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Our Ref: CMW

Dear Ofgem

Response to consultation on 31 October 2025 ‘Supplemental Ofgem Guidance on the determination of disputes: Gate 2 to Whole Queue (the Draft Guidance)’

We are a national law firm acting for developers impacted by Ofgem’s TMO4+ reform package and the Gate 2 to Whole Queue exercise (**G2tWQ**). We write as a stakeholder in response to the questions which Ofgem has raised in its consultation on the Draft Guidance.

We respond as follows:

1. Question 1: Does the G2tWQ Determinations Guidance in Appendix 1 clearly set out the Authority’s determination processes for disputes arising from the G2tWQ exercise and its expectations of disputing parties?

1.1. Summary answer: No. The Draft Guidance does not clearly set out the Authority’s determination processes for disputes arising from the G2tWQ exercise.

1.2. Detailed answer: This is because:

- 1.2.1. The mechanism proposed by Ofgem for its involvement in the determination of disputes in the Draft Guidance results in there being limited (if any) ability to refer a dispute to Ofgem for determination.
- 1.2.2. The mechanism proposed for determining disputes with both DNOs and NESO regarding variations of their agreements is staged. It requires parties to: (i) undertake informal engagement; (ii) use internal complaints' processes; (iii) engage with NESO (where applicable) using the "Other Disputes" framework set out in the CUSC, where available; and, (iv) to utilise any other ADR routes available.
- 1.2.3. Section 7.4 of the CUSC sets out the "Other Disputes" framework. This has a similar dispute escalation mechanism, requiring parties to seek to resolve their disputes through discussions which should take place within specified periods. If the discussions do not resolve the dispute, it can be escalated to final determination through arbitration under the London Court of International Arbitration (**LCIA**) rules.
- 1.2.4. Arbitration awards are final and binding on the parties;¹ they are enforceable in the same way as a Court judgment; and, they are only subject to the very narrowly defined statutory rights of challenge under ss 67 to 69 Arbitration Act 1996 (**AA 1996**). Any attempt to re-open a substantive dispute decided by the arbitration award in future proceedings is prevented by the principle of *res judicata*. This renders the suggestion that the parties should "utilise other ADR routes available" or refer a dispute to the Authority for determination meaningless after an arbitration award has been made.

¹ See s58(1) Arbitration Act 1996

- 1.2.5. Clarity is therefore required as to what disputes the Authority considers will remain between the parties after the “Other Disputes” framework in the CUSC has been followed. Once an arbitration award has been made, there should be no substantive dispute remaining capable of being dealt with by using “other ADR routes available” or which could be determined lawfully by the Authority. Arbitration is the end point of a dispute except in circumstances where the jurisdiction of the arbitrator is challenged, or where a serious procedural irregularity has occurred, or where there is an appeal on a question of law. In these circumstances, the Court has jurisdiction to deal with the dispute, not the Authority.
- 1.2.6. The Authority needs to clarify in the Draft Guidance whether it is its intention for there to be no disputes capable of being referred to it for determination and, if so, how the mechanism it has proposed enables it to meet its determination functions under the Electricity Act 1989 (**EA 1989**) when a party has a dispute relation to the G2tWQ exercise.
- 1.2.7. If the Authority has not considered these points and, in particular, the finality of arbitration awards, the Draft Guidance must be amended to set out a clear and workable procedure which enables parties a meaningful ability to refer disputes to it for determination before a referral to arbitration.
- 1.2.8. We consider that there is significant overlap in the CUSC’s requirement for the parties to hold meetings to try to resolve the dispute and the Draft Guidance’s requirements for the parties to go through informal engagement and internal complaints processes. The process should be streamlined to reflect this. Additionally if, as the Draft Guidance states, final Gate 2 decisions are made by NESO then it is unclear whether a distribution connected project is able to raise a complaint with NESO directly rather than first exhausting a DNO process.

- 1.2.9. The Draft Guidance further cites sections 8.9, 8.11, 8.14 and 8.15 of the Gate 2 Criteria Methodology which states '*A User can dispute NESO's decision in accordance with CUSC Section 7.4. Note that for Small and Medium Relevant Embedded Generation, it would be the DNO/Transmission Connected iDNO that makes the decision on whether the User meets the Gate 2 Readiness Criteria so these Users would raise their dispute to the DNO/Transmission Connected iDNO.*' This appears contradictory to the Draft Guidance which considers the role of DNOs and DNO decisions to be limited, whereas raising a dispute with a DNO in accordance with the approved methodology would involve referral to the Authority under s23 EA 1989.

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

2.1. Summary answer: Yes, further clarity is required.

2.2. Detailed answer: as set out above, the Authority needs to clarify:

- 2.2.1. Noting that the Draft Guidance sets out that the Authority will not consider disputes regarding a TMO4+ decision or advancement, what types of dispute does it consider would be extant and capable of being referred to it once the CUSC "Other disputes" procedure has been completed and an arbitration award made?
- 2.2.2. Whether, in light of the points we have raised in answer to Question 1 above, the Authority will be amending the procedure it has proposed?
- 2.2.3. How, if no changes are made to the procedure currently outlined in the Draft Guidance, the Authority considers it is meeting its statutory determination functions?

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- 2.2.4. In addition, what beneficial outcomes will be available at the end of the process given that the Draft Guidance suggests that these will be limited, as well as providing more clarity on the timings of the process to achieve those beneficial outcomes given that the Draft Guidance refers to the need to act quickly but, as above, also envisages that parties must exhaust other ADR routes available (which would necessarily take time).

Yours faithfully

Freeths LLP

Please respond by e-mail where possible