted. Significant review and work is needed on these ADs including both core and appendix content contained within these documents.

Ofgem in its use of A1.16 has failed to give correct consideration for the context and circumstances with regards to its use of “best endeavours”. We provide detailed comment to this in Annex 2 of this response. We would also note that “all reasonable endeavours” has been used in SLC7A, SLC15A, SLC31E and a variant in SLC8 in direct contradiction of Ofgem’s own licence drafting principles. To correct this this should be changed to “reasonable endeavours” in all circumstances.

Q2. Do you have any views on the definitions and the defined terms set out in Annex 3?

We have reviewed and provided detailed comments in issues logs where relevant/necessary and in Annex 5 to our response. By way of example, where a term is not defined, or in our view needs defining, we have provided this in relevant issues logs to which the term relates to (e.g. West Coast of Cumbria).

2 Proposed new structure of the RIIO-ED2 Special Conditions

Q3. What are your views on the proposed changes to the structure of the SpCs?

We broadly support the structural changes that have been made with the following exceptions:

- We continue to have issues and concerns with the proposed structuring of Cyber conditions and set out details on this in response to question 12 of this document.
- Relatedly we view that the common procedure for PCD assessment should reside in SpC 1.3 and set out in more detail in our response to question 9 of this document.
- Further, we disagree with the drive to unnecessarily align with GD/T with regard to General Obligations set out in chapter 9 of the SpCs and maintain that some of these conditions in chapter 9 should sit in standard (SLCs) as per ED1.

3 Associated Documents for RIIO-ED2

Q4. Do you agree with our principles for Associated Documents?

We agree with the principles for Associated Documents, and whilst it does not state it explicitly within the Ofgem consultation document, we consider that the licence drafting principles should apply equally to the ADs (where relevant).

Many of the ADs are in relatively early draft form and need more work to be able to meet the criteria laid out in the relevant licence condition, the AD principles and the licence drafting principles.

Given that ADs are of increasing prominence and utilisation for RIIO-ED2, we urge Ofgem to ensure that a quality assurance process is performed on these ADs ahead of statutory consultation to ensure that they are consistent, in line with laid out principles and adequately perform their function as additional guidance or governance documents.

Q5. Do you have any views on our proposed list of Associated Documents and the timetable for consulting on and implementing them?

All ADs must be available, and have been fully consulted on, ahead of ED2 starting. Therefore, it is important that all gaps and missing ADs are populated and provided to DNOs and relevant stakeholders ahead of formal statutory consultation in December, but at the bare minimum as part of that formal statutory consultation process. It is unfair and illogical to expect DNOs to provide complete and cohesive comment on the licence where parts of, and whole ADs, are not provided as these need to be reviewed in conjunction with the licence.

The list in Table 2 of the consultation is not an exhaustive list of ADs, as there will be some which are carried forward from ED1. All such documents should be made available to DNOs for the next LDWG, and a comprehensive list and all documents must be included in the statutory consultation in December.

We also request that Ofgem make clear what legal status is given to those documents that are linked to standard conditions. All documents established by the special conditions are termed ADs, however it is unclear what status those established by standard licence conditions are.

4 Proposed changes to the finance related licence conditions and Associated Documents

Q6. Are there any areas where the licence drafting has not correctly implemented the proposals set out in paragraph 4.1? If so please describe.

For issues relating to finance implementation we have included these in our issues log responses.

Q7. Are there other terms or definitions that would be valuable to standardise with other sectors?

The terms Network Licensee and Relevant Network Licensee are used within the various conditions. It would be worthwhile to perform an exercise to ensure that these are used consistently and correctly both in the proposed licence conditions for RIIO-ED2 and also where they are used for other sectors.

Further, we note that paragraph 4.2 of the consultation document introduces the new term “Network Charges” to be consistent with other sectors. We disagree with this change, as it appears to be change for the sake of change. The definition of Network Charges is “the meaning given to the term Use of System Charges in Standard Condition 1”. The term Use of System Charges is used extensively through the SLCs and to change this to Network Charges for the Specials risks unnecessary confusion.

5 Licence Chapter 1 Interpretation, definitions and common procedure

Q8. What are your views on the proposed changes to the SpCs outlined in this chapter?

We welcome all definitions being put together in SpC1.2. We also welcome the consolidation of common procedures in SpC1.3 and our views on potential additions are shared below in question 9.

Other comments on Chapter 1 are shared within issues logs and the definitions spreadsheet submitted as part of our response to the informal licence consultation.

Q9. Do you think any other common procedure should be added to SpC 1.3 (Common procedure)?

Yes, the following should be included in the common procedures set out in SpC 1.3:

- The common process for Authority directing a new re-opener application window, additional or otherwise under SpC 3.2 re-openers.
- The common process for Authority instigating a re-opener under SpC 3.2 and SpC3.6 re-openers. This differs from the above bullet as it relates to the Authority instigating a re-opener rather than directing a window and arises from different clauses. Presently this process is missing from the licence entirely.
- In respect of derogations, all licence conditions should have clauses built into them to enable them to be switched off on request of the licensee and consequent direction from Ofgem. An alternative solution to this is to include an appropriate equivalent clause in special condition 1.3 (Common Procedure) and SLC2 (Interpretation of this licence).

- Further, the common assessment process for PCDs should be set out in SpC 1.3 rather than where it currently resides in the draft of the licence shared for this consultation.

6 Licence Chapter 2 Revenue restriction

Q10. What are your views on the proposed changes to the SpCs outlined in this chapter?

Please see our detailed comments contained within issues logs submitted as part of our response to the informal licence consultation.

One comment we would note is that paragraph 6.1 of the main consultation document sets out that the principle obligation of the price control is to set charges so that revenue recovered equals revenue allowed. We challenge whether this is the principle obligation in the way that this is worded in the consultation document as this isn't what is reflected in the licence as drafted. We ask Ofgem to provide a fuller articulation of how they have defined that this is the principle obligation of the price control, as we consider that the function of the price control is to deliver for customers.

7 Licence Chapter 3 Totex Allowance adjustments

Q11. What are your views on the proposed changes to the SpCs outlined in this chapter?

Please see our detailed comments contained within issues logs submitted as part of our response to the informal licence consultation.

We note that of the uncertainty mechanisms in Chapter 3, there are a variety of re-openers that are a combination of both DNO and Authority trigger. We do not consider that Ofgem have adequately laid out the rationale for this and request that this is clearly provided within Final Determinations.

Further, we note that Chapter 3 gives effect to decisions made or proposals consulted on, with the exception of SpC3.3 for Strategic Investment and SpC3.11 for Net to Gross. It is important that the rationale for these are fully provided in future Ofgem publications.

Q12. Should we maintain a combined Evaluative Price Control Deliverable condition in SpC 3.3 (Evaluative Price Control Deliverables) or split out the relevant Re-openers and Price Control Deliverables? What are your reasons and how do you think we should split out the conditions?

No, we disagree with this being maintained individually as the interaction between the three special conditions that regulate cyber allowance adjustments is difficult to understand and lacks clarity and transparency. In this regard we also note Ofgem's statement at para 7.33 of the consultation stating that *"The methodology for assessing PCDs ... move to SpC 9.3"*.

We provide a fuller explanation of our views in Annex 2 and the associated issues logs, however provide a summary within this question response. Fundamentally, we think that it is important to address all the issues we have identified (and provide separately) with the operation of the licence conditions in respect of cyber OT and cyber IT. Once those issues have been resolved, we would also support the creation of a single condition that covers all aspects of the regulation of cyber OT and cyber IT allowance adjustments. However, this objective is secondary to ensuring that the various components operate correctly.

We disagree with Ofgem's proposal that the methodology for assessing PCDs would then move to SpC 9.3 as this would not address the issue that the Ofgem standard approach to evaluative PCD assessment is not appropriate for the assessment of cyber PCDs.

Our reasons for supporting the creation of a single condition are:

- It is currently difficult to understand the interactions between the various conditions. It is important that all aspects that may influence the basis of Totex allowance adjustments related to Cyber interact with each other properly and can be clearly understood. The creation of a separate condition combining all the relevant elements would better facilitate this.
- The specialist nature of Cyber outputs, combined with the fact that much of the detail associated with these projects is confidential in nature, means that some of the standard approach to the assessment of evaluative PCDs is not appropriate to the assessment of Cyber projects. Bringing all aspects into one condition would also allow aspects of the assessment of PCD delivery evaluation to be better tailored to cyber projects.

We therefore propose that the following conditions/ Parts of conditions be combined into one condition:

- Uncertain costs re-opener (SpC 3.2)
 - Introduction
 - Part A – relevant terms, with wording evolved to recognise that these values will not be placed in the public domain
 - Part G – Cyber Resilience OT Re-opener
 - Part H – Cyber Resilience IT Re-opener
- Evaluative Price Control Deliverables (SpC 3.3)
 - Part A – Relevant paragraphs
 - Part C – tailored for the assessment of cyber outputs, including tailoring of defined terms to better reflect cyber activities
 - Part D – Relevant paragraphs
- Use It or Lose it adjustment basis for cyber OT (if required)
- Price Control Deliverable reporting requirements (SpC 9.3) – Part B and appendix 1
- Text to create a separate guidance document covering cyber OT and cyber IT activities – bringing together the re-opener guidance that is currently set out in Re-opener Guidance and Application Requirements Document with PCD reporting and assessment requirements that are currently set out in PCD Reporting Requirements and Methodology Document.

8 Licence Chapter 4 Output delivery incentives

Q13. What are your views on the proposed changes to the SpCs outlined in this chapter?

Please see our detailed comments contained within issues logs submitted as part of our response to the informal licence consultation.

9 Licence Chapter 5 Other revenue allowances

Q14. What are your views on the proposed changes to the SpCs outlined in this chapter?

Please see our detailed comments contained within issues logs submitted as part of our response to the informal licence consultation.

10 Licence Chapter 6 Pass-through

Q15. What are your views on the proposed changes to the SpCs outlined in this chapter?

Please see our detailed comments contained within issues logs submitted as part of our response to the informal licence consultation.

11 Licence Chapter 7 Legacy

Q16. What are your views on the proposed changes to the SpCs outlined in this chapter?

Please see our detailed comments contained within issues logs submitted as part of our response to the informal licence consultation.

12 Licence Chapter 8 Governance

Q17. What are your views on the proposed changes to the SpCs outlined in this chapter?

Please see our detailed comments contained within issues logs submitted as part of our response to the informal licence consultation.

We note that paragraph 15.38 of this informal consultation document states that the process for calculating PCFM Variable Value will be set out in either the licence, PCFH or PCFM guidance. At this late stage there should not be uncertainty over where this critical process will sit, and more importantly it needs to be viewed by DNOs as soon as possible. We therefore urge Ofgem to discuss with DNOs and agree the decision as soon as possible. This decision and subsequent drafting must be shared with DNOs well ahead of formal statutory consultation.

Further we also highlight that paragraph 16.1 of the informal consultation document pertains to introducing new obligations the licensees must fulfil to calculate Allowed Revenue. These obligations must be clearly signposted to DNOs, and a full version of the PCFH with all the missing elements populated must be available for review well ahead of formal statutory consultation.

13 Licence Chapter 9 General obligations

Q18. What are your views on the proposed changes to the SpCs outlined in this chapter?

Please see our detailed comments contained within issues logs submitted as part of our response to the informal licence consultation.