

Richard Clay
Senior Manager Offshore Transmission
Ofgem
9 Millbank
London
SW1P 3GE

9th April 2009

Dear Richard

Many thanks for the opportunity to respond to this consultation. As we are so close to the first transitional tenders we hope you will appreciate why we have adopted a rather frank tone in this final response on the Tender Regulations.

Whilst BWEA and Scottish Renewables are anxious to ensure that remaining issues on the transitional regime are ironed out, we would stress that we are encouraged by some recent statements which appear to indicate greater flexibility in the regime. We would certainly support this. We will comment further on this in response to the Ofgem / DECC consultation on the offshore transmission regime. The remainder of our comments in this response focus on the lead-up to the Tender Regulations consultation and the consultation itself.

Since the Government selection of a tendering regime for OFTOs, both trade associations have expended considerable resources in trying to understand the regime, and are working very hard to advise on the steps we believe necessary to ensure the regime is able to deliver projects. We have consciously chosen not to ask for a complete review of the regime, but instead highlight areas of concern to our members so that these may be further developed. This has involved a very significant commitment of time and resources.

A great deal of debate has formed around the regime through bilateral meetings, workshops and seminars. Concerns have been put to BWEA and Scottish Renewables that issues raised at earlier stages of the regime have not been addressed in later iterations of the consultation process. Furthermore, impressions given informally about increased flexibility in the regime have not led to flexibility being written into the regime. The proximity of Go-Active and the implications of unbundling legislation bring into sharp focus the need to clarify those risks that must be accommodated and those that can be addressed through adjustment of the tender process.

The first tenders are a matter of months away and at this stage our absolute primary objective is ensuring that generators have a viable and timely route to connection and operation of their project. We have no doubt that Ofgem and DECC share this objective.

We believe that the ability of the regime to deliver is dependent on working co-operatively with industry. We do not profess to have all of the answers and we do not expect Ofgem and DECC to design the absolutely perfect regime from the outset. All of the relevant sectors have valuable contributions to make in developing a workable regime. There will inevitably be some “learning by doing” and the key will be to ensure that the regime is robust in protecting a project’s viability. In this case, we believe that the strength of the regime will be in its flexibility to accommodate circumstances as they are anticipated and as they arise.

We would reiterate our support for recent clarifications and statements on the potential for flexibility in the regime and we would seek to work with Ofgem and DECC in delivering this through ensuring that the legislation reflects this intent, and through implementation.

We have provided our comments on the Tender Regulations consultation below under broad subject headings. As noted we anticipate making further comments on the enduring regime, the grid connection arrangements, risk allocation and OFTO incentives in response to the second consultation on the overall offshore regime.

Qualification for transitional status

BWEA and Scottish Renewables would like to work with Ofgem and DECC in bringing the required clarity and comfort that the potential transitional generators need for their projects in:

- deciding whether to sink resources into attempting to qualify as a transitional project; and,
- where they do qualify, provide the necessary reassurance that they will have an OFTO on-time, and that they will not be exposed to unmanageable risks on network failure.

The design of the enduring regime is very relevant to the transitional regime in so far as it is the only alternative for those projects on the cusp of qualifying or not for the transitional regime. If projects on the cusp of qualifying for the transitional regime are to remain on-track, it is essential that there is some flexibility either in the transitional or the enduring regime, or both, lest they fail because neither can deliver them an OFTO in the right timescales.

BWEA and Scottish Renewables welcome Ofgem’s willingness to consider “reasonable endeavours” in meeting some of the transitional regime criteria. We do not believe it is necessary for all projects in the transitional regime to be exactly at pre-defined stages of development. The OFTOs will be at liberty to make their offers reflective of the project’s status. The same can be said of the enduring regime.

The separation of pre-conditions into “project” and “tender” qualifying criteria seems rather academic. The main point is to understand when and where Ofgem is willing to be more or less flexible. We accept that there are some areas where flexibility would be inappropriate, but would ask that Ofgem ensures that it seeks expert advice in areas such as consents and the kind of information that bidders require to bid against (i.e. the data room information). There are shades of grey involved, and the ultimate test should be the timescale in which project delivery

can realistically be achieved. We would like to avoid the OFTO regime being a delaying factor for projects otherwise ready to proceed.

Changeover to the enduring regime

Some of our members are concerned that the differences between the transitional and enduring regime are such that the regime itself will precipitate a hiatus in design and construction activity as projects effectively wait for an OFTO to kick-start the grid connection work. BWEA and Scottish Renewables understand that design and construction work undertaken by developers is not specifically prohibited by the enduring regime ("transmission" is the prohibited activity) but that the policy intent is for OFTOs to design, procure and build the connections.

We are not entirely clear on whether the unbundling regulations will place limitations on a developer's involvement in design and construction work. We would appreciate Ofgem and DECC's assistance in facilitating this through ongoing negotiations, as far as possible, and in assisting our sector in understanding the implications of the final legislative package.

BWEA and Scottish Renewables have separately asked for a more strategic approach to OFTO development for Round 3, which is centred around the zonal development approach of The Crown Estate. The design concerns of developers could be incorporated into a strategic zonal plan and potentially remove some of this element of uncertainty from a Round 3 OFTO tender process.

The lack of a backstop power to mandate asset transfer under the enduring regime is a particular problem for projects that just miss qualification as a transitional project. At the very least we consider that the enduring regime needs to be flexible enough to accommodate the appointment of OFTOs for projects at different development stages. Some projects may actively prefer to progress design work and we would like to see a willingness to negotiate a range of asset transfer schemes.

Transitional projects and obligation to construct

BWEA and Scottish Renewables have severe reservations over whether an obligation on projects to construct within 12 months is workable. It is difficult to understand why the OFTOs cannot price in any risk on timescales into their offers. The balance of risk could be negotiated as part of the asset transfer scheme.

Generally we feel Ofgem's desire to secure as many bidders as possible and hence demonstrate competition should not lose sight of the fact that bidders should be competent and experienced in managing and mitigating these kind of risks. It should also not result in risks being weighted onto the generator community.

Independent engineering report

BWEA and Scottish Renewables would ask if the requirement for an independent engineering report is driven by a desire for the equivalent of a single survey system when purchasing a house i.e. the seller provides an independent house survey, avoiding the need for buyers to commission their own individual surveys. If it is, then we would very much support there being a clearly defined content and we would suggest that Ofgem retains the relevant expertise to help with this. We do not think it appropriate for Ofgem to require generators to meet a strict pre-

qualification criterion of data room population to Ofgem's "satisfaction" but then to reserve the right to define "satisfaction" right up to the wire.

If the independent engineering report is less important and is seen as an added extra to a bidder's own due diligence work, then we would agree that there is less of a need to define the content of the report. However in this case we would question why the report should be mandatory for the data room.

Allocation of risks

As noted above, BWEA and Scottish Renewables believe there is more work in defining, apportioning and mitigating the risk of network failure. We will consider this in more detail in our response to the consultation on the offshore regime.

We would also challenge Ofgem's statement that the risk of generator failure lies with consumers. The statement is correct for the present access regime but the offshore transmission regime is not in the present, it is in the future. And as Ofgem knows there is the prospect of changes to risk allocation under the Transmission Access Review (TAR) proposals. In fact Ofgem has been very strong in its desire to see generators bear some of the risk of abandonment. We would prefer to have an accurate representation of Ofgem's future aspirations.

Suppliers' role in consortia

BWEA and Scottish Renewables note the request for feedback in paragraph 5.25 on a proposal to preclude supply chain exclusivity. Whilst we appreciate the intent, we do think it is crucial for the supply chain to be involved with the consortia to ensure the credibility of the bids. Furthermore the supply chain needs timely commitments for timely delivery and we are working hard to help this process. We would be happy to work with Ofgem in finding an appropriate compromise on this issue. For instance, perhaps the *quid pro quo* for non-exclusivity (but nonetheless meaningful involvement) is some form of guarantee that would allow the supply chain to ramp up its supply capacity before orders are placed by the appointed OFTO?

A strategic plan for Round 3 OFTOs could give signals to the supply chain on the scale and timetable for increased delivery. If this strategic plan was adopted, a role for the supply chain in the bidding process would still be necessary to ensure what was proposed was possible.

Assessment of bids

At the new PQO stage BWEA and Scottish Renewables would query Ofgem's ability to appraise submissions based upon a limited amount of project information. In particular we would question the reliability of desired Internal Rate of Return (IRR) put forward at this stage.

More generally we are concerned that Ofgem will focus on the price, potentially at the expense of other factors that our membership might value more highly. We trust that Ofgem has appointed parties to advise on technical competence and experience. We would be concerned if National Grid's role on Operational aspects were to be extended to other technical aspects of the bids.

Developer's role in negotiations

As you know, BWEA and Scottish Renewables consider it essential that developers have the ability to make meaningful input during the tender process. Ultimately, this will minimise the likelihood of the developer vetoing the Agreement to Vary its grid connection offer from National Grid. We would support direct tri-partite negotiations between the developer, the potential OFTOs and Ofgem during the tender process.

The proposals on "bidder clarification" appear to say that developers will not be able to directly negotiate with OFTOs on anything but the asset transfer scheme. Furthermore the requirement for developers to warrant their responses appears to assume that the information flow will be one-way from the developer to the OFTO. If Ofgem wants the connection offer to be acceptable to the developer, we cannot stress how important it is for this dialogue to be two-way. We also believe that direct communication would be much more productive, albeit we accept the need for it to be moderated.

Auctions at BAFO stage

BWEA and Scottish Renewables consider that it is far too early to be pushing the auctions agenda for the OFTO regime. We wish to see if the regime can deliver first, before starting any dialogue on controversial subjects.

We hope you find these comments useful. Please do not hesitate to contact either of our Associations if you would like to discuss any of these points.

Yours sincerely,

Gordon Edge
Director of Economics and Markets
BWEA

Jason Ormiston
CEO
Scottish Renewables