



Modifications to the special licence conditions in the electricity transmission licences - Early Competition in Onshore Electricity Transmission: Statutory Consultation

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Dear Samuel,

Modifications to the special licence conditions in the electricity transmission licences - Early Competition in Onshore Electricity Transmission: Statutory Consultation

Please find enclosed a response to Ofgem's consultation on all elements of the Modifications to the special licence conditions in the electricity transmission licences – Early Competition in Onshore Electricity Transmission: Statutory Consultation. SSEN Transmission¹ ("SSENT"), part of the SSE Group, is responsible for the electricity transmission network in the north of Scotland.

We are committed to delivering a network for net zero and supporting the clear regulatory and policy shift towards more anticipatory strategic network planning initially, through the Governments Clean Power 2030 Action Plan and then the first Strategic Spatial Energy Plan that will help shape the mix of clean energy sources connecting to the electricity network.

The TO obligations relating to Onshore Competition are consequential to the role of the NESO as Delivery body and should not be implemented until the NESO licence changes and the CATO licence have been consulted on. There is a potential for regulatory misalignment as the TO licence changes have been developed and consulted on without TOs seeing the other licence changes which include interdependencies. For example, NESO have reciprocal obligations on which TO obligations are based, including the obligation to comply with the Information Exchange Guidance.

Ofgem should confirm how it proposes to manage the potential for misalignment with TO/NESO/CATO licence changes and how it will mitigate against the potential for multiple changes/iterations of new obligations once the interactions are understood.

We don't support the proposed licence change on management separation - the introduction of a process to develop and submit for approval a Conflict Mitigation Statement, is sufficient to achieve this outcome aligned with the principles set out, without additional licence conditions.

¹ Scottish and Southern Electricity Networks is a trading name of: Scottish and Southern Energy Power Distribution Limited Registered in Scotland No. SC213459; Scottish Hydro Electric Transmission plc Registered in Scotland No. SC213461; Scottish Hydro Electric Power Distribution plc Registered in Scotland No. SC213460; (all having their Registered Offices at Inverlorn House 200 Dunkeld Road Perth PH1 3AQ); and Southern Electric Power Distribution plc Registered in England & Wales No. 04094290 having their Registered Office at No.1 Forbury Place, 43 Forbury Road, Reading, RG1 3JH which are members of the SSE Group www.ssen.co.uk

Ofgem should not be overly prescriptive in setting the solutions and allow TOs to present the case as to how the conflicts will be managed as part of the Conflict Mitigation Statement. A key objective of the competition regime should be to minimise the business impact on incumbent TOs and manage any conflicts of interest in a proportionate manner.

Audit requirements proposed are disproportionate for out of area projects and would create unnecessary expense for TO as part of bidding costs. If an external audit is required of conflict mitigation arrangements, this should be requested if the TO is the preferred bidder, not as a requirement for participation.

While we accept that conflict mitigation measures are required, Ofgem should commit to reviewing the framework once implemented to ensure there are not unnecessary barriers to entry or costs for TOs based on a perception of unfairness rather than the practical application of conflict mitigation measures.

Our overall responses to the individual questions can be found in Appendix 1. We would welcome the opportunity to meet with Ofgem to further discuss any of the issues raised in this response.

Yours Sincerely,

Rebecca Middlemiss
Regulation Manager

Appendix 1

Q1. Do you agree with our proposed drafting for the Tender Support Activities in Onshore Electricity Transmission licence condition?

There are reciprocal obligations are required for the NESO in relation to the Onshore Information Guidance. The NESO licence does not yet have any obligations in relation to its role as Delivery Body for the onshore competition tender process. Any changes to the NESO licence should be consulted on and take effect at the same time, or before any obligations on TO's in relation to Tender Support Activities take effect. We can't agree to new obligations which are consequential to and substantially interconnected with the licence obligations on another body without being satisfied that the reciprocal obligations are appropriate. This would also mitigate against the potential for the Onshore Competition Information Exchange Guidance requiring further changes.

9.20.5 - A licence condition which obliges TOs to provide confidential information should never put us in breach of our licence condition which obliges us to maintain confidentiality. Notwithstanding the amendment proposed to 9.4.14 (f), the obligation in 9.20.5 should be clearer that the licensee will not provide any information that would result in breaching the core obligation in 9.14.2.

Q2. Do you agree with the proposed Onshore Information Exchange Guidance?

1. Background

Paragraph 1.1 - The guidance states the early competition tender is used to 'determine a solution to a need'. This is not correct, in the current model the solution to the need is already identified and it's the solution that is going out to tender.

2. Introduction

Paragraph 2.1 - In practice, the TO gives information to the NESO and the NESO gives information to bidders. The use of the phrase 'gives information indirectly to bidders' is potentially misleading and not necessary.

3. Onshore Competition Information Exchange Timeline

Section 3 Table Summary - Wording of the site visit row suggests the potential for a site visit at stage gate 2 and ITT stage. Assuming the Stage Gate 2 activities are coordinating with NESO to organise the visit, this should be clearer otherwise could suggest a site visit at each stage rather than one at ITT stage but organising could be done in Stage Gate 2 as outlined in para 3.5.

Information/an indication of timescales should be given for the site visit. For example, preparation in SG2 – facilitation in ITT (1-2 days or similar).

In row 4 'pre-tender' is not Stage Gate 2 (pre-tender), it's not clear whether this means it's a different stage from references to SG2.

Paragraph 3.3 - It would be helpful to indicate when this circa 3-month period is expected within the pre-tender period.

Paragraph 3.6 It is not clear from drafting that this 14-week period is different to the 3-month period during which information will be requested.

The drafting is incorrect where it states 'from the Delivery Body on behalf of bidders', Q and A is just a standard part of the procurement process the Delivery Body is responsible for, the Delivery Body may not be able to answer all the questions and may need support from TO's with further information to be able to respond to bidders. As highlighted with drafting elsewhere, this suggests the Delivery Body is in a 'facilitation' role between the TO and the bidder which is not correct.

Paragraph 3.8 - Information requests within pre-tender and ITT stages should also allow for enough time for a response. For example, It may be difficult responding to requests close to the 14th week.

There is a reference to 15 working days. Elsewhere durations are given in terms of days (not specifically working days). There should be consistency across all the documents.

Paragraph 3.9 - The drafting is a bit complex, clarificatory isn't a word most people encounter very often.

Figure 1 – Stage Gate 2 is used in the Section 3 Table summary but not the timeline. Stage Gate 1 is used in the timeline but not used elsewhere.

4.Tender Documentation Support

Paragraph 4.1 - The definition used - 'technical network data specific to the interface sites' seems appropriate. However, it is limited compared to the wording in 9.20.4 (a) that refers to 'information relating to the licensee's Transmission Area as is reasonably required by the Delivery Body'. The latter encompasses the whole licence area potentially and seems very wide in comparison.

The drafting should try and define 'reasonably required' a bit more or explicitly tie it into the technical network data request.

Paragraph 4.3

4.3 - (2) i. should state 'Busbar Fault Level details at point of interconnection'

4.4 includes (8) 'connection feasibility reporting'. This is absent from the Information template and needs included within it if it is to remain and, in addition, further detail/elaboration on what is required/expected needs to be provided.

Also (7) is a broad request - what is 'sufficiently detailed'? And expectation of 'reasonably be required'?

Paragraph 4.4 - There is potential for a project to be exempt from competition after information has been shared by TO. For example, information highlighting complexities that previously were unknown. This has not been accounted for in the guidance

Paragraph 4.5 - There is no indication of Delivery Body's criteria for a successful extension request

Paragraphs 4.8 and 4.9 seem more related to process rather than templates so should follow on from 4.6.

5. Formal Information Requests during ITT stage

Paragraph 5.1 - As per comment the above, this worded in a way that suggests a role for TO's in the procurement process and relationship between the bidders and the TO. Q and A/clarifications during the ITT stage are a normal part of the procurement process. The NESO/Delivery Body may need support from TO's to respond to questions/clarifications which they can't answer, and these responses may require the request of further information. It's not and shouldn't be framed as the Delivery Body managing the process for TO's responding to bidders. The Delivery Body are responsible for the procurement process, the obligation on TO's is provision of information to the Delivery Body – TOs have no direct role in the process or in responding to questions from bidders, guidance should not expand or confuse the interpretation of the obligation.

Paragraph 5.3 - as per comment on 5.1, this is not necessarily just requests for further information, it may be supporting responses to questions/clarifications the Delivery Body can't answer.

Paragraph 5.10 - 5.10 of the document references "*commercial sensitivities outside of the parameters of the Confidentiality agreement, it must inform the Delivery Body in the first instance.*" Sensitivity could be broader than purely commercial (as per Data best Practice triage process) as it could be due to legal, privacy, security, critical national infrastructure sensitivities.

Our understanding is that if the information is relevant to the tender but it isn't being disclosed as it is commercially sensitive, this is still automatically referred to Ofgem. The drafting should perhaps be clearer on this.

6. Facilitating Site Visits

Paragraph 6.4 –It's not clear from the guidance what would happen in the event of an unsatisfactory site visit, especially since bidders aren't authorised to request additional site visits.

The drafting in the guidance seems to indicate the TO would be responsible for organising travel to and from the site. It should be made clearer this is not the case.

7. Confidentiality Agreements

Paragraph 7.1- The requirement for TOs to enter into a tripartite confidentiality agreement with the Delivery Body and the bidder somewhat contradicts the earlier guidance that indicated there would be no requirement for TOs to directly communicate or have any dealings with bidders. Based on the earlier guidance, our expectation was that the TO would share information with the Delivery Body who would in turn share it with the bidder. To protect the confidential information, the Delivery Body would be required to put in place a confidentiality agreement with the bidder which required the same level of confidentiality and imposed the same level of liabilities that the Delivery Body owes to the TO (either through a bilateral confidentiality agreement or the codes). In the event of a breach by the bidder, the TO would make a claim against the Delivery Body and the Delivery Body would make a claim against the bidder. The requirement for TOs to claim directly against the bidders raises concerns for several reasons. For example, as the guidance sets out, TOs do not have any direct relationship with the bidders. As a result, they do not have any oversight of how confidential information is being used in

practice or the measures being put in place to protect it. In addition to this, whether a bidder passes PQ and therefore requires confidential information from the TO is out with the control of that TO. This means that, despite the TO not having any control over who it must share its confidential information with, it may be forced to make a claim against that party which takes time and resource and can be damaging to its reputation.

Paragraph 7.2 - The information sharing arrangements that exist between the TO and delivery body would need to be assessed and considered if they are appropriate for use.

Paragraph 7.3 - More clarity is required in respect of the timeframes for entering into a confidentiality agreement. The draft licence conditions make clear that TOs are required to share information within certain time periods, however they also make clear that information must not be shared without an appropriate confidentiality agreement in place. Any information/data shared by SSENT must go through our data triage process to establish if it is appropriate for sharing and (if it is), subject to what conditions/safeguards. The duration of the triage process will largely depend on the sensitivity of the data which raises concern around the time periods imposed upon TOs for providing information and the consequences for not adhering to them

The varying data sensitivity also means that a 'standard' confidentiality agreement might not always be appropriate, and we may need to amend the terms of the agreement on a case-by-case basis. Although the guidance suggests that the bidders will be issued with 'non-negotiable terms', it is not clear what happens if the confidentiality agreement cannot be agreed between the TO and Delivery Body within the period that the TO has to provide information. For example, if a 'standard' template is developed and the TO then amends the template due to the sensitivity of the data being shared (or any other factors that may render an amendment necessary), and the Delivery Body does not agree with the amendment which results in the time period that the TO has for sharing information expiring, what are the consequences? The TO would technically be in breach for not sharing information. On the other hand, if the TO had shared the information without the appropriate agreement in place, it would also be in breach. For these reasons, it is our view that the period for providing information placed on TOs should not start until an appropriate confidentiality agreement has been agreed and is fully signed.

We also have concerns around the practicalities of bidders being issued with 'non-negotiable' terms. For example, we would expect the confidentiality agreement to include an indemnity of an amount we feel is appropriate to protect the confidential information and that we could easily rely upon in the event of a breach by a bidder. In practice however, this type of provision is nearly always negotiated, and we would be interested to understand how the Delivery Body intends to manage this. Additionally, it is standard for our NDAs to include provisions whereby we do not provide any warranty as to the accuracy or completeness of any information or data shared. It would therefore also be helpful to understand the extent of TOs obligations and responsibilities towards the Delivery Body and/or the bidder in relation to this.

There are inconsistencies in how the confidentiality agreements are described in paragraphs 7.1- 7.3 and how it is depicted in the diagram. There is reference to tri-partite confidentiality arrangement in 7.1 and a TO-NESO agreement in 7.3 but then reference to the STC, which we understand will govern the data share between the TO and NESO. In 7.2 and from the diagram in Figure 3 the only confidentiality agreement shown is between Delivery Body NESO and Bidders.

We note that the guidance does not clarify what would happen in the event a confidentiality agreement has been breached. Ofgem should clarify the reason for excluding these clauses for the current draft.

Appendix 1 – Pre-tender information request template

Second Paragraph - The word ‘incumbent’ should be replaced with ‘TO’. There is a possible misinterpretation suggesting change of ownership associated with CATO delivered infrastructure

‘Desktop-based feasibility study’ is sufficient i.e. the word “detailed” can be omitted required as its requirement is implicit within the scope.

Paragraphs 2 (i) and (ii) - For both existing and new substations the most appropriate connection bay(s) may be determined by external circuit routing factors governing the approach of new circuits to the substations. This information will not be fully known before detailed design is undertaken. Therefore, this aspect of the feasibility report will be caveated.

Paragraph v - should be changed to ‘deliver the connection infrastructure’. Delivery of the entire connection has a CATO dependency.

If any requested information includes 3rd party information/IP e.g. active lines then we potentially legally cannot provide this information.

Q3. Do you agree with our proposed drafting for the Conflict Mitigation Arrangements condition?

Business Separation definition and use: The consultation document, on page 16, references ‘business separation requirements’. While this is the overarching text relating to the Ofgem policy position, it should now be amended to reflect the obligations placed on the Licensee, which relate to ringfencing of the bidding unit, not business separation. There is a clear and distinct difference between the conflict mitigation proposed in the new obligation and Business Separation obligations, which is monitoring on a permanent basis, relating to the Transmission business and the other businesses within the corporate group.

SSE has a suite of processes and internal training that are mandatory for all employees. These ensure we are meeting our licence requirements with respect to business separation and other SSE entities. If the term business separation is used to also apply to internal transmission teams working on bids this will be difficult to train all employees to understand and complicates things as different processes are required to support conflict mitigation to those we apply to business separation. References to business separation could therefore cause confusion.

Cost Recovery: Although we agree with the proposal for cost recovery, that in the current price control period costs will be recovered through Close Out, this should be set out clearly in the licence at the same time as obligation takes effect, with an appropriate methodology set out.

Separation of Management Structures (9.21.5): We understand the principle that is set out in Part A: ‘...the licensee must act in a manner intended to ensure that neither the Bidding Unit, nor any Bidder, obtains an unfair commercial advantage...’. The introduction of a process to

develop and submit for approval a Conflict Mitigation Statement, is sufficient to achieve this outcome without additional licence conditions.

The requirement in 9.21.5 to separate management structures within the licensee up to, but not including, Board level is unnecessary and flawed for the following reasons.

- The Conflict Mitigation Statement should be the primary route through which the individual TO, in the context of each potential Onshore Transmission Tender Exercise, is able to demonstrate that no unfair commercial advantage is created for any Bidding Unit or Bidder. This allows the solution adopted to flex depending on whether the potential competition project is within a TO's network area, the type of project and the existing structure of the TO. Moreover, it avoids the prescriptive management separation which will introduce conflicts with the efficient operation and licence duties of the TOs as set out below.
- **Director's duties** - The TO Senior Management team (CEO, MD, Executive Directors etc) must be able to discharge their duties in running and efficient, effective and safe network. To do so, they need to be able to see and act on issues which impact the whole business. Deciding to bid in an Onshore Transmission Tender Exercise, would be one such issue:
 - Imposition of management separation through the TO structure up to the Board level will create an environment where no one member of the Management team has oversight of the business activities and operation. This would place all management duties onto the Board which is not appropriate.
 - The licensee has a duty to ensure that it has access to resources necessary for the operation of the licenced entity (Condition B7). To be able to discharge that duty, the Management of the business must have some oversight of material commitments being made elsewhere within the organisation.

We believe that objective of 9.21 (and in particular 9.21.3) can readily be achieved and evidenced through the Conflict Mitigation Statement without having to prescribe the separation of management structures all the way to the licensee Board. Protection against unfair advantage can more easily and effectively be achieved through the control of key information and access to TO specific data. This then leaves management to be able to consider and decide on business activity (core Licensee and Bidding Unit) without having to duplicate itself.

The current drafting of 9.21.5 should be amended as follows:

9.21.5 The licensee will demonstrate through the Conflict Mitigation Statement, set out in Part D of this condition, the proposed management structure between licensee and any Bidding Unit necessary to achieve the objectives set out in the Introduction to this condition.

Similarly, paragraph A3.1 within the Conflict Mitigation Methodology should be amended to reflect the wording change in the licence:

A3.1 Ofgem requirement: *the CMS must show that the management of the Bidding Unit is organised in such a way as effectively separates it from the rest of the TO. This may mean the creation of discrete management structures at different levels for the Bidding Unit as determined by the CMS assessment (Ofgem do not require separation at parent board level).*

9.21.23 (d) seems to be reference to ‘implementing procedures’ following the notification, it’s not clear whether this mean implementing procedures before the approval or potential direction in 9.21.22

9.21.25 We understand that the external Audit could be conducted internally as long as it meets the requirements of being sufficiently independent, for example by a Group Audit or Compliance function where the Licencee is part of an corporate group structure with the appropriate business separation in place and that this is Ofgem’s preference as it would be more efficient. The Conflict Management Terms of Reference confirms professional membership is required. There would be no such professional accreditation available internally, so this requirement seems to prevent the external audit being conducted by an independent internal party in the wider corporate group.

Q4. Do you agree with our Conflict Mitigation Methodology and Conflict Management Audit Terms of Reference associated documents?

1. Conflict Mitigation Methodology

Condition 1.2 - Drafting should make clearer the difference between an in area and out of area solution. For example, ‘TOs receive no unfair advantage through their role undertaking Tender Support Activities, or network planning activities if the project is in their Network Area.

Condition 1.4 - Figure 1 should clearly indicate whether ts referencing a process for when the project to be tendered is in the TO’s Network Area.

The double headed arrow used in the figure should be clearly explained and not subject to interpretation.

The box in the figure that describes the staff to be ringfenced is too narrow, currently described as as ‘development team’ in the diagram and should be changed to align with SpC 9.21.6 which more appropriately described the extent or the ringfencing required, which is ‘network planning or development operations’.

Condition 1.9, bullet 5 – Non-participation in the tender is the appropriate categorisation here. It is wholly inappropriate to be pursued as a licence breach.

Appendix A – Conflict Mitigation Methodology Document

Condition 1.3 - Typo, should be ‘associated’ monitoring

Conditions 1.4 to 1.5 - no space

A1. Separation of Bidding Unit

Condition A1.2 – Ofgem/NESO will need to ensure there is sufficient time in the process as all conflict mitigation requirements need to be to be approved and implemented post project announcement and prior to PQ stage.

Bullet 2 – The guidance document needs to align with licence condition. Guidance implies the expectation of “separation of the Bidding Unit up to Board level...” whereas the licence condition (Condition 9.21.5) states ‘up to, but not necessarily including the board of directors...’.

Bullet 3 – The terminology used here should acknowledge that organisations may have a Managing Director (MD) rather than CEO so CEO/MD.

Condition A1.4 – timeline shows this is post preferred bidder stage – drafting should be clearer.

A2. Employee Transfer Restrictions

Condition A2.2 – The Conflicts Management Register is used in the event of an identified Conflict of Interest; therefore, it is unnecessary to include a section on this in initial submission of CMS.

A3. Managerial Separation

Condition A3.1 – The CMS is the correct and proportionate route to establish effective business ringfencing. Alternative wording should be:

A3.1 Ofgem requirement: *the CMS must show that the management of the Bidding Unit is organised in such a way as effectively separates it from the rest of the TO. This may mean the creation of discrete management structures at different levels for the Bidding Unit as determined by the CMS assessment (Ofgem do not require separation at parent board level).*

A3.2 (bullet 2) - *A clear diagrammatic representation and explanatory text showing how the management structures of the TO and the Bidding Unit are separate up to the relevant level as justified in the CMS. This may be up to, but not necessarily including, the TO board of directors of an immediate parent company of the TO.*

A7. Process for agreeing a CMS with Ofgem

Condition A7.2, bullet 5 – There is no indication of the length of time Ofgem will take in signing the final copy of the CMS.

Appendix C. Declaration of Interest Form, 1: typographical error. Should be “manage” instead of ‘mange’.

Conflict Management Audit Terms of Reference

As we have noted above, the audit requirements are disproportionate for out of area projects as only potential conflict is NOA committee etc. no conflict in development teams.

The terms of reference mention the use of an 'external auditor,' and we would appreciate further clarification regarding whether this requirement necessitates the engagement of an independent, third-party organisation, or if it could be fulfilled by one of our internal functions. Our understanding of Ofgem’s view is that, an internal team, which operates independently from the core business and regularly conducts audits of a similar scope and nature, could satisfy this requirement.

Paragraph 1.9 references the requirement for ‘any external auditor to be accredited by the Royal Institution of Chartered Surveyors (RICS).’ We would appreciate further clarification on the rationale behind this specific qualification being mandated.

Q5. Do you agree with our proposed modifications to SpC 9.14 Restriction of the use of certain information?

Yes

Q6. Do you propose any modifications to the proposed licence drafting?

Yes.

As noted in the response to Q3, The current drafting of 9.21.5 should be amended as follows:

9.21.5 The licensee will demonstrate through the Conflict Mitigation Statement, set out in Part D of this condition, the proposed management structure between licensee and any Bidding Unit necessary to achieve the objectives set out in the Introduction to this condition.

Paragraph A3.1 within the Conflict Mitigation Methodology should be amended to reflect the wording change in the licence:

A3.1 Ofgem requirement: *the CMS must show that the management of the Bidding Unit is organised in such a way as effectively separates it from the rest of the TO. This may mean the creation of discrete management structures at different levels for the Bidding Unit as determined by the CMS assessment (Ofgem do not require separation at parent board level).*

As noted in the response to Q3. We have proposed alternative drafting for Condition 1.2 - Drafting should make clearer the difference between an in area and out of area solution. For example 'TOs receive no unfair advantage through their role undertaking Tender Support Activities, or network planning activities if the project is in their Network Area.

Q7. Do you agree with our proposed modifications to SpC 1.1 Interpretations and definitions?

PQ Stage – the term “qualifying bidders” as used in the definition of “PQ Stage” may, in itself, require further explanation.