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Our Ref. NEU-NCO-ZZZ-UK-LT-RE-0005

26 April 2021

**FAO: Rebecca Barnett, Offshore Networks and
Low Carbon RAB**

Dear Rebecca,

RE: Consultation on Ofgem’s proposed approach in circumstances where an interconnector projects’ cap and floor regime start date has been delayed due to force majeure events in the pre-operational period (the “Consultation”)

NeuConnect welcomes the opportunity to respond to this Consultation. The Regime Start Date is a crucial element for project financed interconnector projects. It establishes the maximum duration over which protection from the floor arrangements for lenders will apply and has a very significant impact on the profitability of the project and, therefore, on the incentive for sponsors to invest.

Although you have provided a template for consultation responses, we found that our comments needed further explanation and therefore these are set out below. Where these comments lead to adjustments to the proposed legal text we have shown these potential adjustments in the template provided.

Need to align Regime Start Date with Floor Start Date

Lenders will lend to the project based on the duration during which the floor is available, which ends when the regime duration expires. Consequently, it is important to ensure the

Regime Start Date is aligned with the Floor Start Date to optimise the terms on which the debt is provided to the project; delivering better value for consumers.

Where the Regime Start Date would occur before the Floor Start Date the regime duration will be less than 25 years. This will shorten the period over which the debt is repaid. This increases annual debt service costs but for a shorter period, which adversely impacts potential equity returns in the short term and makes equity returns more reliant on distributions from uncertain future surpluses.

Lenders require a well-motivated equity partner

It is important for lenders, over the debt tenor period, that equity investors are strongly motivated to perform; aligning both lender, sponsors and consumer requirements. Without such alignment, lenders will be concerned and adjust lending terms in a way to ensure lenders are protected. This is likely to result in higher financing costs. This can be avoided by implementing a process for allowing the Regime Start Date to be shifted for events outside the developer's control and aligning this with the Floor Start Date and guaranteeing the floor applies for the entire regime duration.

Timing of requests and timescales for Decisions on shifting the Regime Start Date

The precise impact of events which result in a delay to the Regime Start Date, is often not identifiable at the point the delay occurs but evolves over time as the project develops.

Running parallel workstreams in a development project means that delays suffered in one workstream may become masked by the "shadow" cast by delays in other workstreams. It is the delay (or combination of delays) with the "longest shadow" that needs to be accommodated in the revised Regime Start Date. Often it is only very late in the development process the full impact of events (or combination of events) that caused the longest shadow can be identified.

The Regime Start Date crucially impacts the viability of a project as it affects the annual debt service requirements. Therefore any adjustment to the Regime Start Date is required before the debt raise begins to be certain that lending terms can be the most competitive possible.

Inevitably this makes the Authority's decision fall on the critical path to financial close. To enable projects to be planned efficiently it is vital that decisions by the Authority are made quickly and in a definite timescale; from receipt of application to publication of the Authority's decision. Such commitment to a defined timescale will make it clearer to developers, lenders and suppliers when key information will be known in the development process, thus avoiding large delays - which can arise if factory capacity is committed elsewhere pending an Authority decision where there is an uncertain and potentially lengthy decision making process.

Ofgem has indicated that it "*encourages developers to consider submitting requests alongside their FPA or their PCR submissions*". In our view this is not appropriate for project financed solutions as this would result in the decision on the FPA being required **before** a debt raise process can begin. This would effectively postpone the debt raise process until after the FPA process has concluded and this adds unnecessary delay (and costs) to the development phase of a project.

Instead, the request should be made when the impacts of the events giving rise to the delay are known, or likely to be known, which will almost certainly pre-date the FPA decision.

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NeuConnect would encourage the Authority to then follow a strict decision timetable rather than wait to publish a decision alongside the FPA decision. In the case of NeuConnect, it is important to decide by the end of June to avoid development costs increasing in the manner indicated in the Confidential Annex to this response.

Determination of route to change the RSD

In the Consultation, Ofgem indicates the process for deciding which route to amend the Regime Start Date to use is dependent on whether the:

- i. Licensee specific Cap and Floor Special Licence Conditions **and** the new Standard Condition 26A have been implemented, in which case Ofgem will consider and decide upon any request to amend the Regime Start Date under Standard Condition 26A; or
- ii. Licensee specific Cap and Floor Special Licence Conditions have not been implemented, in which case Ofgem will consider and decide upon any request to amend the Regime Start Date under its draft policy decision document.

It is our opinion that these parameters can lead to a peculiar situation for NeuConnect, particularly under scenario (i) above: If the Special Licence Conditions have been implemented but the new Standard Condition 26A is **not** in force¹ the Regime Start Date could only be modified by:

- a. following the standard process for amending the Special Licence Conditions; or
- b. waiting until the new Standard Condition 26A is effective² and then following the process prescribed therein.

Whilst (b) is faster than (a), assuming (b) is implemented promptly after this Consultation, neither is as fast as the following proposed sequence, (c):

- Step 1, Ofgem implements the policy proposed in Annex 1 of the Consultation;
- Step 2, Ofgem issues a Policy Decision Letter **before** implementing NeuConnect's Special Licence Conditions. This way the Regime Start Date implemented via the Special Licence Conditions will include the date set out in the Policy Decision Letter.
- Step 3, Ofgem implements NeuConnect's Special Licence Conditions, with the Regime Start Date being as specified in the Policy Decision Letter.

The proposed alternative of (c) delivers a new Regime Start Date that lenders can rely on, soonest; whilst the new Standard Condition 26A has either not been implemented or is still waiting for its 56 day standstill period to expire. This route (c) is possible provided that the Authority accepts and confirms that: (i) any application made by NeuConnect for a new Regime Start Date will be treated as an application made under the Annex 1 policy document; and (ii) any decision to extend the RSD adopted under the Annex 1 policy

¹ Because it has either not been implemented or it remains in the 56 day stand still period after a decision to implement it has been published.

² 56 days after Ofgem published its decision to implement the new Standard Condition 26A

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document will be reflected in the final NeuConnect Special Licence Conditions that are currently out for consultation.

Whichever route is chosen it is clear the debt raise process cannot conclude without clarity of the likely length of the floor tenor period. That can only be identified once the Regime Start Date is known.

Definition of Pre-operational Force Majeure

NeuConnect notes the existing definition of Force Majeure, which applies to the interconnector post energisation, is the same as that proposed for pre-Operational Force Majeure, save for the addition of a conditional date range which restricts the pre-Operational Force Majeure regime to the period post IPA and up to energisation. This is troubling. It points to an underlying assumption that events which constitute Force Majeure during the post energisation phase are likely to match those which occur during the pre-Operational phase i.e., the period between the IPA decision and the energisation of the interconnector. In practice the pre-Operational phase is dominated by the development and construction phases. Activities in this phase relate to:

- a. acquiring regulatory approvals;
- b. acquiring consents and permissions;
- c. carrying out surveys and feasibility studies;
- d. negotiating commercial agreements and land purchases;
- e. negotiation and preparation of EPC contracts.
- f. Construction.

In NeuConnect's experience the activities required to achieve regulatory approvals and positive decisions on consents/permissions represent the biggest challenges for developers that are outside their control, and most susceptible to delay. Therefore, the pre-Operational Force Majeure definition should be adjusted to make it clear that delays by regulatory authorities are acknowledged as a Force Majeure event. Such events are clearly outside of developer's control and have the potential to undermine a project's viability if the Regime Start Date is not shifted to reflect any delays so incurred.

Developers cannot be expected to take on a greater burden of risk and cost as a result. Without the adjustment NeuConnect proposes, developers will continue to evaluate opportunities in light of the potential for regulatory authorities to impose cost and risk on project delivery; this is unlikely to be in the interests of consumers as development premiums may be higher, or projects that could have delivered consumer benefits, at the margin, are not developed.

Furthermore, the Regime Start Date will dictate the tenor of the floor and therefore the tenor of the debt. Given projects will raise a single financing package, any decision in the UK which results in a shorter duration of debt is likely to impact the whole financing package, and not just the element in the UK.

I trust you will find this response useful. In the meantime, if you have any questions, please do not hesitate to contact me.

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Yours sincerely,

A handwritten signature in blue ink, appearing to read 'C. Vanhove', with a long horizontal flourish extending to the right.

Christophe Vanhove
Chief Executive Officer NeuConnect Britain Ltd.

Licence consultation response Consultation on Pre-Operational Force Majeure.

Respondent details		NeuConnect Britain Ltd Christophe Vanhove			
Licence/Document name	Condition/Section number	Condition/Section name	Page/Paragraph Ref	Comments	Suggested alternative drafting (please use tracked changes wherever possible)
Licence & Policy Document	SLC 26A in the Licence and the Policy Document appended as Appendix 1 to the Consultation	Delay to Regime Start Date caused by Pre-Operational Force Majeure / Minded-to decision on the framework applicable to the procedural steps, the assessment and decision-making processes in respect of a relevant licensee's request for an adjustment to the Regime Start Date due to delays caused by Pre-Operational Force Majeure	Paragraph 10 of SLC 26A, and Paragraph 12 of the Policy Document	For the reasons set out above in the section titled " <i>Definition of Pre-operational Force Majeure</i> ", NeuConnect believes it is both necessary and appropriate to expressly include regulatory delay as an example of Force Majeure.	Limb (a) of the definition of "Pre-operational Force Majeure" should be amended to include "regulatory delay" as an event of Force Majeure, as follows: “(a) an event or circumstance which is beyond the reasonable control of the licensee, including act of God, act of the public enemy, strike, lockout and other industrial disturbance, war declared or undeclared, threat of war, terrorist act (or threat of), blockade, revolution, riot, insurrection, civil commotion, public demonstration, sabotage, act of vandalism, governmental restraint or regulatory delay (in each case, without limiting such restraint or delay to United Kingdom competent authorities, and including the restraint or delay of any organs or emanations of any state) , provided that lack of funds of the licensee or performance or non-performance by an electricity transmission licensee or equivalent entity shall not be interpreted as a cause beyond the reasonable control of the licensee and provided that weather and ground conditions which are

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					reasonably to be expected at the location of the event or circumstance are also excluded as not being beyond the reasonable control of the licensee; and”
Licence	SLC 26A	Delay to Regime Start Date caused by Pre-Operational Force Majeure	Paragraphs 6 and 10 of SLC 26A	<p>It is unclear why SLC 26A requires a different definition of “Regime Start Date” as opposed to being defined fully by reference to the definition in the Special Conditions. In our view, the parallel definitions (in the SLCs and the Special Conditions) may not work. This is because limb (b) of the SLC 26A definition is already contained in limb (b) of the Special Conditions definition of “Regime Start Date”. Limb (b) of the latter is as follows:</p> <p>“(b) 1st January 2024, or such later date as the Authority may specify in the direction issued pursuant to Standard Licence Condition [XX] Delay to Regime Start Date caused by Pre-Operational Force Majeure”</p> <p>Therefore, the Special Conditions definition of “Regime Start Date” already provides for a direction under SLC 26A.</p> <p>Further, for clarity it would be helpful if it were made clear that any date specified in a paragraph</p>	<p>Define “Regime Start Date” in SLC 26A solely by reference to the definition in NC’s Special Conditions.</p> <p>Amend paragraph 6(a) in LC 26A such that it reads as follows:</p> <p>“(a) has been delayed by an event or circumstance of Pre-operational Force Majeure, the Regime Start Date shall fall on such later date as the Authority may specify in a direction. <u>For the avoidance of doubt, the date specified in such direction shall also apply for the purposes of limb (b) of the definition of Regime Start Date set out in the Special Conditions of this Licence; or</u>”</p>

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				6(a) direction applies for the purposes of limb (b) of the RSD definition in the Special Conditions.	
Licence & Policy Document	SLC 26A in the Licence and the Policy Document appended as Appendix 1 to the Consultation	Delay to Regime Start Date caused by Pre-Operational Force Majeure / Minded-to decision on the framework applicable to the procedural steps, the assessment and decision-making processes in respect of a relevant licensee's request for an adjustment to the Regime Start Date due to delays caused by Pre-Operational Force Majeure	Paragraph 1 of the SLC 26A, and Paragraph 1 of the Policy Document	The reference to the provisions which "may" apply is ambiguous as it introduces uncertainty as to the circumstances that trigger the provisions. NeuConnect considers that the drafting would be more precise and better reflect the intention by omitting the word "may".	Delete the word "may" from Paragraph 1 of SLC 26A and Paragraph 1 of the Policy Document.
Licence & Policy Document	SLC 26A in the Licence and the Policy Document appended as Appendix 1 to	Delay to Regime Start Date caused by Pre-Operational Force Majeure / Minded-to decision on the framework	Various (see last column)	We note that the drafting in both documents contemplates that a pre-operational FM event has already delayed the RSD. However, this is somewhat inaccurate as it is now proposed that the RSD can only be extended by Ofgem pursuant to	In both SLC 26A and the Policy Document, insert " Initial Commissioning " as a new defined term with the following definition: "means the successful completion of such procedures and tests in relation to the licensee's Interconnector that are in accordance with, at the time they are undertaken, Good Industry Practice for

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	the Consultation	applicable to the procedural steps, the assessment and decision-making processes in respect of a relevant licensee's request for an adjustment to the Regime Start Date due to delays caused by Pre-Operational Force Majeure		the processes set out in the consultation. In NC's view, it would be more accurate to refer to pre-operational FM events that delay <u>commissioning</u> , such that the RSD needs to be adjusted to account for such delays.	commissioning that type of interconnector in order to demonstrate that the licensee's Interconnector is available for the use of conveyance of electricity at the Rated Capacity Where relevant, amend references to the Regime Start Date/RSD having been delayed by the FM event to refer instead to the completion of Initial Commissioning having been delayed by the FM event.
Licence & Policy Document	SLC 26A in the Licence and the Policy Document appended as Appendix 1 to the Consultation	Delay to Regime Start Date caused by Pre-Operational Force Majeure / Minded-to decision on the framework applicable to the procedural steps, the assessment and decision-making processes in respect of a relevant licensee's request for an adjustment to the Regime Start Date due to delays caused by Pre-	Various (see last column)	For the reasons set out above in the section titled " <u>Timing of requests and timescales for Decisions on shifting the Regime Start Date</u> ", NeuConnect consider that it is necessary and appropriate to provide greater certainty regarding the process and timeframes.	Amend paragraph 5 to read as follows: "The licensee must provide the Authority, within a reasonable timeframe, as specified by the Authority, with any additional information that the Authority may reasonably require for the purposes of the Authority's consideration under this condition. The Authority must specify all such additional information it may require under this paragraph within one month of receiving the licensee's request. In paragraph 6, insert " Subject to paragraphs 7 and 8. " before "If, in the Authority's opinion, the Regime Start Date:". Include new paragraphs 7 and 8 to provide as follows (with the existing paragraphs 7

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		Operational Force Majeure			<p>and 8 and subsequent paragraphs being re-numbered accordingly):</p> <p><u>“7. In circumstances where:</u></p> <p>(a) <u>the licensee’s request has not specified any additional analysis or information under paragraph 4 and the Authority has not requested additional information under paragraph 5, the Authority must issue a direction under paragraph 6(a) or (b) within one month of receiving the licensee’s request under paragraph 2;</u></p> <p>(b) <u>the licensee’s request has specified additional analysis or information under paragraph 4 or the Authority has requested additional information under paragraph 5, the Authority must issue a direction under paragraph 6(a) or (b) within one month of receiving all additional information and analysis so specified by the licensee or so requested by the Authority.</u></p> <p><u>8. If the Authority has not issued a direction under paragraph 6(a) or (b) within</u></p>
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					<p><u>the relevant timeframe specified in paragraph 7:</u></p> <p>(a) <u>the length of delay caused by the event or circumstance of Pre-Operational Force Majeure shall be as specified in the licensee's request (as such length of delay may have been subsequently updated or amended by the licensee in any additional information or analysis provided to the Authority pursuant to paragraphs 4 or 5); and</u></p> <p>(b) <u>within 7 days of the expiry of the relevant timeframe specified in paragraph 7, the Authority shall issue a direction specifying a later date as the Regime Start Date that reflects in full the length of delay determined under paragraph 8(a). For the avoidance of doubt, the date specified in such direction shall also apply for the purposes of limb (b) of the definition of Regime Start Date set out in the Special Conditions of this Licence."</u></p> <p>Very similar amendments as set out above would also need to be made to the drafting in the Policy Document to the equivalent provisions, which we would be happy to</p>
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					provide separately if helpful. Further, there are clearly several ways that this comment could be implemented and we would be happy to discuss with the Authority the precise drafting.
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