

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

## *National Grid Electricity Transmission response*

This response to Ofgem's "Modifications to the special licence conditions in the electricity transmission licences: Early Competition in Onshore Electricity Transmission" dated 10 December 2024 (the consultation) is from our transmission business, National Grid Electricity Transmission plc (NGET).

We welcome this statutory consultation to introduce special licence conditions for the implementation of Early Competition in onshore electricity transmission. We are grateful for the open and collaborative engagement to date in drafting these licence conditions and associated documents and look forward to continuing to work with Ofgem to implement the early competition framework. However, we are concerned that there is still considerable work required on the associated documents to ensure that the policy intent is clear and that the drafting delivers the intended outcomes. Before these are directed into effect, further discussion with Ofgem is required.

Overall, we broadly agree with the drafting of the special licence conditions, but there are three main points we would like to highlight:

1. We do not agree with the current drafting of Special Condition 9.21. **Requiring an audit to be conducted by default, and the outcome submitted with the conflict mitigation statement at pre-qualification stage, is unnecessarily onerous.** We suggest that the wording 'as directed by the Authority' is reinserted into the relevant conditions, which should only trigger an audit in cases where Ofgem has concerns that a Transmission Owner (TO) is not complying with its Conflict Methodology Statement. The approach for conflict mitigation audits in Early Competition should mirror that in Special Condition 9.18 of the National Grid Electricity Transmission (NGET) licence which covers audits relating to annual TO compliance reporting. We also query the value of the audit at the Prequalification (PQ) stage where reporting will focus on whether the right processes are in place, rather than the effectiveness of these processes.
2. **It is unclear how TOs will recover their costs relating to tender support activities.** During discussions with Ofgem and other TOs in the development of Special Condition 9.20, a strong preference for tender support costs to be recovered on a pass-through basis was identified. We are supportive of an amendment to Special Condition 6.1 (pass-through items, PTt) to accommodate this. We do not agree that T2 close-out provides a suitable mechanism where there are no current allowances to be reconciled. Furthermore, this funding requirement is also not envisaged in the Sector Specific Methodology Decision (SSMD)<sup>1</sup> for T3. Therefore, **we require further clarity on how Ofgem intends to reimburse these tender support costs prior to any tender support activity obligations being introduced in to the TO licences.**
3. We are concerned that Ofgem is considering that a TO being found ineligible to bid could lead to enforcement action (as described in Bullet 6). There is no obligation on TOs to bid, therefore, being found ineligible to do so **would not constitute a licence breach.** This provision must be removed from the Conflict Mitigation Methodology (CMM).

We understand, through previous engagement with Ofgem, that the intention is for Competitively Appointed Transmission Owners (CATOs) to have equivalent requirements placed on them relating to conflict mitigation to ensure a level playing field. We would welcome clarity from Ofgem regarding how equivalent requirements will be implemented for CATOs given that, at the point of tender, they will not be a licensed entity.

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

We broadly agree with the drafting of Special Condition 9.20 to cover the tender support activities that will be provided by the relevant TO for an onshore competition tender. However, we have some specific comments to note:

- We suggest removing reference to the "Onshore Competition Information Exchange Process" in paragraph 9.20.4 and simplifying it to read "Subject to paragraph 9.20.6, and upon request from the Delivery Body..."

<sup>1</sup> [RIIO-3 Sector Specific Methodology Decision – Overview Document](#)

- We would welcome additional clarity in the licence condition regarding when site visits should be facilitated for Bidders and suggest adding “during the Invitation to Tender stage” to paragraph 9.20.7. The detail in the Onshore Competition Information Exchange Guidance can then reflect the high-level obligation in the licence.
- We suggest that the text in paragraph 9.20.8 should be included in the Onshore Competition Information Exchange Guidance rather than the licence.
- The drafting in paragraph 9.20.13 should reflect the standard formatting/drafting used throughout the licence in relation to issuing/amending associated guidance documents as we have previously proposed. For example, as per paragraph 9.21.20 of Special Condition 9.20 (subject to the comments below on that paragraph).
- Ofgem must consider the sequencing of these licence modifications alongside other ongoing licence amendments (for example, Ofgem is also separately proposing a new condition titled “Termination of Operational Services Agreement” as Special Condition 9.20 in the NGET licence).

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

We would welcome further engagement with Ofgem to share our feedback on the drafting of the Onshore Information Exchange Guidance as further modifications and engagement with the TOs is required before this guidance is brought into effect.

We are concerned that as currently drafted there are disparities in the arrangements between the guidance and the licence, particularly relating to when confidentiality agreements will be in place and between which parties. We do not agree that tripartite confidentiality agreements provide the most appropriate route for compliance. As currently drafted it is unclear what provisions would cover the exchange of information between the TO and the Delivery Body during the development of the tender pack.

We suggest that bilateral agreements are implemented between the TO and the Delivery Body to cover all information exchange for a tender, with the Delivery Body entering into bilateral agreements with potential bidders at the appropriate time. This also reflects the fact that no information is expected to flow from TOs directly to bidders. We would welcome confirmation from Ofgem on the expected process for entering into confidentiality arrangements.

We would also welcome confirmation from Ofgem that the obligations on NESO included in the guidance will be reflected in NESO’s licence.

More specifically we have feedback in the following areas:

- We would welcome clarity from Ofgem regarding what arrangements are envisaged to ensure the confidentiality of information provided by TOs to the Delivery Body for the tender packs as listed in Table 1. We presume that such information exchange between the TO and the Delivery Body would be subject to non-disclosure by the Delivery Body under s105 of the Utilities Act 2000 but we would welcome confirmation of this.
- A confidentiality agreement is only entered into prior to a formal information request by the Delivery Body but not before. This means that the provision of information for the tender packs would not be covered. We suggest amending the drafting to capture all information provided by the TO to the Delivery Body during the tender exercise and managing this through a bilateral confidentiality agreement.
- On the cover page, we think “and bidders” should be deleted from line 2. Special Condition 9.20 only requires the provision of information to the Delivery Body (not directly to bidders).
- Paragraph 3.4 covers details of site visits but does not consider confidentiality/information exchange during the visits. We would welcome further consideration of how this can be covered.
- We would welcome clarification from Ofgem on what constitutes a formal request for information as referred to in paragraph 3.6.
- Paragraph 3.7 refers to existing information sharing provisions for information exchange outside of formal requests from the Delivery Body. However, paragraph 9.20.4(c) of Special Condition 9.20 provides for these requests. We suggest referring to the latter provision instead.
- We would welcome clarification in paragraph 5.4 regarding with whom the timeframes referred to are agreed with. We presume this is with the Delivery Body but welcome further clarification.
- We would be grateful for clarification that Bidders will be made aware (in the tender documentation) that they are not to contact the TO directly as described in paragraph 5.5. The second sentence of paragraph 5.5 is also repetitive to paragraph 5.3 above.
- Paragraph 5.6 refers to only exchanging information with Bidders who have passed PQ stage and a confidentiality agreement is in place. This should be made clearer in line with 5.5 that TOs should not have direct contact with Bidders and that all information exchange will take place via the Delivery Body.

- We query the relevance of paragraph 5.7 in the guidance as TOs are only required to provide information to the Delivery Body not to Bidders. We suggest this provision is more appropriately addressed in Delivery Body / Bidder document arrangements.
- We suggest the first sentence of paragraph 5.8 is moved to paragraph 5.2 which deals with the same issue.
- Paragraph 5.11 states that TO responses will be shared with all Bidders in that tender exercise, regardless of which Bidder made the original request. We would welcome confirmation that the confidentiality agreement will cover such scenarios.
- In relation to site visits in paragraph 6.5, consideration needs to be given to requirements on Bidders to be allowed on site and how this is contractualised, where relevant.
- We understand that all information will flow via the Delivery Body; however, paragraph 7.1 mentions tripartite confidentiality agreements. We do not think this will be necessary in cases where information is only flowing via the Delivery Body, but as mentioned above, may be required for site visits.
- As per our comment above in relation to Table 1, paragraph 7.2 refers to the SO-TO Code (STC) for information sharing arrangements between the TO and Delivery Body. However, the relevance of the reference to the STC here needs to be clarified as tender support information is being provided by the TOs to the Delivery Body under Special Condition 9.20 and not the STC. Therefore, the information is not caught by the STC and its confidentiality provisions which is why, as per our comment above, we would welcome further clarity from Ofgem as to what confidentiality provisions will apply in relation to information shared by TOs with the Delivery Body under Special Condition 9.20.
- The reference in paragraph 7.3 seems to address the concern above that no arrangements for information sharing as between the TOs and the Delivery Body would be in place for the development of the tender packs. However, this is not envisaged in the licence, nor in Figure 3 of the guidance. As mentioned above, it is also unclear as to whether the provision of information for the tender packs could possibly be governed by the STC when it is being requested under Special Condition 9.20. We would welcome further detailed clarification from Ofgem on exactly what confidentiality arrangements are envisaged to be in place between the various parties (TOs, Delivery Body and Bidders) in relation to information exchange arrangements at the various stages of the tender process.

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

We understand the intent of this Special Condition as drafted; however, we welcome further clarity from Ofgem on several points and we also provide drafting suggestions, below:

- We do not agree with the current drafting of paragraph 9.21.2 and 9.21.25. Requiring an audit to be conducted by default, and the outcome submitted with the conflict mitigation statement at pre-qualification stage, is unnecessarily onerous. We suggest that the wording 'as directed by the Authority' is reinserted into this condition, so that an audit is only triggered in cases where Ofgem has concerns that a TO is not complying with its Conflict Methodology Statement. **Overall, the obligations on TOs relating to audit requirements and timelines needs to be better understood and communicated by Ofgem.**
- "Unfair commercial advantage" is already defined (currently for the purposes of Special Condition 9.17 of the NGET licence) in Special Condition 1.1. We would welcome clarification that that definition is intended to apply here, and if so, that the term is capitalised.
- It is unclear what assets are being referred to in paragraph 9.21.9. At the time of the tender exercise there will be no physical transmission assets.
- We think that paragraph 9.21.13 could be merged with paragraph 9.21.12 as follows:

*Except as provided for in paragraph 9.21.14, the licensee must not disclose, authorise access to, or authorise use of any Confidential Information to:*

*(a) any Bidder; and*

*(b) any Bidding Unit, including any employees, agents, contractors, consultants, and advisers of the Bidding Unit.*

- It is unclear whether the reference to the EAA in paragraph 9.21.14(a)(vii) is still required. The Electricity Arbitration Association (EAA) is currently defined in Special Condition 1.1, but the term is not referred to in the existing licence.

- We suggest amending the title for Part D of Special Condition 9.21 to include reference to the Conflict Mitigation Methodology as Part D deals with both defined terms of Conflicts Mitigation Statement (CMS) and CMM refer to Part D.
- We do not think it is necessary to list out the areas to be covered in the Conflict Mitigation Methodology in the licence (paragraph 9.21.16). This detail can be covered in the guidance document.
- The requirement in paragraph 9.21.16(c) for Board approval of the CMS is new and was not discussed with TOs ahead of statutory consultation. We would welcome clarity on when approval is required – whether before submission of the CMS to Ofgem for approval or after Ofgem has approved it.
- The words “reasons for the proposed” are superfluous and should be deleted in paragraph 9.21.20(b).
- We suggest moving paragraphs 9.21.22 - 9.21.24 to follow 9.21.16 before moving on to details of the Conflict Mitigation Methodology.
- In paragraph 9.21.23, the timing of the obligation in (a) needs to be clarified, as well as the interaction of (a) with (d). In addition, clause (d) should refer to 9.21.15(a).
- We would welcome clarity on where to publish the approved Conflict Mitigation Statement as described in paragraph 9.21.24.
- As above, we do not agree that an audit should be required in all cases and suggest reinserting ‘as directed by the Authority’ in to paragraph 9.21.25.
- It is unclear what is being referred to in paragraph 9.21.26. The paragraph should more clearly describe which part(s) of the Audit Terms of Reference is to be complied with.

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

Below we set out our detailed feedback to the drafting of the Conflict Mitigation Methodology (CMM) and the Conflict Management Audit Terms of Reference associated documents.

**Further modifications and engagement with the TOs is required before this guidance is brought in to effect.** We are concerned that as currently drafted there are disparities in the arrangements between the guidance and the licence.

Our main concerns relate to inconsistencies in terms of the scope of the audit and whether the intention is for this to be on the Conflicts Mitigation Statement (CMS) (as per the licence drafting) or the compliance report (as per the CMM). There is also a lack of detail in the CMM relating to Ofgem’s expectations for how long each aspect of the conflict mitigation is to stay in place. This detail is essential if TOs are to be able to plan and make informed decisions relating to onshore competition.

It is also unclear how the conflicts management register and the conflicts of interest form fit with the CMS requirements. We would welcome clarity on the interactions between these documents and how collectively compliance with the requirements is achieved.

#### **Conflict Mitigation Methodology**

- The terms Conflicts Mitigation Statement and Conflicts Methodology Statement are used interchangeably. This needs to be referred to consistently throughout the documentation.
- The CMM should include a paragraph similar to paragraph 1.4 of the Information Exchange Guidance relating to defined / capitalised terms.
- Figure 1 refers to Centralised Strategic Network Plan (CSNP) identified projects. The pilot, and likely the immediate pipeline of projects, will be identified through transitional Centralised Strategic Network Plan (tCSNP2). Figure 1 should be amended to reflect this. The reference to ESO should also be updated to NESO.
- We would welcome confirmation that reference to “TO bidding unit” in Figure 1 also covers an affiliated Bidding Unit.
- For clarity, we suggest adding “through as bidding unit” after “and by participating as a bidder” in paragraph 1.1.
- We would welcome confirmation as to which assets are being referred to in bullet 2 of paragraph 1.6. At this point in the tender process there will not be any transmission assets.
- We suggest clarifying in paragraph 1.7 that compliance must be demonstrated to Ofgem.
- Figure 2 is mis-labelled Figure 1.
- We think that further detail on the discontinuation of conflict arrangements (as outlined in Figure 2) should be included in the CMM. Ofgem’s expectations for TOs are currently unclear and need to be understood to inform our internal decision making and approach.
- Paragraph 1.10 refers to the Conflict Mitigation Methodology Document (CMMD), while paragraph 9.21.18 in the licence condition refers to the CMM. We think that the guidance document should be updated to align with the licence and the term CMMD is not required.

- We are concerned that paragraph 1.9 introduces new obligations that are not covered or referred to in the licence. These are:
  - Bullet 1 should state that Ofgem notifies TOs of requirements for CMS and audit, as per the licence.
  - Bullet 2 is covered in the licence and as such we do not think it is required in the guidance.
  - Bullet 3 describes an “initial conflict of interest declaration” which is not referred to in the licence. It is also unclear who the applicants are in this scenario.
  - Bullet 4 is inconsistent with the licence and what is being audited when. The guidance in respect of scope and timing of the audit needs to align with the corresponding provisions in the licence. We have provided comments above on the licence drafting in respect of the audit requirements.
  - We are concerned that Ofgem is considering that a TO being found ineligible to bid could lead to enforcement action (as described in Bullet 6). There is no obligation on TOs to bid, therefore, being found ineligible to do so **would not constitute a licence breach**. This provision must be removed from the CMM.

## Conflict Mitigation Methodology: Appendix A

We have summarised our detailed feedback below. One key aspect we would welcome further clarity on is the length of time the arrangements are expected to be in place for the different aspects of conflict mitigation. In some cases, this is clearly described, but in others it is unclear. This detail is essential if TOs are to be able to plan and make informed decisions relating to onshore competition.

- As noted above, it is not clear why Appendix A is titled the CMMD and how, if at all, the CMMD differs from the CMM (which is the term referred to in the licence).
- Paragraph 1.1 refers only to parts B and C of Special Condition 9.21. This should also refer to parts D and E.
- As per our feedback to the licence condition, we would welcome clarity regarding whether TO board approval of the CMS should come before or after Authority approval. However, we suggest that the process for approval should follow that outlined and implemented in Special Condition 9.18 for the annual compliance statement, and that board approval should not be required. For consistency and clarity, paragraph 1.2 should confirm that the CMS will be approved by Ofgem rather than agreed between the parties.
- In paragraph 1.3 we would welcome clarification of what the highlighted conflicts of interest are.
- The final sentence of paragraph A1.1 should read “The full legal separation of the Bidding Unit from the TO is NOT necessary.”
- We would welcome clarity on paragraph A1.2 relating to the meaning of ‘signed statements from each member of the Bidding Unit’ – does this mean each individual member or a representative of each?
- Paragraph A1.3 requires communication of any updates to the structure of the “organisation.” Further clarification is required on the intent of this requirement to ensure that it is proportionate and achieves the intended objectives. We assume that this relates to the organisation of the Bidding Unit rather than the wider group of the TO and Bidding Unit but this needs to be clarified.
- The final bullet in the drafting of paragraph A3.2, should be refined to limit this to employee transfers between the Bidding Unit and the TO so that it does not capture employee transfers between the Bidding Unit and other parts of the group in which it sits (i.e. in NGET’s case the wider National Grid plc group of businesses).
- Paragraph A3.3 should refer to the Conflict Management Register as per Appendix B.
- The first bullet in paragraph A3.2 should read “...but not necessarily including the board of directors of an immediate parent company of the TO.” We would also welcome clarity on the meaning of the second bullet. The fourth bullet should also be limited as follows “...for any management movements *between the bidding unit and the rest of the TO*” so that it doesn’t capture movements within the TO.
- We would welcome clarification from Ofgem on what constitutes critical information, as referred to in the fourth bullet of paragraph A4.2.
- Paragraph A4.3 refers to training matrices – we would be grateful for clarification on what this is referring to. In addition, we suggest amending the wording in the second bullet to require a TO to let Ofgem know where a breach has occurred as soon as possible, to reflect that it may not be immediately obvious.
- Paragraph A6.1 refers to an audit of the TO compliance report in the second bullet whereas the licence and the audit ToR refers to audit of the CMS. As per various comments above we would welcome clarity from Ofgem on the intended process. In addition, the timing and scope of the audit needs to be clarified and whether this is mandatory or at the direction of the Authority (we have stated our preference above that this should be at the direction of the Authority rather than a mandatory requirement).
- We are unclear as to how the Conflicts Management Officer (CMO) will demonstrate that it will ensure responsibility for the TOs compliance as described in paragraph A6.2. The third bullet is also unclear, and the



fifth bullet of paragraph refers to a report from the TO on how it will achieve its obligations – we would welcome further clarity on whether this is the same report as referred to in paragraph A6.1.

- For clarity, in paragraph A7.1 we suggest adding “through a Bidding Unit” after “to bid”. This should also refer to Ofgem assessing the CMS not the methodology.
- In general, the approach in paragraph 7.2 for approving a compliance statement, is not reflective of how these are normally approved, for example, requiring a TO board to countersign and approve. We think point 1 in paragraph 7.2 should state that Ofgem notifies the TO, not the Delivery Body. The detail of 7.2 also does not include the step of board approval for the TO. The process for approving the compliance statement should align with the existing approach detailed in Part B of Special Condition 9.18 of the NGET licence for the Compliance Statement, which does not require Board approval.

#### **Audit Terms of reference**

- In Section 2, interdependence needs to be replaced with independence in the table.
- We would welcome clarity on the meaning of capitalised/defined terms, as per paragraph 1.4 of the Information Exchange Guidance.
- In paragraph 1.1 we suggest adding “through a Bidding Unit” at the end for clarity.
- paragraph 1.4 refers to audit of the CMS. This is consistent with the licence drafting, but inconsistent with the CMS which refers to an audit of the compliance report.
- In paragraph 1.5, we suggest clarifying to whom the unfair advantage is expected to be conferred to.

#### **Q5. Do you agree with our proposed modifications to Special Condition 9.14 Restriction of the use of certain information?**

*Not applicable – changes relate to SPT and SHET*

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

*Not applicable – changes relate to SPT and SHET*

#### **Q7. Do you agree with our proposed modifications to Special Condition 1.1 Interpretations and definitions?**

We suggest the following amendments:

- “Conflicts Management Officer” is not used in the licence and therefore does not need to be in Special Condition 1.1. If it is used in the Conflict Management Methodology, then it should be defined there.
- “Tender Support Activities” should decapitalise “Licensee”.