

## AD Re-opener Guidance and Application Requirements Document

Condition	Comment
General	<ul style="list-style-type: none"> <li>Paragraph 1.1 of the Re-opener Guidance and Application Requirements Document (referred to below as the <b>Document</b>) states that re-openers allow Ofgem to adjust a licensee's allowances in response to changing circumstances. These types of re-openers are then addressed in the Document. However, we note that under the licence re-openers may also involve changes to other things, notably outputs and delivery dates, without any requested change in allowances. Our understanding is that these types of re-opener are not covered by the Document. If it is intended that any of these types of re-opener should be covered by parts of the Document, we request that Ofgem engages with us further on which parts it proposes would be applicable.</li> <li>In reviewing the latest draft of the Document, there are many details which Ofgem proposes should form part of re-opener applications which we do not object to. However, it is clear that Ofgem has still not properly considered the implications of making compliance with the Document mandatory as is proposed under SpC 9.4 of the recent statutory consultation licence conditions. Neither has Ofgem adopted the Associated Document principles which it consulted on in September 2020 (noting that we have seen no decision following that consultation).</li> <li>The Document does not make clear the legal effect of provisions in it. A number of different formulations are used to denote the effect of particular provisions, including that the licensee "<i>must</i>" or "<i>should</i>" take certain action, that the "<i>application must</i>" include certain things or that certain things are "<i>expected</i>" or must be "<i>ensured</i>". Ofgem must make clear which provisions form licence obligations which are advisory only and which, if any, licensees are required to have regard to (but not follow in every case). Since it is not clear on these things, the Document is inconsistent with Ofgem's Associated Document principle to ensure that obligations are "<i>drafted clearly... so licensees can be sure what is expected of them</i>". We made these points in response to the previous consultation and have received no response. (In our response below, we flag other particular areas where the Document is unclear.)</li> <li>We do not consider that the introduction of any absolute licence obligations in the Document has been justified. Many of the proposed obligations are clearly disproportionate as absolute obligations. For example, we do not consider that it is proportionate that there should be a breach leading to potential enforcement action where a licensee inadvertently failed to detail an assumption as part of a CBA.</li> <li>We propose that the document is set out as guidance which licensees must have regard to and that this is made clear at the beginning of the Document. This aligns with how the document is drafted (without the precision of formal licence obligations) and is the most proportionate approach.</li> <li>Alternatively, we propose that, throughout the Document, it should be made clear that the requirements apply <u>or</u> the licensee must provide an explanation for not providing the information. This approach would be consistent with the approach taken in Appendices 2 and 4 of the Document, but not elsewhere. It is not clear what the rationale is for not including this provision throughout the document.</li> </ul>

<b>Front pages</b>	As noted in our response to Ofgem's statutory licence consultation, the document should set out which re-openers it applies to (as in Appendix 1) and we propose that this is made clear upfront.
<b>1. Introduction</b>	<p>1.1 – Since not all re-openers may adjust allowances up or down, we propose changing to “...<i>(in some cases up and in some cases down)</i>...”.</p> <p>1.3 – As noted above, we propose that this paragraph should state that the document sets out which re-openers it applies to (since there are some which it does not apply to).</p> <p>1.4 – It is incorrect and confusing to state that the document contains requirements applicable to “...<i>all re-opener applications...</i>”. We suggest adding “...<i>to which this document applies...</i>”.</p> <p>1.6 – We propose adding “...<i>and those re-opener mechanisms which this document applies to</i>”.</p> <p>1.8 - This states that Annex 1: Application process does not form part of the guidance document. The rationale for this is unclear and we believe that this should be included, and changes to Annex 1 consulted on as with other parts of the document. It would be contrary to best regulatory practice for Ofgem to consult on Annex 1 now but to then seek to make any material changes to the policy in it without further consultation. It is also clearly unhelpful for the regulatory framework to have an Associated Document which contains material which is stated to not be part of that Associated Document.</p>
<b>2. Assurance and publication requirements</b>	<p>2.1. – As stated in response to the previous consultation, it is not appropriate to include, in effect, a licence obligation that an application must be “<i>concise</i>”. This is unclear to the level that it is not clear how a licensee will comply (generally, but in particular given the potentially inconsistent references to “<i>detailed</i>” information being required elsewhere in the document).</p> <p>2.2 –</p> <ul style="list-style-type: none"> <li>• The confirmation required under this paragraph should be required to give the senior person's opinion on the issues listed and this should be made clear (by adding “...<i>in his or her opinion</i>”). The senior person clearly cannot be expected to second guess Ofgem's view on what is good value for consumers.</li> <li>• The last bullet in 2.2 is not consistent with Ofgem's confirmation of its policy position in a previous issues log that the requirement for Board level assurance is not required, nor is it consistent with Ofgem's own tiered approach to assessment which recognises that re-openers are different. This is a disproportionate requirement and we request that this bullet point is removed.</li> </ul> <p>2.5 – Our understanding is that the bullet point list is not intended to be exhaustive. If that is Ofgem's intention, this should be made clear.</p>
<b>3. Guidance on the style, structure and requirements for the content of reopener applications</b>	<p>Introduction – The first bullet should be changed to “<i>Why the licensee considers that an adjustment to allowances is justified</i>”. Clearly the application can only be required to set out the licensee's position. It is not clear if this paragraph is intended to form a licence obligation or not.</p> <p>3.1 - Ofgem states that the accompanying narrative should be as “...<i>short as possible...</i>” but should present proportionate evidence and justification. However, experience has shown that areas that have been kept brief in the past have resulted in</p>

numbers of supplementary questions from Ofgem. Ofgem should give examples of what proportionate would look like in terms of length of response and guidance for each type of re-opener. Any limits on lengths of application narrative should be set out in the guidance as far in advance as possible to aid companies in the production of a re-opener narrative that aligns with Ofgem's expectations.

3.3 – It is not clear what is meant by “...ensure Ofgem can easily identify material contained in an application that will be relevant to our assessment...”. We would expect all material contained to be relevant to Ofgem's assessment. As noted above, what is meant by “ensure” here is not clear and we request that Ofgem makes sure that it is clear what obligation is being imposed upon licensees.

3.5 – It is not clear what is meant by the reference to SpC 9.4 here, since that simply requires compliance with the Re-opener Guidance and Application Requirements Document (already listed). We propose that this is removed.

3.10 – It is not clear what is meant by “...the associated risk quantified, where appropriate”.

3.11 – This paragraph is unclear and is certainly not drafted with the precision of a licence obligation. We propose “...the application should demonstrate why the level of expenditure is proposed and why the licensee considers this level to be efficient”. We are not clear what is meant by “meet obligations” and propose that this is removed.

3.12 – It is not clear what is meant by a sensitivity analysis “where appropriate”.

3.13 – It is not sufficiently clear to require a “detailed” description and we propose that this word is removed from the paragraph. In circumstances where, elsewhere, the requirement is for the application to be “concise”, it is very unclear what is required of licensees.

3.15 – We propose “...of what the licensee considers to be the benefits to customers...”. The application can only be required to set out the licensee's position.

3.16 – “[A]ppropriate” detail is not sufficiently clear and “appropriate” should be removed.

3.17 – We propose that it is made clear that no engagement is needed where there is no material impact on stakeholders (e.g. non-load related Plant Status Civils). Also, we propose that it should be set out expressly that cyber resilience and physical security are being set out as examples.

3.18 – For the reasons explained above, we propose “...why the licensee considers that an adjustment to allowances is justified...”.

3.19 – It is not clear what is meant by “...appropriate sensitivity analysis and, where appropriate, a register of these uncertainties must be included”.

3.20 – It is not sufficiently clear to have a licence obligation to be consistent with “...recognised best practice...”. Similarly, it is not sufficiently clear to require that CBAs and EJPs act as a “robust” decision support tool. If included these in particular should be changed to become guidance.

3.21 - Please could Ofgem make clear which re-openers require engineering justification papers and CBAs. In addition, it is not clear to us why the document should cross-refer to previous guidance rather than including relevant provisions in this document. If a cross-reference is included, Ofgem should make clear which document takes precedence should there be a conflict between the EJP and CBA guidance and

	<p>the Document. It is a contradiction in terms to state that the guidance “<i>must</i>” be followed and we propose that the language is changed to correct this.</p>
<p><b>Appendix 1: Complete list of RIIO-2 reopeners</b></p>	<p>General –</p> <ul style="list-style-type: none"> <li>• It is not clear from this list where there is no information in the final column if this will receive a specific annex to this guidance or if it is simply the main section of this guidance that would apply. This must be made clear so that licensees are clear on the relevant obligations which will apply.</li> <li>• To align with our comment on the Licence suggest the following amendment to better reflect the nature of the work covered: <i>Substation Civil Proactive Investment Works (NGET)</i>.</li> <li>• An additional appendix to cover the MSIP reopener, initially focussed on how the ESO requirements element can be made to work in a proportionate and agile manner to avoid delays in the delivery of consumer benefits is required. Discussions between the ESO, TOs and Ofgem are ongoing and we are hopeful that this will result in a workable approach that can be set out in this guidance.</li> <li>• Where there is additional guidance to be published, please can Ofgem indicate when this will be consulted on.</li> </ul> <p>1<sup>st</sup> table – Tax review and pensions are not set out as a Re-openers in the licence and so should not be listed here.</p>
<p><b>Appendix 2: Non-Operational IT and Telecoms (IT&amp;T) Capex Reopener Application Guidance</b></p>	<p>Opening text – We welcome the confirmation that licensees can justify why information is not provided. Our understanding is that this means that where the licensee provides its reason for not providing the information, there is no breach of the relevant obligation. Our understanding is that the reference to Ofgem considering such explanations is relevant to the re-opener application consideration and not to compliance. We propose that this is made clear with the following changed wording following on from the first two sentences – <u>“However, where the licensee considers that it is not able to provide the level of detail listed within this Appendix, it may instead provide its reasoning why that detail is not being provided (for Ofgem’s to take into account in its consideration of the application)”</u>.</p> <p>1.1 – This is not drafted with sufficient precision to form a licence obligation and we request that it is clarified.</p> <p>1.3 – It is not clear to us what the difference is between “<i>risks</i>” and “<i>challenges</i>” in this paragraph.</p> <p>1.7 – The opening line of this paragraph does not align with the bullets.</p> <p>1.8 – For the reasons set out above, we propose: “...<u>demonstrate why it considers that:</u> • <i>it has carried out an appropriate risk mitigation exercise; and</i> • <i>that the proposed investments submitted to Ofgem...</i>”.</p> <p>1.9 – “<i>Sufficient justification</i>” is not sufficiently clear to be included as a licence obligation. We propose that this should refer to “...<u>explaining why it considers that the requested amount needs to be invested in non-operational...</u>”.</p> <p>1.10 – This paragraph requires the licensee to provide a level of detail that is unrealistic at this stage of the project life-cycle. In any case, it is not sufficiently clear to refer to “<i>detailed</i>” plans and schedules. Suggest this can be resolved by minor amendments to the guidance:</p>

	<p>“ provide a <u>summary</u> description of project delivery plans including, but not be limited to: • <u>Outline project plan and timelines</u> (eg Gantt chart) • <u>Outline project schedule, including activity milestones for project delivery, personnel on-boarding, training, etc</u>”</p> <p>1.12 – For the reasons set out above, we propose that this refers to “...<u>provide its justification for the need...</u>”.</p> <p>1.14 –</p> <ul style="list-style-type: none"> <li>• For the reasons set out above, we propose that the first bullet begins “...<u>Provide evidence demonstrating why it considers that the costs presented within the re-opener application are justified and efficient...</u>”.</li> <li>• We propose that “<u>appropriate</u>” is deleted from the 4<sup>th</sup> bullet, since this is not sufficiently clear to form a licence obligation.</li> </ul> <p>1.16 – As noted above in relation to para 3.21, it is not clear to us why the document should cross-refer to previous guidance rather than including relevant provisions in this document. If cross-reference is used, Ofgem should make clear which document takes precedence should there be a conflict between previous requirements and this document.</p> <p>1.17 – For the reasons set out above, we propose that this is changed to “<u>The licensee should explain why it considers there to be a compelling case...</u>”.</p>
<p><b>Appendix 3: Coordinated Adjustment Mechanism Reopener Application Guidance</b></p>	<p>1.6 – For the reasons set out above, we propose “...<u>set out what it considers to be the overall value...</u>”.</p> <p>1.16 - For the reasons set out above, we propose “...<u>demonstrate why the licensee considers that there is a net benefit...</u>”.</p> <p>1.22 – This paragraph is unclear. Our understanding is that the application should demonstrate that there <u>will be</u> a net benefit, which as stated may take time to materialise. The net gain will not necessarily have been received before the reallocation of funds. We request that this is made clear.</p>
<p><b>Appendix 4: Cyber Resilience IT and OT re- opener application requirements</b></p>	<p>General - In 2.2 of the overarching re-opener guidance we note that this still refers to “<u>the application being overseen and accepted by the board, and the company board is responsible for the application submitted.</u>” When raised in the issues log, the response received was that this was to be removed. Given that we are currently progressing our cyber re-opener plans in parallel to the re-opener guidance being drafted, we request that this should be clarified urgently.</p> <p>Introduction – Our comments on the Appendix 2 introduction apply equally here.</p> <p>1.7 – This paragraph includes a new requirement for Cost Benefit Analysis (CBA) to be provided. Given the challenges to how CBA’s are performed for cyber, it would be helpful if Ofgem could provide guidance on these types of CBAs.</p> <p>1.10 – This paragraph requires the licensee to provide a level of detail that is unrealistic at this stage of the project life-cycle. Suggest amending “<u>detailed</u>” terminology to “<u>outline</u>” as it is unlikely to have more than outline details at the re-opener phase. In any case, it is not sufficiently clear to refer to “<u>detailed</u>” plan and schedule.</p>
<p><b>Annex 1: Application Process</b></p>	<p>Table 1, Step 3 – This step involves Ofgem reviewing whether it has all information. Under the current draft, Ofgem stating that certain information has not been provided would be a determination of licence breach and so would (to be consistent) need to</p>

follow Ofgem's enforcement process, with the work and delay that this would involve. This is an important reason why Ofgem should accept the changes we propose in the "General" section of this response. Should Ofgem retain the current approach, our understanding is that before Ofgem makes any determination of breach as part of an application process, it will follow its published enforcement process.

Table 1 – We propose that timescales are included for clarity and request that the licensee is provided with the Ofgem draft documents for comment prior to Ofgem publishing on their website.

1.4 - Re-opener pipeline log – The requirements here are quite detailed and we note might not be proportionate to be provided in all cases.

1.10 – states "*We will work with stakeholders to develop this tiered assessment process, including the criteria for the three tiers*". We would be grateful if Ofgem would confirm timescales for this further work.

Authority triggered reopener process – We propose that timescales are included for each step to aid clarity.