

CROSS SECTOR	
REFERENCE NUMBER:	CATEGORY: Addition
LICENCE CONDITION NUMBER: (if relevant):	SpC 9.4
TITLE:	RIIO2 Reopener Guidance and Application Requirements Document
RELEVANT LICENCE CONSULTATION QUESTIONS (if any):	Q21 – What are your views on the principles we have created for drafting re-opener licence conditions?
RELEVANT ISSUES LOG:	Reopener Guidance and Requirements
POLICY ISSUES	
<ul style="list-style-type: none"> General Associated Document principles Absolute licence obligations 	<ul style="list-style-type: none"> As a general point, we are disappointed that information in the draft guidance is not described at a sufficient level of granularity to enable the reader to fully understand what good looks like for Ofgem from a reopener submission. This is a particular issue for reopeners that do not even have specific annexes available yet or which may not ever be the subject of a specific annex. There are a number of areas where the draft guidance does not meet the Associated Document principles of use (set out by Ofgem in para 3.3 of the informal licence drafting consultation).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 raised in our response to the informal licence drafting consultation that guidance documents are often drafted in less clear and precise language 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: <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 that a re-opener application must be “<i>concise</i>”, with a “<i>detailed description</i>” or that information must be included “<i>where appropriate</i>”. 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>should</i>”. 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. The draft guidance contains a number of what are, in effect, absolute licence obligations.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

<ul style="list-style-type: none"> Paragraph 1.8 Paragraph 2.2 Paragraph 2.7 	<p>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 the source of data in some cost assessment information? Others are not appropriate for the reasons set out above in relation to Associated Document principles of use.</p> <ul style="list-style-type: none"> We do not see the justification for such provisions being licence obligations, in circumstances where Ofgem may reject a re-opener application if appropriate information is not provided. There is no need for this to be a licence breach. There is also a further issue, in the context where para 4.3 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. 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 "<i>or explain why it has not provided such information</i>". 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 re-opener guidance. Ofgem has not yet set out which reopeners require separate guidance, or provided copies of all the related guidance documents. These should be clarified and issued as soon as possible to enable network companies to fully understand the requirements on them for RIIO-2. Save to the reference to Appendices 1 and 2, Table 1 does not help to clarify whether reopener specific guidance is either not needed or is not yet available. Please can Ofgem clarify the position in respect of each reopener referred to in the table The guidance and application requirements document still references the need for Board assurance, which is too onerous for many projects and therefore noted as no longer being a requirement in the issues log (ref. Issue 2); suggest document updated to reflect decision. Ofgem states that accompanying narrative should be as "short as possible" but should present "proportionate evidence and justification". However, experience has shown that areas that have been kept brief in the past have resulted in 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 reopener. 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 reopener narrative that aligns with Ofgem's expectations.
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<ul style="list-style-type: none"> Chapter 3: Content of re-opener applications Paragraph 3.11 Paragraph 3.12 Paragraph 4.1 Paragraph 4.2 Table 2 Indicative re-opener process 	<ul style="list-style-type: none"> Many of the principles set out in this section align to our understanding of what reopener applications would entail. However, at the moment, this is too generic and high level for us to understand fully what good looks like from an Ofgem perspective . For example, taking requirements in paragraph 3.9 page 11, there are a number of granularities at which project delivery and monitoring plans should be submitted. We would like to understand how much detail Ofgem feel is appropriate for us to submit on these internal processes This paragraph sets out the importance of justification for additional allowances and states, "...also crucially involves demonstrating additionality". Given this aspect is deemed crucial the guidance should be more explicit about what is meant by additionality. Please can Ofgem clarify. Bullet 4, "in a way that is easily comparable with other benchmarks" - shouldn't this be "where applicable" given that benchmarks for gas transmission are not always available. We believe Ofgem should be firmer in its commitment to decision making timescales rather than a high level intention "which may not always be possible". For projects that are reliant on funding certainty to continue, delays in decision making have the potential to delay projects and increase overall costs. We ask Ofgem to commit to timeframes in which decisions will be made and include similar provisions to the RIIO-1 licence whereby if a decision is not made within a given timeframe then it is deemed to have been given. We raise this point in detail in our response to the informal consultation on the licence drafting. Step 1: We believe it may be useful for any such "pre application discussion" set out in the first stage of the indicative reopener process to include a discussion around the structure of materials between Ofgem and the regulated party. This would ensure that expectations are agreed at an early point, reducing the potential for re-work and supplementary questions. Is further guidance over and above the generic reopener guidance and any specific guidance contained in an Appendix to the generic guidance envisaged here? Step 6: When Ofgem is consulting on its minded to position as set out in the licence, we believe that in order for such to be open and transparent and to allow for meaningful representations to be made, Ofgem will need to share any external evidence used, consultant reports etc. to enable stakeholders to fully understand the proposed position.
DRAFTING ISSUES	

FINANCE ISSUES	
SUPPORTING INFORMATION	N/A
OFGEM ENGAGEMENT:	N/A