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Your reference: 005000076569

Moyola Park Trustees – Mr Edward Whitley

Job Number 15/20696

Dear Sirs

I am writing on behalf of the Moyola Park Trustees in response to your recent consultation entitled "an Alternative Connection Application and Offer Process Proposal". Our response is set out under the following headings:

Introduction

Legal and Regulatory Position

Matters for further Investigation by the Utility Regulator

Comments on the Batch Process

A copy of this letter has been sent to the Utility Regulator and it has been sent by email to *connections@soni.ltd.uk*. We would appreciate an acknowledgement of its receipt by email to the email address given above.

Introduction

The consultation document that has been published is extremely limited in scope. It is stated that the purpose of this consultation is to:

- Detail the limitations of the existing connection application and offer process and explain why the existing process is not practical for processing the influx of generation connection applications;
- Present further detail on the proposed "Batch Process"; and

- Seek views and suggestions from stakeholders on the proposed "Batch Process" and proposed changes required to implement the "Batch Process".

Interested parties are invited to comment on a document that is 56 pages long which sets out merely one possible solution to the problem that NIE incorrectly considers has been created by the Utility Regulator's (UR) Determination DET-572. Our view is that the Batch process should only be adopted after other avenues have been exhausted.

Legal and Regulatory Position

It regrettably appears that DET-572 may have been misinterpreted by NIE and SONI and that the need for a change in connection procedures is not necessary. The Executive Summary of the Consultation Document states:

"This concluded that NIE Networks was not entitled to require grant of planning permission as a pre-requisite for applying for a generation connection to the Distribution System."

This statement is completely incorrect since DET-572 goes out of its way to demonstrate that there are circumstances in which Planning Permission could be required.

More specifically DET-572 states:

- "Paragraph 8.3.1 (We order that NIE) gives to SVL a notice under Article 20(5) of the Electricity Order which, subject to **any applicable exception under Article 21** of the Electricity Order, makes a connection offer to SVL which offer: ……"

- Article 21(2) of the electricity order is as follows:

  (2) Without prejudice to the generality of paragraph (1) an electricity distributor is not required to make a connection if—

  (a) making the connection involves the distributor doing something which, without the consent of another person, would require the exercise of a power conferred on him by any provision of Schedule 3 or 4;

  (b) those provisions do not have effect in relation to him; and

  (c) any necessary consent has not, at the time the request is made, been given.

Article 21(2)(c) is at no stage in the UR Determination properly addressed and a simple reading of the law as written would indicate that planning permission could reasonably be expected to fall within the definition of "any necessary consent".

NIE and SONI have previously failed to apply a planning consent precondition. For example DET-572 states:

- *Paragraph 4.17 "None of the documentation that we approve obliges the applicant to obtain planning permission before submitting the application."*
- *Paragraph 4.16 "the TSO and DSO **recommend** that planning permission is obtained before making an application".*
- *Paragraph 4.21 "…..not a policy requirement on the part of SONI that an applicant must have formal planning consent before an application for grid connection will be accepted."*

SVL states that this is evidence that the Utility Regulator is aware that there is no legislative basis for NIE to require there to be a grant of planning permission before a connection application can be made. That is untrue and is merely an expression of SVL's belief that NIE is unaware of the law. This

belief cannot be used to deny that both NIE and SONI are entitled within the law to **require** planning permission it as a "necessary consent".

Because the requirement for planning permission was treated as advisory and not mandatory, NIE and SONI were, throughout the arbitration process, defending their case from a position of weakness that can easily be corrected. None of the above precludes NIE and SONI from now defining Planning Permission as a "necessary consent" under Article 21 rather than merely "recommending" that it is obtained. Indeed Paragraph of DET-572 is positively inviting the parties to invoke this Article:

- *"Paragraph 8.3.1 …….Gives to SVL a notice under Article 20(5) of the Electricity Order which, **subject to any applicable exception under Article 21** of the Electricity Order, makes a connection offer to SVL which offer:……."*

Similarly Section 7 of DET-572 leaves the door wide open to apply a Planning Consent precondition:

- *Paragraph 7.5 It follows from our determination that NIE will be required to make changes to its Connection Policy, to remove the current inconsistency with the provisions of the Electricity Order.*

  The inconsistency is the use of a recommendation for planning consent in some instances rather than defining it as a necessary consent for all applications.

- *Paragraph 7.6 How NIE chooses to do so is outside the scope of this final determination. Any changes made should ensure that NIE is able to comply with its statutory duties and its licence obligations. In the meantime, NIE must comply with those statutory duties and licence obligations in relation to any further connection applications which it receives.*

  i.e. Invoke Article 21

- *Paragraph 7.8 For the avoidance of doubt, our determination relates to the application of Articles 19 and 20 of the Electricity Order. Our determination should not be taken to have a bearing on other industry processes or procedures which provide that something may only occur where planning permission has been granted in relation to a particular site.*

  i.e. Invoke Article 21 and make Planning Permission a necessary consent.

As consultees we would welcome an explanation as to why Article 21 has not been invoked. If the possibility of its use had been recognised earlier all the present problems could have been avoided.

Even if the use of Article 21 is arguable in law it would be reasonable to assume that its use in the manner proposed was the original intention of the legislators. To this extent NIE, SONI and UR should urgently raise the issue with the relevant Government Department with a view to clarifying and if necessary amending the law to specify Planning Permission as a "necessary consent".

DET-572 was published on 30th July 2015. It is unlikely that any connections will be granted to generators because of the failure of NIE and SONI to use Article 21 of the Electricity Order until July 2016 at the earliest. As a result of this unreasonable delay generators who have already acquired planning permission and all necessary environmental consents will have suffered significant financial loss.

In summary we do not believe that adopting the proposed Batch Process system would be either the quickest or most efficient method of resolving the problem that has arisen – in our view, entirely

unnecessarily. Instead DET-572 should be interpreted correctly and a firm requirement for planning permission – as opposed to a loose recommendation – should be imposed immediately as a "necessary consent".

Should this course of action not achieve a resolution, consultees should be provided with an explanation for its failure. Only then should the Batch Process be considered.

Matters for further Investigation by the Utility Regulator

Discriminatory Behaviour

Our principal concern is that there may have been unequal treatment and discriminatory behaviour by NIE towards certain categories of applicant in the time between the date of the Determination decision in DET-572 (30th July 2015) and NIE's and the cutoff date of 15th August 2015. UR should investigate whether the information about the choice of 15th August was shared equally with all applicants.

Nearly four months after this cutoff date applicants were told that connections would effectively be treated on a first come first served basis. It seems clear that some applicants were informed of this new allocation basis long before it was made public in NIE's general letter dated 9th December 2015 and thereby encouraged to submit early applications to the potential disadvantage of others.

UR has, at the very least a duty to investigate the timing of lodging of applications and if it should become evident that there is any possibility that some applicants were party to private information about the change in process and the significance of certain dates the case should be handed to the Competition and Markets Authority with a view to instigating a more comprehensive investigation into whether there has been **market rigging** i.e. the application process has been rigged in favour of certain applicants.

Costs to Consumers

UR should investigate whether NIEs failure to differentiate between different renewable technologies has any implications for the consumer. For example allocation of guaranteed grid capacity to solar farms is clearly a less efficient use of capital investment than allocation to Hydropower. NIE should not therefore be permitted to proceed with any application process that does not take account of different technologies.

EU DIRECTIVE 2009/28/EC and the NIE Licence Conditions

Article 16(2) requires that "… appropriate grid and market-related operational measures are taken in order to minimise the curtailment of electricity produced from renewable energy sources". Hydropower has a minimal effect on the "secure operation" of the system compared to other technologies and the present refusal to offer Hydropower any grid connections conflicts with the terms of NIE's licence and the wider principles of priority dispatch. Hydropower operators have valid grounds for complaint in this respect and the matter should be addressed by UR as a matter of urgency.

Comments on Batch Process

Introduction

1. NIE and SONI have certain Duties in meeting the legal requirements of their licence. In particular:

- To develop and maintain an efficient, coordinated and economical system of electricity distribution which **has the long-term ability** to meet reasonable demands for the distribution of electricity;
- Facilitate competition in the supply and generation of electricity.
  It will be against the background of these principal duties that we will make our comments.

2. The Batch Process system fails to recognise different types of generation. In the introduction to the Consultation Document there is heavy emphasis on "uncontrollable" generation, but no attempt at all to address the fact that some forms of generation may provide a more "controllable" supply than others. For example wind power is highly "uncontrollable", but Hydropower is almost entirely predictable and "controllable" and its impact on the stability of the grid (being frequently small scale) is negligible. It would be in the interests of NIE and SONI to promote more "controllable" generation at the expense of "uncontrollable" on the grounds of maintaining security. **For this reason we consider that all Hydropower applications where planning and environmental consents have already been given, should be given immediate offers of grid connections.**

   Given that there would be no significant impact on the security of the grid if this were done, failure to do so would therefore be a breach of:
   DIRECTIVE 2009/28/EC

- Failure to promote SMEs and independent energy producers;
- Failure to encourage decentralisation of generation;
- Failure to streamline administrative approval procedures with transparent timetables for installations using energy from renewable sources; and
- Failure to meet connection obligations and in particular to provide a reasonable indicative timetable for any proposed grid connection.

3. The document makes the assertion that "the more uncontrollable generation that is connected then more curtailment of controllable generation will be required." This needs explaining because renewable generation that is substantially "controllable" eg Hydropower or Anaerobic Digestors (AD) should not be disadvantaged at the expense of "uncontrollable" generation.

Question 1: Do you have any additional suggestions for consideration in relation to continuing to apply the existing connection application and offer process given the recent influx of connection applications received?

See above. NIE and SONI have failed to interpret DET-572 correctly and Article 21 of the Electricity Order should be used intelligently to resolve the problem.

Question 2: Do you consider that the underpinning principles of the proposed connection application and offer process at a high level address the approach necessary to deal with the influx of connection applications? Can you suggest any further principles that should be considered?

One additional further principle should be "to comply with and make full use of the law and EU Directives". There is a hint of expediency in some aspects of the proposed method of resolution which could result in the process being challenged. Not only could this delay the process, but it could lay NIE and SONI open to claims for compensation. In connection with this the Regulator also has a specific duty to comply with "The General Objectives of the Regulatory Authority" which implies a requirement to vet existing practices as well as proposed changes.

A further additional principal should be to give more "controllable" technologies priority over less "controllable". The regulator has a duty to ensure that end prices for consumers reflect efficient costs. The costs associated with managing "uncontrollable" capacity are very much higher than costs associated with such technologies as Hydropower and AD. The regulator would be failing in its duty if it did not insist on NIE and SONI giving first priority to technologies whose output costs less to manage.

Question 3: Do you agree that the Batch Process is the most pragmatic alternative connection application and offer process to deal with the recent influx of applications? Do you have any other suggestions or specific comments on the proposed approach?

No. There are real concerns about "uncontrolled" capacity and a simple Batch process does not address this. Different types of generation which are more "controllable" e.g. Hydropower and AD should be given priority access to connections. To treat such generators in the same way as wind power would breach the majority of the High Level Principles set out in Section 7.1. In addition where such generators currently have all existing planning and environmental permissions in place they should be given connections outside the process and without delay

Question 4: Do you agree with the proposal to remove all consenting requirements for transmission connection applications?

No comment

Question 5: Do you agree with the types of connection applications that are proposed to be included in the Batch? Please provide reasons for any views expressed

All applications provide details of generating technology, which should be used to assess the "uncontrollability of supply". Applications should then be categorised accordingly.

Question 6: What do you believe would be an adequate length of time between a decision paper from this consultation process being issued and the proposed Closure Date? Do you agree that a 4 week period would be adequate? Please provide reasons for any preference.

This question presupposes the response that a Batch Process is the best solution - which may not be the case. If other solutions emerge a shorter time may be acceptable.

Question 7: Is there any information you can provide to describe how it is proposed that the over-installed plant, particularly in the case where there is a mix of generation technologies, is capped to MEC safely and securely?

This question dodges the main issue that is raised in the explanatory notes Paragraph 8.4. It also introduces the concept – without explanation – of a "Batch for controllable generation only". We welcome such a concept and believe it should be adopted for all applications. The notes clearly acknowledge the desirability of having more "controlled" generation and less "uncontrolled", and we

welcome this. Regrettably having recognised that different technologies may be more or less "controllable", the solution for promoting more "controlled" generation is addressed only in terms of capped MEC.

Just because a generator has a capped MEC, even at a low level or with mixed technologies, does not mean that their output is necessarily in the "controlled" category: their output could range from zero to many megawatts. To be consistent with the rest of the argument in Section 8.4 the controllability issue needs to be addressed in terms of technology before MEC capping is considered. It is our view that all applications for Hydropower and AD should be given priority over less "controllable" technologies. The act of capping MECs on mixed or single technologies will be less effective in meeting the High Level Principles and more expensive for consumers than giving first priority to known "controllable " technologies.

Question 8: Is there any information you can provide to describe how it is proposed to limit the availability declarations from the generation site to the SEM and the SONI control centre via SCADA?

No comment

Question 9: Please provide any information you feel could explain how, if there is more than one technology type on site, the generation behind the connection point will be reduced in the event of a system constraint or curtailment?

This is a problem for generators and not NIE and SONI. If MEC capping is imposed generators will have to find their own solutions for compliance at their own expense.

Question 10: Are there any further considerations for the TSO and DNO before this type of connection can be facilitated?

See answers to Questions 7,8 and 9 above.

Question 11: Do you agree with the proposal for allocating any remaining Cluster capacity as a priority and issue these offers outside of the Batch Process? Can you suggest any alternatives for consideration?

Yes, but Hydropower and AD should be given first priority in any cluster in order of valid application date and then all less "controllable" generators separately in their own order of application date.

Question 12: Do you agree that a change may be required to the weighting of projects connecting into Clusters that have not submitted for planning permission and subsequent connection offers have expired or been rejected? Would you consider a weighting of zero for such projects to be acceptable?

A weighting of zero for all projects that have not submitted planning applications would be correct. Given the likelihood of many more speculative planning applications associated with speculative connection applications there should also be a significant weighting for planning applications submitted, but not approved. The cost of planning applications can be relatively low compared to connection applications and there should therefore be some deterrent to speculative applications. As soon as planning permission ***and*** *all other necessary consents are obtained the weighting could be lifted.*

Question 13: Do you agree that the proposal to order the transmission assessments of the Groups based on the Groups with the earliest individual Valid Connection Application is a practical approach? If not, can you suggest any alternatives?

Groups should be weighted according to level of "controllable" generation and those with the highest levels of controllable generation should be dealt with first.

Question 14: Do you believe it would be a prudent approach in the first instance for the TSO to determine whether there is existing grid capacity and issue offers where there is capacity as a priority, accepting that other applicants not included in this phase 1 would need to wait longer for connection offers?

Yes. This would not just be prudent but in some instances NIE should do this as a matter of urgency to protect itself. There will be cases where applications were made after 15th August 2015 and before the issue of the general letter dated 9th December 2015 where applicants were promised connections within three months subject to planning permission. Some of those applicants will now have planning permission and will suffer loss as a result of NIE's failure to meet the terms of the offer letters issued, for which NIE could be held liable. It would be prudent for NIE to issue connections to these applicants first, giving first priority to smaller scale "controllable" technologies, then to larger "controllable" technologies, then to "uncontrollable" technologies.

Offers in this category should only now be made to generators that have all "necessary consents" in place. Such a condition does not conflict with DET-572 so long as it is mandatory rather than advisory.

Question 15: In relation to connection offer validity periods, what length of time do you suggest would strike a balance between giving customers enough time to consider the connection offer and not unduly delay starting to process the remainder of the Batch?

Most customers would already have had more than enough time (too much) to consider their position and 30 days would be more than adequate.

Question 16: In order to reduce time, it is proposed to allow a period of 10 days from information on initial nodal assignment being provided for a decision to be made on whether to withdraw from an application from the process. Do you consider that the suggested 10 day period will provide an adequate balance between reducing delays and allowing high level decisions to be made by developers?

Yes.

Question 17: Do you believe that high level information on estimated nodal assignment, connection method, potential charges and estimated timeframes for delivery would be of value and enable a decision to withdraw early to be made?

Yes.

Question 18: Can you suggest any alternatives to ensure that customers are committed to their connection application?

Applicants could be asked to make a further deposit with NIE that would be refundable immediately on conclusion of the planning process. This would ensure that all applicants are serious, non-speculative applicants that have drawn up plans and submitted them for planning approval. For avoidance of doubt these deposits would be refunded in the event of both successful and failed planning applications. Those that already have planning permission would of course be exempt from this requirement.

Question 19: Do you agree with the proposal to share the costs of common connection assets between applicants on a per MW basis as described?

NIE is a commercial operation and should therefore be expected to carry some proportion of the risk of Capital Expenditure. Indeed the customer charging regime reflects the need for a return on capital expenditure. NIE has previously demonstrated that it is confused about the nature of Capital Expenditure and was recently criticised by the regulator for its questionable accounting practices in this respect. In this instance there is no scope for confusion and the TSO should therefore bear some of the risk.

In connection with this it would not be acceptable for generators to give the TSO a potentially uncapped Bond. A situation could arise where only one small generator in a group accepted an offer and as a result be required to bear exorbitant connection costs. To put any generator in this position would be unreasonable and an obstacle to encouraging renewable generation that was so significant as to be in contravention of the law and EU Directives.

NIE and UR need to consider EU Directive 2009/28/EC Article 16(4) in respect of the above.

All Bonds should therefore be capped at a reasonable level.

The present charging practices are questionable and this question appears to be asking generators to endorse them. EU Directive 2009/72/EC Article 23 (2) and (3) states the following:

(2)The transmission system operator shall not be entitled to refuse the connection of a new power plant on the grounds of possible future limitations to available network capacities, such as congestion in distant parts of the transmission system. The transmission system operator shall supply necessary information.
(3)The transmission system operator shall not be entitled to refuse a new connection point, on the ground that it will lead to additional costs linked with necessary capacity increase of system elements in the close-up range to the connection point.

Full cost recovery on a pro-rata basis as proposed is inconsistent with this Directive since it is proposed that unless applicants pay their full share of the costs their application will be refused. Similarly it is questionable if such a method of charging meets the "non-discriminatory" requirements of other directives since generators in remote locations could be unfairly disadvantaged.

Question 20: Do you think Proposal A or Proposal B is preferable for entry into the FAQ list? Do you have any other suggestions for entry into the FAQ list?

Proposal A is preferable by far. Proposal B fails to meet several of the high level principals and should be rejected by the regulator because of the potentially increased cost to the consumer. In Proposal A the position of Small Scale Generators (SSGs) – below 5MW and therefore outside the scope of FAQ- is not addressed and a mechanism should therefore be put in place to ensure that they are given equal treatment. For example SSGs who made an application after 15 August 2015 and have since received planning permission should also be invited to inform SONI/NIE to ensure they can receive equal treatment.

Question 21: Would a connection offer for generators of 5MW and above without firm access assessment provide sufficient information for that offer to be accepted or for high level decisions on project viability to be made?

Very unlikely.

Question 22: Would a connection offer which does not contain GOR information provide sufficient information for that offer to be accepted or high level decisions on project viability to be made?

No comment.

Question 23: Is it essential for GOR information to be issued along with FAQ and ATR information or is GOR information alone sufficient information for an offer to be accepted?

No comment.

Question 24: Do you agree that the offer acceptance criteria outlined above strikes the right balance between ensuring that applicants are committed to their projects, without being too onerous that applicants will not be in a position to accept their offer?

Relevant deposit – acceptable.

Application of a Connection Charge Bond. This is potentially extremely onerous – see answer to Question 19 above and could leave applicants open to unquantifiable liabilities which would deter any reasonable investor.

Application of an MEC Bond. Acceptable.

Application of per MW sharing. Acceptable only if capped and the TSO bears a proportion of the Capital Expenditure risk.

Question 25: Do you agree that project milestones relating specifically to planning permission are required now that the planning permission pre-requisite has been removed for applications to the Distribution System? What do you believe to be an adequate length of time to secure planning permission after a connection offer has been accepted?

Yes

Planning permission initiated within two months.

> *One month would be sufficient because it would encourage applicants to get "all their ducks in a row" before applying for a connection.*

Environmental Impact Assessment.

> *One month –see above.*

Planning Permission Obtained.

> *As proposed a 12 month period gives applicants 10 months to get through planning from the date of submission (12 months less 2 months to submit the planning). The new Northern Ireland planning regime commits the planners to respond in a far shorter period than this and if they fail to do so planning applicants now have the right to proceed without planning. Environmental consultees are also now required to respond in much shorter defined times and if they fail to do so they can be disregarded.*
>
> *6 months would therefore be more than adequate.*

Question 26: Do you believe that the outcome of the Ofgem milestone consultation in GB should be applied in Northern Ireland without further consultation?

Yes, but qualified if necessary to reflect any differences in response times in planning regimes between regions.

Yours Faithfully

Edward Whitley

For and on behalf of

Moyola Park Trustees