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Dear All

Supplemental Ofgem guidance on the determination of disputes: Gate 2 to Whole Queue

The Flexible Generation Group (FGG) represents the owners of and investors in small scale, flexible generation. These power stations are embedded in distribution networks and provide a variety of vital services to the system operator to help it deliver secure, economic supplies to electricity customers. Most of our members have participated in the Capacity Market (CM) since its inception and have made significant investment in new capacity on the back of CM agreements.

Summary

One of the roles of Ofgem is to protect users from NESO's monopoly status with respect to forming a reformed connections queue. Faced with an incompetent monopoly, users should expect Ofgem to act. Instead, Ofgem is seeking to remove itself from the process. FGG fundamentally disagrees with the proposals set out in this consultation.

More broadly, NESO continues to fail in many of its primary functions, such as operating the capacity market, the connections queue management, the code administration process, etc. Ofgem regulate this monopoly and it is time that it considers which roles currently undertaken by NESO would be better delivered by more competent bodies.

Context

The FGG understands the need to rationalise the existing connections queue, albeit that such action was probably 5 years too late. The process to reform the connection queue was undertaken under CMP434 and CMP435. During this process, users and NESO discussed the role of dispute resolution should users wish to challenge NESO's decisions. At one point, NESO suggested a bespoke fast track process to settle any disputes. Following discussion, NESO dropped this suggestion, a decision that FGG supported. At that time users were assured that their dispute resolution rights, whether under the CUSC or formal determination routes under the licenses, would not be altered as a result of the approval of CMP434 and CMP435. At no time did Ofgem suggest that their rights to ask the Authority to determine disputes would be scaled back in the way suggested by this consultation.

The consultation does little to reflect the degree of chaos that NESO's Connections Portal imposed on the industry. We believe the roll-out of the applications window was one of the most significant failures of a monopoly for some years. Hundreds of millions of pounds have been laid out by users in good faith. As such, users should expect NESO, as the organiser of the revised queue, to have a degree of professional competence. Instead, NESO's performance was woeful.

The roll-out of the Connections Portal that required all existing connection agreements to be re-provided to NESO or the DNOs with a supplemental set of information was chaotic, directly affecting hundreds of generators, cost the industry time and money. This was exacerbated by NESO cutting off all contact between users and their contract managers. Parties had to cancel holidays, work weekends, spend days uploading data multiple times with a portal that did not work. At the same time parties were undertaking capacity market and AR7 qualifications, again on portals that were not working properly, all provided by NESO.

Recognising that the application window did finally accept, as we understand, all connection agreements that wished to apply for Gate 1 or Gate 2, we were expecting a degree of scrutiny as to NESO's performance. It is difficult to see that NESO was complying with its licence obligations and it was clearly in breach of the Code. However, we see no interest from Ofgem in understanding the cause of NESO's failures, or in suggesting improvements that might make subsequent application windows more effective. Rather, we see both NESO and Ofgem failing to review the chaos that ensued this Summer.

While not lawyers, it would also seem to FGG that by disallowing a robust disputes resolution process, Ofgem is opening itself and the whole TMO4+ process to judicial review, because there is a prima facie argument that the process is then procedurally flawed. Forcing parties directly into the courts in order to establish whether the process has been followed will add to costs, ultimately born by customers, and time in resolving the queue.

Ofgem views

Before turning to the questions posed by Ofgem, we wish to comment on the analysis, such as it is, put forward by Ofgem.

The Authority continues to work with NESO, DNOs, and relevant industry decision makers to ensure there are strong processes and assurance measures within the new strategic connections process, across both decision and dispute areas. This seeks to underpin the integrity of NESO's operational decisions, and subsequent outcomes, during the G2tWQ exercise. We are satisfied with the work that has occurred so far; however, we will continuously assess these areas and may update the published version of this guidance should the need arise.

FGG cannot see how Ofgem has reached this state of comfort over the integrity of NESO's operational decisions. We have no confidence that NESO will be any more competent in the

creation of the revised queue than it was when seeking applications for Gate 1 and Gate 2 connection agreements. We would have expected at least independent oversight of this next stage of queue formation.

In general, therefore, Ofgem's position is that parties will not be able to request a determination if they disagree with NESO's decision about the status of their project when that results from proper implementation of the TMO4+ decision.

The point is that parties will not be in a position to understand, and therefore challenge, NESO's position. Confidentiality of other parties' information means that only the Authority will be in a position to assess NESO's decision. We do not see how a user will have comfort that there has been "proper implementation" of the decision as we will not be able to assess how NESO has assessed one user's application against another.

We do not consider ourselves able to make individual determinations that are inconsistent with the TMO4+ reform package related decisions that were issued by the Authority earlier this year.

No one is asking Ofgem to make decisions that are inconsistent with the TMO4+ process. However, we are requesting that Ofgem is able to assure itself and users that the TMO4+ process has been correctly implemented by NESO.

Consequently, we will only accept a request for determination if a party can produce evidence that NESO and/or the DNO has not correctly followed the TMO4+ process as set out in the CUSC, licence conditions and associated methodologies or has reached an incorrect decision. The Authority's presumption will be that if the connections process has been correctly followed and is free of error, then the terms (including Gate 1 Terms) offered to the applicant are reasonable.

We are at a loss as to how a party can procure such evidence. As we understand the process, a revised queue will be produced by NESO. Offers will then be issued based on that queue. Gate 2 offers will, we understand, include a connection date, a point of connection and milestones. The queue formation will, we presume, involve a degree of iteration between NESO and the Transmission Owners and DNOs. However, due to the confidentiality of connection offers, we do not see how users are going to be able to prove that NESO (or for that matter the network operators) have made errors. Ofgem is trying to put too high of a burden on users.

While the Authority's discretion is broad, the one-off nature and timing of the G2tWQ exercise means that there may be real practical constraints that will limit the beneficial outcomes that the Authority can direct when we find in favour of the applicant. This could be due to operational timing of key mechanisms contained within the new reform regime, e.g. when future application windows open.

A regulator's statutory powers cannot be set aside on the basis of the regulator's resources, which seems to be the implication here. Should NESO have made errors in forming the queue, it is imperative that such errors are corrected, including any consequential changes to the reformed queue, prior to any further application windows being opened. If the NESO decision is wrong, then Ofgem must have the ability to place that project in the queue position (including PoC and connection date if a protected project) that it should have been in. As such, we do not see that the Authority's powers and obligation to determine should be affected by "operational timing of key mechanisms". NESO and Ofgem should take as long as necessary to ensure that the queue is correctly made.

Whilst these would depend on the particular facts of the case, we do not consider financial redress to be within the scope of our existing determination functions.

Hundreds of millions of pounds are at risk as NESO re-orders the queue. Three quarters of users, with firm connection rights, will have those firm connection rights torn up by this process. At the very least, if users end up financially out of pocket due to NESO's actions, then NESO should be forced to compensate if, as indicated above, Ofgem is not willing to put a wronged user back into the position they would have been. Instead, we see no regulatory action to ensure that the next stage of connection reform has a better outcome than the last stage of connection reform.

Consultation Questions

1. Does the G2tWQ Determinations Guidance in Appendix 1 clearly set out the Authority's determination processes for disputes arising from the Gate 2 to Whole Queue exercise and its expectations of disputing parties?

We do not consider that the guidance is clear enough as to how a user is meant to produce "objective evidence that the process has not been correctly followed" (Paragraph 2.9 of Appendix 1). There seem to be no ability for a user to seek independent scrutiny of NESO's decisions or the DNOs when they are implementing NESO's decisions on queue formation.

We do not understand why the Authority is choosing not to act when advancement is not achieved (Paragraph 2.10). If User A sees that an adjacent generator, with the same technology, has achieved advancement when, for example, that generator was behind User A in the TEC Register, they should be entitled to understand the rationale behind such a decision. This stance from the Authority will undermine their ability to ascertain whether NESO has applied the selection criteria correctly.

We completely disagree with the Authority's presumption (Paragraphs 2.11 and 2.14) that the new varied terms offered by NESO or the DNOs are reasonable. This fundamentally misunderstands the role of a regulator in protecting users for the abuse of monopolies and, in the case of NESO, a demonstrably incompetent monopoly.

More clarity needs to be provided on the position of DNO-connected generators. The Authority says (Paragraph 2.13) that Section 23 of the DNOs' licenses cannot be used to challenge NESO's decision-making. If this is the case, then we see that distribution-connected generators will have less rights of appeal than transmission-connection generators. Taken together with the proposed removal of the Authority from its statutory determination powers, this would seem to amount to undue discrimination against distribution-connected generators. We note that there is reference to fault being found in NESO's offer to its customers, which we assume means the DNOs. Some clarity around the transparency of that offer would help to assuage concerns.

We note the Authority's view (Paragraph 2.19) that it is unlikely that a successful determination would result a direction to put a user into the connection queue. This is unacceptable to FGG. If the failure to be placed in the queue results from a NESO or DNO error, then NESO or the relevant DNO should be required to place that user into the queue where it should have been. To the extent that this affects other Gate 2 offers, that will be for NESO or the relevant DNO to negotiate with those other users accordingly. Alternatively, this could be a circumstance when the caps on technology by region are allowed to be exceeded.

2. Is there any additional clarity that you think is needed on the determinations procedures in the G2tWQ Determinations Guidance?

FGG considers that disputes, if any, should be published, within the bounds of confidentiality. Building up a body of evidence as to how NESO is creating and administering the queue and how NESO and the DNOs are implementing NESO's decisions would help to avoid further disputes in the future. We note that Ofgem publishes the results of disputes with respect to NESO's role as the Capacity Market Delivery Body. This has created a valuable resource that allows parties to consider whether or not to dispute pre-qualification and agreement management disputes.

In conclusion, it is Ofgem's duty to hear disputes, over the TMO4+ process and over connections issues more broadly. Parties cannot negotiate with monopolies and hence the role of the regulator. We do not understand why Ofgem is trying to duck its responsibilities, but it is unacceptable.

FGG will be happy to discuss this further.

Yours faithfully



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