

Electricity Transmission	
REFERENCE NUMBER:	CATEGORY: Associated Document
LICENCE CONDITION NUMBER: (if relevant):	Associated Document
TITLE:	Guidance on the Large Onshore Transmission Investments (LOTI) re-opener in RIIO-ET2
RELEVANT LICENCE CONSULTATION QUESTIONS (if any):	Sp C3.20- LOTI Re-opener; Sp C3.22 - PCF; Sp C3.10 - Wider Works PCDs
RELEVANT ISSUES LOG:	Annex 1 response template
POLICY ISSUES	
Overarching view on LOTI	<p>Whilst we agree with the principles of a LOTI re-opener mechanism that builds on the policy intent and mechanics of SWW, the Draft Determination represented a rigid and cumbersome process that is insufficiently agile to allow TOs to enable net-zero. We set out our detailed views on the LOTI mechanism in our response to Draft Determinations and have been engaging with Ofgem to discuss the process since. Ongoing discussions are taking place with Ofgem to work towards a more satisfactory licence mechanism for LOTI projects. We disagree with the inclusion of asset health schemes in the LOTI process (see para. 3.2iii) for the reasons set out in our Draft Determinations response. We have generally not repeated our position in this response to the draft guidance unless relevant to particular policy and drafting points. Similarly, we have not repeated comments made in our response to the informal licence consultation other than in particular areas. Any changes made to the licence condition in line with that response would need to flow through to the guidance document.</p>
Associated Document principles	<p>There are a number of areas where the draft guidance does not meet the Associated Document principles of use (set out by Ofgem in para 3.3 of the informal licence drafting consultation). In particular, there are a number of areas where obligations are not <i>“drafted clearly... so licensees can be sure what is expected of them”</i>. We have set out in our response to the informal licence drafting consultation that guidance documents are often drafted less formally and precisely than licence conditions and this is the case with the draft LOTI guidance. We have also noted that the licensee must be <u>able</u> to comply. Examples of this issue include:</p> <ul style="list-style-type: none"> Provisions which are ambiguous to the level that it is not clear how a licensee would comply, such as an obligation to <i>“provide a robust case for costs to be funded”</i>, to explain the <i>“policy context”</i> or to provide an <i>“appropriate level of detail on technical designs”</i>.

	<ul style="list-style-type: none"> • It not being clear what the legal effect of particular provisions is. We understand that “<i>must</i>” denotes an absolute obligation. But it is not clear whether “<i>expect</i>” denotes a have regard to obligation or not and it is not clear what is meant by other formulations, such as “<i>TOs will need to</i>”. • Provisions which include an obligation based on the actions of others which lead to an automatic licence breach. For example, the need to provide a CBA produced by the ESO. <p>We do not note all such issues in this response, but note a number of further specific areas below. As noted below, although the drafting should be made as clear as possible in any case, one way to mitigate this issue is to frame the provisions properly as guidance, rather than as absolute licence obligations.</p> <p>We note that there are also cases where the guidance merely duplicates the licence condition and so fail to meet the principle that “<i>Associated Documents should only be used where more detail and explanation is required</i>”.</p>
Absolute licence obligations	<p>The draft LOTI guidance contains a large number of absolute licence obligations. It is not clear to us why it is justified for the provisions to contain such obligations, rather than being advisory guidance. Many of the proposed obligations are disproportionate as absolute obligations. For example, is it really Ofgem’s position that there should be a breach leading to potential enforcement action where a licensee failed to detail land ownership as part of a submission narrative? Others are not appropriate for the reasons set out above in relation to Associated Document principles of use.</p> <p>We do not see the justification for such provisions being licence obligations, in circumstances where Ofgem may reject a re-opener application or give a negative opinion if all appropriate information is not provided. There is no need for this to be a licence breach.</p> <p>There is also a further issue, in the context where para 6.22 includes Ofgem reviewing whether it has all information. Under the current draft guidance, Ofgem stating that certain information has not been provided would be a determination of licence breach and so would (to be consistent) need to follow Ofgem’s enforcement process, with the work and delay that this would involve. We do not consider that this is intended.</p> <p>We suggest that the provisions should properly be framed as guidance unless there is a justification to do otherwise. We note that the draft Funded Incremental Obligated Capacity Re-Opener Guidance uses the formulation that the licensee must provide information specified “...or explain why it has not provided such information”. Although we do not see the justification that the case for a licence obligation is made out, such an approach is clearly more appropriate than the blanket approach adopted in the draft LOTI guidance.</p>

Timings	<p>Our discussions with Ofgem indicate that there is flexibility and movement on Ofgem’s views on the timing and duration of regulatory submissions. We note that some of the timings referred to in the draft LOTI Guidance do not line up with our current understanding of the latest policy position, and in some cases are inconsistent in the document (e.g. Figure 1 gives various durations that are inconsistent with the text). We very much support shorter timelines and the ability to be flexible with milestones – in particular for earlier submission of the FNC.</p> <p>In discussions, we have made clear that a rigid interpretation of the timelines would potentially delay projects. For example, requiring the INC 12 months prior to planning consultation may delay that consultation if planning is on the critical path for delivery. Requiring the FNC only after planning consents are secured is very late in the process, given that many projects are likely to be nearing contract award by this point. This is the case for all investments with NOA5 proceed signals for which we are seeking baseline funding. This arrangement also introduces an unacceptable ‘double jeopardy’, where Ofgem may come to a different view on the optimal technical solution to the Secretary of State’s planning decision.</p> <p>We welcome the confirmation at para. 1.13 that the timelines are provided for “<i>illustrative purposes only</i>”. However, this is inconsistent with mandating the timelines in the licence, as is currently proposed. We consider that including indicative guidelines of timings in published LOTI guidance is sufficient to enable a timely and constructive LOTI submission and assessment process.</p>
Competition assessment	<p>We have set out our views on competition for LOTI projects elsewhere. We believe that Ofgem should focus its efforts on the development of a model that can deliver the benefits of genuine competition for consumers, and be clearer that CPM is not a competition model, but rather a price control model.</p> <p>We welcome the confirmation at para 1.22 that a decision on whether to apply a model of late competition will be made as soon as practicable once the relevant project design is sufficiently settled. However, the guidance allows for the decision to be made as late as FNC. In our view, this is likely to be too late, especially given the expectation that FNC should ideally be after planning has been proposed. It is typical that procurement processes are run in parallel to the planning process, to allow contracts to be let and construction to begin shortly after planning permission is given. The decision should be taken at the INC stage, given generally tight delivery programmes and the regulatory certainty required by the market, be that our supply base (if the incumbent TO is to deliver the works), or alternative delivery bodies (if competition is applied).</p> <p>If Ofgem considers that the ability to decide at FNC should be retained, there should at least be explicit recognition that, in some cases, a decision of competition will be necessary at an early stage to allow projects to progress to their optimal delivery date (for example at para. 4.13, which refers to competition assessments at the INC stage).</p>

Assessment of submissions	We generally support the intention to create structure around how submissions should be submitted and kept up-to-date (e.g. change logs) (see para. 2.12). The assessment process, while varying in scope and detail, could be standardised across projects and TOs. For example, guidance on how the SQ process could be run would be helpful in allowing TOs to prepare in a timely manner.
Alignment with NOA process	<p>The guidance points to the NOA process, which is used to identify new transmission projects that may be required in the future (see paras. 2.17 – 2.19). Whilst we agree that it is for TOs to work with the ESO to propose appropriate timings, we believe that Ofgem also has a key role to play. It is likely that, with net zero featuring increasingly prominently in the Future Energy Scenarios underpinning the NOA, there will be an imperative to deliver reinforcements at speed. It is vital that the regulatory process aligns with this to prevent delay to projects.</p> <p>This is important in two key respects: 1) flexibility on timings of submissions, as covered above, and 2) the timing and scope of the supporting Cost Benefit Analysis (CBA) carried out by the ESO. It is likely that there will be trade-offs between the certainty of the CBA and the need for fast delivery of reinforcements to deliver consumer benefit. A delay in confirming initial need, based in large part on the CBA, is likely to in turn delay the planning process, which is likely to delay delivery. It is common for even single year delay constraint costs to run into hundreds of millions of pounds.</p> <p>Both of these factors should be considered by Ofgem in assessing the timelines proposed by TOs.</p>
Combined Eligibility Assessments	Given that need for new investments is likely to arrive partly in tranches via the NOA process, we consider there may be benefit in multiple projects being assessed for eligibility at one time, which would give the opportunity for a holistic approach to timings, resources, Pre-Construction Funding etc. This could usefully be mentioned in Section 3.
Purpose of INC stage	Table 1 and para. 4.15 refer to the INC determination as a document ' <i>outlining [Ofgem's] views</i> '. Whilst we appreciate that a final decision would not be made at this stage, we are concerned that this may not be a sufficiently strong and definitive view to give the confidence to proceed into the planning stage, leading to concerns that the FNC may reach a different conclusion. This is especially the case if the FNC is to take place at a late stage in the process, as covered above.
INC CBA	<p>Para 4.8 states that "<i>at the INC stage, no CBA should include any costs associated with the changing of a preferred option, as all options should be able to start at the same time at this stage of the project</i>". We are concerned that this approach could lead to 'hindsighting' of NOA recommendations. Whilst we do not disagree that all options should be treated consistently, there are likely to be instances where it is not practicable that all options are started at the same time.</p> <p>By the point that the INC is submitted, a material degree of development is likely to have occurred. In the case of NOA-driven investments, we will generally invest to keep options with 'proceed' signals in a state capable of meeting their EISDs or recommended delivery dates. However, we would not do so for alternative options with 'hold' or 'stop' signals, as this</p>

	<p>would be inefficient and contrary to the purpose of NOA. The delivery dates for these projects would therefore fall back relative to 'proceed' schemes.</p> <p>Notwithstanding this concern, we welcome the reference at para. 4.9 to <i>"an assessment of the key uncertainties underlying the timing of the transmission reinforcement, including CBA results for different delivery dates and a range of generation scenarios"</i>. This will be useful for assessing the relative delivery risk of different options, which may vary between options.</p>
Purpose of FNC stage	<p>We broadly agree with Ofgem's description of its role in the process as an economic regulator (see paras. 2.13 – 2.16). However, we are concerned with the statement that Ofgem <i>"will take into account the outcome of the planning process in assessing the costs the network companies are allowed to recover from consumers for projects"</i>.</p> <p>As discussed above, this introduces potential 'double jeopardy' for TOs, as we may seek planning permission for schemes which Ofgem subsequently determine are inefficient. To avoid this, we believe that Ofgem should confirm the efficient solution before planning is sought (see our comments on the timing of the FNC). Flexibility on this requirement will be needed to reflect the different scales, scopes and planning regimes of different projects.</p> <p>We believe that, if the FNC stage is required at all, it should be linked to a point where the scope is sufficiently fixed – for example, after the statutory consultation has taken place, or at the point that planning is sought. Generally, very little change in scope is possible beyond these points. In the event planning permission is refused for the agreed strategic option, it may be necessary to revisit the entire economic case for development, which would in effect mean restarting the LOTI process.</p> <p>Our suggested approach is consistent with what believe is Ofgem's intention, which is that the FNC occurs once <i>"the TO has developed a detailed project design and completed its stakeholder consultation"</i> (see para. 5.2).</p> <p>We also consider that in some cases, it may be appropriate that no formal FNC submission is made, as the need will be clear at the INC stage and it is necessary to move at speed towards delivery. At para. 5.4, Ofgem refers to the possibility in some cases that licensees may be informed <i>"they do not need to submit certain information related to areas covered by our assessment of the INC"</i>. This should be expanded to allow Ofgem to relieve the TO of this duty altogether where there is justification for doing so.</p>
Project Assessment / cost certainty	<p>Para. 6.2 refers to various requirements on confidence in cost estimates prior to Project Assessment submission, including as stipulation that the TO must have <i>"received its final procurement offers from external suppliers"</i> and <i>"clear evidence on subsequent negotiations with external suppliers leading to the signing of contracts"</i>. We believe this is likely to be too restrictive. The optimal point for the Project Assessment is likely to be before best and final offers are received, but far enough into the procurement process that the prices have been sufficiently evaluated and normalised. This will allow the</p>

	<p>assessment to be made on the basis of market-tested information whilst ensuring that the Project Assessment does not delay the award of contracts or unnecessarily extend the period for which we expect tenderers to hold prices.</p> <p>Whilst we broadly agree with Ofgem's desire for fully market tested prices, we consider that scope for flexibility to allow alternative ways of agreeing efficient costs could be usefully be added to the guidance, which may be necessary in some limited circumstances to maintain delivery programmes (i.e. there will not be time to wait for the results of a procurement process). These might include benchmarks or Early Market Engagement on guide prices.</p> <p>Para. 6.14 requires that "all procurement and tender information that has been shared during the procurement rounds must be included as appendices or supporting documents". High value construction contracts tend to generator large amounts of paperwork. This is likely to be impractical and could lead to a high volume of extraneous information being submitted. We would encourage Ofgem to consider focussing on the information that it considers will assist with its assessment.</p> <p>We also note that there are multiple references to benchmarking of costs at the Project Assessment stage. The guidance could be clearer on what this applies to, given that Ofgem expects market-tested costs for contractor elements of the estimates. Provided the procurement processes are agreed to be robust, it is unreasonable to test these costs against benchmarks.</p> <p>Para 6.28 refers to comparing the project costs with comparable projects. If this remains the intention, please could Ofgem confirm that the licensee will have the opportunity to comment on the data Ofgem uses from other projects?</p>
LOTI output	<p>Paras. 6.12-6.13 or 6.18 could include explicit reference to the TO providing its view on the definition of the output to be achieved, and ultimately added to the licence. This would allow an easy transition from the Project Assessment stage into licence drafting. Although in some cases this may be a simple task, the recent experience in Hinkley-Seabank shows the need to be clear about which assets are included or excluded in the output and exactly what the assets are designed to achieve.</p>
Cost and Output Adjusting Event	<p>We note that the guidance provides no detail on how Ofgem would identify or determine any particular Cost and Output Adjusting Events (COAE) which would be applied under proposed SpC 3.20.18 or any project specific materiality threshold and we suggest that this issue is considered further in the guidance.</p>
LPD mechanisms	<p>We note there is a placeholder at para. 7.5 for LPD mechanisms. We are therefore not able to comment on this aspect of the proposals in any detail at this stage.</p>

	<p>We have set out our wider view on the LPD measures in our Draft Determinations response. We note the importance of setting a robust target delivery date that does not lead to perverse incentives and recommend that this is done at a point in the process where there is sufficient confidence to do such as at the project assessment stage.</p> <p>Para. 7.7 includes a statement that “<i>for the avoidance of doubt, in general we consider that a licensee is responsible for all of its actions, including where it engages third parties</i>”. We understand this to refer to third parties in the sense of contractors (there is a later reference to “<i>whether the licensee does the work in house or uses an external contractor</i>”). The paragraph should be clear that this is the case. However, even with this limitation we do not consider that this statement is correct in all cases in representing the position under the licence. In some cases, risks will fall within the definition of a COAE under the LOTI condition (for example, as extreme weather and flood risk is in the T1 arrangements). In these cases, the licence acknowledges that there are risks that the licensee should not bear.</p>
Licence breach for late delivery	For the reasons set out in our response to the informal licence drafting consultation, we do not agree that it is appropriate that failure to deliver the licence should be a breach of licence. We note that para 7 of the draft LOTI guidance does not provide any detailed guidance on how Ofgem would approach this issue and how it would ensure that any enforcement action taken would be appropriate and proportionate.
DRAFTING ISSUES	
General	Where lists of information and documents are included, it is in a number of places stated that the submission must cover “ <i>but not be limited to</i> ” the specified list. It is not clear what is intended by this wording and we request that this is clarified.
Title	If, as noted above, the document is to retain so many absolute licence obligations, it should not be referred to as a guidance document.
Para 1.3	We suggest mirroring the licence condition here.
LOTI definition (paras 1.6 and 3.2)	The explanation of the LOTI definition and the licence condition need to be consistent. We have set out our view on the scope of the LOTI project definition in our response to the Draft Determination.
Para 1.7	We note that the timing here is inconsistent with the current draft of the licence in SpC 3.20.6. However, the guidance timing may be more appropriate. This paragraph is also inconsistent with the licence condition in suggesting that the stage involves more than the licensee demonstrating that the project falls within the LOTI definition, whereas our understanding

	<p>is that it serves this limited purpose. We suggest that the guidance should refer to Ofgem approving that the investment is a LOTI.</p> <p>We note that we do not consider it appropriate to use the term “<i>network upgrade</i>”, since this does not clearly cover connections.</p>
Para 1.9	To be consistent with the licence, this provision should acknowledge that the licence contains a provision allowing derogation from this requirement. We consider that it would be clearer to refer to “ <i>comments</i> ” being provided, rather than a response.
Para 1.20	The statement that failure to deliver the specified output could give rise to enforcement action does not appear to align with the licence condition, which currently states that any delay is a licence breach. As noted above, we do not consider that this position is appropriate.
Para 1.22	Once the project design is “ <i>sufficiently settled</i> ” is unclear.
Returned submissions	Paras. 2.4 and 2.8 contain repetitious wording on returning submissions to TOs where the information provided is insufficient. In any case, we note that the concept of returning a submission to the TO does not feature in the licence and we suggest that this should be removed.
Para 2.7	It appears to us that this is an unnecessary paragraph.
Para 2.10	It is not sufficiently clear to include a licence obligation that the licensee must consider carefully the supporting material to ensure that it makes robust submissions for its project. This should be advisory guidance.
Para 2.11	The requirement to “ <i>engage</i> ” with Ofgem is unclear and the provision that the TO must explain missing information is not consistent with the position that failure to provide information will be a licence breach. As noted above, it may be that this is intended to follow the approach in the draft Funded Incremental Obligated Capacity Re-opener guidance, that it is appropriate for the licensee to explain why an item of information is not available. However, this is not reflected in the current LOTI guidance drafting.

Para 2.12	This provision contains a number of requirements which are not sufficiently clear to form absolute licence obligations, such as the requirement to engage early with the ESO and the requirement to “ <i>clearly identify and justify the validity of assumptions</i> ”. Further, the obligation to update any information provided may well be a disproportionate obligation with no limitation included based on the materiality of the issue.
Para 2.19	As in para 1.7, the timing for the eligibility assessment is different from the licence condition.
Para 3.1	Our understanding is that the licensee is being required to explain why it considers that the project meets the LOTI definition (see SpC 3.20.6(a)) and we suggest that this paragraph should make this clear. The date here is inconsistent with the date in other parts of the guidance.
Para 3.3	We welcome acknowledgement that there should be provision for SWW projects transitioning to LOTI. However, we are not clear of how the process explained in this paragraph is consistent with the licence condition.
‘Initial’ eligibility assessment (Para 3.6)	Para. 3.6 refers to ‘initial’ eligibility assessment, which potentially creates confusion with the Initial Needs Case. We suggest this is amended to refer to approving that the investment is a LOTI. We request confirmation whether Ofgem would plan to consult with the licensee on its minded to decision.
Para 3.7	Our understanding is that the initial stage is to determine whether Ofgem agrees that the project falls within the LOTI definition. This paragraph acknowledges this in referring to the project meeting “ <i>qualification criteria for assessment</i> ”. However, the paragraph then refers to information being required some of which is not relevant to that assessment (e.g. proposed working arrangements). This makes it unclear what the purpose of this stage is.
Paras 4.6 - 4.7	These provisions contain a number of requirements which are not sufficiently clear to form absolute licence obligations, such as the requirements to provide “ <i>analysis</i> ” of what would happen without the investment and to provide an explanation of the “ <i>policy context</i> ”. It is not clear to refer to quantitative analysis being provided “ <i>where relevant</i> ”.
Para 4.11	4.11 requires TOs to include “ <i>evidence on the quality of the TO’s stakeholder engagement</i> ”. However, in some cases, at the INC stage (prior to statutory consultation) it is likely that only limited engagement will have taken place, and this is more likely to be the case in the future as schemes are progressed rapidly. This statement should be qualified to recognise this.
Paras 5.3 – 5.6	It is not clear what is expected to be provided as part of the FNC in the absence of confirmation from Ofgem that certain information is not required all that all INC information must be resubmitted. We request that it is made clear what the

	default position is or that Ofgem will always engage with the licensee sufficiently far in advance to allow the licensee to be able to plan.
Para 5.8	It is not clear what is intended here. Is it that the FNC consideration will be a full rerun of the INC consideration other than to the extent Ofgem specifies? If so, this does not seem consistent with the statement in para 5.1 that the FNC is to “ <i>review progression and changes</i> ”.
Para 5.10	Please can Ofgem confirm the reason for including a consultation provision in the guidance, but not in the licence condition?
Para 6.2	As noted in relation to similar wording in the licence condition, this should not be framed as a prohibition on submitting an application but as a limitation on when one may be made. We note that “ <i>confidence in cost estimates</i> ” is unclear and is certainly not clear enough to include as a licence obligation.
Para 6.7	It is not sufficiently clear to state that the submission “ <i>must be clearly structured and provide a robust case for costs to be funded</i> ”. Clearly the licensee will aim to do this so that the application is approved. But it is not at all clear what Ofgem’s intention is here in terms of what is meant by this. Similarly, the list is in bullet point form and not sufficiently precise to form an absolute licence obligation.
Para 6.8	Para. 6.8 refers to explanations for factors “that might drive costs away from industry standards”. This is unclear. We take this to mean assessment against benchmarks (for example, the reference in para. 6.13 to “divergences in cost relative to industry benchmarks”). However, it is inaccurate to refer to ‘standard’ costs, as benchmarks are generally an average of a range of costs.
Para 6.9	<p>The list is not sufficiently clear. For example, it is not clear whether “<i>Details of land ownership</i>” refers only to the land needed for the project or to all surrounding land which may impact on the development.</p> <p>In addition “<i>Evidence that the costs are efficient</i>” should be changed to “<i>evidence as to why the licensee considers that the costs are efficient</i>”. Whether or not Ofgem agrees that costs are efficient bears on its re-opener decision, but should not be a specific licence requirement.</p>
Para 6.10	“ <i>Asset type</i> ” is not particularly clear.

Para 6.11	It is not clear to us what is the specific purpose of the section on firmness of cost submissions and it would be helpful if this could be explained.
Para 6.32	It is still unclear how any Large Project Delivery mechanisms would be implemented and we request further information on this as soon as possible.
FINANCE ISSUES	
SUPPORTING INFORMATION	
OFGEM ENGAGEMENT:	We are continuing to engage with Ofgem on the LOTI arrangements and expect that the LOTI Guidance will be updated to reflect the outcome of these discussions.