

Ofgem - Consultation on assessment of capital costs for the Hinkley-Seabank electricity transmission project

Response of the National Infrastructure Planning Association (NIPA)

Background

1. As we set out in our original response to consultation by Ofgem https://www.ofgem.gov.uk/system/files/docs/2017/10/national_infrastructure_planning_association.pdf 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 (NSIPs) 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, and develop, share and champion best practice in national infrastructure planning.
3. The efficiency of progressing projects through the PA 2008 planning process, and the effectiveness of subsequent project delivery, are therefore of particular interest to NIPA.
4. Our consultation response requests Ofgem to consider in detail our previous response and responds further to the questions raised in this additional consultation, but more generally relates to the broader issue of the interaction between the regulatory and PA 2008 systems.
5. NIPA is responding to this consultation because if Ofgem is to adopt tests in the form contemplated to determine the costs allowed to an electricity network licence holder for a scheme's construction, it would have profound implications not only for the consenting of electricity network NSIPs but for all regulated infrastructure sectors.

Legislative and policy context

6. It is worth once again setting out in brief the legislative and policy context that informs this NIPA response.
7. PA 2008 requires the Secretary of State (SoS), in exercising his/her functions in relation to the production of National Policy Statements (NPSs) (which form the planning policy framework against which applications for development consent for NSIPs 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.
8. Consequently, NPSs EN-1 and EN-5 (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 proposed Hinkley Point C Connection DCO (and appended to our original response, at Annex A).
9. 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",

though it is noted that the Energy Act 2010 clarified that these interests are to be “*taken as a whole*”. It is similarly relevant to record that the Energy Act 2004 also requires Ofgem to contribute to the achievement of sustainable development.

10. 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.
11. Equally, Ofgem does recognise that it will be guided by the planning system – the original consultation document noted that it “is not there to take a view on what additional mitigation measures are required”; and similarly, its Visual Amenity Factsheet 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”.
12. In its factsheet explaining the Strategic Wider Works process, Ofgem set 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”.
13. 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 for the NSIP concerned.
14. 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 and the reliance on pre-application consultation and engagement in scheme development and examination. 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 that has already undergone a rigorous and independent examination and determination by the SoS).
15. 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.
16. The PA 2008 rightly places a significant emphasis on consultation by promoters of NSIPs as part of the DCO 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.
17. 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.
18. 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 DCO examinations, and those contrasting opinions tested and 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.
19. 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, and with the statutory regard to consultation and engagement as the project design was developed, is highly unhelpful. Not only does it fundamentally undermine the balanced and robust consenting process through which the scheme has already been but it wholly disenfranchises all interested

parties who have genuinely engaged with and participated in the PA 2008 consenting process, including a six month public examination. It also appears to overstep the intended scope of the justification process.

20. 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 should (a) engage in the prior NPS process, and have this set out as a clear Government policy; and (b) directly engage and participate in an open and equitable manner in the proper consenting process because inevitably, almost without exception, those other participants at the DCO examination will be arguing for greater design innovation and mitigation, not less.
21. While NIPA notes that the Gas and Electricity Markets Authority is no longer a prescribed consultee on draft NPSs, that should not prevent Ofgem from engaging with government policy and 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 and fairly tested. The relevant DCO Guidance 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”.
22. The unintended consequence of maintaining Ofgem’s approach to HSB would 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 promoters would 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 and the need then to reapply to prove the case that Ofgem are seeking to retrospectively apply. This would significantly increase community disruption, blight and harm as well as cost and delay.
23. 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 DCO 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.
24. 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 and would be likely to result first in a refusal and then the need to rerun the original DCO consent or seek a material change to that consent if the timescales are no longer effective.
25. 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 and trusts that this has now become embedded practice.
26. However, NIPA considers that more can be done to better align the planning and regulatory processes such that they work in a complementary, open and transparent, and coherent fashion, rather than in a sequential, closed and disruptive way. In addition, therefore, to earlier engagement by Ofgem in the pre-application phases of schemes (in accordance with the fundamental principles of PA 2008), NIPA recommends that Ofgem sets out (perhaps through its Factsheet series) the basis on 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, such that other interested parties will be able to engage on these aspects as well.
27. Furthermore, NIPA recommends that Ofgem engages positively with government when the relevant NPSs are being revised such that they then contain appropriate guidance to applicants, participants in the consenting process 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.

The questions

Question 1: Regarding T-Pylons, do you agree with our initial views in relation to:

a) NGET's approach to proposing T-Pylons in its planning application?

28. Response 1: For the reasons set out above and the original NIPA submission, we consider it wholly inappropriate to seek in effect to re-determine the outcome of the Planning Act 2008 consenting process, which has been through extensive public engagement and testing in public and then determination by the SoS.
29. This approach serves to wholly undermine the transparent, open and iterative consenting process and is likely to result in undermining public trust and causing additional consenting risk and costs as well as delivery timescales consequent on this.
30. NGET were under significant pressure during the DCO process and took considerable time during pre-application to look at alternatives including total undergrounding and other innovative ways of bringing forward an appropriately designed consentable project that had full regard to government policy and initiatives (including the pylon design competition) and consultation responses within the NPS policy framework.
31. The approach taken is the one that is required of all infrastructure applicants in the PA 2008 consenting regime and there is considerable criticism of and risk to applicants that do not have regard to consultation, policy and design requirements in the Development Consent Order consenting process. They risk non-acceptance at the DCO submission stage, a difficult and prolonged examination and ultimately refusal of a DCO application, which is cost and time intensive. The whole regime is set up to narrow the areas of conflict and refine the design and acceptability of the scheme through the pre-application process - that should not be subject to change during the examination and certainly not after the determination of the DCO application.

b) Disallowing £11.3m of T-Pylon 'development costs'?

c) Allowing £12.3m of additional costs for T-Pylons along the route?

32. In terms of the specific costs NIPA only has a general position, which is that what is consented and genuinely arises from that consenting process should be allowable under the regulatory regime.
33. This is an area that is constantly changing and Ofgem will need to keep up to date with the requirements of planning policy, not just with regard to design and undergrounding but increasingly with emerging requirements such as environmental net gain.

Question 2: Do you agree with our proposals on how to treat high impact, low probability and difficult to quantify risks?

Question 3: Do you have any views on our proposed treatment of other costs not covered in questions 1 and 2?

34. With regard to Questions 2 and 3 NIPA has no specific response except with regard to the submissions made on not undermining the PA 2008 process and genuine and transparent engagement and testing at the appropriate stage in the development of a project. Legitimate design and mitigation proposals developed through the front-loaded iterative planning process must absolutely be allowable costs.

35. To assist further with the understanding and reporting of examination in this case NIPA has also provided at **Appendix A** to this submission some additional extracts from the ExA's report on the HSB DCO that go to support the submissions made.

Conclusions

36. 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 it would appear that 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 allowable costs of the prospective project, that would be of significant benefit.
37. 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 our original submission), and NIPA sees the benefit in such an 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.
38. The criterion apparently proposed by Ofgem to prove the counterfactual in the 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 the engagement required in the front-loaded Planning Act process, which must be genuine and open and should also not be confused with the willingness of consumers to pay for it.
39. NIPA would welcome continued dialogue with Ofgem on this matter, and certainly strongly encourages Ofgem from this point forward to engage in the NPS policy-making and DCO application pre-application phase of electricity network NSIPs.

National Infrastructure Planning Association

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Appendix A

Consideration of NPS compliance by the HSB DCO ExA

There are some interesting points in the ExA's report on compliance with the NPS – at 5.9.39 the Panel says:

“The Applicant sets out its compliance assessment with the EN-5, para 2.8.10 regarding the selection of the most suitable type and design of support structure, by referring to the pylon design options report [Doc 5.2.2.6], justifying the T-pylon along the majority of the route because:

*it would minimise visual effects as it is lower than other supports which could be used for a 400kV line; and
it would use the approximate route of an existing line for most of the route.”*

At 5.9.40 they conclude *“The Panel is satisfied with the thoroughness of the appraisal for recommending pylon type”* and at 5.9.41 *“The Panel has had due regard for the serious concerns expressed by IPs about the potential significance of adverse effects the proposed overhead line would have on the landscape and views”*.

Section 5.14.2 — 5.14.65 looks at alternatives and the call for undergrounding. At 5.14.20 the ExA say:

“The Consultation Report [Doc 6.1.3] notes that a recurring theme during each stage of consultation was the desire of consultees to see the connection completely undergrounded, constructed in the sea using subsea cables or constructed with an alternative technology that did not require overhead transmission infrastructure. The use of alternatives such as subsea and Gas Insulated Lines (GIL) was also a recurring theme of representations and objections made during the Examination. These matters were explored further at the OFHs [Open Floor Hearings], ISHs [Issue Specific Hearings], and the Compulsory Acquisition Hearing (CAH). The ExA also asked a number of questions specifically concerning alternative options including various underground options, subsea and GIL. The Applicants response to Q21.1 [Doc 8.1.3] summonses the available information relating to its consideration of alternatives.”

Support for T-Pylons

The [Consultation Report](#) includes reference to support for T-Pylons over most sections of the route. Paragraph 12.7.10 of the Consultation Report summarised the representations made by prescribed consultees as including (Table 12.13): “T-pylons should be used for as much of the route as is practicable as they provide the best option.” (NB. the link takes you to part 2 or 3, the others are available [here](#) and [here](#)).

The consultation responses themselves are not in the public domain, but there is one example here in a [North Somerset Council s42 committee report](#), which recommends that “the T Pylon design option is supported” and says various supportive things such as:

“3.20 There are significant benefits in keeping the pylon heights as low as possible, particularly where crossing the more open Somerset Levels and Moors landscape. These alternative tower designs (36m tall) are approximately 12m shorter than the proposed lattice towers and this is a significant difference. It will help reduce the visual impact of the pylons, particularly in the wider landscape.”

Also, for reference, the following was also considered in relation to pylon type in the planning and examination process:
the [Pylon Design Options Report](#) (published alongside the s42 consultation) and in brief, in the [Project Need and Alternatives chapter](#) of the Environmental Statement, which understandably goes into far more detail on more controversial issues like not undergrounding.