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Date: 20 January 2025

Dear Mr. Rooke,

**Final determination in relation to notice of an income adjusting event from Gwynt y Môr OFTO plc**

1. On 6 July 2023 and 19 March 2024, the Authority determined the event that occurred on 15 October 2020 and resulted in the failure of Subsea Export Cable 3 (**SSEC3**) on the Gwynt y Môr OFTO plc (the **2020 Cable Failure**) was an Income Adjusting Event (**IAE**).<sup>1</sup>
2. On 25 June 2024, and on 22 October 2024, the Authority received notices (the **Notices**) from Gwynt y Môr OFTO plc (the **Licensee**) in respect of:
  - i. further costs incurred as a result of the 2020 Cable Failure (the **Further Costs**). These costs were incurred in years 2022/23, 2023/24 and 2024/25; and
  - ii. costs incurred as a result of the failure of subsea export cable SSEC3 on 14 December 2023 (the **2023 Cable Failure**), which the Licensee considers to be an income adjusting event (**IAE**) pursuant to Amended Standard Condition E12-J3 (Restriction of Transmission Revenue: Allowed Pass-through Items) of its Licence (the **Condition**) These costs were incurred in years 2020/21, 2021/22, 2023/24 and 2024/25.
3. The Authority has considered the claim and has determined that the 2023 Cable Failure constitutes an IAE for the reasons given in this letter:

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<sup>1</sup> Link to [determination dated 6 July 2023](#) and [determination dated 19 March 2024](#).

- i. in respect of the Further Costs, the Authority has determined:
    - not to amend the allowed income adjustment ( $IAT_t$ ) for year 2022/23 to reflect the Further Costs incurred in respect of that year<sup>2</sup>; and
    - an allowed income adjustment ( $IAT_t$ ) for years 2023/24 and 2024/25 to reflect the Further Costs incurred in respect of those years. We consider this necessary in order to restore the financial position of the Licensee to the position as if the IAE had not taken place;<sup>3</sup>
  - ii. in respect of the costs incurred as a result of the 2023 Cable Failure, the Authority has determined:
    - not to amend the allowed income adjustment ( $IAT_t$ ) for year 2020/21 to reflect the costs incurred in respect of that year<sup>4</sup>;
    - not to amend the allowed income adjustment ( $IAT_t$ ) for year 2021/22 to reflect the costs incurred in respect of that year; and
    - an allowed income adjustment ( $IAT_t$ ) for years 2023/24 and 2024/25 to reflect the costs incurred in respect of those years.
4. In respect of the allowed income adjustment ( $IAT_t$ ) for years 2023/24 and 2024/25, and in accordance with paragraph 21(c)(iii) of the Condition, it is not yet possible to make a final determination of the allowed income adjustment ( $IAT_t$ ) for years 2023/24 and 2024/25 and accordingly we direct a partial allowed income adjustment ( $IAT_t$ ) for year 2023/24 and a partial allowed income adjustment ( $IAT_t$ ) for year 2024/25 with final determinations to be made as soon as reasonably practicable. This is because:
- i. the Licensee has claimed costs incurred in years 2023/24 and 2024/25 in respect of the 'Stage 4 repair' in circumstances where the Stage 4 repair has not yet commenced; and
  - ii. further, in respect of the year 2024/25, that financial year has not yet concluded and therefore the Licensee may incur further costs in respect of the IAE in 2024/25 which it may then seek to claim under the Condition.

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<sup>2</sup> Under paragraph 24 of the Condition the Authority may amend an allowed income adjustment it has previously determined (in this case the  $IAT_t$  for year 2022/23) with the consent of the licensee, following consultation with the licensee and relevant parties.

<sup>3</sup> Paragraph 21(c) of the Condition.

<sup>4</sup> Under paragraph 24 of the Condition the Authority may amend an allowed income adjustment it has previously determined (in this case the  $IAT_t$  for years 2020/21 and 2021/22) with the consent of the licensee, following consultation with the licensee and relevant parties.

5. In relation to the relevant year:

- i. 2023/24 the partial allowed income adjustment ( $IAT_t$ ) shall be £1,590,592.79; and
- ii. 2024/25 the partial allowed income adjustment ( $IAT_t$ ) shall be £18,853,565.86.<sup>5</sup>

## Background

6. The Licensee is the holder of an offshore electricity transmission licence, granted on 11 February 2015 under section 6(1)(b) of the Electricity Act 1989 (the **Act**).

7. The Licensee provided the Notices to the Authority pursuant to paragraph 14 of the Condition, in respect of an increase in costs and/or expenses incurred by the Licensee that it considers was caused by an IAE.

8. Pursuant to paragraph 16 of the Condition, the Notices gave particulars of:

- i. the event to which the Notice(s) relates and why the Licensee considers the event to be an IAE;
- ii. the amount of any change in costs and/or expenses that can be demonstrated by the Licensee to have been caused by the event and how the amount of these costs and/or expenses has been calculated;
- iii. the amount of any allowed revenue adjustment proposed as a consequence of that event and how this allowed revenue adjustment has been calculated; and
- iv. any other analysis or information that the Licensee considers sufficient to enable the Authority and the relevant parties to assess fully the event to which the Notice(s) relates.

9. On 29 August and pursuant to paragraph 17 of the Condition, the Authority requested that the supporting evidence provided by the Licensee in the 25 June 2024 Notice be supplemented with additional information to enable the Authority to assess whether an IAE had occurred in respect of the 2023 Cable Failure and to assess the amounts of any allowed income adjustment ( $IAT_t$ ) that should be approved. The Licensee responded to this request on 1 October 2024.

## Publication of the Notices and consultation

10. Paragraph 19 of the Condition requires the Authority to publish the Notice(s), excluding any confidential information, following its receipt. Paragraph 21 requires that the

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<sup>5</sup> We consider a cost has been incurred on the date on the invoice.

Authority consults with the Licensee and such other persons as it considers desirable before making its determination.

11. The Licensee considered that the details of the 2023 Cable Failure and certain commercial arrangements should be kept confidential because it might seriously prejudice its ability to recover incurred costs from other parties, and that this could affect the size of the claims.
12. Under paragraph 20 of the Condition, the Authority has the discretion to determine the confidentiality of information in the Notices by balancing the need for disclosure to enable relevant parties to fully assess the 2023 Cable Failure against the risk of seriously prejudicing the interests of a person to which it relates. In the specific circumstances of the 2023 Cable Failure, the Authority agreed that the publication of certain information about it and related commercial arrangements might seriously prejudice the interests of the Licensee in respect of its commercial discussions and therefore redacted that information. The Authority published the redacted Notices on 31 July 2024 and 25 November 2024.<sup>6</sup>
13. In accordance with paragraph 21 of the Condition, the Authority consulted with the Licensee in relation to the Minded-to determination (MTD). The Licensee submitted representations on 19 December 2024.
14. The Authority also consulting with the developer of the wind farm, Gwynt y Môr Offshore Wind Farm Limited (**GYMOWFL**), as it was responsible for the construction of the transmission assets – GYMOWFL did not submit any representations.
15. Based on the facts and circumstances of the 2023 Cable Failure, the Authority does not consider it desirable to consult with any other party before making its determination. This is on the basis that the fact-specific nature of the claim limited the likelihood that any other party would have any additional information in this case that might be relevant to our determination.

## **Income Adjusting Event**

16. Paragraph 15 of the Condition defines what constitutes an IAE, as follows:

*An income adjusting event in relevant year  $t$  may arise from any of the following:*

- a) an event or circumstance constituting Force Majeure;*
- b) an event or circumstance resulting from an amendment to the STC not allowed for when allowed transmission owner revenues of the Licensee were determined for the relevant year  $t$ ; and*

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<sup>6</sup> Notices are available at [Publication of notice of an Income Adjusting Event from Gwynt y Môr OFTO Limited | Ofgem](#) and [Publication of notice of an Income Adjusting Event from Gwynt y Môr OFTO Limited | Ofgem](#)

*c) an event or circumstance other than listed above which, in the opinion of the Authority, is an income adjusting event and is approved by it as such in accordance with paragraph 21 of this licence condition,*

*where the event or circumstance has, for relevant year t, increased or decreased costs and/or expenses by more than £1,000,000 (the "threshold amount").*

17. The Licensee claims that the 2023 Cable Failure is an IAE pursuant to sub-paragraph 15(c) of the Condition (**Limb (c)**).

18. Under Limb (c), the Authority may approve any other event or circumstance not covered by sub-paragraphs 15(a) and (b) which, in the opinion of the Authority, is an IAE. The Condition does not expressly set out any particular qualifying criteria for determining whether an event constitutes an IAE under this limb. In our determination on an IAE claim from Blue Transmission London Array Limited dated 27 October 2016 (the **BTLAL Determination**), we set out our approach for assessing claims under Limb (c) (see, in particular, pp. 4-6 of the BTLAL Determination).<sup>7</sup>

19. In assessing whether an event or circumstance is an IAE under Limb (c), we have considered, consistent with the BTLAL Determination, whether it is appropriate for the Licensee to manage the risk of the event. To determine this, we have considered the extent to which the Licensee was, or should have been, in a position to foresee the event or circumstances and the level of control it had to mitigate the impact of such event.

20. We considered the following factors:

- a) whether the Licensee knew of the event or circumstance before it arose or ought to have known of it;
- b) whether the risk of damage of that type was reasonably foreseeable (even if the particular way in which the damage has occurred may not have been);
- c) whether there are nevertheless exceptional factors in the relevant case that mean that the event or circumstance, or its consequences, could not have been reasonably foreseeable; and
- d) the ability of the Licensee to manage the risk or impact by putting in place and pursuing risk management arrangements such as insurance, commercial recourse against third parties and/or operating practices.

21. As noted in the BTLAL Determination, we consider that such an approach is consistent with the overarching design of the OFTO regime and with the Authority's statutory duties, in particular its principal objective to protect the interests of existing and future

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<sup>7</sup> [https://www.ofgem.gov.uk/system/files/docs/2016/10/btlal\\_iae\\_determination\\_final.pdf](https://www.ofgem.gov.uk/system/files/docs/2016/10/btlal_iae_determination_final.pdf)

consumers in relation to electricity conveyed by transmission systems.<sup>8</sup> For example, we do not consider it to be in the interests of consumers<sup>9</sup> to pass through those costs arising from a type of damage that was (or should have been) foreseeable to a bidder/OFTO, solely because the precise damage of that type that occurred was not foreseeable. We therefore consider it appropriate to adopt a narrower, rather than a broader, construction of Limb (c) in this regard. Such an approach also seeks to ensure that bidders are properly incentivised to conduct due diligence in respect of the assets, to put in place appropriate commercial arrangements prior to asset transfer and to pursue any relevant third parties who may be liable (such as developers, manufacturers, installers, and insurers). The OFTO regime facilitates commercial transactions for large-scale infrastructure investment. We consider that the OFTO is responsible for managing its investment including adopting what it considers are suitable risk management measures.

### **Determination on whether the 2023 Cable Failure constitutes an IAE under Limb (c)**

22. We have reviewed the technical report submitted by the Licensee on 1 October 2024. Based on this report and information submitted by the Licensee, and consistent with previous cable failures on SSEC3, we consider the 2023 Cable Failure was caused by the same latent defect that caused the 2020 Cable Failure (the **SSEC3 Latent Defect**), being:

*“electrical activity caused by inconsistent conductivity (resulting from a manufacturing or, more likely, a design defect) of the PE sheath within the spare FOC led to a breach in the waterproofing abilities of the PE sheath that in turn allowed water to penetrate into the metallic armour, which resulted in the armour corroding and further increasing resistance within the FOC. The increased resistance led to heat that melted the armour wires surrounding the FOC casing the current to find an alternative path through the steel tube housing the fibres. Heating caused by the current flowing through the steel tube damaged both the steel tube and the plastic protective coating of the FOC, resulting in breaks in the FOC. The breaks in the FOC caused the induced current to flow through the power core lead sheath, which in turn damaged the power core insulation, which ultimately resulted in the Cable Failure”.*<sup>10</sup>

23. The Authority determines that this latent defect in the sheath of the cable, that ultimately led to the 2023 Cable Failure constitutes an “event or circumstance” that is an IAE pursuant to Limb c). The reasons for this decision are as follows.

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<sup>8</sup> Section 3A of the Electricity Act 1989.

<sup>9</sup> Whilst we recognise that the charging regime will in part or whole allocate costs for IAEs to offshore windfarm developers, we refer to consumers bearing these costs in the sense that all costs passed through into network charges are ultimately borne by consumers through their energy payments.

<sup>10</sup> FOC means fibre optic cable.

*Whether the Licensee knew of the event or circumstance before it arose or ought to have known of it*

24. Overall, we are satisfied that the Licensee did not know of the event or circumstance leading to the 2023 Cable Failure at the time that the offshore transmission assets were transferred to it, nor ought to have known of them; this is a factor, in the context of a latent defect, weighing in favour of the 2023 Cable Failure being found to be an IAE under Limb (c).

*Whether the risk of damage of that type was reasonably foreseeable*

25. The Authority considers that risks arising from defects in the construction of the transmission assets are reasonably foreseeable risks associated with operating the assets over the 20-year revenue period. The Licensee has not provided any information that would cause us to reconsider our position in the particular circumstances of this case.

*Whether there are exceptional factors in the relevant case that mean that the event or circumstance, or its consequences, could not have been reasonably foreseeable*

26. The Authority has considered whether the nature and frequency of the FOC breaks across SSEC3 since 2020 is such as to render the relevant event or circumstance 'exceptional', such that it is not appropriate to treat the event or circumstance, or its consequences, as reasonably foreseeable. Given that the Authority is content that the event or circumstances would be an IAE even if it were found to be reasonably foreseeable, it is not necessary to consider whether the exceptionality test is met; however, the Authority can see arguments in favour of the event or circumstance, or its consequences, being exceptional in this instance and thus unforeseeable, which would only strengthen that conclusion.

*The ability of the OFTO to manage the risk or impact by putting in place and pursuing risk management arrangements such as insurance, commercial recourse against third parties and/or operating practices*

27. Similar to any other transaction involving a purchase of assets, a licensee should enter into such transactions with the awareness that it is assuming any risks arising from damage or defects that it has not been able to discover through its due diligence. The OFTO regime was not designed to insulate licensees from all such risks.<sup>11</sup> Even if a licensee believes, having conducted a reasonable level of due diligence, that the construction of the assets had been undertaken properly and to the level of reasonable skill and care expected, we do not consider it appropriate for the licensee to be able to

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<sup>11</sup> The framework for the OFTO regime also reflects this through the STC which deems the OFTO, for the purpose of the STC, to have been the party that developed the transmission assets from the point of asset transfer (paragraph 6.3 of Section G).

pass on the risks arising from defective work in the construction of the assets to consumers.

28. As outlined above, we consider that risks arising from defects in the construction of the transmission assets are reasonably foreseeable risks associated with operating the assets over the 20-year revenue period. We consider that failure of the cable arising from a Latent Defect is the type of risk that is reasonably foreseeable to a licensee and should be within its contemplation when it submits tenders under the generator build regime, however such defect may materialise.

29. We expect licensees to pursue third parties for remedies in respect of their negligent or substandard work and to put in place other commercial arrangements and risk management practices to ensure they can bear the consequences of such risks in the event there may not be any such recourse. We also expect licensees to put in place appropriate insurance arrangements to manage risks and satisfy themselves that the insurance cover is suitable for their needs.

### *Insurance*

30. One important aspect of the fourth factor in the BTLAL Determination is the ability of a licensee to protect itself through insurance. We expect licensees to put in place appropriate insurance arrangements to manage risks and satisfy themselves that the insurance cover is suitable for their needs.

31. On 17 November 2020, the Condition was modified<sup>12</sup> to provide clarity of uninsurability protection, where an OFTO is unable effectively to mitigate the effects of latent defect risk (including, through no fault of its own), that risk becoming Uninsurable. Uninsurable means that the Authority determines either that:

- i. Insurance is not available to the licensee in respect of all or part of its Transmission Assets in the Worldwide Offshore Transmission Asset Insurance Market with reputable insurers of good standing in respect of a Risk; or
- ii. the Insurance premium payable for insuring that Risk is at such a level that the Risk is deemed as not being insurable in the Worldwide Offshore Transmission Asset Insurance Market with reputable insurers of good standing.

Where (amongst other definitions):

- i. a "Risk" means the physical loss or damage requiring replacement or rectification of Transmission Assets, which is caused by a Latent Defect resulting from material workmanship design plan or specification; and

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<sup>12</sup> [Link](#) to modification Notice and Schedule dated 17 November 2020.



“Insurance” means the indemnity which would normally be covered by an Operational All Risk insurance policy with a LEG3/06 exclusion, or equivalent, which includes indemnity for the full cost of replacement or rectification of the Offshore Transmission Assets (but not improvement) rendered necessary by damage which is the consequence of a Latent Defect.

32. The Licensee considers the claim should be determined as an IAE on the grounds of Uninsurability under Limb (c).
33. The Notices included details of the Licensee’s insurance arrangements, put in place on 13 November 2023 and in force from 13th November 2023 to 12th November 2025.
34. The Authority’s insurance experts confirmed the correct policy to consider was the policy dated 13 November 2023 and that policy excluded all coverage for damage arising from defects in the export cable with an absolute exclusion for loss or damage due to defects in the export cable.
35. Our expert advisers also confirmed that the ‘Insurance premium payable for insuring that Risk is at such a level that the Risk is deemed as not being insurable in the Worldwide Offshore Transmission Asset Insurance Market with reputable insurers of good standing’.
36. Therefore, and in light of the advice from our insurance experts based on the information provided by the Licensee, we conclude that the Licensee was unable to manage the risk or impact by putting in place insurance requiring the payment of economically viable insurance premiums at the relevant time, i.e. the event was ‘Uninsurable’, as defined in the Licence definitions.

#### *Other risk management arrangements*

37. Under the fourth factor in the BTLAL Determination, insurance is not the only relevant risk management arrangement to be considered by the Authority. We have also considered the ability of the Licensee to manage the risk or impact by putting in place and pursuing other risk management arrangements such as commercial recourse against third parties and/or operating practices.
38. We note all construction warranties have expired. We understand the Licensee does not have any route of recourse to Gwynt Y Mor Offshore Windfarm Limited.<sup>13</sup> We conclude there are no other commercial arrangements available that allow the Licensee to recover its costs.

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<sup>13</sup> Based on numerous meetings with the Licensee and Gwynt Y Mor Offshore Windfarm Limited.

## Conclusion

39. In summary, we consider that the general risk of damage of the type that occurred from the 2023 Cable Failure was reasonably foreseeable. However, against that factor, we note that the 2023 Cable Failure itself was the result of the SSEC3 Latent Defect, and the Licensee therefore did not know, nor ought to have known, of the defect at the time the assets were transferred to it. Importantly, we are satisfied that the Licensee did not have the opportunity to manage the risk or impact of the 2023 Cable Failure, in particular because of the actual or effective unavailability of insurance for the 2023 Cable Failure. Applying the weight we consider appropriate to those separate factors, we consider that it is not appropriate to require the Licensee to manage the risk of the event; we therefore consider the event is an IAE under Limb (c).

## Allowed income adjustment ( $IAT_t$ )

40. Paragraph 21 of the Condition requires that the Authority determine (after consultation with the licensee and such other persons as it considers desirable):

- i. whether any or all of the costs and/or expenses given in the Notices were caused or saved by an income adjusting event (**paragraph 21(a) of the Condition**);
- ii. whether the event or circumstance has increased or decreased the costs and/or expenses given in the notice pursuant to paragraph 14 by more than the threshold amount (**paragraph 21(b) of the Condition**); and
- iii. if so, whether the amount of the proposed income adjustment ensures that the financial position and performance of the licensee are, insofar as is reasonably practicable, the same as if that income adjusting event had not taken place, and if not, what allowed income adjustment would secure that effect (**paragraph 21(c) of the Condition**).

### *Further Costs*

41. The Licensee has incurred Further Costs totalling £2,666,660.42, being:

- i. £1,379,548.35 in 2022/23;
- ii. £923,662.79 in 2023/24, and
- iii. £363,449.28 in 2024/25.

42. The Authority has determined the Further Costs were caused by an IAE, being the SSEC3 Latent Defect, therefore paragraph 21(a) is met in respect of the Further Costs.

43. For the reasons set out further below,

- i. Further Costs incurred in 2022/23 totalling £1,379,548.35 are not awarded.
- ii. Further Costs incurred in 2023/24 totalling £923,662 are awarded.
- iii. Further Costs incurred in 2024/25 totalling £363,449.28 are awarded.

44. Further Costs incurred in the 2022/23 (£1,379,548.35), referred to in the Notice as 'Testing' and 'PBCE Related') exceed the threshold amount of £1m, therefore paragraph 21(b) of the Condition is satisfied. However, it is not appropriate to amend the allowed income adjustment (IAT<sub>t</sub>) for year 2022/23 to reflect these costs on the basis that:

- i. Paragraph 18 of the Condition required these costs totalling £1,379,548.35 to be notified by June 2023, and they were not notified until June 2024. Accordingly, they are 'out of time' pursuant to paragraph 18 of the Condition (**Paragraph 18**);
- ii. In the event that – contrary to this approach – the Authority retains a discretion to consider whether these costs should be allowed (i.e. by amendment of the determination of the IAT<sub>t</sub> for the 2022/23 year), we have considered the exercise of that discretion. We do not consider that the discretion should be exercised here because a determination has already been reached on the IAT<sub>t</sub> for the 2022/23 year (the March 2024 determination<sup>14</sup>), and the Licensee was aware of that determination being reached on a final basis and it did not at any time notify the Authority of these costs. In particular:
  - the Licensee had a number of opportunities to claim these costs before the final determination in March 2024; in particular in response to the Minded-to position dated 23 February 2024, in response to our requests for further information dated 29 August 2023 and 22 December 2023 or the Licensee could have submitted a further Notice by end June 2023; and
  - Whilst the Licensee did tell the Authority, in general terms, that it was incurring 'PCBE related costs', the Licensee did not tell the Authority that it intended to claim these costs as being incurred as a result of an IAE nor (as stated above) did it notify the Authority of the specific costs. For clarity, the Licensee did not tell the Authority it was incurring ongoing 'Testing costs'.
- iii. Although we acknowledge that previously we have, in certain circumstances, awarded costs which were notified out of time pursuant to Paragraph 18, these were always costs that were notified to us before the determination and in the

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<sup>14</sup> A copy of the March 2024 IAE determination is available on the Ofgem website here: [GYM SSE3 IAE - final determination March 2024 \(redacted for publication\)](#)

course of us seeking information to allow us to identify the figure required by paragraph 21(c) of the Condition. These distinguishing factors are not present in this case.

45. Further Costs incurred in the 2023/24 financial year (£923,662.79) and 2024/25 (£363,449.28) do not, of themselves, exceed the threshold amount of £1m. However, when added to the Stage 3 costs also incurred in 2023/24 and 2024/25 are granted (see paragraph 54 below), as paragraph 21(b) of the Condition is satisfied.

46. We note financial year 24/25 has not yet concluded and therefore the Licensee may incur further costs in respect of the IAE in 2024/25 which it may then seek to claim under the Condition. Paragraph 21(c)(iii) provides a mechanism whereby, if *"it is not yet possible to make a final determination"* under paragraph 21(c)(i) and (ii), the Authority *"may direct a partial amount of income adjustment, if any, pending the final determination of amount, such final determination to be made as soon as is reasonably practicable"*. In accordance with paragraph 21(c)(iii) of the Condition, it is not yet possible to make a final determination of the allowed income adjustment (IAT<sub>t</sub>) for year 2024/25. This means that, while the Further Costs incurred in 2024/25 are awarded, we will make a final determination of the allowed income adjustment (IAT<sub>t</sub>) for year 2024/25 as soon as reasonably practicable in 2025 (ie after the financial year has concluded and any further claims in respect of the year 2024/25 are made).<sup>15</sup>

#### *Discussion of PCBE interest payments as a cost category*

47. The Licensee incurred interest costs totalling £1,368,523.26 in 2022/23 and £874,430.75 in 2023/24 as a result of its need to raise additional funds to undertake the Stage 1&2 repairs, known as the 'PBCE related costs'.

48. A letter dated 23 September 2024, submitted on behalf of GYMOWFL (the **GYMOWFL letter**) states *"It would set a perverse incentive for Ofgem to allow recovery of such significant borrowing costs, which would never be faced by a properly resourced OFTO. To allow such a claim would incentivise OFTOs to minimise available liquid assets or efforts to fund at the lowest cost, given the signal that Ofgem is likely to allow multiple millions in interest payments"*. Amongst other things, the GYMOWFL letter considers *"There is on the face of the matter no clear or direct causative link between the 2020 IAE event (or indeed the 2023 event under consideration now by Ofgem) and the PBCE interest payments"*.

49. We do not agree with this conclusion as we consider the 'PBCE related' costs would not have been incurred by the Licensee had the IAE not occurred. For clarity, costs incurred

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<sup>15</sup> Paragraph 21 (c) (iii) of the Condition.

in 2022/23 totalling £1,368,523.26 are not awarded for the reasons given at paragraph 44 of this paper.

### *Stage 3 Costs*

50. The Licensee has incurred Stage 3 Costs totalling £19,446,756.58, being:

- i. £116,550 incurred in 2020/21 financial year;
- ii. £173,160.00 in 2021/22 financial year;
- iii. £666,930.00 in 2023/24 financial year, and
- iv. £18,490,116.58 in 2024/25 financial year.

51. We consider the Stage 3 Costs incurred in 2023/24 and 2024/25 were caused by an IAE, being the SSEC3 Latent Defect, therefore paragraph 21(a) of the Condition is met in respect of these costs.

52. For the reasons set out further below:

- i. Stage 3 costs incurred in 2020/21 totalling £116,550 and in 2021/22 totalling £173,160.00 are not awarded.
- ii. Stage 3 Costs incurred in 2023/24 totalling £666,930.00 are awarded.
- iii. Stage 3 Costs incurred in 2024/25 totalling £18,490,116.58 are awarded.

53. In respect of the Stage 3 costs claimed as incurred in years 2020/21 and 2021/22, we do not consider it appropriate to amend the previously determined allowed income adjustment (IAT<sub>t</sub>) for years 2020/21 and 2021/22 to reflect these costs. Our reasons for this are the same as set out in paragraph 59 below.

54. Stage 3 Costs incurred in the 2023/24 financial year (£666,930.00) do not, of themselves, exceed the threshold amount of £1m. However, when added to the Further Costs also incurred in 2023/24 (see paragraph 45 above), this brings the total costs incurred in 2023/24 to £1,590,592.79 and accordingly paragraph 21(b) of the Condition is satisfied.

55. Paragraph 21(b) of the Condition is satisfied in respect of the Stage 3 Costs incurred in 2024/25 totalling £18,490,116.58.

56. Further to paragraph 46 above, we note financial year 2024/25 has not yet concluded and therefore the Licensee may incur further costs in respect of the IAE in 2024/25 which it may then seek to claim under the Condition. In accordance with paragraph 21(c)(iii) of the Condition, it is not yet possible to make a final determination of the allowed income adjustment (IAT<sub>t</sub>) for year 2024/25. This means that, while Stage 3 Costs incurred in

2024/25 are awarded, we will make a final determination of the allowed income adjustment ( $IAT_t$ ) for year 2024/25 as soon as reasonably practicable in 2025 (ie after the financial year has concluded and any further claims in respect of the year 2024/25 are made).<sup>16</sup>

#### *Stage 4 Costs*

57. In general terms, we consider the costs claimed in respect of the Stage 4 repair relate to the same IAE as the Stage 3 costs being claimed under the Notices, being the SSEC3 Latent Defect. However:

- i. In respect of the Stage 4 costs claimed as incurred in the 2020/21 year, we do not consider it appropriate to amend the previously determined allowed income adjustment ( $IAT_t$ ) for year 2020/21 to reflect these costs. Our reasons for this are the same as set out in paragraph 59, below.
- ii. In respect of the Stage 4 Costs incurred in years 2023/24 and 2024/25, in accordance with paragraph 21(c)(iii) of the Condition, is that it is not yet possible to make a final determination of the allowed income adjustment ( $IAT_t$ ) for years 2023/24 and 2024/25 in respect of these Stage 4 costs on the basis that the Stage 4 repair has not yet commenced. Accordingly, we will make a final determination on the Stage 4 Costs claimed in respect of years 2023/24 and 2024/25 as soon as reasonably practicable.

#### *Other*

58. In the GYMOWFL Letter, GYMOWFL notes from the IAE Notice that the *"evidence to confirm the root cause of the 2023 Cable Failure should be available later in 2024 after the failed cable length has been recovered"* and makes *"no further comment on this pending receipt of technical expert evidence"*. We understand RWE, the parent company of GYMOWFL, attended the forensic analysis of the damaged cable and has a copy of the RCA report.

#### *Licensee's representations and Ofgem response*

59. We have considered the representations made by the Licensee in response to our MTD and set these representations and our response out below:

- i. The Licensee noted some of the costs reflected in the MTD had been transposed incorrectly.

We agree with this, and the error has been corrected in this final determination.

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<sup>16</sup> Paragraph 21 (c) (iii) of the Condition.

ii. The Licensee questioned the Authority's minded-to position to disallow Further Costs incurred in 2022/23 totalling £1,379,548.35. The License considered:

- the costs were "*timed out by one day*" and
- this approach did not reflect the difficulty with aligning these dates to a more fluid insurance process, and whether previous decisions would be complicated by adding these sums into the claim total.

We welcome the Licensee's considerations. However, we have carefully considered whether we should exercise discretion in these circumstances to allow these costs and we consider that the Licensee has not provided any further information in response to the MTD that has changed our minded-to position. Accordingly, our decision is that it is not appropriate to amend the allowed income adjustment (IATt) for year 2022/23 to reflect these costs on the basis that:

- Paragraph 18 of the Condition required these costs totalling £1,379,548.35 to be notified by June 2023, and they were not notified until June 2024. Accordingly, they are 'out of time' pursuant to paragraph 18 of the Condition (Paragraph 18);
- In the event that – contrary to this approach – the Authority retains a discretion to consider whether these costs should be allowed (i.e. by amendment of the determination of the IATt for the 2022/23 year), we have considered the exercise of that discretion. We do not consider that the discretion should be exercised here because a determination has already been reached on the IATt for the 2022/23 year (the March 2024 determination<sup>17</sup>, and the Licensee was aware of that determination being reached on a final basis and it did not at any time notify the Authority of these costs. In particular:
  1. the Licensee had a number of opportunities to claim these costs before the final determination in March 2024; in particular in response to the Minded-to position dated 23 February 2024, in response to our requests for further information dated 29 August 2023 and 22 December 2023, or by submitting a further Notice by the end of June 2023; and
  2. Whilst the Licensee did inform the Authority, in general terms, that it was incurring 'PCBE related costs', the Licensee did not tell the Authority that it intended to claim these costs as being incurred as a result of an IAE nor (as stated above) did it notify the Authority of the specific costs. For clarity, the Licensee did not tell the Authority it was incurring ongoing 'Testing costs'.
- Although we acknowledge that previously we have, in certain circumstances, awarded costs which were notified out of time pursuant to Paragraph 18, these were always costs that were notified to us before the determination and in the course of us seeking information to allow us to identify the figure required by paragraph 21(c) of the

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<sup>17</sup> Link to [determination dated 19 March 2024](#).

Condition. Our view is that those distinguishing factors are not present in this case.

- In addition, the IAE provisions are not intended to act in the same manner an insurance policy acts, and we consider the notification requirements set out in the Condition to be sufficiently clear.
- iii. The Licensee provided some information in respect of the costs incurred in 2020/21 and 2021/22 for joints that were used on the Stage 3 Repair and costs incurred in 2020/21 for joints it expects to use in the Stage 4 repair.

Whilst we have considered this information, we do not consider the information provided has clarified the relevant details of these costs, importantly, whether the costs claimed are in respect to joints that have been used in the Stage 3 (or 4) repair. Based on the information made available to us, we are not satisfied that the costs were caused by an IAE (paragraph 21(a) of the Condition).

### **Deductible pursuant to paragraph 21(c)(i)(a)(i) of the Condition**

60. Paragraph 21(c)(i) of the Condition states that a deductible may be applied *"unless, and to the extent that, the Authority has already applied such reductions to a previous income adjustment related to the same event or circumstance as year."*

61. The Authority has determined that a deductible should not be applied to the costs awarded in this determination because a deductible of £3m has already been applied to this IAE (being the Latent Defect on SSEC3).

62. The GYMOWFL Letter states *"that the two entirely separate cable failures in 2020 and 2023 must be treated for IAE deductible purposes as separate IAEs, each attracting a £3 million deductible"*. We disagree with this view for the reasons set out above.

63. This letter constitutes the Authority's determination in relation to the Notices.

64. If you have any questions or wish to discuss this determination further, please contact Yvonne Naughton at [yvonne.naughton@ofgem.gov.uk](mailto:yvonne.naughton@ofgem.gov.uk).

Yours sincerely,

**Stuart Borland**  
**Deputy Director, Offshore Network Regulation**

**For and on behalf of the Gas and Electricity Markets Authority**