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Mr Richard Clay
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Ofgem
9 Millbank
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Dear Mr Clay

Offshore Electricity Transmission – SPA Consultation

Thank you for the opportunity to comment on your documents issued on 6 May 2008. This response is made by DONG Energy A/S. Our detailed response on the model form SPA is attached as in the form of a mark-up to the draft you prepared, and we make our more general comments below. We are still considering the data room guidelines and may make a later comment on these.

Although not clear from the consultation, we assume that developers entering the tender would have the opportunity to not only populate the project specific appendices, but also to vary terms in the main body of the SPA to suit their particular requirements. Obviously to the extent that these terms proved unattractive to potential bidders, it would affect the bids made and/or number of bidders for a particular asset. However we don't think it appropriate that developers should be forced to use terms which they do not agree is right for them or their project.

In terms of the generic provisions, the one issue of greatest commercial concern is the proposal included in the SPA that only 75% of the ex-ante asset value ("ex-ante RAV") would be paid on Completion. This is an important policy issue and should really have been consulted upon directly, rather than being buried in the legal text. DONG Energy believes that in principle the full value of the assets should be paid at Completion, although we recognise the practical difficulties in doing so for projects still under development or construction. However we do not see why 100% of the ex-ante RAV cannot be paid at that time, indeed the drafting envisages that the developer may need to repay part of the initial consideration if the ex-post asset value ("ex-post RAV") is lower. We note from earlier Ofgem and DECC policy statements that the developer is guaranteed at least 75% of the ex-ante RAV (even if the ex-post RAV is lower) so the drafting in clause 17.2 would not be needed if the intention was only to pay 75% of the ex-ante RAV.

Related to this is our understanding that for projects that are already complete at the start of the tender process there will be no ex-ante RAV assessment (by definition you can only calculate an ex-post RAV as the assets are complete), so in this case there is no reason not pay 100% at Completion.

Our mark-up proposes that the costs of certain activities should be borne by the purchaser, see for example clause 2.7. This is on the basis that the Vendor is not choosing to sell the Assets and the Business but is required to by a change in the law. The Purchaser, on the other hand, has chosen to enter into a tender process to be given the opportunity to acquire these assets.

We also note that the question of commissioning power has not been addressed. We have raised this on a number of occasions but it is still unclear how a project will be able to commission the transmission assets (or indeed, its wind farm) without power flowing. Previous policy statements had been clear that the assets would be fully commissioned before being transferred to the OFTO and the SPA requires a completion certificate from NGET (per clause 13 and Schedule Part B(3) and part C(1)). As the act of making the power flow, required to commission the assets, is potentially a licensable activity, there needs to be either a licence or exemption in place before commissioning and hence before Completion under the SPA. We had been led to believe this would be addressed in this consultation but it is not. Our proposed solution is very simple, transitional projects should be granted a time limited exemption from the requirement for a transmission licence to be used solely during the period of commissioning the transmission assets. Once fully tested and completed the assets should be transferred to the OFTO and the exemption could end. This would be in line with the previous policy position as regards completion and avoid the situation of assets being transferred and a licence being garneted for an asset which has not been fully commissioned.

We would also note that DONG energy will wish to have in place an O&M agreement with the OFTOs that are to own the transmission assets which it is using.

The consultation paper refers to the statutory transfer scheme provided for in the Energy Act 2008. We think more information should be provided on how this will operate in practice, in particular with regard to third party contracts and easements. We believe that it is more likely that these provisions will be required for third parties since both the developer and potential OFTO will have a real driver to complete the transaction; third parties may wish to use it to extract an unjustified premium from the process. It needs to be clear that the statutory transfer scheme can be used quickly and at low cost to avoid having to resort to its use.

We have copied this letter to DECC to draw attention to the need for a temporary licence exemption as noted above.

Yours sincerely

PP 

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