SPR EA1N and EA2 PROJECTS

DEADLINE 13 – RESPONSE TO APPLICANTS SUBMISSIONS IN RESPECT OF THE ELECTRICITY ACT 1989

Interested Party: SASES **PINS Refs:** 20024106 & 20024110

Date: 5 July 2021 **Issue:** 1

1. In section 3 of REP11-052, the Applicants belatedly addressed SASES's Deadline 8 submissions on matters relating to the regulatory framework and specifically the Electricity Act 1989 and the CION process. This submission responds to that submission by the Applicants and should be read with SASES's earlier submissions on these matters.

Electricity Act

2. The Applicants are wrong (at paragraph 6) to describe SASES's analysis as "partial". SASES has consistently focused on the elements of the regulatory regime that directly bear on the matters before the examination.

3. It is no answer to SASES's submissions on s 9 EA 1989 to say that it is "directed to the system as a whole" (paragraph 6), since that does not dilute the duty in respect of the present proposals. Like any other statutory duty, it can be breached in relation to a single matter, even if it is not being breached in other respects.

4. Similarly, the extensive citation (e.g. at paragraph 7) of additional regulatory controls is no answer to SASES complaint. In any event, those elements of the regulatory framework (such as the duty on the Secretary of State and Ofgem in s 3A EA 1989) are consistent with the duties on those licensed to operate the network. The principal objection in s 3A – the protection of consumers – must obviously be read consistently with the specific duties in licence holders such as s 9. Otherwise, the functions of the Secretary of State would conflict with the duties of the licence holders. Thus the licence holder duties in respect of an "efficient, co-ordinated and economical system of electricity transmission" cannot be read as somehow being diluted by the objectives of the Secretary of State and Ofgem. It is obviously the case that the various objectives in s 3A (including the principal objective) can be best met through an efficient, co-ordinated and economical system of transmission.

5. Whilst it is unlikely to be make any difference to the analysis, the Applicants are wrong to say (at paragraph 8) that the CION process is "created to fulfil licence obligations and thereby to discharge the statutory duties of the Secretary of State and GEMA/Ofgem". The licence holder does not discharge duties in the Secretary of State, GEMA or Ofgem. It discharges the duties imposed on it by (a) its licence and (b) statutory provisions. The Applicants' submissions risk misleading in this regard. CION is a creation of the licence holder; and a judgment must be made as to whether the CION process is designed and operated (in any given case) in a way which is consistent with the licence and the statute. This point is made clear in Ofgem's letter of 28 May 2019 [REP3-132] which states: *"The CION assessment is an industry process… As a general rule, Ofgem does not have a role overseeing or approving the CION assessment process".*

6. The Applicants reference to forward planning (paragraph 9) appears to be an attempt to hide from the ongoing need for compliance with the relevant statutory duties. Naturally the electricity system operator and the transmission operators must plan in advance, but it must also comply with its statutory duties in respect of individual decision-making. It is also notable that NGET's forward planning, specifically, has been strongly criticised by consultants instructed to consider "the suitability of the current planning regime to enable the delivery of the Government's objective to connect 40GW of electricity from offshore wind power to the UK transmission network by 2030". Quod noted (see attached):

   "6.2 NGET is responsible for designing and bringing forward and consenting new transmission network projects for the East Coast of England as NGET is the TO for England and Wales… On receipt of a request for connection from an offshore TO or developer, NGET must respond within 3 months and offer a connection. The timescale offers no opportunity for strategic forward planning. Some protection is built in to offers which are made "subject to obtaining necessary consents" but that simply enables NGET and the TO to try and fail to deliver the necessary consents and then go through the process again with a different connection point. It does not allow a process in which connections from offshore are anticipated and planned for - with connections and routes selected, planned, agreed locally and invested in in advance. Such an anticipatory plan would bring time, cost, consenting and environmental benefits but it is not currently possible due to the constraints of the regulatory process.

   6.3 This background is entirely unsuited to generating an integrated network solution that can command respect in the consenting process. No party has a responsibility to plan the full

integrated network that will be necessary to meet the 40GW challenge – and there is no such plan."

7. In those circumstances, it is surprising that the Applicants choose to pray in aid the "extensive forward planning" of NGESO and NGET as the transmission operator, when NGET's own advisors are so critical as to the absence of any forward plan. Thus the regulatory regime does not, in fact, operate to secure the proper planning of grid connections. The ExA and Secretary of State should therefore not rely on the regulatory regime, but rather consider whether the grid connection process has generated the correct outcome in this instance, and whether the decision-making has met the statutory duties in the EA 1989. It is through the development consent regime that these matters can be properly considered and monitored, and the ExA and Secretary of State can have no confidence at all that the matters can properly be determined through the private and commercially driven CION regime.

8. It follows that, contrary to the submission at paragraph 9, SASES's submissions do have a proper foundation in law. They are based on a proper interpretation of the statutory framework. They highlight an absence of proper forward planning, coupled with a failure of regulation, that consequently needs to be resolved in the context of a development consent decision. The Secretary of State will doubtless wish to treat these matters as being relevant and important to the determination. If the CION process has failed to meet the relevant statutory and licence obligations, then it has resulted in a proposal which is not suited to the proper organisation of the system of transmission.

9. In respect of paragraphs 11 to 13, the criticism of SASES's approach is spurious. It is of course recognised that NGESO and NGET fulfil different functions. However, as a matter of fact, National Grid fulfils both the system operator and transmission operator function through those two different entities. Moreover, the relevant duties are applicable to both: see s 9(1) and 9(2) EA 1989. The Applicants' point therefore goes nowhere. For the avoidance of doubt, SASES has taken care to ensure that National Grid Ventures is identified separately as the proposed promoter of the interconnector schemes. Although each part fulfils different functions, all three companies are part the same group.

<u>CION process</u>

10. At paragraph 14, the Applicants' repeat the misleading statement that the CION process derives from the duties on the Secretary of State, GEMA and Ofgem. It does not: it is an "industry

process" which is not supervised by the regulator (see above). The CION process thus derives no credibility from the wider regulatory framework which, in essence, fails to concern itself with it. In correspondence, Ofgem has specifically directed the questions as to the adequacy of the CION process in this instance, and compliance with the relevant duties in NGESO and NGET, to the examination. On 30 January 2020 [REP3-131], Ofgem stated that *"As the DCO application for EA2 has now been accepted by the Planning Inspectorate, we consider that SASES should direct these concerns as formal matters for the Examination Authority to consider"*.

11. Tellingly, Ofgem also confirmed that they were not responsible for enforcing compliance with Schedule 9 EA 1989 (which is ignored by the Applicants in their submission). In those circumstances, compliance should be presumed to be a matter for the Secretary of State at development consent stage.

12. In respect of the Bramford option, the Applicants' conclusions at paragraphs 15 and 16 have no merit once it is remembered that Bramford provides the connection for EA1 and EA3, and EA1N and EA2 were originally also intended to be developed at Bramford. Further, NG and SPR already control land at Bramford (see REP1-359) which would allow for the connection at that location with less land take. The significant environmental benefits of connecting at Bramford have already been addressed and are not repeated here.

13. The suggestion (at paragraph 16) that the CION process is conducted in an "open and transparent way" is wholly incorrect. The CION process is shrouded in secrecy, and only partial information has been provided. Since the Applicants use the CION process to justify the selection of the Friston location (by apparently constraining the Applicants' ability to look beyond the "Leiston area"), it is unsurprising that they seek to defend it. However, it has not been open to proper scrutiny in the examination process.

14. Finally, in paragraph 17 the Applicants refer to the Five Estuaries proposals. The submission is confusing. If there is an alternative location for connection for that proposal, its capacity is not known. It is unclear why such a location would be likely to only be able to accommodate a single 348MW connection.

<u>Conclusion</u>

15. The Applicants' submissions do nothing to diminish those submissions already made by SASES. The ExA, and then the Secretary of State, should conclude that there has been a substantial failure to comply with the EA 1989 duties.

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3 July 2021