

PRINCIPLES AND GUIDANCE ON SONI TSO LICENCE CONDITION 42 DEROGATIONS

About the Utility Regulator

The Utility Regulator is the independent non-ministerial government department responsible for regulating Northern Ireland's electricity, gas, water and sewerage industries, to promote the short and long-term interests of consumers.

We are not a policy-making department of government, but we make sure that the energy and water utility industries in Northern Ireland are regulated and developed within ministerial policy as set out in our statutory duties.

We are governed by a Board of Directors and are accountable to the Northern Ireland Assembly through financial and annual reporting obligations.

We are based at Queens House in the centre of Belfast. The Chief Executive and two Executive Directors lead teams in each of the main functional areas in the organisation: CEO Office; Price Controls; Networks and Energy Futures; and Markets and Consumer Protection and Enforcement. The staff team includes economists, engineers, accountants, utility specialists, legal advisors and administration professionals.

OUR MISSION

To protect the short and long-term interests of consumers of electricity, gas and water.

OUR VISION

To ensure value and sustainability in energy and water.

OUR VALUES

ACCOUNTABLE:

We take ownership of our actions.

TRANSPARENT:

Ensuring trust through openness and honesty.

COLLABORATIVE:

Connecting and working with others for a shared purpose.

DILIGENT:

Working with care and rigour.

RESPECTFUL:

Treating everyone with dignity and fairness.

ABSTRACT

Condition 42 of the SONI TSO licence provides that the Utility Regulator (UR) may set out principles and guidance in relation to any application for a Derogation that is made by SONI to the UR under either Part C or Part D of Condition 42. This document sets out principles and guidance and is designed to guide SONI in preparing an application for derogation.

AUDIENCE

This document is likely to be of interest to a limited group of stakeholders - SONI, EirGrid plc, SEMC and CCNI

CONSUMER IMPACT

The UR's governance changes are designed to better secure the protection of the interests of Northern Ireland consumers and other stakeholders now and into the future.

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1. Introduction

Purpose and Content

- 1.1 Condition 42 of the SONI TSO licence provides that the Utility Regulator (UR) may set out principles and guidance in relation to any application for a Derogation (an Application) that is made by SONI to the UR under either Part C or Part D of Condition 42.
- 1.2 This document sets out principles and guidance and is designed to guide SONI in preparing an application for derogation. UR welcomes ongoing and collaborative engagement with SONI while it prepares its application (see sections 4.9-4.13 below Pre-Application dialogue).
- 1.3 The UR wants to fully encourage applications for Condition 42 Derogations from SONI, particularly for all-island TSO functions or programmes of work which can be more efficiently delivered with EirGrid TSO and maintain synergies. These programmes are likely to be delivered more efficiently when management and resources are shared between the two TSOs.
- 1.4 This document sets out –
 - a) at Section 2, the form and content of the information and evidence to be provided by SONI as part of any Application,
 - b) at Section 3, the procedure to be followed by SONI in respect of any Application,
 - c) at Section 4, guidance as to the process to be followed by the UR in considering any Application that has been made to it by SONI,
 - d) at Section 5, guidance as to the statutory duties to be followed, and the principles to be applied, by the UR in deciding whether or not (or subject to what conditions) to grant a Derogation in response to an Application that has been made to it,
 - e) at Section 6, definitions and rules of interpretation which are to apply for the purposes of this document.

2. Guidance on form and content of an Application

Introduction

- 2.1 Subject to complying with the procedural requirements in Section 3, SONI may submit any one or more Applications.
- 2.2 Each Application must be made in writing and must be accompanied by all of the information and evidence described in this Section 2.
- 2.3 An Application must clearly specify each Business Function to which it relates and separately, in respect of each such Business Function, be accompanied by the following information –
- a) Business Function – the Application must describe in detail, in accordance with the requirements of paragraphs 2.5-2.13, the activities which together constitute each Business Function which forms part of the SONI TSO Business.¹
 - b) Shared Management and Resources – the Application must specify, in accordance with the requirements of paragraphs 2.14-2.17, the characteristics of the Shared Management and Shared Resources that SONI would propose to use (if a Derogation were granted) for the purposes of carrying out the activities falling within the description of that Business Function.²
 - c) Arrangements with Associated Companies – the Application must set out, in accordance with the requirements of paragraphs 2.18-2.25, the arrangements with one or more Associated Companies by virtue of which that Shared Management and those Shared Resources would be used in common, including the terms of any proposed Services Agreement.³
 - d) Conditions – the Application may set out, in accordance with the requirements of paragraphs 2.26-2.30, any one or more conditions to which SONI considers that the Derogation (if it were granted) should be subject.⁴

¹ Condition 42.25(a)

² Condition 42.25(b)

³ Condition 42.25(c)

⁴ Condition 42.25(d)

- e) Reasons – the Application must state, in accordance with the requirements of paragraphs 2.31-2.37, the reasons why, in the submission of SONI, the granting of a Derogation in relation to that Business Function would be best calculated to further the statutory duties of the UR referred to in Section 4 having regard to the principles set out in Section 5.⁵
 - f) Completeness – the Application may, in accordance with the provisions of paragraphs 2.38-2.40, be accompanied by such other information as SONI wishes the UR to take into account when considering the Application.⁶
- 2.4 In accordance with Condition 42, an Application must comply with the requirements of this Section 2 in order to be a valid application.⁷

Business Function

Introduction and Purpose

- 2.5 In order to assess and make a decision on any Application – even if that Application relates to a single Business Function and no other Derogations are being sought – the UR needs to have a clear understanding of all the Business Functions which together constitute the TSO Business of SONI, of how those Business Functions relate to each other within that TSO Business, and of the extent to which each of them makes use of the resources of the TSO Business.
- 2.6 The extent to which these Business Functions are clearly defined will affect the UR's ability to: (i) understand the nature of the Derogation being sought, (ii) determine whether (or subject to what conditions) it is to be granted, and (iii) decide whether it should be granted (with or without conditions) in relation to a differently-defined Business Function.
- 2.7 It is therefore fundamental to the operation of the Derogation process that each Application clearly and precisely identifies –
- a) each Business Function to which that Application relates,
 - b) each Business Function which is to be treated as a separate Business Function falling outside the scope of that Application (whether or not it is, or is intended in future to be, the subject of a different Application).

⁵Condition 42.25(e)

⁶Condition 42.25(h)

⁷Condition 42.26

- 2.8 It follows that, for the purposes of each Application, SONI needs to provide a clear definition of: (i) the Business Functions which are the subject of that Application, (ii) those Business Functions which are outside the scope of that Application, and (iii) what the relationship is between each of these Business Functions and the resources deployed by them.
- 2.9 It is essential that SONI defines each individual Business Function with sufficient precision to allow it to be clearly distinguished from all other Business Functions, demarcating the respective boundaries of those Business Functions in such a way as to ensure that there is no overlap between them.

General Approach

- 2.10 To assist the UR SONI must –
- a) provide as part of the Application a diagram showing where the Business Function sits by reference to all other Business Functions within SONI,
 - b) provide as part of the Application all of the information and evidence necessary to give a full and clear description of each Business Function, and not cross-refer to information or evidence previously provided to the UR or to any other documents which are not provided as part of the Application (even if the information, evidence or documents are already in the possession of the UR or in the public domain).

Specific Requirements

- 2.11 In respect of each Business Function to which the Application relates, SONI must in particular provide the following information –
- a) a full description of each category of business activity carried out by SONI which forms part of the Business Function, including activities which are –
 - (i) external-facing and involve dealings with third party entities (in which case those entities must be identified either individually or by descriptive category),
 - (ii) external-facing and involve dealings with Associated Companies (in which case those companies must be identified individually),
 - (iii) internal-facing and involve dealings with other Business Functions within SONI (in which case those Business Functions must be identified individually),

- b) a full description of the resources deployed by SONI for the purposes of the Business Function, including in particular a description of –
- (i) all personnel who are either employed or engaged under a contract for services by SONI and who spend any part of their time carrying out roles performed for the purposes of that Business Function, identifying each of those individuals by:
 - name or another signifier per employee,
 - job title,
 - description of the relevant role,
 - proportion of their time spend performing the relevant role,
 - (ii) all managerial and operational resources – including in particular premises, IT and other systems, equipment, facilities, processes and tangible and intellectual property – which are engaged by SONI wholly or partly for the purposes of the activities which form part of that Business Function, identifying in respect of each of those resources:
 - whether it is wholly or only partly utilised for the purposes of the Business Function,
 - where it is only utilised in part for the purposes of the Business Function, the specific part or proportion of the resource which is so used,
 - (iii) all data (described by category) which are obtained, created or otherwise relied upon for the purposes of the activities which form part of that Business Function,
- c) a full description of the relationship between the Business Function and other Business Functions, including in particular an identification of –
- (i) all individuals with management responsibility for the Business Function,
 - (ii) all reporting lines that exist both internally within the Business Function and from individuals within the Business Function to any individuals outside of it,
 - (iii) the extent to which personnel, other managerial and operational resources and data are shared between the Business Function and other Business Functions, identifying

in respect of each of those resources:

- with which other Business Functions it is shared,
- the part or proportion of the resource used by each of those other Business Functions,
- (iv) any dependencies in relation to the availability or deployment of personnel, other managerial and operational resources, and data in respect of which:
 - the Business Function is dependent on the activities of, or decisions made by individuals within, other Business Functions,
 - other Business Functions are dependent on the activities of, or decisions made by individuals within, the Business Function,
- d) a full description of any Shared Management or Shared Resources which, at the date on which the Application is made, are utilised for the purposes of the Business Function.

Exceptions

2.12 In complying with the specific requirements of paragraph 2.11 (a) and (b), SONI need not include in its descriptions any activities or non-personnel resources which are *de minimis* in respect of the relevant Business Function, which for the purposes of this paragraph shall be taken to mean –

- a) any activity which (by reference to the time devoted to its performance) individually constitutes less than one percent of the total activity of the Business Function, so long as the sum of all such activities does not (by reference to the aggregate time devoted to their performance) exceed five percent of that total activity,
- b) any non-personnel resource which constitutes (by value) less than one percent of the total non-personnel resources deployed for the purposes of the Business Function, so long as the sum of all such resources does not exceed (by value) five percent of those total resources.

2.13 However, where SONI wishes to take advantage of this *de minimis* exemption, the Application must be accompanied by a short statement indicating that it has done so, briefly summarising the nature of the *de*

minimis activities or non-personnel resources involved, and indicating its calculation of the time or value (as the case may be) that is associated with each such activity or resource.

Shared Management and Resources

Introduction and Purpose

- 2.14 The description by SONI of the Shared Management and Shared Resources that it wishes to use for the purposes of one or more Business Functions constitutes the central core of any Application. It defines the nature and scope of the Derogation that is being sought, and therefore the fundamental issue for determination by the UR.

Specific Requirements

- 2.15 SONI must, in respect of each Business Function to which the Application relates, provide as part of the Application a list itemising each element of Shared Management or Shared Resources that it proposes to use for the purposes of that Business Function, and that list shall identify separately –
- a) each individual role that is to be performed for the purposes of that Business Function that would involve the use of Shared Management, and
 - b) each item of managerial or operational resources or (where a set of resources together constitutes an integrated system or whole that cannot for practical purposes be disaggregated into its component parts) each set of such resources to be engaged in the activities constituting that Business Function – including in particular any premises, IT and other systems, equipment, facilities, processes and tangible and intellectual property – that would involve the use of Shared Resources.
- 2.16 SONI must ensure that, in respect of each of the listed items, the Application is accompanied by a clear and detailed description of that item, which shall in particular –
- a) where it is a role that would involve the use of Shared Management –
 - (i) identify the job title associated with that role,
 - (ii) state whether it is a role that is to be performed by a SONI employee or a person engaged under a contract for services,

- (iii) describe the nature of the role and the activities to be carried out by the person performing it for the purposes of any relevant Business Function,
 - (iv) if it is a role currently being carried out at the date of the Application, identify by name or another signifier per employee the individual carrying out the role at that date,
 - b) where it is an item of managerial or operational resources that would involve the use of Shared Resources –
 - (i) identify that item by the means most appropriate to that category of managerial or operational resources, so that it can be clearly distinguished from other items falling within the same category of managerial or operational resources that may be deployed for the purposes of the TSO Business,
 - (ii) identify the activities to be carried out by any relevant Business Function which will involve the use of that item of managerial or operational resource.
- 2.17 SONI must ensure that, in respect of each of the listed items, the Application is accompanied by a statement clearly identifying how it is proposed that the item would be used. That statement must in particular identify –
- a) each Associated Company with which that item is to be used in common,
 - b) the proportion of that item (by time or value, as applicable) which is to be used by SONI and the proportion to be used by any Associated Company,
 - c) the respective legal rights and obligations that SONI and each relevant Associated Company will have in relation to that item,
 - d) the Services Agreement between SONI and each relevant Associated Company which relates to that item.

Arrangements with Associated Companies

Introduction and Purpose

- 2.18 It is essential that the detailed nature of the arrangements under which SONI proposes to use Shared Management and Shared Resources in common with one or more Associated Companies are clear. Clarity as to

these arrangements will be fundamental to the evaluation by the UR of the potential implications of the use of Shared Management and Shared Resources and whether these are consistent with the duties and principles described in Section 5.

- 2.19 In all cases, the UR would expect to grant a Derogation subject to the condition that SONI and each relevant Associated Company must enter into arrangements to ensure that the SONI board and management can oversee and approve costs and service levels received from EirGrid or a third party in a manner which is transparent and open to regulatory scrutiny by the UR. Such arrangements must be encapsulated in an appropriate Services Agreement (whether as proposed by SONI, or on alternative terms to be approved or determined by the UR).
- 2.20 Accordingly, the UR prefers that each Application will be accompanied by one or more Services Agreements (in draft form) that will clarify in full legal detail the terms on which it is proposed to make common use of the Shared Management and Shared Resources to which that Application relates. The role of a Services Agreement is to set out the basis on which the Shared Management or Shared Resources will be made available for use by each of the parties.
- 2.21 Where this is not possible at the time of application then SONI must set out the arrangements with EirGrid or a third party that it proposes and how these should ensure that the SONI board and management can oversee and approve costs and service levels received by SONI in a manner which is transparent and open to regulatory scrutiny by the UR.
- 2.22 Each Services Agreement must be prepared and entered into on an arm's length basis, i.e. on terms comparable to those that a reasonable observer would expect to be entered into between companies dealing on equal terms and having no corporate relationship to each other.

Specific Requirements

- 2.23 At the time at which an Application is made, the UR does not expect that Services Agreements will already have been entered into between SONI and the relevant Associated Companies. However, for the purposes of the Application, SONI must provide a full draft of each Services Agreement that it proposes to enter into should a Derogation be granted on the terms sought, together with evidence either that each of the proposed parties has indicated its willingness to enter into that agreement as drafted or that negotiations are ongoing between the parties in good faith with the aim of reaching agreement.
- 2.24 In assessing each such draft, the UR will apply a strong presumption that it should be written on the basis that the Services Agreement will create

legally enforceable rights and obligations between the parties. If SONI wishes to propose that, exceptionally, any Services Agreement should not be legally binding, it must accompany the draft with a statement explaining why, in its opinion, an agreement which is not legally binding is consistent with the principle that it must be entered into on an arm's length basis.

- 2.25 Each draft Services Agreement must document the entire agreement between the parties to it in respect of their provision and use of the Shared Management or Shared Resources. It must include in particular provisions clearly identifying –
- a) the Shared Management or Shared Resources which are the subject of the agreement,
 - b) whether (or to what extent) the Shared Management or Shared Resources are –
 - (i) to be provided by SONI to an Associated Company,
 - (ii) to be provided by an Associated Company to SONI, or
 - (iii) otherwise to be used in common by SONI and an Associated Company,
 - c) the respective rights of each of the parties to the agreement in respect of the Shared Management or Shared Resources, including in particular (where applicable) –
 - (i) the proportion of the Shared Management or Shared Resources which each of the parties is entitled to use,
 - (ii) any other form of limitation on the amount of the Shared Management or Shared Resources which each of the parties is entitled to use, the circumstances in which they are entitled to use it, or any conditions to which that use is subject,
 - (iii) any priority that one party has over another in respect of its entitlement to use the Shared Management or Shared Resources,
 - d) with regard to meeting the costs of the Shared Management or Shared Resources, either –

- (i) the price (including the reimbursement or any costs or expenses) to be paid by one party to the other for the provision of the Shared Management or Shared Resources, or a methodology by means of which that price is to be calculated, or
 - (ii) (where applicable) the respective contributions to be made by each party to meeting the costs of Shared Management or Shared Resources,
- e) the frequency and timing of any payments to be made by either party in accordance with the agreement, and the consequences of late payment or non-payment,
- f) the obligations on service quality to be met by the provider of the Shared Management or Shared Resources, including –
 - (i) any key performance indicators or other metrics to be used for the measurement of performance against required quality standards, and
 - (ii) any liquidated damages or other means of compensation for failure to meet those required quality standards,
- g) the term (i.e. duration in time) of the agreement, including any provisions by which it may be extended at the end of that term or terminated before the end of that term,
- h) the means by which the agreement may be amended during its term,
- i) the rights of a party (including rights to compensation, remediation or the termination of the agreement) when the other party is in material breach of the agreement,
- j) the means by which disputes between the parties may be resolved.

Conditions

- 2.26 Where the UR grants a Derogation, it is entitled to attach to that Derogation such conditions as it considers requisite or expedient.⁸ These conditions will then be binding on SONI.⁹
- 2.27 In making an Application, SONI is under no obligation to propose any conditions to be attached to the Derogation if granted. Neither the UR's power to attach conditions to a Derogation, nor the potential content of those conditions, is contingent on SONI having first made a proposal.
- 2.28 However, where SONI recognises that there are potential difficulties with, or 'negative' aspects to, the proposed Derogation, and considers that these might be either mitigated or overcome by suitably drafted conditions, we would welcome proposed draft conditions for the UR to consider.
- 2.29 Any condition which is proposed must make clear the nature of the obligation that would be placed by the condition on SONI, and therefore facilitate identification of non-compliance. Any draft condition that is proposed should also be accompanied by a note indicating the problem to which it is addressed and explaining why in the opinion of SONI it would effectively mitigate or resolve that problem.
- 2.30 The UR will carefully consider any proposed conditions as part of its assessment of the overall Application.

Reasons

Introduction and Purpose

- 2.31 An Application is the vehicle by which SONI is entitled to seek a Derogation, which we would encourage SONI to use. In the case of each Application, SONI should satisfy the UR why it is appropriate to grant a Derogation in the terms sought. The statement of reasons is subject only to the requirements specified below in paragraphs 2.31-2.37. Otherwise there are no constraints as to its length, style, format or content. SONI is free to seek to advance its argument in whatever manner it considers most likely to be effective.

⁸ Condition 42.32

⁹ Condition 42.33

Specific Requirements

- 2.32 However, this is subject to the following requirements.
- 2.33 First, as Condition 42 expressly states¹⁰, SONI must develop its reasoning by reference to the UR's statutory duties (see further Section 5 below). The statutory duties provide the criteria by reference to which the UR will determine whether or not (or subject to what conditions) to grant the Derogation being sought. There are several different elements to those criteria, but the most important consideration, to which all of the other elements relate, is what is in the interests of consumers in Northern Ireland or (if the determination is a SEM Matter) the island of Ireland.
- 2.34 SONI should directly addresses the different aspects of those duties and demonstrate to the UR why – on balance, all things being considered – those duties are likely to be best satisfied by the grant of the Derogation that is sought.
- 2.35 Second, A statement of reasons takes the form of a reasoned argument. To the extent that it seeks to rely on information or evidence it must be able to point to a source outside of itself. Assertions which are unsupported by any such evidence will be treated by the UR as an unevicenced part of the argument.
- 2.36 SONI may support its statement of reasons with any information or evidence that it considers appropriate, having regard to the wide scope of information it is entitled to adduce in accordance with paragraphs 2.38-2.40. SONI should ensure that its statement of reasons contains clear cross-references, using the bundle index numbering referred to in paragraphs 2.41-2.47, to each document containing information or evidence on which that statement of reasons seeks to rely.
- 2.37 Third, the statement of reasons provides an opportunity for SONI, where it wishes to do so, to make submissions as to whether the determination of the Application should be treated as a SEM Matter. Where it elects to make any such submissions, SONI must address them directly by reference to the relevant statutory test.¹¹

¹⁰ Condition 42.25(e)

¹¹ Article 6(3) of the SEM Order

Completeness

Introduction and Purpose

- 2.38 The starting point is that each Application must contain all of the information and evidence that SONI wishes the UR to take into account for the purpose of considering whether or not to grant a Derogation. The UR is entitled to judge an Application solely on the basis of the information that is contained within it. SONI should ensure that it provides all of the information that the UR ought to have access to for the purposes of reaching a determination.
- 2.39 SONI will not be entitled to provide any further information in support of an Application after that Application has been submitted to the UR, unless and to the extent that it has been expressly requested to do so by the UR.
- 2.40 The information that may be provided as part of an Application is not limited to those categories of mandatory information listed in paragraphs 2.5-2.37, but may include anything which SONI considers likely to support its case for a Derogation or to assist the UR in deciding whether or not (and subject to what conditions) to grant a Derogation. Each Application must be viewed as SONI's opportunity to satisfy the UR that a Derogation should be granted on the terms that it seeks, and SONI is entitled to provide any supporting information that it considers appropriate in support of that outcome. As a general principle, the UR will expect that all of the supporting information that is provided by SONI will be referenced in the statement of reasons in such a way as to make clear: (i) why SONI considers that information relevant to its Application, and (ii) how, in SONI's opinion, that information supports its case for the grant of a Derogation.

Form of the Application

- 2.41 Each Application made by SONI, including all of the information and evidence which forms part of that Application or is provided together with it, must be submitted to the UR both –
- a) in electronic form, and
 - b) in the form of three paper copies.
- 2.42 The Application submitted in electronic form must constitute documents –

- a) in an up-to-date version of one or more of the following file formats –
 - (i) Microsoft Word, Excel, and/or
 - (ii) Adobe Acrobat, or
 - b) in any other file format only to the extent that SONI has notified the UR of its intention to submit it in that format, and the UR has agreed to receive it on that basis, prior to the submission of the Application.
- 2.43 Prior to submitting the Application in electronic form, SONI must notify the UR of the expected aggregate file size of the Application, and must then make the submission by such means and to such location as the UR may specify in the light of that file size.
- 2.44 The Application submitted in paper copy form must be submitted by delivery to the Belfast office of the UR within normal working hours on a working day.
- 2.45 SONI may compile the documents which form part of an Application in any order that it thinks appropriate in the light of their content. However, each document must be assigned a reference in the common form Folder/Tab/page-page (e.g. A/12/50-60), where –
- a) the folder in which the document is included bears an alphabetic indicator in the range A to Z,
 - b) each document within a folder sits within its own numbered tab, all tabs within the folder being sequentially numbered, and
 - c) each document bears a page number (or a range of page numbers) clearly printed in the same location, all pages within the folder being sequentially numbered.
- 2.46 The electronic form of the Application must be presented in electronic folders using the same structure and the same document referencing system as the paper copies.
- 2.47 All cross-references in one document to another document (or part of a document) contained within the Application must use the document referencing system described in paragraphs 2.41-2.47.

3. Guidance as to the procedure to be followed by SONI

The Application

- 3.1 SONI's primary obligations relate to the Application itself – ensuring it is submitted in accordance with all the requirements of Section 2, is made in a timely fashion and certainly by no later than the deadline set out in Condition 42.

The Post-Application Process

- 3.2 Once it has submitted an Application, SONI's duties are –
- a) to assist and co-operate with the UR in good faith to such extent as the UR reasonably requests in order to facilitate its consideration of the Application,¹²
 - b) in particular to provide the UR with further information and evidence that it reasonably requests for that purpose as soon as reasonably practicable after the request is made.¹³
- 3.3 The UR's process for considering and determining an Application is set out at Section 4. Where, in accordance with that section, the UR makes an information request, requests a site visit or a meeting, or makes any other request for assistance or co-operation, SONI must comply with that request so as to facilitate the UR's consideration and determination of the Application.
- 3.4 Such requests will typically set out a timeframe for compliance. In each case, SONI must comply with the request as soon as reasonably practicable, and in any event by any time limit that is specified. Where, exceptionally, it is simply impracticable to comply within that timescale, SONI must: (i) notify the UR as soon as possible after receiving the request, (ii) indicate the cause of its difficulty in meeting the timescale, (iii) propose the earliest date by which it considers that it can realistically satisfy the request, and (iv) comply with any amended target date that the UR may set in the light of the information provided.
- 3.5 SONI should note, however, that since the UR will be acting under a deadline set by Condition 42 for the determination of any Application, there will be limited scope to adjust the timeframes that are set for

¹² Condition 42.29(a)

¹³ Condition 42.29(b)

compliance with any request. Once SONI has commenced the Derogation process by serving an Application on the UR, it is SONI's responsibility to make sure that it will have sufficient resource to assist and co-operate with the UR throughout the period during which the Application will be under consideration.

- 3.6 Extensions of time will usually be granted only on an exceptional basis where there are overriding reasons, which could not reasonably have been anticipated and prevented, rendering it impracticable to comply with the original deadline.

4. Guidance as to the procedure to be followed by UR

Timing

- 4.1 The starting point, in accordance with Condition 42, is that –
- a) For Part C Applications, there is a two-month time window within which an Application may be made by SONI.¹⁴ Depending on the date during this window on which the Application is received by the UR, the UR must determine that Application by no later than six to eight months after it was made.¹⁵
 - b) For Part D Applications, there is an earliest date on which any Application may be made by SONI.¹⁶ The UR must determine an Application by no later than six months after it was made.¹⁷
- 4.2 However, where the UR is satisfied that it requires more time to consider the Application, it may issue a direction extending the time period for the determination by up to six months.¹⁸ In total, therefore, the UR may take up to a maximum of twelve to fourteen months to determine a Part C Application, and up to a maximum of twelve months to determine a Part D Application. We expect that the maximum time allowed will only be needed in cases where an application is complex. In all other cases we anticipate that our review will much take less time than the maximum allowed. We will aim to complete our review as soon as possible.
- 4.3 If no determination has been made by the appropriate backstop date, the Application will be deemed to have been granted and a Derogation to have been issued on the terms requested.¹⁹ The UR does not expect this deeming provision ever to be needed, but its function is to assure SONI that the length of the determination process can never exceed the specified period.
- 4.4 In practice, the time taken to determine any individual Application will vary depending on a range of factors – including in particular the length, complexity and substance of the Application, taken together with that of any other Applications which the UR must consider at the same time. No

¹⁴ Condition 42.24

¹⁵ Condition 42.27(a)

¹⁶ Condition 42.37 to 42.42

¹⁷ Condition 42.44(c)(i)

¹⁸ Condition 42.27(b) and 42.44(c)(ii)

¹⁹ Condition 42.28 and 42.45

guidance can therefore indicate the likely timescale for the determination of any application.

- 4.5 However, the UR will aim in the first instance to determine each Application as soon as possible, and within the initial deadline period – of six to eight months in the case of a Part C Application, and six months in the case of a Part D Application – after it is received. If it becomes clear that the Application cannot realistically be determined within that period, the UR will issue a direction extending the time by an appropriate additional period.
- 4.6 The UR would expect to issue any direction extending the time period shortly after it becomes clear that extra time is required, and not to wait until the end of the initial deadline period to do so. However, in some circumstances a direction may not be given until the end of that period. This is most likely where the UR believes that a determination can realistically be made within the initial deadline and works towards that outcome, but it becomes clear towards the very end of that period that a short additional amount of time will be needed.
- 4.7 Where it appears to the UR necessary to give a direction extending the time period, it will assess the length of the extension by reference to all relevant factors within its knowledge at that time. However, since only one direction may be issued, and against the risk that unforeseen matters may arise, the UR will tend to err on the side of caution in deciding on the length of the extension and will typically allow some room for contingency in its revised deadline.
- 4.8 The UR is not required to, and will not usually, consult SONI before issuing a direction. In some cases, however, the UR may choose to do so where it considers that this will better inform the decision whether a direction needs to be issued and/or the period of time to be specified in it.

Pre-Application Dialogue

- 4.9 Except to the limited extent provided by paragraphs 2.42 and 2.43, SONI is not required to notify the UR in advance that it intends to make an Application, nor to give the UR any prior indication of the likely nature or content of that Application.
- 4.10 However, if SONI chooses to provide advanced notice of an Application, it will assist the UR to undertake preparatory steps before that Application is received. It is therefore likely to result in the Application being dealt with more speedily and efficiently on its receipt, and so to reduce the time required before a final determination is made. Accordingly, SONI is

encouraged to give such notice as early as possible, wherever it is in a position to do so.

- 4.11 If it would assist SONI, the UR would welcome – during any period in which SONI is preparing an Application or considering whether to prepare one – engagement in a dialogue with SONI for the purpose of clarifying the interpretation and application of Condition 42 or of this document, and so helping SONI in its preparatory activities.
- 4.12 Any such dialogue will only be entered into on a strictly confidential and without prejudice basis. This means in particular that, it will be entirely without prejudice –
- a) to SONI's decisions whether or not to make an Application, and as to the nature and content of any Application that is made. Matters discussed in pre-Application dialogue will not be referred to or form any part of the UR decision-making process in reaching its determination on any Application that is ultimately made,
 - b) to the UR's determination of any Application. Guidance and indications given by the UR in pre-Application dialogue will be strictly non-binding and will not amount to assurances or constrain the discretion of the UR in reaching its determination of the Application that is made.
- 4.13 Where SONI wishes to engage in pre-Application dialogue with the UR on the terms specified above, SONI should contact the UR, in good time before any Application falls to be made, and notify the UR that it would like to instigate that dialogue.

Initial Procedural Steps

- 4.14 On receipt of an Application, the UR will take two initial steps.
- 4.15 First, the UR will carry out a detailed initial assessment of the Application for the purpose of determining whether it fully satisfies the requirements of Section 2 or is defective and therefore invalid.
- 4.16 Where the UR determines that the Application is invalid, it will notify SONI, and the Application will thereafter be treated as if it had not been made.²⁰ Absent such notification, the Application will be presumed valid.
- 4.17 Second, the UR will keep the SEM Committee informed on any valid Applications received and will provide any analysis or information to the SEM Committee which the Committee may request.

²⁰ Condition 42.26

- 4.18 In accordance with the provisions of the SEM Order,²¹ a matter will be a SEM Matter if the SEM Committee determines that it is. In the absence of any such determination, the default position is that the matter is not considered to be a SEM Matter.

Conclusion of the First and Second Steps

- 4.19 If the UR has determined that the Application is invalid the invalid Application will be withdrawn.
- 4.20 Where the SEM Committee determines that the determination of an Application will constitute a SEM Matter –
- (i) SONI will be notified as soon as practicable after that decision is made,
 - (ii) the SEM Committee will proceed to determine the Application, with professional and administrative support provided by the UR,
 - (iii) references to the UR in both Condition 42 and this document shall (except where the contrary intention is clear from the words or context) be treated as references to the SEM Committee.
- 4.21 The UR may decide to appoint one or more individuals drawn from its members and/or staff to act as decision-makers, on behalf of the UR, in relation to the Application. Where UR does so, SONI will be notified as soon as practicable of the identity of the decision-makers.

Timing

- 4.22 The UR will aim to ensure that the first and second procedural steps are completed within the first two months after the receipt of an Application. Where this does not prove to be practicable, it will notify SONI by the end of that period of its estimate of the time remaining to the completion of those steps.

Subsequent Procedural Steps

- 4.23 As with the time taken to determine any individual Application, the procedural steps necessary to reach that determination will vary depending on a range of factors – including in particular the length, complexity and substance of the Application, taken together with that of any other Applications which the UR must consider at the same time. No

²¹ Article 6(3)

general guidance can therefore indicate the steps that the UR will be likely to take in relation to any particular Application.

- 4.24 However, in broad terms, the UR expects to scrutinise each Application closely, not only for the purpose of assessing the strength of the case made by SONI for the grant of a Derogation, but also to consider whether an alternative to the proposal made by SONI would be likely to better satisfy its statutory duties. The assessment of any Application is therefore not simply a binary matter of considering whether to accept or reject that Application on its own terms – although in some cases the outcome may involve one or the other of those outcomes – but a question of whether the Derogation sought by SONI could be granted on terms which are different (and to be preferred) to those that SONI has proposed.

Information Requests

- 4.25 Given this context, it is likely, in the case of the majority of Applications, that the UR will need to serve on SONI a number of information requests during the course of its assessment of the Application.
- 4.26 There may be residual non-substantial ambiguities, or subject-matter which can be better understood only with the benefit of additional information, which will need to be the subject of information requests in particular cases.
- 4.27 In addition to this, the UR may need to make information requests relevant to a wide range of other matters which are future-facing and contingent – for example, about the operation of potential provisions of a Services Agreement, or potential conditions concerned with ring-fencing or any other matter. We cannot provide an exhaustive list at this stage. We encourage SONI to engage in Pre-Application dialogue with the UR to ensure that an Application is sufficiently clear and detailed as to all fundamental matters as possible.
- 4.28 In any information request, the UR will specify a deadline by which it must be met. The UR may also specify other requirements as to the form or content of the response.

Site Visits and Meeting

- 4.29 The UR may – where it considers that it would assist it better to understand the context of any Application, or the likely effect of granting a Derogation or of conditions which may be imposed on any such grant – request the opportunity for a site visit to the premises of SONI or a meeting with one or more members of the SONI board or of its staff (whether or not they are employees or engaged under a contract for services).

- 4.30 Where the UR requests a site visit or meeting, UR will endeavour to agree a mutually acceptable time with SONI for the visit or meeting to take place, and an agenda for the visit or meeting. In the case of a site visit, the UR may request to see the operation of premises, IT systems, control rooms or any other processes or activities carried out by SONI as part of the TSO Business. In the case of either a meeting or a site visit, the UR may elect to be accompanied by one or more professional advisers (e.g. IT consultants).
- 4.31 Site visits and meetings during the course of considering an Application will be neither without prejudice nor confidential. Information gathered and observations made during those processes may be relied upon by the UR for the purposes of its determination of the Application.

Timings

- 4.32 Because the UR is subject to its own time deadlines in making a determination, it will generally need to set tight timeframes for compliance with any request it may make of SONI in accordance with paragraphs 4.23-4.32. Exceptionally, in the circumstances described in paragraphs 3.2-3.6, the UR may adjust a timeframe it has set in light of submissions by SONI as to the practicability of meeting it.

The Determination

- 4.33 When the UR issues its determination it will do so together with its reasoning, a statement of any alternative definition of a Business Function that may be relevant to the determination, and a full draft of any conditions that are to be attached to the Derogation (if granted).

Pre-Determination Steps

- 4.34 The UR may choose, at its discretion, to disclose to SONI – in advance of its determination – aspects of its thinking in the form of ‘minded to’ proposals or ‘provisional’ sections of the final determination.
- 4.35 Where it does so, its purpose will be to consult SONI on the matters disclosed, with the intention of obtaining and having regard to SONI’s views on them. Any such disclosures will be entirely without prejudice to the final determination, because they will disclose thinking which is not, at that stage, either concluded or conclusive of the relevant issues. The UR will set a strict deadline for responses by SONI to any such disclosure.

- 4.36 The disclosure of ‘minded to’ positions in this manner should not be regarded as a normative part of the process for reaching a determination, and SONI should have no expectation that it will typically occur before a determination is finalised. The UR is likely to employ this aspect of the process only in cases where it is considering matters which appear finely balanced, where it considers it necessary or highly desirable to have the benefit of the opinion of SONI before it reaches a final balanced decision on those matters, and where there is sufficient time left before a determination must be made to allow for the process to be undertaken.
- 4.37 Disclosures of this nature differ from the information requests issued under paragraphs 4.23-4.32 in that information requests: (i) are merely exploratory, and imply no current ‘minded to’ position on the part of the UR; and (ii) seek factual answers in the form of information or evidence, and are not invitations for the submission of statements of opinion by SONI
- 4.38 The UR reserves the right to engage in a wider consultation – whether with the general public or with any subset of third parties it considers to be appropriate to the case – on any ‘minded to’ position or any one or more aspects of a ‘provisional’ determination. However, the UR would anticipate doing this only in an exceptional case. This means not only a case in which the issues are finely balanced and time permits, but also one in which it appears to the UR that third parties may be able to provide information or offer opinions that would be likely to assist it in reaching a final decision.
- 4.39 In that restricted class of cases in which the UR does choose to engage in a wider consultation, it would expect to do so in a focused manner in relation only to specific issues that it identifies, and to publish only that information relating to the Application which is germane to those issues and necessary for the purpose of an effective consultation.

Post-Determination Steps

- 4.40 The UR is required by law to make any determination of an Application, including the reasons for it, publicly available. It will do this by publication of the full determination on its website.
- 4.41 However, after providing a copy of the determination to SONI, but before publishing it, the UR will allow SONI a short period of time in which to make representations as to any parts of the determination which SONI considers should be redacted prior to publication. The UR will take into account any representations received and make appropriate redactions where it considers them warranted in all the circumstances of the case.

5. Guidance as to the Statutory Duties and Principles to be Applied by the UR

General Approach

- 5.1 We welcome Applications for derogation from SONI and the UR will approach each Application with an open mind.
- 5.2 The default position under Condition 42 is that the TSO Business is to be run using Separate Management and Separate Resources. However, this is expressly subject to the right of SONI to apply for a Derogation that would allow it to use Shared Management and Shared Resources in respect of one or more Business Functions.
- 5.3 The Condition 42 regime taken as a whole is therefore designed to ensure that SONI has the right to seek to satisfy the UR that the use of Shared Management and Shared Resources is in the interests of consumers, whether for the TSO Business as a whole or at least for certain parts of it.
- 5.4 As this document emphasises in a number of places, the effect of this regime is that the onus is on SONI to make its case for the grant of a Derogation, adequately supported by appropriate information and evidence. Subject to this, however, the UR operates no presumption against the use of Shared Management and Shared Resources. The UR will decide whether or not to grant a Derogation based on whether SONI has demonstrated, on balance, that it is preferable to do so.

The Duties

- 5.5 What is 'preferable' in this context means what is best aligned with the UR's statutory duties.²² The duties do not produce a mechanical outcome in the case of any matter to be decided. They require the exercise of judgment based on what is 'best calculated' to achieve them.²³
- 5.6 This judgment takes place within a clearly defined framework. It starts with a principal objective of protecting the interests of consumers.²⁴ Then via a series of provisions – set out in a hierarchy and with certain factors having different degrees of weight – unpack what this means and what particular matters need to be taken into account in the decision-making process. Nonetheless, having taken into account all relevant matters in

²² Article 12 of the Energy Order or (in the case of a SEM Matter) Article 9 of the SEM Order

²³ Article 12(2) of the Energy Order, Article 9(2) of the SEM Order

²⁴ Meaning electricity consumers in Northern Ireland or (in the case of a SEM Matter) on the island of Ireland

their proper place within the framework, what remains is the need for an evaluative judgment by the UR.

The Principles

- 5.7 SONI, in its capacity as TSO, has an important role to play in furthering the short, medium and long-term interests of consumers in Northern Ireland. This has always been true, but its role is even more important in the context of the government's policy imperative of achieving net zero. SONI can be expected, in the coming years, to be required to make a series of decisions of strategic significance for the decarbonisation of the NI energy sector and economy as a whole.
- 5.8 It will be essential to the successful fulfilment of this role that SONI can be effectively regulated. This means that its decision-making must be transparent and accountable. The reasons for its decisions must be clear, and must be open to effective scrutiny by the UR.
- 5.9 In SONI's dealings with the Irish TSO, EirGrid, the concepts of transparency and accountability have long been reflected in the Licence in the form of Condition 24. Condition 24 requires SONI and EirGrid to enter into a system operator agreement which will govern how they deal with each other on matters involving their joint collaboration. The policy underlying the condition is that the two TSOs, each with the specialist knowledge and expertise to speak for the interests of consumers in their own jurisdiction, will work together in a way that is – because it is governed by the terms of the agreement – transparent and accountable, with the aim of maximising the overall benefits (and minimising detriments) to consumers both north and south of the border.
- 5.10 The embodiment of these principles in an existing Licence condition reflects the view that they are themselves derived from and consistent with the statutory duties, since those duties formed the basis on which Condition 24 was introduced.

Key Elements of the Duties and Principles

- 5.11 The UR will assess each case on its merits, having regard to all of the information provided by SONI as part of its Application, and all other relevant circumstances of the case, and applying its statutory duties in the round to determine whether (or subject to what conditions) it should grant a Derogation. The principal consideration in every case will be what is best calculated to facilitate the protection of the interests of consumers. That is a matter that calls for judgment, balancing all of the relevant factors in the case.

5.12 In making its decisions, the UR will have particular regard to the following matters –

- a) Security of supply is fundamental to the interests of electricity consumers.²⁵ It is also important to secure the long-term diversity, viability and environmental sustainability of that supply.²⁶ SONI, in its capacity as the TSO for Northern Ireland, has a significant role to play in the delivery of these objectives. It is both a repository of industry expertise and a maker of strategically important decisions which will have a bearing on the security of supply and the long-term shift to decarbonisation of the sector. Long-term security of supply and decarbonisation require secure and stable transmission networks supported by the right mix of generation capacity. It follows that it is essential that SONI must be an effectively functioning body which can call on individuals possessing all the skills and experience needed to do its job and to deliver for consumers with consistent high-quality performance. Any arrangements for its future organisation should be designed to ensure this is the case. Equally, it is essential that SONI has a business model that ensures its resilience. It must not be unduly dependent on third party skills and experience – whether or not it is provided by Associated Companies – that could be withdrawn in the medium term. It must have the right amount of dedicated in-house capability, in both people and other resources, to be balanced against those it buys in or shares. Moreover, in its role as the independent TSO for Northern Ireland, the UR expects SONI to maintain particularly close and detailed knowledge of the NI industry and the needs of NI consumers, and to be in a position effectively and with independence to represent the interests of those consumers in discussions taking place under the aegis of the Condition 24 system operator agreement. This too requires that it has the appropriate balance of dedicated staff and resources.

²⁵ Article 12(2)(a) of the Energy Order, Article 9(2)(a) of the SEM Order

²⁶ Article 12(5)(b) of the Energy Order, Article 9(4)(b) of the SEM Order

- b) Efficiency and economy of operation are important for SONI as they are for all parts of the industry.²⁷ However, since SONI as TSO is a monopoly entity and not subject to the disciplines of the competitive market, it needs to be price controlled to ensure that consumers are required to pay only an appropriate and efficient level of costs for the service that they receive. SONI's approach to acquiring the management and resources it needs for its business must work consistently with the principles of efficiency and economy. It is important that the arrangements in place will be, subject to the overarching need to ensure the quality of SONI's TSO services, able to be delivered at a price which is demonstrably efficient and cost-effective. Wherever possible this means that SONI's arrangements for the procurement and use of personnel and resources should be market tested, or capable of being proven comparable in cost to equivalent market-tested arrangements.
 - c) Promoting effective competition is, in the UR's statutory duties, a preferred means to the end of protecting the interests of consumers.²⁸ National TSOs were required to be re-constituted as fully independent entities in EU law primarily so that other market participants could have confidence that they would make key decisions on an objective basis without conflict of interest. This facilitates confidence in the role of TSOs, and in turn encourages further investment, new market entry and effective competition. Again, this emphasises the importance of SONI being demonstrably independent and without conflict of interest. The UR will expect to approve arrangements only to the extent that they are designed to ensure that this is the case.
- 5.13 In addition, it is important that, by the time it falls to the UR to consider an Application in detail, SONI has in place an up-to-date and effective Condition 24 system operator agreement with EirGrid. The UR will expect that agreement to make appropriate provisions to maintain suitable standards of transparency and accountability, and the avoidance of any conflict of interest, in the manner in which the two TSOs work together and in particular in any joint or co-operative decision-making process. The agreement should facilitate regulatory oversight by providing for clarity of the rationale behind important decisions, and allow SONI to demonstrate clearly that it has fulfilled its role of ensuring that the interests of Northern Ireland consumers are effectively represented.
- 5.14 Once that agreement is effective, the UR will assess any Application by reference to it, and will wish to be satisfied that the arrangements that

²⁷ Article 12(5)(a) of the Energy Order, Article 9(4)(a) of the SEM Order

²⁸ Article 12(1) of the Energy Order, Article 9(1) of the SEM Order

would be in place were it to grant the requested Derogation will: (i) be consistent with the proper functioning of the arrangements provided for by the agreement; (ii) not be likely to compromise the effective operation of those arrangements in practice; (iii) be compatible with the underlying principles of transparency, accountability and independence on the part of SONI.

- 5.15 Finally, the UR will seek to deal proportionately with any potential difficulties which are identified in the Application by SONI, or which the UR identifies, with regard to the practical effects of the Derogation if granted. In particular, it will consider carefully whether those issues are capable of being effectively mitigated or resolved by conditions that can be attached to the Derogation, rather than requiring the refusal of the Derogation in its entirety. The answer will inevitably turn on the detailed facts and circumstances relating to each Application.

6. Definitions and Interpretation

Definitions

- 6.1 For the purposes of this document, words and expressions defined in Condition 1 or Condition 42 of the Licence shall have the same meanings as are given to them in that condition.
- 6.2 For the purposes of this document – unless the contrary intention is made clear from either the words or context – the following words and expressions shall have the meanings that are given to them below –

Application	has the meaning given in paragraph A2.1.
Energy Order	means the Energy (Northern Ireland) Order 2003.
Licence	has the meaning given in paragraph A1.1.
Part C Application	means an Application made under Part C of Condition 42.
Part D Application	means an Application made under Part D of Condition 42.
SEM Committee	means the SEM Committee of the Northern Ireland Authority for Utility Regulation established in accordance with Article 6(1) of the SEM Order.
SEM Matter	has the meaning given in Article 6(3) of the SEM Order.
SEM Order	means the Electricity (Single Wholesale Market) (Northern Ireland) Order 2007
SONI	has the meaning given in paragraph A1.1.
TSO	has the meaning given in paragraph A1.1.
TSO Business	means the Transmission System Operator Business.
UR	has the meaning given in paragraph A1.2.

References

- 6.3 In this document, any reference –
- a) to Condition 42 or to another numbered condition is a reference to the condition of the Licence bearing that number (as it may be amended from time to time),
 - b) to any of Sections 1 to 6, is to the corresponding section of this document,
 - c) to a paragraph (e.g. paragraph 2.5) is to the corresponding paragraph of this document.

Interpretation

- 6.4 Unless the contrary intention is made clear from the words or the context, this document shall be interpreted in the same manner as the Licence, applying the same rules of construction as are set out in Condition 1.
- 6.5 In this document, unless the contrary intention is clear from the words or the context, where any reference is made –
- a) to ‘information’, it shall be treated as incorporating a reference to both information and evidence,
 - b) to information being ‘included within’, ‘contained within’, ‘part of’ or provided ‘together with’ an Application, or to an Application being ‘accompanied’ or ‘supported’ by any information – or, in any of the above cases, to any cognate form of such expression – it shall in each case be treated as referring to information provided by SONI to the UR:
 - (i) at the same time as it makes the Application,
 - (ii) regardless of the form in which it is presented,
 - (iii) for the purpose of being taken into account by the UR when deciding whether or not (or subject to what conditions) to grant the Derogation that is being sought by means of the Application.