

18 October 2017, Final, Issued to Ofgem

Ofgem consultation:

Hinkley-Seabank (HSB) – Consultation on Final Needs Case and potential delivery models

Background

1. The National Infrastructure Planning Association (NIPA) was launched in November 2010 with the aim of bringing together individuals and organisations involved in the planning and authorisation of major infrastructure projects. Our principal focus is the planning and authorisation regime for nationally significant infrastructure projects (NSIP) introduced by the Planning Act 2008 (PA 2008).
2. NIPA was created to develop and disseminate learning and best practice for both promoters and those affected by proposed projects. Our membership of around 500 provides a forum for those with an interest in the planning and authorisation of national infrastructure projects in the UK, particularly those brought forward within the framework of the PA 2008. In summary, we:
 - i. advocate and promote an effective, accountable, efficient, fair and inclusive system for the planning and authorisation of national infrastructure projects and act as a single voice for those involved in national infrastructure planning and authorisation;
 - ii. participate in debate on the practice and future of national infrastructure planning and act as a consultee on proposed changes to national infrastructure planning and authorisation regimes and other relevant consultations; and
 - iii. improve knowledge, skills, understanding and engagement and so provide learning and education opportunities on national infrastructure planning, develop, share and champion best practice in national infrastructure planning.
3. The efficiency of progressing projects through the planning process, and the effectiveness of subsequent project delivery is therefore of particular interest to NIPA.
4. Our consultation response draws upon matters raised in Chapter 2 of this consultation document¹ (in particular in relation to the use of the T-Pylon), but more generally applies to the broader issue of the interaction between the regulatory and planning systems.
5. This is an interim response, pending a meeting of the NIPA Board and Council on 16th October 2017, where NIPA welcomes the attendance of Ofgem officials.

Ofgem's view

6. Ofgem contends that “*NGET has not fully justified the estimated additional £65m cost of the new ‘T-pylon’ technology it intends to use on HSB*”. This view is based on a report undertaken by TNEI Ltd who advises that:
 - i. “*NGET has not made the case that the project categorically would not have gained consent had regular lattice rather than T-Pylons been proposed.*”
 - ii. There is a lack of primary data to support the case that consumers would be willing to pay for the additional costs associated with the use of T-Pylons for this scheme
7. NIPA is responding to this consultation because if Ofgem is to adopt tests in this form to determine the costs allowed to an electricity network licence holder for a scheme's construction, it would have profound implications for the consenting of electricity network NSIPs.

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Legislative and policy context

8. Section 10 of the Planning Actⁱⁱ requires the Secretary of State (SoS), in exercising their functions in relation to the production of National Policy Statements (NPS) (which form the planning policy framework against which applications for development consent are tested), to do so with regard to the objective of contributing to sustainable development, and in having specific regard to the desirability of achieving good design.
9. Consequently, NPSs EN-1ⁱⁱⁱ and EN-5^{iv} (the relevant NPSs for electricity networks projects) contain detailed policy requirements related to the requirement for, and approach to, good design. These are concisely summarised in paragraphs 5.5.1 – 5.5.4 of the Examining Authority’s (ExA) report to the SoS on the Hinkley Point C Connection^v (and appended at Annex A to this response).
10. It is recognised that Ofgem’s principal duty, established through the Electricity Act 1989 (as amended by the Energy Act 2008) is *“to protect the interests of existing and future customers”*^{vi}, though it is noted that the Energy Act 2010 clarified that these interests are to be *“taken as a whole”*^{vii}. It is similarly relevant to record that the Energy Act 2004^{viii} also requires Ofgem to contribute to the achievement of sustainable development.
11. To that end, the statutory duties incumbent upon the SoS (and reflected in drafting of the NPSs) and those of Ofgem are not irreconcilable and should allow the planning and regulatory processes to adequately align.
12. Equally, Ofgem does recognise that it will be guided by the planning system – the consultation document notes that it *“is not there to take a view on what additional mitigation measures are required”*, and similarly its Visual Amenity Factsheet^{ix} recognises that *“[i]f planning permission is given we will enable the network company to collect the efficient costs of delivering the scheme from consumers”*.

Ofgem’s approach

13. In its factsheet explaining the Strategic Wider Works process^x, Ofgem sets out that it will assess whether a proposed network development is *“well-justified and whether it is in the interests of existing and future consumers to proceed”*.
14. In that vein, one would expect Ofgem to review whether the decisions made through the consenting process can be well-justified, based on all relevant issues and knowledge at that point, including, importantly, the prevailing assessment of risk of the SoS refusing development consent.
15. In this case, Ofgem appears to be applying a different, and significantly more onerous test, that being whether an alternative, hypothetical scheme could have been granted development consent. Furthermore, such an approach does not adequately appreciate the specific requirements and constraints of either the NPSs, or, more fundamentally, the tests that apply to applications for development consent. It also appears to conflict with a stated intention not to interfere in the necessity or otherwise of particular mitigation measures (which is rightly a planning matter).
16. With respect to the NPSs, for the reasons set out above, a rigorous approach to good design is a fundamental policy test for energy infrastructure schemes, it cannot be dispensed with or unilaterally overridden for cost considerations.
17. The PA 2008 rightly places a significant emphasis on consultation by promoters of NSIPs as part of the pre-application process. Section 37 specifically requires a Consultation Report to be submitted alongside the application for development consent to report, and take account of, consultation responses.

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18. Promoters of electricity network schemes must therefore retain the flexibility to modify the proposed scheme in light of consultation responses, and in the interests of good design, if appropriate, and not be constrained by an unwavering view of Ofgem that a low cost option must be sustained throughout the consenting process, to determine whether it was ultimately consentable, or not.
19. The appraisal of the landscape and visual impacts of a scheme can be particularly highly contested (even within a consistent methodological framework), and it is frequently the case that alternate views to those of the promoter are expressed and considered during examinations, and those contrasting opinions mediated by the ExA. The consideration of good design and landscape and visual impacts within the ExA's report on the HPC connection is extensive, indeed at close to 100 pages it is a significant proportion of that report, and not a section with which the SoS, in making his decision, took issue.
20. The decision therefore of Ofgem to commission a further set of landscape and visual impact consultants via TNEI to re-examine this matter in this way, particularly at this point, is unhelpful and serves to undermine the balanced and robust consenting process through which the scheme has already been. It also appears to overstep the intended scope of the justification process.
21. If Ofgem feels it incumbent to argue against certain forms of mitigation or require further evidence to be submitted and therefore be satisfied that what is being proposed is necessary, it must engage in the consenting process, because inevitably, almost without exception, those other participants at the examination will be arguing for *greater* mitigation, not less.
22. While NIPA notes that the Gas and Electricity Markets Authority is no longer a prescribed consultee^{xi} that should not prevent it engaging with promoters, and indeed other stakeholders, during the consenting process to ensure that all factors which contribute to the implementation of a project are fully understood in the pre-application process. The relevant Guidance^{xii} to promoters, but also relevant to interested parties, states that the "*front-loaded emphasis of consultation in the major infrastructure planning regime is designed to ensure a more transparent and efficient examination process*".
23. The unintended consequence of maintaining Ofgem's approach to HSB will be to make the consenting process more complex and costlier for promoters, and consequently for the very consumers that Ofgem is seeking to protect. This is because they will either need to progress alternative schemes through the consenting process to evidence what can and cannot be consented, or to propose schemes with limited mitigation, and thus increase the risk of refusal, increasing cost and delay.
24. Ofgem's approach to HSB will also confuse and disenfranchise stakeholders who will feel that their views have not been taken into account through the consultation process. Ofgem should therefore consider carefully the message being given to electricity network promoters, and indeed other interested parties, through the approach being taken here.
25. Conversely, if Ofgem refuses to allow the costs associated with a consented scheme, this could force the promoter back through the consenting process (at some expense) – in this particular case a £65m shortfall in funding might entice such an effect, which is clearly undesirable.
26. NIPA recognises that Ofgem's processes have evolved since the inception of the HSB project, such that there has been earlier, and open engagement in the more recent North West Coast Connections Project through the assessment of an initial needs case, and NIPA welcomes this approach.

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27. However, NIPA considers more can be done to better align the planning and regulatory processes such that they work in a complementary and coherent fashion, not in a sequential and disruptive way. In addition, therefore, to earlier engagement of Ofgem in the pre-application phases of schemes (in accordance with the fundamental principles of the Planning Act), NIPA recommends that Ofgem sets out (perhaps through its Factsheet series) the basis in which it will ultimately determine whether the costs associated with a consented scheme are well-justified, and specifically, therefore, the evidence that ought to be presented (and consulted upon) as part of the development consent application process.

28. Furthermore, NIPA recommends that Ofgem engages positively when the relevant NPSs are being revised such that they then contain appropriate guidance to both applicants and decision-makers on the preparation and determination of applications for development consent, so that they more fully reflect how the delicate balance between cost to consumers and cost to the environment should be approached.

Willingness to Pay

29. There is likely a role for Willingness to Pay (WTP) at a strategic, or business plan, level to understand better the choices we want to make as a nation, but WTP at a project specific level is unworkable because it would not properly recognise the aggregate effect across multiple schemes.

30. In any event, it is irrelevant, for the reasons explained above, to scheme specific mitigation; if mitigation is required because the impacts of the scheme warrant it, whether consumers are willing to pay a sufficient amount is immaterial. Consumers, if given the choice, may take the view they don't want to pay for the scheme at all, but clearly if the strategic need exists, that is also irrelevant.

31. NIPA therefore cautions against the use of WTP at a scheme-specific level.

Conclusions

32. The NPSs already require the SoS to have regard to the statutory duties of licence holders in striking a balance between the need for mitigation and financial imperatives enforced through the regulatory framework, so one might argue this existing arrangement can address the prevailing conundrum without the need for a further re-examination by Ofgem's own environmental consultants. If further guidance from Ofgem, or, in due course, revisions to the relevant NPS, can create an environment in which the SoS can facilitate the process by which Ofgem determines the allowed revenue for the prospective project, that would be of significant benefit.

33. It is noted that previous SoS decisions have already set a precedent that decisions on DCO applications can fix the parameters within which licence holders must subsequently conduct their duties (see Annex B attached to this response), and NIPA sees the benefit in such approach. Indeed, in that particular circumstance described in Annex B, NIPA welcomes the confirmation from Ofgem that it will not be re-examining the respective merits and costs of alternative options.

34. The criterion apparently proposed by Ofgem to prove the counterfactual in case of HSB (particularly noting the approach that TNEI has adopted) is certainly too severe; the question of the mitigation required for any given project is not a black and white legal matter, it is one of planning judgement, having regard to the prevailing risks, which cannot necessarily be quantified, and should also not be confused with the willingness of consumers to pay for it.

35. NIPA would welcome continued dialogue with Ofgem on this matter, and certainly encourages it to engage in the pre-application phase of electricity network NSIPs from this point forward.

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Annex A – Excerpt from ExA Report on Hinkley Point C Connection

5.5.1 The Overarching National Policy Statement for Energy (EN-1), states at paragraph 4.5.1 that applying "good design" to energy projects should produce sustainable infrastructure sensitive to place, efficient in the use of natural resources and energy used in their construction and operation, matched by an appearance that demonstrates good aesthetic as far as possible.

5.5.2 EN-1 continues, in the following paragraphs, by stating that good design is also a means by which many policy objectives in the NPS can be met. The decision maker needs to be satisfied that energy infrastructure developments are sustainable and, having regard to regulatory and other constraints, are as attractive, durable and adaptable as they can be, taking into account both functionality (including fitness for purpose and sustainability) and aesthetics (including its contribution to the quality of the area in which it would be located) as far as possible. It also notes that the design and sensitive use of materials in any associated development such as electricity substations will assist in ensuring that such development contributes to the quality of the area.

5.5.3 The National Policy Statement for Electricity Networks Infrastructure (EN-5) tells us, at paragraph 2.5.2, that proposals for electricity networks infrastructure should demonstrate good design in their approach to mitigating the potential adverse impacts which can be associated with overhead lines. These include:

- biodiversity and geological conservation;
- landscape and visual;
- noise and vibration; and
- electric and magnetic fields.

These impacts and their mitigation are considered in detail elsewhere in the Panel's report.

5.5.4 Policy indicates, therefore, that good design in its widest sense should apply to all aspects of the proposed development.

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Annex B – Excerpt from SoS decision on Progress Power

In the case of Progress Power Limited, the Secretary of State's decision letter^{xiii} reads as follows:

The Secretary of State notes National Grid Electricity Transmission plc (“NGET”) expressed a preference for the AIS variant and suggested that restricting its choice to a GIS design would prevent it from performing its duty to balance amenity considerations against its other obligations to be economic and efficient. NGET therefore argued that the choice between the AIS and GIS options should be left to them. The Secretary of State agrees with the ExA [ER 9.11] that there are significant differences in planning terms between the impacts of the AIS and the GIS options that are relevant to the consideration as to whether to grant an Order and that coming to a view on the choice between the AIS and GIS options would not override NGET's duties under the Electricity Act 1989 but just set the parameters in which these duties must be undertaken [ER 9.11].

The Secretary of State notes the consideration given by the ExA [ER 6.40] to the permanent damage that would result from the AIS variant and that the same benefits could be achieved through the GIS variant. The Secretary of State acknowledges that the GIS variant will cost an additional £4m that will be passed on to consumers but that this will be over the lifetime of the Development. The Secretary of State agrees with the conclusion reached by the ExA [ER 6.41] that on balance the need for new generating capacity and the lower cost of the AIS variant does not provide exceptional reasons to justify the harm to the field boundaries, as an asset of equivalent significance to a SM, or the harm to the landscape and visual impact that would result from the AIS variant.

The Secretary of State agrees with the ExA that with the GIS variant, the need for the Development and other benefits would be greater than the harm to landscape and visual impact and to heritage assets. The Secretary of State is therefore satisfied that whilst the case for the AIS variant has not been made, the case for the GIS variant has been

ⁱ <https://www.ofgem.gov.uk/publications-and-updates/hinkley-seabank-consultation-final-needs-case-and-potential-delivery-models>

ⁱⁱ http://www.legislation.gov.uk/ukpga/2008/29/pdfs/ukpga_20080029_en.pdf

ⁱⁱⁱ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/47854/1938-overarching-nps-for-energy-en1.pdf

^{iv} https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/47858/1942-national-policy-statement-electricity-networks.pdf

^v https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN020001/EN020001-004121-151019_EN020001_HPCC_ExA_Report_to_SoS_Main_Report.pdf

^{vi} <http://www.legislation.gov.uk/ukpga/2008/32/section/83>

^{vii} <http://www.legislation.gov.uk/ukpga/2010/27/part/3/enacted>

^{viii} <http://www.legislation.gov.uk/ukpga/2004/20/section/83>

^{ix} <https://www.ofgem.gov.uk/ofgem-publications/76102/109-visual-amenity-factsheet-pdf>

^x https://www.ofgem.gov.uk/sites/default/files/docs/2013/12/strategic_wider_works_factsheet_0.pdf

^{xi} <http://www.legislation.gov.uk/uksi/2015/462/contents/made>

^{xii} https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418009/150326_Pre-Application_Guidance.pdf

^{xiii} <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010060/EN010060-001044-Decision%20Letter%20and%20Statement%20of%20Reason%20-%20Superseded.pdf>