

Offshore Electricity Transmission: Guidance on the Transfer Agreement for Tender Round 3 (TR3)

Guidance

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Overview:

The regulatory regime for offshore electricity transmission enables the Authority to grant OFTO Licences on the basis of a competitive tender process. Ofgem is responsible for managing this process.

This document sets out guidance on the Transfer Agreement to be prepared by Developers of Qualifying Projects in TR3, which is the first competitive Tender Round under the Enduring Regime leading to the grant of OFTO Licences for Generator Build projects.

Context

With the government setting an ambitious target that 15% of the UK's energy needs to be met from renewable sources by 2020, a dynamic approach was needed to deliver the substantial investment required in transmission. In the case of offshore wind, the Department of Energy and Climate Change, together with Ofgem, established the competitive regulatory regime for offshore transmission in June 2009. Under the regime we run the competitive tender process to select and licence OFTOs.

From the outset the offshore transmission regime has sought to encourage innovation and to attract new sources of technical expertise and finance, whilst ensuring that grid connections are delivered efficiently and effectively. The competitive regime was designed to be delivered in two parts, a Transitional and an Enduring Regime. Once we have granted OFTO Licences for all projects in the transitional Tender Rounds it will bring total investment in offshore transmission to approximately £2.5bn.

The investment opportunity in the Enduring Regime is expected to be significantly larger and is likely to deliver billions of pounds of investment in offshore transmission over the next decade. The Enduring Regime is also operating in the context of the proposed development of increasingly complex, integrated and coordinated offshore grid networks in the UK and the European Union.

Projects where the Developer has met certain requirements after 31 March 2012 fall under the Enduring Regime and are known as Generator Build or OFTO Build. Under Generator Build, Developers are required to transfer ownership of the completed Transmission Assets to an OFTO appointed through the tender process. Ofgem expects this transfer to be effected by a Transfer Agreement which is commercially agreed between these parties. This is distinct from OFTO Build, where the Developer obtains the connection offer and undertakes high level design and Preliminary Works, with the OFTO undertaking construction of the Transmission Assets. This guidance does not apply to Transfer Agreements for OFTO Build Qualifying Projects.

Associated documents

- The Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2013¹
- Offshore Electricity Transmission: Tender Rules for Tender Round 3²
- Enhanced Pre-Qualification Document for Tender Round 3.
- Cost Recovery Methodology for Tender Round 3³
- Guidance on the Process to Close for Tender Round 3⁴

¹ <http://www.legislation.gov.uk/ukxi/2013/175/contents/made>

³ <http://www.ofgem.gov.uk>

⁴ <http://www.ofgem.gov.uk>

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Executive Summary

This guidance applies to Tender Exercises conducted under the Enduring Regime. It is intended to inform Developers and Bidders of the principles and processes applying to development of the Transfer Agreement by which Transmission Assets the subject of a Generator Build Tender Exercise are to be transferred from the Developer to an OFTO.

In participating in a Tender Round, the Developer must complete the Transfer Agreement and undertake to continue to complete with relevant information. Failure to complete the Transfer Agreement or breach of the undertaking to continue to complete the Transfer Agreement could result in a Developer's disqualification from a Tender Exercise or Tender Round and cancellation of the relevant Qualifying Project from the Tender Exercise.

The Tender Regulations provide for the Transfer Agreement to be in the form of either an agreement for the transfer of property, rights and liabilities in respect of the Transmission Assets (an asset sale) **or** an agreement for the transfer of shares in an undertaking which holds the Transmission Assets (a share sale).

Although reference is made throughout this guidance to "asset transfer", the principles and processes set out in this guidance apply whether transfer of the Transmission Assets is structured as an asset sale or as a share sale, unless expressly indicated otherwise.

This guidance should be read in conjunction with:

- the Tender Regulations;
- the Tender Rules for TR3, which set out the rules with which Developers and Bidders must comply when participating in this Tender Round; and
- Guidance on the Process to Close for TR3, which sets out further detail of the tender process.

It should be noted that this guidance, including the example clauses, is generic; the final terms of a Transfer Agreement will be project specific and as negotiated by the parties.

1. Introduction

1.1. Under the Tender Regulations, which set out the tender process to identify the OFTO, Developers must satisfy a number of conditions to enable Ofgem to run a Tender Exercise for their Qualifying Project. One of these conditions is that a Developer must complete the Transfer Agreement and undertake to continue to update it. Failure to do so can result in a Developer's disqualification from a Tender Exercise or Tender Round and cancellation of the relevant Qualifying Project from the Tender Exercise.⁵

1.2. The Transfer Agreement is a key document in the tender process, as the agreement under which the Transmission Assets are transferred from the Developer to the OFTO. Although the Transfer Agreement is a matter for the parties to commercially agree, Ofgem has an interest in it as manager of the tender process. The proposed terms should not be inconsistent with the regulatory regime, and should not affect Ofgem's ability to run a tender process effectively in accordance with:

- its principal objectives and general duties⁶;
- its duties under the Tender Regulations; and
- the key objectives of a competitive Tender Exercise⁷.

1.3. For TR3, we propose to continue the approach to the Transfer Agreement we adopted in the second transitional Tender Round. This guidance therefore sets out:

- the process for development of the Transfer Agreement in parallel with the tender process;
- certain principles with which parties should seek to be consistent with in developing and agreeing the Transfer Agreement; and
- arrangements which Ofgem expects to see in a Transfer Agreement, including reference to example clauses which Developers may wish to incorporate, and which are attached in the Appendices to this guidance.

⁵ See section 2 below.

⁶ Set out in section 3A of the Electricity Act 1989.

⁷ See section 3 below.

2. Ofgem's role in the development of the Transfer Agreement

Introduction

2.1. This section sets out Ofgem's role in the development of the Transfer Agreement. Whilst the Transfer Agreement is a matter for the parties to commercially agree, this section also discusses Ofgem's power to make a property transfer scheme where the parties are unable to do so.

Ensuring Developers and Bidders comply with the tender process

2.2. Under the Tender Regulations, Ofgem is responsible for running the competitive tender process to identify the OFTO for a Qualifying Project. Timely development of the Transfer Agreement is necessary for the efficient management of the tender process. It is important that this is done in an appropriate manner within timescales which enable Ofgem to:

- run a competitive Tender Exercise for the project; and
- grant an OFTO Licence to an OFTO for the relevant Transmission Assets by the time offshore electricity transmission takes place.

2.3. The Tender Regulations require that a Developer complete the Transfer Agreement and undertake to Ofgem to continue to complete it with relevant information⁸ to enable Ofgem to run a Tender Exercise for its Qualifying Project.

2.4. If a Developer fails to complete the Transfer Agreement or breaches its undertaking to continue to complete the Transfer Agreement with all relevant information, Ofgem may disqualify the Developer from a Tender Exercise or Tender Round and may cancel the relevant Qualifying Project from the Tender Round.⁹

Facilitating the development of the Transfer Agreement

2.5. Section 3 sets out the process for developing the Transfer Agreement which Ofgem expects to follow at each stage of the tender process and how Ofgem will engage with Developers and Bidders. It also sets out the process for developing other Ancillary Documentation.

Checking consistency of the Transfer Agreement with this guidance

2.6. This guidance is intended to assist Developers in the development of a Transfer Agreement which is consistent with the regulatory regime. Ofgem encourages Developers and Bidders to have regard to this guidance in developing the Transfer Agreement.

⁸ Regulation 10 and paragraph 2(e) of Schedule 2 to the Tender Regulations.

⁹ Paragraph 2(c) of Schedule 9 and paragraph 1(b) of Schedule 8 to the Tender Regulations.

Property transfer scheme

2.7. Schedule 2A of the Electricity Act, as amended by the Energy Act 2008, entitles Ofgem to make a property transfer scheme for Generator Build Qualifying Projects and to recover its costs for running a competitive tender process.

2.8. The purpose of a Schedule 2A property transfer scheme is to effect the transfer of property, rights and liabilities required by an OFTO to perform its functions, for example in situations where commercial agreement has not been reached, upon application by a Bidder or Developer.

2.9. A Preferred Bidder or Successful Bidder, as applicable and/or a Developer may apply to Ofgem for a property transfer scheme pursuant to paragraph 3 of Schedule 2A to the Electricity Act. If the application were successful, Ofgem would make a scheme to transfer property rights and liabilities from the Developer to the Successful Bidder.

2.10. Ofgem considers that use of this guidance and a structured process of dialogue between Bidders and the Developer on the proposed terms of the Transfer Agreement throughout the tender process should facilitate its successful agreement. This should therefore minimise the need for parties to seek to use the statutory transfer powers described above. Ofgem would only expect these powers to be exercised as a last resort, with parties exhausting all possibilities to negotiate commercial arrangements before applying for a Schedule 2A property transfer scheme.

2.11. Pursuant to paragraph 5(2) of Schedule 2A of the Electricity Act, no application for a property transfer scheme can be made after the end of a transitional period, meaning on or after 19 May 2025¹⁰.

2.12. The process, timing, terms and other matters in relation to property transfer schemes are set out fully in Schedule 2A to the Electricity Act.

2.13. Nothing in this guidance should be taken as constraining Ofgem's discretion as to the terms on which it might make a property transfer scheme under Schedule 2A to the Electricity Act in any particular case.

¹⁰ Extended by the Electricity (Extension of Transitional Period for Property Schemes) Order 2013

3. Process for development of the Transfer Agreement and Ancillary Documentation

Introduction

3.1. This section sets out Ofgem's expectations regarding the process by which the Transfer Agreement and Ancillary Documentation will be developed by Developers at various stages of the tender process. It includes expectations about revisions of the Transfer Agreement and Ancillary Documentation, the stages at which these will be made available to Bidders, and how Bidder feedback is provided to Developers.

Stages of a Tender Process

3.2. We expect to commence TR3 in early 2014. TR3 will comprise of two Tender Exercises in respect of the Westernmost Rough and Humber Gateway projects. The following stages of a Tender Exercise are set out in the Tender Regulations at a high level and in the Tender Rules in more detail:

- the Enhanced Pre-Qualification (EPQ) Stage;
- the Invitation To Tender (ITT) Stage;
- the Best And Final Offer (BAFO) Stage;
- the Preferred Bidder (PB) Stage; and
- the Successful Bidder (SB) Stage.

3.3. Ofgem will specify particular timescales by which certain steps should be met in respect of each stage in the tender process, including in relation to development of the Transfer Agreement. To meet these timescales Developers should organise themselves internally to prepare both for the requirements of each stage of the tender process and for asset transfer. It is expected that a Developer would need, for example, to:

- undertake internal due diligence to inform the terms of the Transfer Agreement;
- draft the Transfer Agreement with input from relevant advisers;
- obtain appropriate internal and third party or funder approvals for progressing the Transfer Agreement;
- put in place appropriate technical, financial or other resources to prepare the relevant package of due diligence information and deal with due diligence enquiries; and
- satisfy itself as to the completeness of due diligence information.

3.4. Adequate preparation for the due diligence process is key to efficient progression of the Transfer Agreement during the ITT and PB Stages in particular. Developers are also advised to try, insofar as possible, to ensure continuity of personnel in the Developer teams involved throughout the tender process. Further details of the process to close are set out in Guidance on the Process to Close for TR3.

3.5. Until the end of the ITT Stage, Ofgem will engage with Developers to monitor progress towards completing the Transfer Agreement in accordance with its undertaking to continue to complete the Transfer Agreement. We will also keep the draft Transfer

Agreement under review to understand the extent to which it is consistent with this guidance. This may include:

- arranging face-to-face meetings with Developers to discuss:
 - (a) development of the Transfer Agreement;
 - (b) aspects of the offshore transmission regime or the specifics of a Qualifying Project that might impact the terms and conditions of the Transfer Agreement or Ancillary Documentation; and
 - (c) feedback on drafts of the Transfer Agreement; and
- providing written clarification in relation to this guidance, whether by letter, supplemental guidance note or otherwise, where appropriate.

3.6. Ofgem will release drafts of the Transfer Agreement and related Ancillary Documentation to Bidders during the course of the EPQ stage. However, the draft Transfer Agreement will only be released to bidders who return to Ofgem signed copies of the Confidentiality Agreement and Conflicts of Interest Declaration. Bidders are free to identify and comment on issues they identify relative to the Transfer Agreement, however those comments will not be factored into the scoring process for the EPQ stage.

3.7. Ofgem does not endorse any of the documents nor the positions taken by Developers expressed in them, nor does Ofgem constrain its discretion as to the terms on which it might make a property transfer scheme under Schedule 2A to the Electricity Act in a particular case.

3.8. The process for developing the Transfer Agreement at each stage of the Tender Exercise is set out in more detail below.

EPQ Stage

3.9. As set out above, to enable Ofgem to run a Tender Exercise for its Qualifying Projects, each Developer must complete the Transfer Agreement, and keep it updated as far as possible with all relevant information available to the Developer. Ofgem would expect development of the Transfer Agreement to be a structured and iterative process and intends to hold bilateral meetings with Developers to facilitate this process.

3.10. As stated above, Bidders are free to comment on issues they identify relative to the Transfer Agreement. However, comments raised will not be factored into the scoring process for the EPQ stage. Ofgem does however encourage Developers to take account of any bidder comments in relation to the Transfer Agreement in order to gain visibility of potential issues that may arise later in the process. .

3.11. In order to deliver the most competitive tender process possible, Ofgem would expect Developers to have developed the Transfer Agreement such that it is in a form suitable to be shared with Bidders at the EPQ Stage once Bidders have signed the necessary Confidentiality Agreement and satisfactory confirmation in respect of conflicts of interest.

3.12. Ofgem will evaluate the Submissions in relation to the Transfer Agreement in accordance with the criteria published in the EPQ Document.

ITT Stage

3.13. If not provided earlier, Ofgem will make the Developer's draft Transfer Agreement available to Bidders at the beginning of the ITT Stage. If previously available, Ofgem will provide a further draft of the Transfer Agreement, amended by the

Developer to reflect its review of Bidder feedback during the EPQ Stage and any further internal development.

3.14. Developers should also provide drafts of the Ancillary Documentation at the beginning of the ITT Stage, in order to provide Bidders with a complete view of the terms of transfer and any transitional arrangements.

3.15. In the Transitional Regime, Bidders were asked to provide a mark-up of these documents and/or commentary and were asked to indicate whether the issues underlying their proposed changes had high, medium or low impact. For TR3, Ofgem expects to take the same approach and will set out the requirements in the ITT Document.

3.16. Ofgem proposes to share Qualifying Bidder mark-ups and commentary with Developers. Developers are expected to consider the mark-ups and commentaries and Ofgem encourages them to take the issues raised into account and address them to the extent appropriate in amending the Transfer Agreement and Ancillary Documentation, particularly with a view to ensuring the fundability of the transfer.

3.17. Ofgem intends to facilitate and supervise discussions between Developers and Bidders on the Transfer Agreement and Ancillary Documentation during the ITT Stage. These sessions are intended to help facilitate resolution of queries on the Transfer Agreement, Ancillary Documentation and commercial offers. Ofgem will notify the parties with details prior to or at the start of the ITT Stage.

3.18. Ofgem will liaise with Developers during the ITT Stage to review the development of the Transfer Agreement. This will include reviewing the extent to which the Transfer Agreement is consistent with this guidance and may include discussing the manner and extent to which Developers propose to address issues raised in Qualifying Bidder feedback.

3.19. Before the end of the ITT Stage, Ofgem expects to issue a final draft Transfer Agreement prepared by Developers. Bidders should make their firm TRS Bids against this final draft and their bids should fully reflect its terms. Therefore, the final draft Transfer Agreement must be as full and complete as possible. Where a Developer is not able to complete an aspect of the Transfer Agreement due to project-specific circumstances, Ofgem expects that Developer to explain either in the Transfer Agreement or in additional documentation its proposed approach to resolving the outstanding aspects.

3.20. Developers may provide information notes to accompany any versions or revised versions of the Transfer Agreement or Ancillary Documentation. The purpose of the notes should be solely to:

- explain any changes to the Transfer Agreement and Ancillary Documentation;
- clarify any issues which appear to be unclear to Bidders in view of their comments on the previous drafts of the Transfer Agreement and Ancillary Documentation; and/or
- give context to the Developer's approach to specific clauses within the Transfer Agreement and Ancillary Documentation in light of Qualifying Bidder feedback where thought necessary.

3.21. In the interests of maintaining a fair and transparent tender process, the information note should not refer to individual Bidders or address matters other than those set out above.

PB Stage (following any BAFO Stage, if applicable) until Asset Transfer

3.22. Ofgem expects that it will continue to engage Developers on the Transfer Agreement until the end of the ITT Stage. From appointment of the Preferred Bidder, Ofgem expects that most of the issues arising in the process to close will be for resolution on a commercial basis through direct discussions between the Developer, the Preferred Bidder and any other relevant parties.

3.23. The Preferred Bidder will be expected to move promptly to finalise the Transfer Agreement with the Developer, together with all other transaction documents alongside securing final funding approvals, in accordance with timescales for that Qualifying Project as notified to the Preferred Bidder.

3.24. Although ITT Submissions provided by Bidders are expected to be fully reflective of the final draft Transfer Agreement, Ofgem acknowledges that the Developer and Preferred Bidder will need to finalise the terms of the Transfer Agreement during the PB Stage and that in certain areas, Developers may be in a position to provide updates to the Transfer Agreement.

3.25. During the PB Stage, Ofgem does not propose to review or participate in the development of documents to which it is not a party, including the Transfer Agreement and Ancillary Documentation, or to act as an arbiter of disputes between the parties.

3.26. Similarly, Ofgem does not intend to review the agreed form of the Transfer Agreement or other Ancillary Documentation although we may request copies, whether before or after their execution.

3.27. Finalisation of the Transfer Agreement and Ancillary Documentation, is part of the matters to be satisfied before a Preferred Bidder becomes the Successful Bidder for a project and the tender process moves to the SB Stage.

Ancillary Documentation

Interface Agreement

3.28. Under the Connection and Use of System Code (CUSC), the Developer is required to enter into an Interface Agreement with the OFTO in a form to be agreed between them but based substantially on the form set out in Exhibit O to the CUSC¹¹ The Interface Agreement sets out the rights and obligations between the Developer and OFTO in respect of the interface of their generation assets and Transmission Assets.

3.29. The Interface Agreement is a key document for Developers and Qualifying Bidders. Ofgem encourages Developers to consider and prepare this document as early as possible to give Bidders visibility of the terms proposed. Bidders will be asked to provide commentary on the draft Interface Agreement during the ITT Stage.

Disclosure Letters

3.30. Developers should develop a draft disclosure letter in relation to the warranties given under the Transfer Agreement. Ofgem expects the Developer to provide Bidders with appropriate supporting information and documentation in relation to any disclosure

¹¹ A similar requirement on the OFTO is contained in the System Operator Transmission Owner Code (STC).

against the warranties, as without this Bidders may not be able to price the implications of the disclosure. For example, where the disclosure relates to a defect in the assets, the disclosure might include details of any proposed rectification, including scope, timing and impact.

3.31. The draft disclosure letter should be updated with relevant information as and when it becomes available. Bidders will be asked to provide a mark-up and commentary on the disclosure letter at the ITT Stage of the tender process.

4. Overarching principles relating to the drafting of the Transfer Agreement and Ancillary Documentation

Introduction

4.1. This section sets out certain principles with which parties should seek to be consistent in developing and agreeing the Transfer Agreement. Ofgem has developed these principles in light of its principal objective and general duties, its duties and powers under the Tender Regulations and the stated key objectives of the tender process. Ofgem will have regard to these principles when reviewing the draft Transfer Agreement developed during the EPQ and ITT Stages. The principles set out below also apply to the Ancillary Documentation prepared by the Developer. This is not intended to be an exhaustive statement of all principles which may be relevant.

Principles

The Transfer Agreement should transfer to the Successful Bidder any:

- a) property interests, rights or liabilities in or relating to the Transmission Assets;**
- b) shares or other interests in the undertaking in which any property interests, rights or liabilities in relation to Transmission Assets are vested; or**
- c) beneficial interest in any property interests, rights or liabilities within paragraph (a) above or shares or other interests within paragraph (b) above,**

for the Qualifying Project that is within the Developer's ability to transfer, to enable the Successful Bidder to fulfil its obligations as OFTO.

4.2. Following feedback on arrangements for the Enduring Regime, the definition of Transfer Agreement in the Tender Regulations covers transfer of ownership of the Transmission Assets by way of either an asset sale or a share sale. Developers may therefore choose whether to effect transfer by way of an asset sale or a share sale.

4.3. Developers should inform Ofgem about the intended sale structure so that Ofgem is able to consider any impact on the Tender Exercise. A share sale may have implications on the tender documentation and on cost assessment arrangements, in that the OFTO would be purchasing a company which may have liabilities that may not be easily captured by the current cost assessment process.

4.4. Although Ofgem does not expect any additional costs of a share sale relative to an asset sale to be passed onto consumers, Ofgem expects consumers to share any benefits.

4.5. The OFTO is required under the OFTO Licence to secure that it has available to it such resources, including fixed assets, rights and consents, to ensure that it is at all times able to carry on the transmission business and comply with its obligations under the OFTO Licence and the Electricity Act.

4.6. As part of the Qualifying Project requirements to be satisfied under the Tender Regulations, a Developer must obtain all necessary consents and property rights for the Transmission Assets to be constructed and maintained. A Developer must ensure that any such consents or property rights which are capable of being assignable to the Successful Bidder are so assignable.

4.7. Ofgem expects that the Transfer Agreement will, to the extent possible, transfer to the Successful Bidder all property, rights and liabilities owned by the Developer in relation to the Transmission Assets and which are capable of transfer. Ofgem expects this to include asset-related information and documents (such as test reports, drawings and manuals), and other records relevant to the ownership, operation and maintenance of the assets.

4.8. In particular the OFTO should receive the benefit of the construction contracts relating to the transferring assets, including the warranties under those contracts. Developers should identify the methods they will use to transfer the benefit of these contracts to the OFTO as early as possible in the process, for example by way of novation, assignment or collateral warranty. By the ITT Stage at the latest the Transfer Agreement should include details of how the benefit of the contracts will be transferred.

4.9. Ofgem recognises that there may be certain consents, licences or permits held by the Developer which relate to the Transmission Assets but cannot be transferred or assigned to the Successful Bidder. These would remain with the Developer.

4.10. Certain assets may be shared between generation and transmission interests, and might therefore be subject to sharing arrangements under the Transfer Agreement or the Interface Agreement.

The Transfer Agreement should not be discriminatory to different kinds of Bidders

4.11. Ofgem has an interest in ensuring that the tender process is conducted on a competitive basis and treats all Bidders equally. Ofgem therefore expects that the Transfer Agreement would not contain provisions that might materially favour or disadvantage one Bidder, or one kind of Bidder, over another. Such provisions could affect the viability and competitiveness of the tender process from a Qualifying Bidder's perspective.

4.12. For example, Ofgem does not expect to see provisions included in or omitted from the Transfer Agreement that might:

- materially affect the risk profile of most Qualifying Bidders, but which may not impact to the same extent a Qualifying Bidder which is related to the Developer;
- favour or disadvantage certain sources of funding over others. For example, a balance sheet bidder versus a bidder relying on non-recourse project finance or capital markets;
- favour or disadvantage Bidders in certain jurisdictions. For example, through the dispute resolution arrangements; or
- be so unattractive, in terms of risk allocation or otherwise, that Bidders may be deterred from bidding.

The Transfer Agreement should be consistent with the offshore transmission regime and the wider regulatory framework

4.13. The Transfer Agreement should not contain provisions which contradict or undermine the intent of the regulatory regime set out in the Electricity Act, Tender

Regulations, the OFTO Licence and other associated codes and documents. Nor should its provisions contradict the policy considerations underpinning the regime, including the tender process.

4.14. In particular, Ofgem does not expect to see obligations or remedies under the Transfer Agreement which overlap with, extend or conflict with obligations on the OFTO already set out under the OFTO Licence, The Crown Estate lease, the STC, other Industry Codes, or statute. Furthermore, Ofgem does not expect the Transfer Agreement to contain provisions which create ongoing relationships with the OFTO in relation to issues already dealt with in other areas of the regime, or where the Developer's ongoing relationship will be with NGET under the CUSC. For example, obligations in relation to the maintenance or insurance of assets after transfer or indemnification provisions for failure to have consents and permits in place.

4.15. Under the Tender Regulations Ofgem must assess the economic and efficient costs of developing and constructing the Transmission Assets and use that assessment to determine the transfer value for the Transmission Assets. Ofgem expects this to be reflected in the provisions in the Transfer Agreement relating to the determination and payment of the consideration for the transfer.

4.16. Ofgem's estimates and assessment of costs under the Tender Regulations will be based on its understanding of the Transmission Assets transferring to the Successful Bidder (whether by way of an asset sale or a share sale). The Developer should notify Ofgem if, as a result of developing or finalising the Transfer Agreement, the Transmission Assets transferring to the OFTO differ from information previously provided to Ofgem as this may affect Ofgem's cost assessment.

4.17. Similar considerations apply to the Interface Agreement. In particular:

- Developers must be satisfied that any amendments to the form of the CUSC Interface Agreement do not result in the Developer being in breach of its generation licence or the CUSC;
- Bidders must ensure that, as prospective parties to the Interface Agreement, they would not be in breach of the OFTO Licence or the STC; and
- Ofgem would not expect the Interface Agreement to include obligations or remedies which overlap with, extend or conflict with obligations on the OFTO already set out under the OFTO Licence, Transfer Agreement, The Crown Estate lease, the STC, other Industry Codes, or statute.

The Transfer Agreement should facilitate the achievement of an economic and efficient outcome to the competitive tender process

4.18. Ofgem would not expect to see clauses proposed in the Transfer Agreement which result in Bidders bearing unnecessary costs or risks, for example, as a result of duplication of obligations imposed on the OFTO which are already set out under other areas in the offshore regime or the imposition of unnecessary costs by having to resolve disputes in foreign jurisdictions.

4.19. Nor would Ofgem expect to see clauses proposed which resulted in an unbalanced allocation of risk between the parties, the impact of which would ultimately be borne by consumers.

A Developer should ensure that the terms of the Transfer Agreement are clear and are supported by clear, complete and accurate information

4.20. Developers must meet certain conditions to enable Ofgem to run a Tender Exercise for their Qualifying Projects. These include provision of undertakings from the Developer that it will (a) draft and progress the Transfer Agreement and (b) provide Ofgem with new or updated information as it becomes available to populate the Data Room.

4.21. Developers are therefore expected to ensure that the Transfer Agreement is as clear and complete as possible during the ITT Stage. Developers should ensure that the terms of the Transfer Agreement are supported by complete and accurate information, for example cable burial or performance data and data or reports in respect of any remedial works or construction delays. Provision of this information should ensure Bidders are able to make ITT Submissions that are as firm and competitive as possible.

A Developer must carry out its activities in an efficient manner for the purposes of facilitating the tender process

4.22. Developers are expected to take all reasonable steps to facilitate the development and finalisation of the Transfer Agreement and effect asset transfer. Such steps may include the allocation of resource with appropriate expertise and experience, ensuring continuity (as far as possible) within such teams and ensuring that the appropriate internal procedures are in place. Please see paragraph 3.3 above for more detail.

4.23. Developers must provide all necessary information on a timely basis. Ofgem may specify particular timescales by which certain information and steps, including in relation to the development of the Transfer Agreement, should be met. Ofgem expects the timescales for key decisions, for example, where board approvals are required, to be aligned with the key dates for the Tender Exercise.

5. Contents of the Transfer Agreement

Introduction

5.1. This section sets out details of the provisions that Ofgem would expect Developers to include in their Transfer Agreement and, where relevant, refers to example clauses which are in the Appendices to assist Developers in drafting and progressing the Transfer Agreement

5.2. This section sets out general explanation only and does not constitute legal, financial or tax advice from the Authority, Ofgem or its Advisers. Developers will need to complete their Transfer Agreement with regard to the specific circumstances relevant to their Qualifying Project.

Transfer Agreement content

5.3. The focus of this section is on the content of a Transfer Agreement in the context of an asset sale, rather than a share sale, albeit that the underlying principles of transfer set out in this guidance apply equally to either sale structure.

Sale and purchase

5.4. Given the design of the regulatory regime, it is intended that execution of the Transfer Agreement, completion of asset transfer and grant of the OFTO Licence to the OFTO will occur broadly simultaneously, once construction of the Transmission Assets is completed. Appendix 2 provides example clauses that deal with the obligation to transfer the Transmission Assets. Where a period of time is expected to elapse between the Transfer Agreement coming into effect and asset transfer, a Developer should consider including appropriate provisions to cater for this.

Assets

5.5. Each Developer should provide details of all the assets, property and rights, liabilities and obligations (including fixed assets, spares, contracts and properties) relating to be transferred to the Successful Bidder Ofgem expects such particulars of the Transmission Assets to be set out in a schedule to the Transfer Agreement.

5.6. In order to provide firm bids at the ITT Stage, Bidders require certainty as to what is being transferred. Ofgem expects the Developer to transfer the benefit of all construction contracts relating to the Transmission Assets. The Transfer Agreement should clearly set out how such benefit will be transferred, for example by way of assignment, novation or collateral warranty.

5.7. If the Transmission Assets differ from the position set out in the Information Memorandum, we recommend that the Developer clarify why the position has changed.

5.8. If relevant to its Qualifying Project, a Developer should also include a comprehensive framework for the transfer (or sharing) of any applicable information technology systems and intellectual property rights.

5.9. If there assets or contracts are to be shared between the Transmission Assets and the generation assets, the Transfer Agreement (or Interface Agreement where relevant) should clearly set out proposals in relation to the transfer and sharing of these assets and contracts.

5.10. Ofgem would expect the Transfer Agreement to be structured so as to effect a clean division of title and liability on and from the completion date such that the Developer is responsible for payables incurred or attributable to any period prior to completion and is entitled to receive and enforce any receivables accrued up to and including completion.

Payment of transfer value

5.11. The Tender Rules set out details of Ofgem's cost assessment process¹². Ofgem will use its assessment of costs to determine the value of the Transmission Assets transferring to the Successful Bidder in respect of a Qualifying Project. Ofgem will carry out estimates of costs during the tender process and these estimates will be included in the documentation for the ITT Stage as the Indicative Transfer Value.

5.12. For TR3, Ofgem's approach to deferred consideration remains the same as for the second transitional Tender Round. Ofgem considers that assuming full consideration will be payable on asset transfer will allow for greater certainty and deliverability for both the Developer and potential OFTOs regarding the amount, timing and funding of the Final Transfer Value.

5.13. It is intended that Ofgem will finalise the assessment of costs and determine the Final Transfer Value prior to Licence Grant. However in circumstances where this is not possible Ofgem may determine that a proportion of the Indicative Transfer Value should be paid to the Developer on transfer, with deferred consideration paid thereafter. In this case, Ofgem will determine what proportion of the Indicative Transfer Value the Developer should receive on transfer. On conclusion of Ofgem's assessment of costs, the deferred consideration (being the difference between the Final Transfer Value and the proportion of the Indicative Transfer Value received by the Developer on transfer) will then be paid by the Successful Bidder to the Developer.

5.14. Appendix 2 provides example clauses for payment of the transfer value and Appendix 3 provides clauses for payment of deferred consideration, should it be required.

5.15. Given Ofgem's experience of the Transitional Regime, Ofgem recognises that if payment of deferred consideration is required, Developers may want interest on deferred consideration. Where interest is allowed on analogous deferred payments under the onshore and OFTO Licences a base rate of interest is used. Ofgem therefore expects a similar rate to be used in the Transfer Agreement as the rate of interest on deferred consideration.

5.16. In addition, Developers may wish to include provisions in the Transfer Agreement requiring the Successful Bidder to give Security in respect of its obligations to pay the deferred consideration, for example by way of parent company guarantee, letter of credit or other form of Security. Any Security should be limited to the difference between the initial purchase price and 100% of the Indicative Transfer Value provided at ITT Stage. Consideration of the financial standing of the prospective OFTO (in accordance with the conditions of the OFTO Licence) is an important part of the tender process. Therefore, Ofgem does not expect to see Security for ongoing obligations under the Transfer Agreement.

¹² Further information can be found in Ofgem's Guidance for Cost Assessment:
<https://www.ofgem.gov.uk/ofgem-publications/51530/cost-assessment-guidance.pdf>

Excluded assets and contracts

5.17. The Developer may wish to set out details in the Transfer Agreement of the assets which are excluded from the transfer to the Successful Bidder, for example, the generation assets and contracts relating to them. The details of any such excluded assets and contracts will be necessarily project-specific.

Transition Plan

5.18. To ensure an orderly and successful transfer of the Transmission Assets to the Successful Bidder, Ofgem suggests that once a Preferred Bidder is appointed in respect of a Qualifying Project, the Developer and Preferred Bidder should discuss transition arrangements. The parties should agree a transition plan that sets out the actions, timetables and milestones to be met by the each party to ensure that the transfer is carried out in an efficient and effective manner. Ofgem expects Developers to include, either in the Transfer Agreement or in a separate information note, details of any proposed transition arrangements.

Certification of Completion of Offshore Transmission System

5.19. As outlined above, transfer will occur once construction of the Transmission Assets has been completed. Ofgem encourages Developers to provide information about the commissioning process in the Data Room to give clarity to Qualifying Bidders. The Successful Bidder is likely to require evidence of completion of construction as a completion deliverable. Developers should also consider what comfort they can provide to the Successful Bidder in respect of the commissioning process, for example through independent verification or certification.

5.20. Ofgem expects these provisions will be project-specific and will need to reflect the certification provisions under the relevant construction contract(s) as well as relevant processes under the Developer's construction contract with NGET and under the appropriate Industry Codes.

Completion of sale and purchase

5.21. The Transfer Agreement should clearly set out the completion obligations and deliverables on both the Developer and the Successful Bidder. Appendix 7 provides example clauses, however the items to be delivered by each party at completion will necessarily be project-specific.

5.22. Ofgem expects that the Transfer Agreement will also contain provisions detailing the obligations on each of the parties for a period of time after completion of the transfer, as is standard. Appendix 8 provides example clauses.

Warranties and indemnities

5.23. The Transfer Agreement should contain details of the warranties the Developer will give the Successful Bidder in respect of the transfer. Appendix 9 provides an example set of warranties which have been prepared having regard to the subject matter typically included in a Transfer Agreement. The warranties given by Developers should be tailored to project-specific circumstances and Developers should consider whether further warranties are required.

5.24. The example wording provides that the warranties are subject to limitations on claims, as is standard. Appendix 9 also provides example clauses dealing with limitation of liability.

5.25. In preparing the warranties and limitations on liability in the Transfer Agreement and disclosure letter, Ofgem encourages Developers to consider the impact that a lack of sufficient warranty protection may have on the Qualifying Bidders' TRS Bids.

5.26. Based on Ofgem's experience of the Transitional Regime, Bidders may have concerns about the creditworthiness of the selling entity where it is a special purpose vehicle. Developers should consider offering Security for the obligations of the vendor under the Transfer Agreement.

5.27. Given the nature of the Transmission Assets and that construction will be ongoing through the tender process, the Preferred Bidder may become aware of issues or potential issues associated with the Transmission Assets such as remedial works required on assets, cable breakages or cable reburials following completion of the ITT Stage. Ofgem therefore encourages Developers to consider including proposals, either in the Transfer Agreement or associated information note, explaining how they propose to deal with such issues if they arise on the basis of 'most likely scenarios'. Including the scenarios does not imply the event has or will occur and would only be intended to cover issues arising in the period up to completion in respect of the relevant project. For example, the Developer may consider offering indemnities for work associated with cable breakages or reburials, in which case the Developer should provide as much information as possible as to the terms of such an indemnity. This will enable Bidders to better understand the implications of such events and price their bids accordingly based on certain scenarios occurring. It should also allow for speedy resolution should such an event occur prior to completion.

5.28. Developers are reminded that, under the terms of their undertaking given as a tender entry condition, where new relevant information becomes available in relation to the Transmission Assets they are required to provide this to Ofgem so it can be included in the Data Room. Developers are also required to provide reports as required to Ofgem in connection with the development of the relevant generating station and Qualifying Project.

Announcements, confidentiality and other boilerplate clauses

5.29. Ofgem expects the Transfer Agreement to include standard provisions in relation to the prohibition on announcements and disclosure of confidential information, as well as other standard provisions relating to the assignment of the benefit of the Transfer Agreement, third party rights, variation, notices and governing law. Appendix 11 provides example clauses.

Third Party Consents for transfer of assets and contracts

5.30. Ofgem expects parties to the Transfer Agreement to have a mutual obligation to obtain any required third party consent or agreement in relation to the transfer of title of any of the assets and contracts (including property rights and contracts). The Transfer Agreement should contain provisions dealing with the situation where such consent or agreement cannot be obtained prior to completion. For example, one way of resolving this issue is for the Developer to be deemed to hold the benefit of the applicable assets in trust for the Successful Bidder pending the receipt of such consent or agreement. Appendix 4 provides example clauses.

5.31. As stated in Section 4, Developers must satisfy a number of conditions to enable Ofgem to run a Tender Exercise for their Qualifying Project. One of these conditions is that a Developer must ensure that all necessary consents and property rights which are capable of being assigned are assignable. The onus is on Developers to ensure that all contracts, consents, leases and rights necessary to complete the transfer of assets are in transferable form as far as possible in advance of any asset transfer. As execution and

completion of the Transfer Agreement is simultaneous, Ofgem expects Developers to clearly set out, either in the Transfer Agreement or in an information note, a summary of what third party consents are required including the process and timetable for obtaining such consents, and to keep this updated to reflect progress.

Permits

5.32. Ofgem expects the Developer to assign and/or transfer any permits, licences or approvals relating to the assets to the extent possible. Appendix 4 (paragraphs 1.19 and 1.20) provides example clauses.

5.33. The Transfer Agreement may also include provisions agreeing an appropriate allocation of risk and responsibility in respect of permits, licences or approvals that relate to both transmission and generation assets. In addition, Ofgem expects the Transfer Agreement to contain provisions dealing with liabilities and obligations relating to decommissioning and environmental matters. Appendix 5 provides example clauses.

5.34. Ofgem is aware that some permits, licences or approvals are not assignable or transferable and will be retained by the Developer, but may still contain obligations which relate to the Transmission Assets. Similarly, a permit, licence or approval that is transferring to the Successful Bidder may contain obligations that relate to the generation assets.

5.35. Ofgem expects Developers to clearly set out, either in the Transfer Agreement or in a separate information note, a summary of what permits, licences and approvals are required, including the process and timetable for obtaining such permits, licences and approvals, and to keep this updated to reflect progress. Such note should also clearly set out which of these are being transferred and which are being retained.

Assumed and excluded liabilities

5.36. The Transfer Agreement should clearly set out which of the Developer's liabilities are assumed by the Successful Bidder and which are excluded from the transfer.

Sites and Property Documents

5.37. The Transfer Agreement should clearly set out details of all property rights, title and interests (including licences, easement deeds, wayleave agreements and leases) transferring to the Successful Bidder and the terms on which these are to be transferred. Appendix 6 provides example clauses.

5.38. Based on experience from the Transitional Regime, Ofgem expects that The Crown Estate lease granted to the Developer in relation to a Qualifying Project will be split prior to execution of the Transfer Agreement into a lease in respect of the generation assets and a lease in respect of the Transmission Assets, with the lease in respect of the Transmission Assets being assigned to the Successful Bidder on completion. The parties should work with The Crown Estate to achieve this.

Employees and benefits

5.39. Based on experience from the transitional Tender Rounds, Ofgem considers that it is unlikely that any employees will be transferring with the Transmission Assets. However, if this is not the case in respect of a particular Qualifying Project, the Developer should include provisions in the Transfer Agreement in relation to the transferring employees and their benefits (including pensions).

VAT and tax

5.40. The tax structure to be adopted, and the tax treatment to be applied, should be reviewed by the Developer on a project-specific basis, having regard to the likely tax affairs of the relevant parties and the facts and circumstances of the particular Qualifying Project and this should be reflected in the Transfer Agreement. Appendix 10 provides example clauses. Ofgem has received guidance from HMRC regarding the treatment of the transfer of assets to the Successful Bidder as a going concern for VAT purposes¹³. This guidance will be provided to both Developers and Bidders by its inclusion in the Data Room for the projects. Appendix 10 provides example clauses that have been prepared in light of this guidance. If we receive updated guidance from HMRC on this issue, we will make Developers and Bidders aware of this.

5.41. The Developer should put forward their proposed position on capital allowances. The sharing, or otherwise, of any tax benefits such as capital allowances is a matter for commercial agreement between the parties having regard to their specific circumstances. Therefore, we recognise that the position may be finalised after appointment of the Preferred Bidder.

5.42. Developers should note that Ofgem intends to assume for the purposes of its estimate of costs and calculation of the Indicative Transfer Value that the Successful Bidder will obtain the full benefit of all available capital allowances. If the Developer proposes to retain the benefit of any capital allowances the Final Transfer Value will be reduced to reflect this.

5.43. Appendix 10 also provides example clauses in relation to capital allowances and an example schedule of election.

¹³ See the letter from HMRC to Ofgem dated 14 December 2009.

Appendices

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Appendix 1 - Glossary of Terms used in this Guidance (other than in the Example Clauses)

A

Advisers

In relation to Ofgem, its employees, officers, directors, officials, insurers, agents, consultants, advisers, contractors, sub-contractors (of any tier) and affiliates.

Ancillary Documentation

The disclosure letter, the Interface Agreement and the other transactional documents to be entered into between the Developer and the Successful Bidder under or in connection with the Transfer Agreement.

Authority

The Gas and Electricity Markets Authority established by section 1(1) of the Utilities Act 2000. The Authority governs Ofgem.

B

BAFO Document

The document delivered to each Qualifying Bidder invited to submit a BAFO and which sets out the rules and requirements of the BAFO Stage.

BAFO Submission

A selected Qualifying Bidder's response to the BAFO Document.

Best and Final Offer (BAFO) Stage

A stage of a Tender Exercise which the Authority may decide to run after the ITT Stage in order to determine which Qualifying Bidder shall become the Preferred Bidder in respect of a Qualifying Project. This stage starts from the distribution by Ofgem of the BAFO Document to selected Qualifying Bidders, including BAFO preparation, Submission and evaluation, and ending when a Preferred Bidder is selected and notified.

Bidder

Any person or Bidder Group that makes a PQ Submission or an EPQ Submission, a Qualifying Bidder, a Preferred Bidder or a Successful Bidder (as applicable).

C

Confidentiality Agreement

The agreement between a Developer and a Bidder or Qualifying Bidder in respect of confidential information disclosed in connection with a Tender Exercise.

Cost Recovery Methodology

The methodology for calculating and recovering the Authority's tender costs in relation to a particular Tender Round published by the Authority in accordance with regulation 11(4) of the Tender Regulations.

D

[Data Room](#)

In respect of a Qualifying Project, a secure electronic data room populated and maintained by Ofgem with information provided by the relevant Developer, which is made available to relevant Bidders or Qualifying Bidders through the Portal.

[Developer](#)

The Tender Regulations define a 'developer' as 'any person within section 6D(2)(a) of the 1989 Act or within a developer group'. Section 6D(2)(a) of the Electricity Act 1989 defines such person as 'the person who made the connection request for the purposes of which the tender exercise has been, is being or is to be, held'. In practice, such person is also the entity responsible for the construction of the generation assets and, under Generator Build, the transmission assets. Under Generator Build, this is the person who requests that Ofgem commences a Tender Exercise in respect of a proposed project.

E

[Electricity Act](#)

The Electricity Act 1989 as amended from time to time.

[Enduring Regime](#)

The regulatory regime for offshore transmission for any project qualifying for a Tender Exercise after 31 March 2012.

[Enhanced PQ \(EPQ\) Stage](#)

An extended version of the PQ stage of a Tender Exercise that can be used for Generator Build Tender Exercises where the Authority decides not to run a QTT Stage. At the end of this 'enhanced' PQ stage, the Authority will determine which Bidders become Qualifying Bidders and will be invited to participate in the ITT Stage of the Tender Exercise.

[EPQ Document](#)

The document prepared and issued by Ofgem for the purpose of selecting a shortlist of Qualifying Bidders to progress to the ITT Stage, and which sets out the rules and requirements of the EPQ Stage.

[EPQ Questionnaire](#)

The questionnaire that forms part of the EPQ Document.

[EPQ Submission](#)

A Bidder's response to the EPQ Document.

F

[Final Transfer Value](#)

The final value determined by Ofgem, using its assessment of the economic and efficient costs that ought to have been incurred in connection with:

- (a) for a Generator Build Tender Exercise, the development and construction of the relevant transmission assets; or
- (b) for an OFTO Build Tender Exercise, obtaining the relevant Preliminary Works.

G

[Generator Build](#)

A model for the construction of offshore transmission assets. Under the generator build option, the Developer carries out the Preliminary Works, procurement and construction of

the transmission assets. The OFTO operates, maintains and decommissions the transmission assets.

Grid Code

An industry code covering technical aspects relating to connections to, and the operation and use of the NETS, amongst other things; and maintained by the NETSO pursuant to standard condition C14 of its transmission licence.

I

Industry Codes

The industry codes underpin the electricity wholesale and retail markets and define the terms under which industry participants can access the electricity networks including the Connection and Use of System Code (CUSC), the Balancing and Settlement Code (BSC), the Grid Code, the System Operator – Transmission Owner Code (STC), the Distribution Connection and Use of System Agreement (DCUSA) and the Distribution Code.

Indicative Transfer Value

Ofgem's estimate of the economic and efficient costs which ought to be incurred in connection with:

- (a) for a Generator Build Tender Exercise, the development and construction of the relevant transmission assets; or
- (b) for an OFTO Build Tender Exercise, obtaining the relevant Preliminary Works.

Information Memorandum

The document prepared by Ofgem for a Qualifying Project containing detailed information for such Qualifying Project which is issued to Bidders at the EPQ Stage or QTT Stage (as applicable), providing they have entered into the applicable Confidentiality Agreement.

Interface Agreement

The agreement to be entered into between the Developer and the OFTO under the requirements of the Connection and Use of System Code.

Invitation to Tender (ITT) Stage

The stage of a Tender Exercise during which the Authority may determine which Qualifying Bidder becomes the Preferred Bidder or whether to hold a BAFO stage. This stage starts from the distribution of the ITT Document to Qualifying Bidders by Ofgem, and includes the preparation, submission and evaluation of ITT Submissions.

ITT Document

The document prepared and issued by Ofgem to each Qualifying Bidder invited to make an ITT Submission, and which sets out the rules and requirements of the ITT Stage.

ITT Submission

A Qualifying Bidder's response to the ITT Document.

L

Licence Grant

Following its determination to grant an OFTO Licence to the Successful Bidder, the Authority confirms such determination in accordance with regulation 28(6) of the Tender Regulations and grants such OFTO Licence to the Successful Bidder pursuant to section 6(1)(b) of the Electricity Act 1989.

N

National Electricity Transmission System (NETS)

The system consisting (wholly or mainly) of high voltage electric lines owned or operated by transmission licensees within Great Britain, in the territorial sea adjacent to Great Britain and in any Renewable Energy Zone and used for the transmission of electricity from one generating station to a sub-station or to another generating station or between sub-stations or to or from any interconnector and includes any electrical plant or meters owned or operated by any transmission licensee within Great Britain, in the territorial sea adjacent to Great Britain and in any Renewable Energy Zone in connection with the transmission of electricity.

National Electricity Transmission System Operator (NETSO)

The National Electricity Transmission System Operator is the entity responsible for coordinating and directing the flow of electricity over the NETS.

NGET

National Grid Electricity Transmission Plc. NGET owns and maintains the Transmission System in England and Wales. It is also the NETSO for GB.

O

Offshore Transmission Licence (OFTO Licence)

The licence awarded under section 6(1)(b) of the Electricity Act 1989 following a Tender Exercise authorising an OFTO to participate in the transmission of electricity in respect of the relevant Offshore Transmission System. The licence sets out an OFTO's rights and obligations as the offshore transmission asset owner and operator.

Offshore Transmission Owner (OFTO)

The holder of an OFTO Licence.

Offshore Transmission System

A Transmission System made up of Transmission Assets that is used for purposes connected with transmission of electricity in offshore waters, where offshore waters means:

- (a) waters in or adjacent to Great Britain which are between the mean low water mark and the seaward limits of the territorial sea;
- (b) waters within an area designated under section 1(7) of the Continental Shelf Act 1964; and
- (c) waters within an area under section 84(4) of the Energy Act 2004.

Ofgem

Office of Gas and Electricity Markets.

OFTO Build

A model for the construction of offshore transmission assets. Under the OFTO build option, the Developer obtains the connection offer and undertakes high level design and Preliminary Works. The OFTO constructs, operates, maintains and decommissions the transmission assets.

P

PB Matters

The matters to be resolved by the Preferred Bidder to the Authority's satisfaction as specified in regulation 20(4)(a) or (b) of the Tender Regulations, as the case may be,

before that Preferred Bidder becomes the Successful Bidder in accordance with regulation 27(a) of the Tender Regulations.

PB Stage

The stage of a Tender Exercise during which the Preferred Bidder has to resolve certain matters in order that Ofgem may grant the OFTO Licence. This stage starts at the date of Ofgem's notice to a Qualifying Bidder that it has been selected as Preferred Bidder and ending at the date Ofgem determines that the Preferred Bidder has become the Successful Bidder and publishes a notice to that effect in accordance with regulation 27(2) of the Tender Regulations.

Portal

The electronic tendering Portal described in Section 3 and Appendix 2 of the Tender Rules.

PQ Document

The document prepared and issued by Ofgem for the purpose of selecting a longlist of Qualifying Bidders to progress to the QTT Stage and which sets out the rules and requirements of the PQ Stage.

PQ Submission

A Bidder's response to the PQ Document.

Preferred Bidder (PB)

In relation to a Qualifying Project, the Qualifying Bidder determined by Ofgem following its evaluation of the submissions received, to which Ofgem intends to grant the OFTO Licence subject to the satisfaction of the conditions specified by Ofgem in accordance with the Tender Regulations in force at that time.

Preliminary Works

Are defined in the Tender Regulations as 'all necessary works obtained or to be obtained by a developer in relation to the development of the proposed transmission assets, prior to the grant of an offshore transmission licence to a successful bidder in respect of an OFTO build qualifying project, for example, without limitation, works in relation to planning permissions, consents, wayleaves, easements, leases, topography and sea bed surveys, environment and archaeological surveys, impact assessments and professional fees related to obtaining the necessary works'.

Pre-Qualification (PQ) Stage

The stage of a Tender Exercise starting from the publication of the PQ Document, including the preparation, submission and evaluation of PQ Submissions and ending once Ofgem has published the longlist of Qualifying Bidders who have been invited to participate in the QTT Stage.

Q

QTT Document

The documentation prepared and issued by Ofgem for the purpose of selecting a shortlist of Qualifying Bidders to progress to the ITT Stage and which sets out the rules and requirements of the QTT Stage.

QTT Questionnaire

The questionnaire which forms part of the QTT Document.

QTT Submission

A Qualifying Bidder's response to the QTT Document.

Qualification to Tender (QTT) Stage

The stage of a Tender Exercise starting from the distribution by Ofgem of the QTT Document to Qualifying Bidders, including the preparation, submission and evaluation of the QTT Submissions and ending once Ofgem has published the shortlist of Qualifying Bidders who are invited to participate in the ITT Stage.

Qualifying Bidder

A Bidder or Bidder Group in a Tender Exercise invited to make a QTT Submission, an ITT Submission, or a BAFO Submission (as applicable).

Qualifying Project

An offshore transmission project in respect of which Ofgem determines that the Developer has satisfied the requirements described in:

- (a) for Generator Build projects, paragraph 2 of Schedule 1 to the Tender Regulations, or will use its reasonable endeavours to satisfy the relevant Qualifying Project requirements within a period specified by Ofgem; or
- (b) for OFTO Build projects, paragraph 1 of Schedule 1 to the Tender Regulations.

S

SB Stage

The period starting at the date of Ofgem's notice to a Preferred Bidder that it has become the Successful Bidder and ending at the date when the Successful Bidder is granted an OFTO Licence in relation to a particular Qualifying Project.

Security

Includes a charge over a bank account or any other asset, a deposit of money, a performance bond or bank guarantee, an insurance policy or a letter of credit.

Submission(s)

A PQ Submission, an EPQ Submission, a QTT Submission, an ITT Submission or a BAFO Submission.

Successful Bidder (SB)

The Preferred Bidder in a Tender Exercise who has resolved the PB Matters to the Authority's satisfaction, such that the Authority intends to grant to it an OFTO Licence.

System Operator – Transmission Owner Code (STC)

The industry code that defines the high level relationship between the NETSO and Transmission Owners setting out the roles, responsibilities, obligations and rights etc of the NETSO and the Transmission Owners.

T

Tender Exercise

The competitive process run by Ofgem in accordance with the Tender Regulations in order to identify a Successful Bidder to whom a particular OFTO Licence is to be granted.

Tender Regulations

The Electricity (Competitive Tenders for Offshore Transmission Licences) 2013, which are made under section 6C of the Electricity Act 1989 and set out the legal framework and powers for the Authority to run a competitive tender process for the grant of an OFTO Licence in respect of an Offshore Transmission System.

Tender Revenue Stream (TRS)

The revenue established through the tender process, which is the value set out in paragraph 4 of amended standard condition E12–J2 (Restriction of Transmission Revenue: Revenue from Transmission Owner Services) of the OFTO Licence.

TRS Bid

The revenue entitlement of the OFTO as bid by the OFTO through the tender process.

Tender Round

One or more Tender Exercises being held or to be held by Ofgem with a view to determining the Successful Bidders to whom OFTO Licences are to be granted for each Qualifying Project subject to such Tender Exercises.

Tender Round 3 (TR3)

The first competitive Tender Round for the grant of OFTO Licences for Generator Build projects under the Enduring Regime.

Tender Rules

The rules for each Tender Round published by Ofgem in accordance with regulation 11(4) of the 2013 Tender Regulations.

The Crown Estate

The body that manages Crown property and that is responsible for awarding offshore wind leases for access to the seabed to wind farm operators. Each OFTO must enter into a lease or licence with the Crown Estate to be able to operate and maintain its Offshore Transmission System on the seabed.

Transfer Agreement

The agreement to transfer any:

- (a) property interests, rights or liabilities in relation to Transmission Assets;
- (b) shares or other interests in an undertaking in which any property interests, rights or liabilities in relation to Transmission Assets are vested; or
- (c) beneficial interest in any property interests, rights or liabilities or shares or other interests relating to Transmission Assets;

from a Developer to a Successful Bidder in respect of a Qualifying Project subject to a Tender Exercise under the Enduring Regime.

Transitional Regime

The offshore transmission regulatory regime covering all projects that met the Qualifying Project requirements set out in the 2010 Tender Regulations before 31 March 2012.

Transmission Assets

Are defined in paragraph 1(3)(a) of Schedule 2A of the Electricity Act 1989 as 'the transmission system in respect of which the offshore transmission licence is (or is to be) granted or anything which forms part of that system'. The transmission system is expected to include subsea export cables, onshore export cables, onshore and offshore substations, and any other assets, consents, property arrangements or permits required by an incoming OFTO in order for it to fulfil its obligations as a transmission operator.

Transmission Owner (TO)

An owner of a high-voltage transmission system.

Transmission System

Is defined in Section 4(4) of the Electricity Act 1989 as 'a system which consists (wholly or mainly) of high voltage lines and electrical plant, and is used for conveying electricity from a generating station to a substation, from one generating station to another or from one substation to another'.

Transmission Services

Those services which are provided or are to be provided to the system operator by another transmission licensee pursuant to standard condition E15 (Obligation to provide transmission services) of the OFTO Licence.

Appendix 2 – Sale and Purchase

Sale and Purchase

1.1 Subject to Clauses [x]¹⁴ (Third Party Consents for Transfer of Assets and Contracts¹⁵), the Vendor shall sell or procure to be sold and the Purchaser shall purchase the Business and the Assets as a going concern as at and with effect from the Completion Date.

Title

1.2 Subject to Clause [x] (Third Party Consents for Transfer of Assets and Contracts¹⁶), the Vendor has the right to transfer or to procure the transfer of legal and beneficial title to the Assets and sells or procures the sale of the Assets with Full Title Guarantee and free from any Encumbrance.

Consideration

1.3 The consideration for the sale of the Business and the Assets shall be:

1.3.1 the payment by the Purchaser to the Vendor at Completion of the [Final Transfer Value]/[Initial Purchase Price];

1.3.2 [the payment by the Purchaser of the Deferred Consideration (if any) in accordance with Clause [x]¹⁷;]¹⁸ and

1.3.3 the assumption by the Purchaser of the Assumed Liabilities pursuant to and in accordance with Clause [x]¹⁹.

Apportionment of Consideration

1.4 The Consideration payable by the Purchaser shall be apportioned in accordance with schedule of assets setting out details of apportionment.

Risk in the Assets

1.5 Risk in the Assets shall pass to the Purchaser at Completion.

¹⁴ All square brackets containing "x" in the example clauses set out in these Appendices need to be completed by Developers in the project-specific Transfer Agreements developed for their projects.

¹⁵ See Appendix 4.

¹⁶ See Appendix 4.

¹⁷ See Appendix 3.

¹⁸ Ofgem expects the draft Transfer Agreements to include the "Final Transfer Value" wording. The alternative wording related to Initial Purchase Price and Deferred Consideration is provided as a reference in the event that deferred consideration is payable.

¹⁹ See Appendix 5.

Appendix 3 - Deferred Consideration

Deferred Consideration²⁰

1.1 If the Final Transfer Value is greater than the Initial Purchase Price, the Vendor shall be entitled to receive, by way of additional consideration, the amount by which the Final Transfer Value exceeds the Initial Purchase Price.

1.2 If the Final Transfer Value is less than the Initial Purchase Price, the Deferred Consideration shall be zero and the Vendor shall not be entitled to receive any additional consideration nor shall the Vendor be required to repay to the Purchaser any amount.

1.3 Any additional consideration payable by the Purchaser under Clause 1.1 shall be payable within [X] Business Days of the date on which Ofgem notifies the Parties of the Final Transfer Value (the " Final Transfer Value Notice") and shall be paid by electronic transfer to the account of the Vendor (details of which shall be provided in writing to the Purchaser no later than [X] Business Days after the date of the Final Transfer Value Notice) in accordance with Clause [X] (Sale and Purchase) and receipt of such sum shall constitute a valid discharge of the Parties obligations under Clause [x]²¹ (Sale and Purchase).

1.4 Any payment payable under this Clause [x] (Deferred Consideration) shall be made in full without any set off or counter claim howsoever arising and shall be free and clear of and without deduction of, or withholding for or on account of, any amount which is due and payable by any Party under this Agreement.

²⁰ It is intended that Ofgem will finalise the assessment of costs and determine the Final Transfer Value prior to Licence grant. However, these example clauses are included as a reference in the event that deferred consideration is payable.

²¹ See Appendix 2, clause 1.3.2.

Appendix 4 - Third Party Consents for Transfer of Assets and Contracts

Third Party Consents for Transfer of Assets and Contracts

Assets²²

1.1 If any Third Party Consent is required to transfer the benefit of any of the Assets (which, for the purposes of Clauses [1.1] to [1.4] (inclusive) only shall exclude the Contracts) and has not been obtained to the reasonable satisfaction of the Purchaser at or prior to Completion, the Vendor and the Purchaser shall use their respective reasonable endeavours to obtain such Third Party Consent as soon as possible following Completion.

Vendor as trustee

1.2 After Completion, and until such time as that consent or agreement is obtained to the reasonable satisfaction of the Purchaser and the full benefit of the Assets transferred to the Purchaser, [or the Purchaser elects as provided in Clause [1.3],] the Vendor shall be deemed to hold the benefit of the applicable Assets in trust for the Purchaser and the Purchaser shall be entitled to the use and enjoyment of those Assets as against the Vendor and to receive the income therefrom (if any) to the extent that the Vendor is not constrained by operation of law or any third party from granting such use or enjoyment or the right to receive any income to the Purchaser, subject always to the Purchaser maintaining any such Assets in a good state of repair (fair wear and tear excepted) and providing adequate insurance in respect of it noting the Vendor's interest on any applicable insurance policy effected by the Purchaser.

Exclusion of Assets

1.3 If any necessary consent or agreement is refused or not obtained on or before the date being [three] months after Completion (or such longer period as the Purchaser may, at its sole discretion, determine) in respect of the applicable Asset, that Asset shall, if so elected by the Purchaser by written notice to the Vendor on or before such date, be deemed to have been excluded from the sale under this Agreement (and shall thereby be deemed to be an Excluded Asset).

Property Contracts

1.4 The provisions of Clauses [1.1] to [1.16] (inclusive) shall not apply to any consent, approval or licence required in relation to the assignment, transfer or novation of any Property Contracts, which shall be governed by the provisions of Schedule [X]²³ (Sites and Property Contracts).

²² Explanatory note: the example clauses have been drafted on the basis that the generation assets (to be retained by the Vendor) and the offshore transmission assets (to be transferred to the Purchaser) are distinguishable and separable. If necessary, separate arrangements should be documented in relation to the sharing of assets, for example, in relation to mutual access rights on the offshore platform.

²³ See Appendix 6.

Contracts²⁴

1.5 Save as provided in Clauses [1.6] to [1.18] (inclusive), the Purchaser shall assume responsibility as from the Completion Date for the due performance of all obligations under the Contracts and all liabilities arising or falling due for performance after the Completion Date under the Contracts.

Assignment

1.6 This Agreement constitutes, with effect from the Completion Date, an assignment of the Contracts if and to the extent the benefit of each such Contract can be assigned by the Vendor to the Purchaser without Third Party Consent.

Co-operation

1.7 Insofar as the Contracts comprise the benefit and burden of contracts which cannot be effectively assigned except by novation or with Third Party Consent:

- 1.7.1 this Agreement shall not constitute an assignment or attempted assignment of the relevant Contract where such conduct would constitute a breach of the Contract; and
- 1.7.2 the Vendor and the Purchaser shall co-operate and do anything which may reasonably be required to ensure, insofar as each is able, that the relevant Contracts are novated or the necessary Third Party Consent or other agreement is obtained, in each case on terms reasonably satisfactory to the Purchaser.

Exclusion of Contracts

1.8 Subject to Clause [1.7], if any requisite novation or Third Party Consent is refused or not obtained on or before the date being [three] months after Completion (or such longer period as the Purchaser may, at its sole discretion, determine) in respect of any Contract, the relevant Contract shall, if so elected by the Purchaser by written notice to the Vendor on or before such date, be deemed to have been excluded from the sale under this Agreement (and shall thereby be deemed to be an Excluded Contract).

Vendor as trustee

1.9 Subject to Clause [1.7], after the Completion Date and until receipt of any requisite novation or Third Party Consent in respect of a relevant Contract [or, if earlier, receipt of a written election from the Purchaser pursuant to Clause [1.8]] [(and other than in respect of any Contract to the extent it relates to an Asset excluded from the sale pursuant to Clause [1.3])]:

- 1.9.1 the Vendor shall hold the benefit of that Contract and any Assets relating to it on trust for the Purchaser and shall account to the Purchaser accordingly in respect of any monies or other benefits received by the Vendor in relation to it and the Purchaser shall be entitled to the use and enjoyment of such Contracts and any Assets relating to it to the extent the Vendor is not constrained by operation of law or any third party from granting such rights or benefits and subject always to the Purchaser maintaining any Asset relating thereto in a good state of repair (fair wear and tear excepted) and providing adequate insurance in respect of it is

²⁴ Explanatory note: the example clauses have been drafted on the basis that separate contracts (including construction contracts and potentially also IP Licences and Information Technology Agreements) have been entered into in relation to generation assets (to be retained by the Vendor) and offshore transmission assets (to be transferred to the Purchaser). Composite contracts relevant to both the generation assets and the offshore transmission assets will need to be split or apportioned on a project-specific basis, for example, apportionment of limitations on liability and performance security obligations through bilateral or tripartite back to back arrangements.

taken out by the Purchaser, noting the Vendor's interest on any applicable insurance policy effected by the Purchaser; and

- 1.9.2 the Purchaser shall (if sub-contracting or agency is permissible under the relevant Contract) as the Vendor's sub-contractor or agent perform on behalf of the Vendor (but at the Purchaser's expense) all the obligations of the Vendor arising after the Completion Date (to the extent they have been disclosed to the Purchaser) but provided that if any Contract does not permit sub-contracting or agency, the Parties shall make such other arrangements between themselves as may be permissible to implement so far as possible the effective transfer of the benefit and burden of such Contract to the Purchaser.

Pre-Completion Date obligations

1.10 Nothing in this Agreement shall require the Purchaser to perform any obligation falling due for performance or which should have been performed before the Completion Date.

Liability for pre-Completion Date breach

1.11 Nothing in this Agreement shall make the Purchaser liable for any act, neglect, default or omission in respect of any of the Contracts committed by the Vendor, or occurring, prior to the Completion Date, or for any Losses arising from any failure to obtain any novation or Third Party Consent in respect of any such Contract or from any breach of any Contract caused by this Agreement or Completion.

Pre-Completion Date goods and services responsibility

1.12 Nothing in this Agreement shall impose any obligation on the Purchaser for or in respect of any goods sold or services provided by the Vendor prior to the Completion Date.

Vendor indemnity against Purchaser Losses

1.13 The Vendor shall indemnify and keep indemnified the Purchaser against all Losses which may be suffered or incurred by the Purchaser as a result of any act, neglect, default or omission on the part of the Vendor to perform or comply with any obligation of the Vendor under the Contracts arising prior to the Completion Date.

Purchaser indemnity against Vendor Losses

1.14 The Purchaser shall indemnify and keep indemnified the Vendor against all Losses which may be suffered or incurred by the Vendor as a result of any act, neglect, default or omission on the part of the Purchaser to perform or comply with any obligation of the Purchaser under the Contracts arising on or after the Completion Date²⁵.

Vendor performance of non-assumed obligations

1.15 The Vendor shall promptly perform any Contract or other obligation of the Vendor relating to the Assets which the Purchaser is not by this Agreement, or under any of the Contracts, required to perform and the Vendor shall indemnify and keep indemnified the Purchaser against all Losses which may be suffered or incurred by the Purchaser as a result of any act, neglect, default or omission on the part of the Vendor to perform or comply with any such obligation of the Vendor.

Purchaser performance of non-assumed obligations

1.16 The Purchaser may, at its sole discretion, perform any contract or other obligation

²⁵ Explanatory note: any contractual commitments that need to be apportioned between the Purchaser and the Vendor may otherwise be dealt with through assignment or novation. In such circumstances, Clauses 1.13 and 1.14 may not be necessary.

which the Vendor should perform under this Clause [1] and, if it shall do so, the Vendor shall indemnify and keep indemnified the Purchaser against any Losses which may thereby be suffered or incurred by the Purchaser.

Prepayments received by the Vendor

1.17 Where anything (including any service) is to be provided or made available by, or any permission or consent is to be granted by, the Purchaser after the Completion Date but any payment (whether by way of deposit, pre-payment or otherwise) in respect of the price or cost of it has been received by the Vendor before the Completion Date, the Vendor shall pay a sum equal to the amount (a "Prepayment Amount") of that payment (excluding any amount in respect of output VAT for which the Vendor is required to account and less any Deposits in relation thereto and any amount due to the Vendor in relation thereto and transferred to the Purchaser pursuant to this Agreement as a Receivable) to the Purchaser at Completion, to the extent that such Prepayment Amount has been received by Completion, or immediately upon receipt by the Vendor, if later, and shall hold any such monies in trust for the Purchaser pending any such payment. The Purchaser may set off any Prepayment Amount (in whole or in part) against any amounts payable to the Vendor on Completion pursuant to Clause [1.18] below and/or reduce the Consideration payable on Completion by an amount equivalent to the Prepayment Amount.

Prepayments made by the Vendor

1.18 Where anything (including any service) is to be provided or made available to, or any permission or consent is to be granted to, the Purchaser after the Completion Date, but any payment (whether by way of deposit, pre-payment or otherwise) in respect of the price or cost of it has been paid by the Vendor prior to the Completion Date, the Purchaser shall pay a sum equal to the amount of that payment (excluding any amount in respect of VAT) to the Vendor at Completion or immediately following any date, if later, upon which the Vendor shall produce to the Purchaser reasonable evidence of any amount so payable and the calculation thereof.

Relevant Permits

1.19 To the extent that any Relevant Permits (including Environmental Permits) are capable of assignment and/or transfer, the Vendor shall assign and/or transfer such Relevant Permits to the Purchaser on or immediately following Completion or, in the case of a Key Permit, on Completion. To the extent that any Relevant Permit cannot be assigned or transferred to the Purchaser, the Purchaser shall use all reasonable endeavours to obtain its own Relevant Permit as soon as reasonably practicable²⁶.

1.20 In relation to any application to a Governmental Agency by, or on behalf of, the Vendor or the Purchaser in relation to the transfer and/or assignment of a Relevant Permit, each Party shall use reasonable endeavours to provide promptly to the other Party such information and assistance as that other Party shall reasonably request, provided that the Purchaser shall pay the Vendor's reasonable costs and expenses of providing any information or assistance which is required later than [six] months after Completion.

²⁶ Explanatory Note: the parties will need to consider whether the provisions relating to Relevant Permits need to be amended and / or supplemented to reflect the requirements to which the full suite of permits give rise. For example there may be Environmental Permits which it is not appropriate or possible to transfer - e.g. which relate only to the construction phase and not the operational phase, or which relate to both generation and transmission. Also there is likely to be a range of different permit transfer procedures applying across the various consents which are in place. The parties may find it helpful to produce a schedule detailing the relevant permits and transfer procedures.

Appendix 5 - Assumed and Excluded Liabilities

No deemed assumption of Excluded Liabilities

1.1 Nothing in this Agreement shall transfer or be deemed to transfer to the Purchaser or constitute or be deemed to constitute an acceptance or assumption by the Purchaser of any of the Excluded Liabilities or any other liability or obligation of the Vendor, whether in relation to the Business or otherwise, save as expressly set out in this Agreement or in any document in the agreed terms.

Assumption of Assumed Liabilities

1.2 The Purchaser shall with effect from the date of this Agreement assume and duly and properly perform, pay and discharge and indemnify the Vendor against all Assumed Liabilities.

Assumed Liabilities definition

1.3 "Assumed Liabilities" for the purposes of this Agreement means (and each is an "Assumed Liability"), subject to Clauses [X]²⁷ (Third Party Consents for Transfer of Assets and Contracts) and [1.4] (Reservation of Purchaser's rights), all obligations and liabilities of the Vendor under the Contracts or in relation to the Assets arising or falling due for performance on or after the date of this Agreement and specifically excluding any Excluded Liabilities as defined below.

Reservation of Purchaser's rights

1.4 Notwithstanding Clauses [1.1] (No deemed assumption of Excluded Liabilities) and [1.3] (Assumed Liabilities definition):

- 1.4.1 the assumption by the Purchaser of the Assumed Liabilities by means of this Agreement shall be without prejudice to any rights which the Purchaser may have against the Vendor under this Agreement; and
- 1.4.2 the Assumed Liabilities shall not include any liability or obligation of the Vendor arising under this Agreement.

Excluded Liabilities definition

1.5 "Excluded Liabilities" for the purposes of this agreement means all liabilities other than the Assumed Liabilities including, without limitation:

- 1.5.1 any liability or obligation of the Vendor to the extent it relates to the Excluded Assets or the Excluded Contracts;
- 1.5.2 any unknown or contingent creditors which are not recorded in the accounting records of the Business at the date of this Agreement;
- 1.5.3 any liability or obligation of the Vendor which arises prior to the date of this Agreement in respect of loss of profit, loss of revenue, interruption to any business or consequential or indirect loss of the Vendor;
- 1.5.4 any liability of the Vendor to the extent that the Vendor is entitled to be indemnified therefor under a policy of insurance maintained by it prior to the date of this Agreement; and
- 1.5.5 any liability for Taxation relating to the Business or the Assets for which

²⁷ See Appendix 4.

the Vendor is or will become liable whether or not such liability has arisen or will have arisen at the date of this Agreement.

Notification of claims relating to Assumed Liabilities

1.6 The Vendor shall immediately notify the Purchaser if any action, claim or demand is brought or threatened against the Vendor in respect of any Assumed Liability and the Purchaser shall have the option to assume the defence of any such matter. If the Purchaser declines to assume such defence, it shall be liable to the Vendor for all reasonable costs (including legal fees) subsequently incurred by the Vendor in connection with such defence and the Vendor shall be entitled to conduct such defence in such manner as it shall deem appropriate provided that the Vendor shall not settle the action, claim or demand without the consent of the Purchaser (such consent not to be unreasonably withheld or delayed).

Indemnity for Excluded Liabilities

1.7 The Vendor shall continue to be responsible for and shall promptly discharge all debts, liabilities and obligations in connection with the Business not expressly assumed by the Purchaser pursuant to this Agreement (whether or not assumed by the Purchaser by operation of law) and shall indemnify the Purchaser against all Losses in respect of all such debts, liabilities and obligations.

Decommissioning and Environmental Matters

1.8 Without prejudice to Clauses [1.2] (Assumption of Assumed Liabilities) and [1.3] (Assumed Liabilities definition), the Parties agree and acknowledge that all past, present and future liabilities and obligations of the Vendor to any third party or Governmental Agency in relation to or arising from Decommissioning shall be assumed by the Purchaser in their entirety and the allocation of such liabilities and obligations under this Agreement is conclusive and the Purchaser shall discharge its responsibility and liability in relation thereto.

1.9 Without prejudice to Clauses [1.2] (Assumption of Assumed Liabilities), [1.3] (Assumed Liabilities definition) and [1.8], the Parties agree and acknowledge that all past, present and future liabilities and obligations to any third party or Governmental Agency in relation to Environmental Matters:

- 1.9.1 shall be retained by the Vendor to the extent that such Environmental Matters relate to any act or omission prior to the date of this Agreement, and the Vendor shall discharge its responsibility and liability in relation thereto; and
- 1.9.2 shall be assumed by the Purchaser to the extent that such Environmental Matters relate to any act or omission following the date of this Agreement, and the Purchaser shall discharge its responsibility and liability in relation thereto.

1.10 Save in respect of any breach by the Vendor of the Environmental Warranties, neither Party shall bring any claim against the other Party (nor apply to join the other Party into proceedings commenced against the first mentioned Party) in respect of Decommissioning or any Environmental Matters for which the first mentioned Party is responsible pursuant to Clause [1.8] or [1.9].

1.11 Save to the extent that such Losses are recoverable by the Purchaser as a result of any breach by the Vendor of the Environmental Warranties, each Party shall indemnify and keep indemnified the other Party against any Losses suffered or incurred by the other Party after the date of this Agreement in relation to or arising from Decommissioning or any Environmental Matters for which the first mentioned Party is responsible pursuant to Clause [1.8] or [1.9].

1.12 In the event that any Governmental Agency seeks to impose responsibility or liability other than in accordance with the allocation of liabilities and obligations under

Clauses [1.8] to [1.11], the Parties shall communicate and confirm their agreement as to such allocation in relation to Decommissioning or any Environmental Matters to the Governmental Agency and either Party shall be entitled to produce a copy of this Agreement to such Governmental Agency notwithstanding any provisions in the rest of this Agreement relating to confidentiality.

Tax filings

1.13 The parties shall as soon as possible after Completion jointly elect by notice pursuant to section 178(5) CTA 2009, and make all necessary filings to the Inspector of Taxes as shall be required, in order to establish that the consideration for the transfer of that part of the Business Intellectual Property Rights and Business Records which comprises know-how (as that term is defined in section 176(1) CTA 2009) will not be treated for tax purposes as a payment for goodwill.

Appendix 6 - Sites and Property Contracts

1. Ancillary Property Contracts

1.1 The Vendor shall use its reasonable endeavours to obtain any Third Party Consent necessary for the assignment or novation or re-grant of the Ancillary Property Contracts to the Purchaser as soon as reasonably practicable.

1.2 If the Third Party Consent referred to in paragraph [1.1] above has not been obtained by the Completion Date then until such time as the Third Party Consent has been obtained the Vendor shall be deemed to hold the benefit of each applicable Ancillary Property Contract on trust for the Purchaser and the Purchaser shall be entitled to the use and enjoyment of the Ancillary Property Contracts as against the Vendor and to receive the income therefrom (if any) to the extent that the Vendor is not constrained by operation of law or any third party from granting such use or enjoyment or the right to receive income to the Purchaser, subject always to the Purchaser complying with the Vendor's obligations under the Ancillary Property Contracts and indemnifying the Vendor from and against any Losses which may be suffered or incurred by the Vendor as a result of a claim by a party to the Ancillary Property Contracts based on any failure by the Purchaser to comply with the aforementioned obligations.

1.3 If the Third Party Consent referred to in paragraph [1.2] above has not been obtained and the Vendor is constrained by operation of law or any third party from holding the benefit of any applicable Ancillary Property Contract on trust for the Purchaser as detailed in paragraph [1.2] above then, until such time as the Third Party Consent has been obtained the Vendor shall nevertheless be deemed to hold the benefit of the applicable Ancillary Property Contracts on trust for the Purchaser and the Purchaser shall be entitled to the use and enjoyment of the Ancillary Property Contract as against the Vendor and to receive the income therefrom (if any), subject always to the Purchaser complying with the Vendor's obligations under the Ancillary Property Contract and indemnifying the Vendor from and against any Losses which may be suffered or incurred by the Vendor as a result of a claim by a party to the Ancillary Property Contract based on any failure of the Purchaser to comply with the aforementioned obligations and subject also to the Vendor having no liability to the Purchaser in respect of any breach of the Ancillary Property Contract by virtue of the trust arrangement and the Purchaser indemnifying the Vendor from and against any Losses which may be suffered or incurred by the Vendor as a result of any claim by a party to the Ancillary Property Contract based on the trust arrangement.

1.3 The provisions of paragraph 2 of this Schedule [X](Sites and Property Contracts) shall apply to the obtaining of any Third Party Consent and completion of the assignment transfer or novation of the Ancillary Property Contract as if a Third Party Consent was a Relevant Consent and the Ancillary Property Contract were a Lease.

1.4 The assignment or transfer of any Ancillary Property Contract shall be:

1.4.1 [in the form set out in Schedule [X] (or otherwise) on terms to be agreed between Parties (acting reasonably and without delay)]; and

1.4.2 prepared and executed in duplicate, the duplicate to be retained by the Vendor.

1.5 The novation of any Ancillary Property Contract shall be:

1.5.1 [in the form set out in Schedule [X] (or otherwise) on terms to be agreed between Parties (acting reasonably and without delay) and by the relevant third party who will be a party to the deed of novation)]; and

1.5.2 prepared and executed in duplicate, the duplicate to be retained by the Vendor.

1.6 [Other]

2. ASSIGNMENT OR TRANSFER OF THE LEASES

2.1 Interpretation

The definitions and rules of interpretation in this paragraph apply in this Schedule [X](Sites and Property Contracts).

Landlord: the person or persons from time to time entitled to the reversion (whether immediate or not) expectant upon the termination of any Lease.

Lease Transfer Date: the day which is 10 Business Days after the date of the Relevant Consent granted in respect of the assignment or transfer of the Lease in accordance with this Schedule [X](Sites and Property Contracts).

Relevant Consent: the consent of the Landlord authorising an assignment or transfer of the Lease to the Purchaser in accordance with and pursuant to the terms of the Lease, such consent being evidenced in a written, formal licence to assign (where so required by the Landlord), dated signed or executed by or on behalf of all of the parties to it.

Part 1 Conditions: the conditions in Part 1 of the Standard Commercial Property Conditions (Second Edition) and Condition means any one of them.

Part 2 Conditions: the conditions in Part 2 of the Standard Commercial Property Conditions (Second Edition).

2.2 Standard Commercial Property Conditions

2.2.1 The Part 1 Conditions are incorporated in this agreement so far as they:

- (A) apply to the assignment or transfer of the Leases only
- (B) apply to a sale by private treaty;
- (C) are applicable to leasehold land;
- (D) are not inconsistent with the other Clauses in this agreement or Clauses in this Schedule [X](Sites and Property Contracts); and
- (E) have not been modified by the other Clauses in this agreement or Clauses in this Schedule [X](Sites and Property Contracts).

2.2.2 The Part 2 Conditions are not incorporated into this Schedule [X](Sites and Property Contracts).

2.2.3 The following Conditions shall not apply:

- (A) Condition 1.1.4(a);
- (B) Condition 2;
- (C) Conditions 3.1, 3.2.1 and 3.3;
- (D) Conditions 6.1, 6.2, 6.3, 6.6.2, 6.6.3 and 6.6.4;
- (E) Conditions 7.1.2 and 7.1.3;
- (F) Condition 10.3; and
- (G) Condition 11.

2.2.4 The Conditions shall be amended as follows:

- (A) the definition of "completion date" in Condition 1.1.1(d) shall be construed as a reference to the Lease Transfer Date.

2.3 Vacant Possession and Title Guarantee

2.3.1 The Vendor shall:

- (A) assign or procure the assignment of the Lease to the Purchaser; or
- (B) transfer or procure the transfer of the Lease to the Purchaser,

on the Lease Transfer Date with Full Title Guarantee and with vacant possession save for any Assets.

2.4 Matters affecting the Lease

2.4.1 The Purchaser accepts the Vendor's title to the Lease without any further enquiry or requisition.

2.4.2 The Lease is to be assigned free from Encumbrances other than:

- (A) any fully and fairly disclosed matters, except for financial charges;
- (B) any matters that the Vendor does not, and could not reasonably, know about;
- (C) matters discoverable by inspection of the Site;
- (D) matters disclosed, or which would have been disclosed by searches and enquiries which a reasonably prudent assignee would ordinarily make before agreeing to acquire an interest such as the Lease or Licence; and
- (E) unregistered interests of the kind referred to in Schedule 1 or Schedule 3 of the Land Registration Act 2002 other than those of which the Vendor is aware (in which case the Lease shall be assigned subject to such encumbrances only to the extent fully and fairly disclosed),

and the Purchaser accepts all such matters without any further enquiry or requisition.

2.5 Assignment or transfer

2.5.1 The Vendor shall use reasonable endeavours to:

- (A) assign or procure the assignment of the Lease to the Purchaser; or
- (B) transfer or procure the transfer of the Lease to the Purchaser.

[No purchase price or deposit is payable for the assignment of the Lease.]

2.5.2 Any assignment of a Lease shall be:

- (A) [in the form set out in Schedule [X] (or otherwise) on terms to be agreed between Parties (acting reasonably and without delay)]; and
- (B) prepared and executed in duplicate, the duplicate to be retained by the Vendor.

2.5.3 Any transfer of a Lease shall be:

- (A) [in the form set out in Schedule [X] (or otherwise) on terms to be agreed between Parties (acting reasonably and without delay)]; and
- (B) prepared and executed in duplicate, the duplicate to be retained by the Vendor.

2.6 Completion

Completion of the assignment or transfer of the Lease shall take place on the Lease Transfer Date.

2.7 Landlord's Consent

2.7.1 Completion of the assignment or transfer of the Lease is conditional on

every Relevant Consent required under the Lease.

- 2.7.2 The Vendor shall apply for and use all reasonable endeavours to obtain every Relevant Consent necessary for the assignment or transfer of the Lease.
- 2.7.3 The Vendor shall pay all costs associated with obtaining, or seeking to obtain, each Relevant Consent.
- 2.7.4 The Purchaser shall with all due speed:
 - (A) supply all information, accounts and references as the Landlord may be lawfully entitled to require in connection with an application for or consideration of any Relevant Consent;
 - (B) supply, procure or enter into any guarantees, rental or other deposits, direct covenants or other security for the performance of the tenant or licensee's covenants in the Lease as may be lawfully required by the Landlord; and
 - (C) execute the documents containing a Relevant Consent and execute or procure the execution of the documents (if any) required to be entered into pursuant to this Schedule [X](Sites and Property Contracts) each in the form that the Landlord shall be lawfully entitled to require. The Purchaser shall return all such documents duly executed within [10] Business Days after each engrossment has been submitted to it.

Appendix 7 – Completion Obligations

Completion of Sale and Purchase

Completion Date

1. Completion shall take place immediately following the execution of this agreement.

Vendor's Obligations

2. At Completion, the Vendor shall deliver or cause to be delivered to the Purchaser the items set out in Part A of Schedule [X] (Vendor's Obligations)].

Purchaser's Obligations

3. At Completion:
 - 3.1 the Purchaser shall deliver to the Vendor, the items set out in [Part B of Schedule 10 (Purchaser's Obligations)]; and
 - 3.2 the Purchaser shall pay by electronic transfer to the account of the Vendor (details of which shall be provided in writing to the Purchaser no later than [five]Business Days before the date of Completion) the [Final Transfer Value]/[Initial Purchase Price]²⁸ in accordance with Clause [X] (Sale and Purchase)²⁹ and receipt of such sum shall constitute a valid discharge of the Purchaser's obligations under Clause [X].

COMPLETION OBLIGATIONS – EXAMPLE SCHEDULE

PART A VENDOR'S OBLIGATIONS

1. A copy of the minutes of a meeting of the directors of the Vendor authorising the Vendor to enter into and perform its obligations under this Agreement, certified to be a true and complete copy by a director or the secretary of the Vendor;
2. Evidence, to the Purchaser's reasonable satisfaction, that the Offshore Transmission System has been completed and commissioned;
3. Evidence, to the Purchaser's reasonable satisfaction, that all necessary agreements under the CUSC in relation to the Offshore Transmission System are in full force and effect;
4. [Such documents as the Purchaser may reasonably require to complete the sale and purchase of the Assets including, without limitation, the forms of conveyance, transfer and/or assignment specified in the following provisions of this Schedule;]³⁰
5. All deeds and documents of title (if any) relating to any of the Assets and any waivers, consents or other documents required to vest in the Purchaser the full legal and beneficial ownership of the Assets in accordance with Clause [x] (Sale and Purchase)³¹;
6. Duly executed assignments, novations or consents in respect of all of the Key Contracts, Key Transferable Permits and Key Transferable Site Consents in the agreed

²⁸ It is intended that Ofgem will finalise the assessment of costs and determine the Final Transfer Value prior to Licence grant, and Ofgem expects that draft Transfer Agreements refer to the Final Transfer Value. The alternative "Initial Purchase Price" wording is provided as a reference in the event that deferred consideration is payable.

²⁹ See Appendix 2.

³⁰ Explanatory note: to be amended on a project-specific basis.

³¹ See Appendix 2.

terms and all forms necessary to record the change of ownership;

7. Duly executed assignments of each of the Business Intellectual Property Rights in the agreed terms and all forms necessary to record the change of ownership;
8. Duly executed assignments, novations, consents or other documents in respect of all of the Property Contracts in the agreed terms and all forms necessary to record the change of ownership;
9. [All licences, consents, permits and authorisations obtained by or issued to the Vendor in respect of the Business;]
10. Evidence, to the Purchaser's reasonable satisfaction, that the Vendor has satisfied its obligations relating to the Offshore Transmission System under the Construction Agreement entered into under the CUSC;
11. Duly executed originals of each of the Contracts;
12. The documents which the Purchaser may reasonably require to vest title in each of the Sites into the name of the Purchaser or in the name of such other person as the Purchaser may direct including in respect of the Sites written evidence, in a form reasonably satisfactory to the Purchaser, of the consent of all reversioners to the assignment contemplated by this Agreement;
13. Possession of each of the Sites and of all other Assets agreed to be sold in accordance with this Agreement;
14. The Business Records duly completed and up to date in all respects but so that, to the extent that the Vendor may be required by law to retain any of them, the Vendor may deliver copies of the appropriate documents to the Purchaser;
15. Any material books of account or references of customers and/or suppliers and other material records and all insurance policies in respect of the Business; and
16. [Others].

PART B PURCHASER'S OBLIGATIONS

1. Evidence that the Authority has issued, and not revoked, an Offshore Transmission Licence to the Purchaser in respect of the Sites in accordance with the provisions of the Electricity Act 1989 and the Tender Regulations.
2. A copy of the minutes of a meeting of the directors of the Purchaser authorising the Purchaser to enter into and perform its obligation under this Agreement, certified to be a true and complete copy by a director or the secretary of the Purchaser;
3. A copy of all interface and other agreements entered into by the Purchaser as required by STC or such other evidence to the Vendor's reasonable satisfaction that such agreements are in full force and effect;
4. A copy of the equivalent or replacement for each Key Non-Transferable Permit and each Key Non-Transferable Site Consent in the name of the Purchaser; and
5. [Others].

Appendix 8 – Post Completion Activities

POST COMPLETION ACTIVITIES

Access to information

1.1 For a period of [2] years from Completion and except to the extent that it may infringe competition, data-protection or other relevant laws or duties of confidentiality owed to third parties:

- 1.1.1 the Purchaser will make the Business Records available for inspection by representatives of the Vendor at all reasonable times during business hours on reasonable advance notice being given. The Purchaser will allow the Vendor's representatives to take copies, at the Vendor's expense, of any of the Business Records reasonably required by them; and
- 1.1.2 the Vendor will make available any books and records not delivered to the Purchaser which contain information which should be provided to the Purchaser or which is required for the purpose of the Business or any tax or other return in connection with it for inspection by representatives of the Purchaser during business hours on reasonable advance notice being given. The Vendor will allow the Purchaser's representatives to take copies, at the Purchaser's expense, of any of those books and records reasonably required by them. The directors, employees, auditors and other professional advisers of the Vendor shall be instructed to give promptly to the Purchaser and any persons authorised by it all information that it may reasonably require.

1.2 To the extent that inspection or copies of Business Records or books and records are required for the purpose of any tax or other similar return the duration of Clause [1.1] may be extended to cover a period of seven years from Completion provided and in a manner that such arrangements would not infringe any competition, data-protection or other relevant laws or duties of confidentiality owed to third parties.

Insurance

1.3 If, at any time after Completion, the Vendor receives any insurance or other monies from a third party in respect of the Business (other than in respect of an Excluded Liability), then the Vendor shall pay to the Purchaser as soon as reasonably practicable the amount recovered less an amount equal to any liability of the Vendor to Taxation which would not have arisen but for the receipt of such monies.

1.4 If, at any time after Completion, the Purchaser receives any insurance or other monies from a third party in respect of an Excluded Liability then the Purchaser shall pay to the Vendor as soon as reasonably practicable the amount recovered less an amount equal to any liability of the Purchaser to Taxation which would not have arisen but for the receipt of such monies.

Correspondence

1.5 All notices, correspondence, information, orders or enquiries relating to the Business or any of the Business Assets which are received by the Vendor on or after Completion shall immediately be forwarded to the Purchaser.

Notification to Secretary of State

1.6 The Purchaser shall, within [X] Business Days following the Completion Date, deliver to the Secretary of State a notice in accordance with section 112 of the Energy Act 2004.

Appendix 9 – Warranty Provisions

WARRANTIES – EXAMPLE CLAUSE

Power and Authority

1.1 Each Party warrants to each of the other Parties that it has full power and authority to enter into and perform its obligations under this Agreement and that this Agreement contains valid and binding obligations on it in accordance with its terms.

Vendor's warranties

1.2 Subject to the limitations in Schedule [X] (Limitations on Liability), the Vendor warrants and represents to the Purchaser in the terms of the Warranties.

1.3 The only Warranties given:

1.3.1 in respect of Environmental Matters are the Environmental Warranties and each of the other Warranties shall be deemed not to be given in relation to Environmental Matters; and

1.3.2 in respect of Taxation are the Tax Warranties and each of the other Warranties shall be deemed not to be given in relation to Taxation.

1.4 Subject to the limitations in Schedule [X] (Limitations on Liability), the Vendor warrants and represents to the Purchaser that each of the Warranties is true, accurate and not misleading. Subject as specifically otherwise provided in this Agreement, the Warranties shall remain in full force and effect notwithstanding Completion.

1.5 Each of the Warranties shall be construed as a separate warranty and except where this Agreement expressly provides otherwise, each Warranty is not limited by the other provisions of this Agreement, including the other Warranties.

Vendor's Knowledge

1.6 Where any of the Warranties is qualified by the expression "to the best of the knowledge, information and belief of the Vendor" or "so far as the Vendor is aware" or any similar expression, that Warranty shall be deemed to be given only on the basis of matters within the actual knowledge of [X],[X] and [X]³².

1.7 The Vendor shall as soon as reasonably practicable disclose to the Purchaser any matter or thing which arises or of which it may become aware after Completion which is inconsistent with or a breach of any of the Warranties or which might render any of the Warranties untrue.

Purchaser's reliance

1.8 The Vendor acknowledges and accepts that the Purchaser is entering into this Agreement in reliance upon the Warranties.

³² Explanatory Note: identity of specific individuals who are principally involved in the Offshore Transmission System and/or the Business to be included.

WARRANTIES – EXAMPLE SCHEDULE

SCHEDULE [X]

WARRANTIES³³

1. ASSETS

1.1 Sole assets

No assets are used or employed in relation to the Business other than the Assets and the Excluded Assets; and none of the Excluded Assets individually or collectively are material to the operation of the Business.

1.2 Title to Assets

Each of the Assets (other than the Sites and the Intellectual Property Rights relevant to an IP Licence) is the absolute property of the Vendor free from any Encumbrance and is not the subject of any leasing, hiring or hire purchase agreement or agreement for payment on deferred terms or assignment or factoring or other similar agreement, and each such Asset is in the exclusive possession or under the control of the Vendor.

1.3 Condition of assets³⁴

1.3.1 [];

1.3.2 [];

1.3.3 [].

1.4 Maintenance of assets

The Offshore Transmission System has been operated and maintained, and the records relating to the Offshore Transmission System have been maintained, in each case in all material respects in accordance with Good Industry Practice³⁵.

1.5 Past performance of the assets and fitness for purpose

Save as Disclosed, since commissioning:

1.5.1 the Offshore Transmission System has not suffered any breakdown or failure which has caused material disruption to the transmission of electricity;

1.5.2 so far as the Vendor is aware, no material defect or damage has been discovered in relation to the Offshore Transmission System; and

1.5.3 so far as the Vendor is aware, the Offshore Transmission System has not suffered any material adverse change in its performance³⁶.

2. GRANTS AND SUBSIDIES

2.1 None of the Assets has been acquired with the assistance of any governmental, local governmental, quasi governmental or regulatory grant, subsidy or aid or is held on

³³ Explanatory note: this Schedule sets out warranties which might be applicable in respect of all projects and others which would need to be amended on a project-specific basis. This list of warranties is not exhaustive or prescriptive.

³⁴ Explanatory note: this warranty is only relevant if the design and/or construction contract(s) are not assigned to the Purchaser. If such contracts are not assigned, the Vendor should make all the same warranties to the Purchaser in relation to the condition of the assets as it itself receives from its contractors.

³⁵ Explanatory note: this warranty is only relevant if the Offshore Transmission System or any part of it has already been operated and maintained by the Vendor prior to Completion.

³⁶ Explanatory note: this warranty is only relevant if the Offshore Transmission System or any part of it is transferring to the Purchaser having already been operated and maintained by the Vendor for a period prior to Completion.

terms that any such grant, subsidy or aid is due to be repaid or reimbursed in any circumstances.

- 2.2 The Vendor has not done or agreed to do anything as a result of which:
- 2.2.1 any investment grant or other grant or any subsidy received by the Vendor in relation to the Business is or may be liable to be refunded wholly or partly; or
 - 2.2.2 any application made by the Vendor in relation to the Business for such a grant or subsidy shall or may be refused wholly or partly,

and neither the signature nor the performance of this Agreement shall have any such result.

3. LICENCES AND APPLICABLE LEGISLATION

3.1 All Relevant Permits have been unconditionally obtained in writing and are in full force and effect.

3.2 The Vendor has complied with the requirements of all Relevant Permits.

3.3 So far as the Vendor is aware, there are no circumstances which could (a) require any further regulatory consents, licences, authorisations or permits to be obtained in connection with the Business; (b) lead to the revocation, cancellation, suspension, modification, variation or alteration of any Relevant Permits; or (c) necessitate any works or expenditure (other than routine maintenance) in order to continue to comply with such Relevant Permits.

4. COMMERCIAL ARRANGEMENTS AND CONDUCT

4.1 Disclosure

Up-to-date copies of each of the Key Contracts, Key Permits and Key Site Consents have been disclosed or made available to the Purchaser (including any amendments, supplements and/or variations thereto).

4.2 Key Contracts

- 4.2.1 Complete and accurate details of all Contracts which are necessary to carry on the Business in accordance with Good Industry Practice and are material to the Business are set out in Schedule [X] (Key Contracts and Key Permits).
- 4.2.2 The terms of each Key Contract [(including but not limited to design, construction, testing, commissioning and operation and maintenance)]³⁷ have been complied with by the Vendor and, so far as the Vendor is aware, the other parties to the Key Contracts (in each case) in all material respects.
- 4.2.3 So far as the Vendor is aware, the Key Contracts are valid and binding and no notice of termination of any Key Contract has been given.

4.3 Effect of Agreement on other agreements

- 4.3.1 The benefit of each of the Key Contracts is capable of being assigned by the Vendor to the Purchaser without the prior consent of any other party to any such Contract or of any third party.
- 4.3.2 There is no agreement or arrangement between the Vendor in relation to the Business and any other person which will or may be terminated as a

³⁷ Explanatory note: the contents of these brackets will depend on the stage the particular project has reached at the time of Completion.

result of this Agreement or which will be affected materially by it or which includes any provision in respect of a change in the control or management of the Business or any of the Assets.

4.4 Material information

- 4.4.1 All information relating to the Business and the Assets that is in the possession of or under the control of the Vendor (including the current and proposed operations, programmes, budgets, designs, drawings, studies and test results in respect of the Business or the Assets) has been disclosed to the Purchaser in writing.
- 4.4.2 So far as the Vendor is aware, the Vendor has received and remains in possession of all information and data to which the Vendor is entitled.
- 4.4.3 No information known to the Vendor has not been supplied or made available to the Purchaser that would render misleading to a material extent any information or document that has been so supplied or made available.

5. LITIGATION, DEFAULTS AND INSURANCE

5.1 Legal proceedings

Apart from normal debt collection, the Vendor is not engaged, or proposing to engage, in any litigation, arbitration, prosecution or other legal proceedings in relation to the Business, and, so far as the Vendor is aware, there are no claims or actions (whether criminal or civil) in progress, outstanding, pending or threatened by or against the Vendor in relation to the Business.

5.2 Unlawful acts by Vendor

So far as the Vendor is aware, neither the Vendor nor any of its officers or employees has by any act or default, in relation to the Business committed:

- 5.2.1 any criminal or unlawful act, other than minor road traffic offences; or
- 5.2.2 any breach of contract or statutory duty or any tortious act which could entitle any third party to terminate any of the Contracts or could lead to a claim against the Vendor or the Business for damages, compensation or an injunction.

5.3 Official Investigations

No governmental or official investigation or inquiry concerning the Vendor or the Business is in progress or threatened.

6. BUSINESS RECORDS

6.1 All records and information belonging to the Vendor in relation to the Business, including all Business Records, (whether or not held in written form) are in its exclusive possession, under its direct control and subject to unrestricted access by it.

6.2 All the Business Records are true and complete in all material respects and, where applicable, are written up to date.

7. ETHICAL ISSUES

7.1 Neither the Vendor nor any of its officers or employees who are employed in or provide services to the Business have either in private business dealings or in dealings with the public / government sector directly or indirectly given, offered or received or agreed (either themselves or in agreement with others) to offer, give or receive any bribe or committed or attempted to commit (either themselves or in agreement with others) any other corrupt act whether in the United Kingdom or elsewhere in the world.

7.2 Neither the Vendor nor any of its officers or employees who are employed in or

provide services to the Business have, in relation to the Business or the affairs of the customers or suppliers or contacts of the Business, whether acting as principal or agent, received, agreed or attempted to receive the proceeds of or profits from a crime or agreed to assist any person to retain the benefits of a crime.

8. ENVIRONMENTAL MATTERS

8.1 The Vendor is conducting and has conducted the Business in compliance with Environmental Law.

8.2 The Vendor in relation to the Business has obtained all Environmental Permits (all of which are valid and subsisting) and the Vendor complies and has complied with all Environmental Permits in all material respects.

8.3 The Vendor in relation to the Business has not received any written notice of any regulatory or administrative action, claim, investigation or other proceeding or suit alleging any breach or liability under any Environmental Permit and/or Environmental Law.

9. INTELLECTUAL PROPERTY RIGHTS

9.1 Interests

9.1.1 Complete and accurate details are set out in Schedule [X] (Intellectual Property) of:

- (A) all Business Intellectual Property Rights that are Registered Intellectual Property Rights;
- (B) all other Business Intellectual Property Rights that are unregistered Intellectual Property Rights and are material to the Business; and
- (C) all written licences granted by the Vendor to third parties in respect of Business Intellectual Property Rights.

9.1.2 The Vendor is the sole legal and beneficial owner of all Business Intellectual Property Rights, and the sole registered proprietor of all Business Intellectual Property Rights that are Registered Intellectual Property Rights;

9.1.3 All application and renewal fees have been paid for the prosecution and maintenance of all Business Intellectual Property Rights that are Registered Intellectual Property Rights;

9.1.4 So far as the Vendor is aware, there are and have been no claims, challenges, disputes or proceedings, pending or threatened, in relation to the ownership or validity of any Business Intellectual Property Rights that are Registered Intellectual Property Rights;

9.1.5 So far as the Vendor is aware, all Intellectual Property Rights required to conduct the Business at the date of Completion are owned by or licensed to the Vendor.

9.2 Infringement and Breach

9.2.1 So far as the Vendor is aware, no person has infringed, is infringing or is threatening to infringe and nothing has been done or is being done and no circumstances exist which give or are likely to give rise to infringement of, any Business Intellectual Property Right.

9.2.2 So far as the Vendor is aware, the Vendor does not infringe the Intellectual Property Rights of any third party as a result of its use of the Business Intellectual Property Rights.

9.3 Confidentiality

No confidential information relating to the Business has been disclosed or permitted to be disclosed to any person (except in the ordinary and normal course of business and under an obligation of confidence) and the Vendor has not undertaken or arranged to disclose to any person any confidential information relating to the Business.

10. INFORMATION TECHNOLOGY³⁸

10.1 The Vendor holds all the rights necessary to use the Information Technology Systems in the manner in which they are used by the Business.

10.2 So far as the Vendor is aware, use of the Information Technology Systems is and has not been in breach of any obligations to any third party and has not infringed and does not infringe the Intellectual Property Rights of any third party.

10.3 Complete and accurate details of all Information Technology Systems are set out in Part A of Schedule [X] (Information Technology) [or have been Disclosed].

10.4 All Information Technology Systems are in the exclusive possession and control of the Vendor.

10.5 The Information Technology Systems:

10.5.1 are in good working order;

10.5.2 have appropriate security, and hardware and software support and maintenance, to minimise the risk of any error, breakdown, failure or security breach occurring;

10.5.3 are regularly maintained to minimise the effects of bugs, viruses, logic bombs, Trojan horses and other destructive programs or scripts; and

10.5.4 so far as the Vendor is aware, have not suffered any error, breakdown, failure or security breach in the last twelve months which has caused material disruption or damage to the Business;

10.6 Complete and accurate details of all Information Technology Agreements are set out in Part B of Schedule [X] (Information Technology) [or have been Disclosed] and no person is in material breach of any Information Technology Agreement;

10.7 So far as the Vendor is aware, the Information Technology Agreements are valid and binding and no notice of termination of any Information Technology Agreement has been given.

10.8 A copy of the disaster recovery plan in relation to the Business has been Disclosed and the Vendor has complied with that plan.

[Alternative warranty to paragraphs 8 and 9: No [Intellectual Property Rights][Information Technology Systems] are used or employed in relation to the Business or the Assets or are material to the operation of the Business or the Assets.]

11. INSURANCE

11.1 A summary detailing all policies of insurance of the Business for the current

³⁸ Explanatory note: the example clauses have been drafted on the basis that:

- (a) no databases are used by the Vendor in connection with the Business. The Developer should consider including applicable warranties in the transfer agreement if any databases are used in connection with the Business and are to be transferred to the Purchaser; and
- (b) no "personal data" (as defined in the Data Protection Act 1998) is processed in connection with the Business and so will not transfer to the Purchaser. The Developer should consider including applicable warranties relating to the Vendor's compliance with its data processing obligations as a "data controller" (as defined in the Data Protection Act 1998) if any personal data is processed in connection with the Business.

insurance year has been Disclosed.

11.2 In respect of the policies of insurance of the Business referred to in paragraph 10.1:

11.2.1 all premiums have been paid to date; and

11.2.2 all policies of insurance are in full force and effect.

11.3 There is no individual claim outstanding under any such policies of insurance where the amount outstanding exceeds £[X] and (so far as the Vendor is aware) no such claim is pending or threatened and (so far as the Vendor is aware) no circumstances exist which may lead to any such claim.

12. PROPERTY AND PROPERTY CONTRACTS

12.1 Particulars of Property Contracts

12.1.1 The particulars of the Property Contracts as set out Schedule [X] (Sites and Property Contracts) are true, complete and accurate.

12.1.2 The interest of the Vendor under the Property Contracts comprises the entirety of the Site³⁹.

12.2 Replies to Enquiries

All written replies given by or on behalf of the Vendor, in response to any written enquiries raised by or on behalf of the Purchaser in relation to the Site were complete and accurate at the date they were given, and would still be complete and accurate if the replies were instead being given on the date of this Agreement.

12.3 Title to Sites

12.3.1 The Vendor is solely legally and beneficially entitled to, and has good and marketable title to its interest under the Property Contracts, in each case free from Encumbrances.

12.3.2 The Vendor has in its possession and control and has disclosed to the Purchaser:

(A) copies of all the title deeds and documents necessary to prove good and marketable title to, its interest under the Property Contracts;

(B) satisfactory evidence of (as appropriate) each landlord, reversioner, grantor or licensor's title to the Property Contracts and all consents required under each Property Contract for its vesting in the Vendor; and

(C) copies of all collateral assurances, undertakings or concessions affecting any of the Property Contracts.

12.3.3 There are, appurtenant to the Site, the rights and easements necessary for its present or intended use and enjoyment in connection with the Business (without restriction as to time or otherwise).

12.3.4 The Vendor is in possession and actual occupation of the whole of the Site on an exclusive basis, and no right of occupation or enjoyment has been acquired or is in the course of being acquired by any third party.

³⁹ Explanatory note: to the extent that the Property Contracts are not all the real property used or occupied or necessary to be used or occupied by the Vendor in connection with the Business this will need to be disclosed. Additional completion deliverables may then be required.

12.4 Compliance with covenants affecting the Property Contracts

- 12.4.1 No covenants, conditions, restrictions, limitations and other matters affecting the Site are either of an unusual or onerous nature or prejudicially affect the present or intended use or occupation of the Site.
- 12.4.2 The landlord, licensor, grantor, covenantor, covenantee, tenant, licensee, or grantee (as the case may be) under any Property Contract has observed and performed in all material respects all covenants, restrictions, stipulations and other encumbrances relating to that Property Contract and there are no present or anticipated disputes relating to any such matters.
- 12.4.3 All material outgoings and payments of principal rents and other charges and expenses due under any Property Contract have been paid when due and none are disputed.
- 12.4.4 There are no current or anticipated circumstances which (with or without taking other action) would entitle any party to exercise a right of entry to, or take possession of all or any part of the Site, or to determine any of the Property Contracts.

12.5 Statutory obligations and requirements as to lawful use of the Sites

- 12.5.1 So far as the Vendor is aware, the use to which the Site is presently put is a lawful use.
- 12.5.2 So far as the Vendor is aware, the Vendor has complied in all material respects with all applicable statutory and bye-law requirements, and all regulations, rules and delegated legislation with which it is obliged to comply under the terms of the Property Contracts.
- 12.5.3 No notices or complaints have been issued or made by any competent authority or undertaking exercising statutory powers in relation to the Site and the Vendor is not aware of any matter which might reasonably be expected to lead to any such notice, complaint or requirement.

12.6 Claims and disputes

- 12.6.1 So far as the Vendor is aware, no action, claim, proceeding, demand, dispute or liability (contingent or otherwise) in respect of any of the Property Contracts is outstanding or anticipated.
- 12.6.2 So far as the Vendor is aware, no dispute with any adjoining or neighbouring owner with respect to real property adjoining or neighbouring the Site or with respect to any easement, right or means of access to any of the Site is existing.
- 12.6.3 The Vendor has had no occasion to make any claim or complaint in relation to any property neighbouring the Site or the use or occupation of that property.

12.7 Condition of the Sites

- 12.7.1 The Site is in good and substantial repair and fit for the purposes for which it is presently used or is intended to be used. There is no material defect in the construction or condition of the Site and no mining operations have been or are contemplated under it.
- 12.7.2 There has been and is no significant structural or other defect relating to the Site.
- 12.7.3 No deleterious building material or method of construction not in accordance with currently accepted good building practice has been used in the construction, alteration or repair of the Site.

13. EMPLOYEES

No entity currently employs or ever has employed any employee, or currently has in place or has ever had in place contracts for service or consultancy services with any individual or for the benefit of any individual, in each case wholly or mainly assigned to work in relation to the Business.

14. TAXATION MATTERS

14.1 General and compliance matters

HM Revenue and Customs has not agreed to operate any special arrangement (being an arrangement which is not based on a strict and detailed application of the relevant legislation whether expressly provided for in the relevant legislation or operated by way of extra statutory concession or otherwise) in relation to the Business.

14.2 VAT

- 13.4.1 The Vendor is a registered and taxable person in relation to the Business for the purposes of the VATA. The Vendor has complied with and observed in all respects the terms of such legislation and all regulations made or notices issued thereunder and has maintained and obtained full, complete, correct and up to date records, invoices and other documents (as the case may be) appropriate or requisite for the purposes thereof.
- 14.2.2 The Vendor:
 - (A) is not in arrears with any payment or returns or notifications under the VATA or any regulations made or notices issued thereunder or liable to any abnormal or non routine payment or any forfeiture or penalty or interest or surcharge provisions contained therein;
 - (B) has not received a notice under paragraph 2 of Schedule 6 to the VATA (valuation – special cases);
- 14.2.3 [No claims have been or could be made by the Vendor in relation to the Business under section 36 of the VATA or any regulations made thereunder (refund of tax in cases of bad debts).]
- 14.2.4 The Vendor is not contractually committed (contingently or otherwise) to receive any supply in respect of which, in accordance with Schedule 10 to the VATA, an election to waive exemption or a real estate election has been made, or an option to tax has been exercised.
- 14.2.5 The Vendor has disclosed in writing to the Purchaser details (including the total input tax on the capital item and the percentage of input tax claimed on the item in the first interval, both as defined in Part XV of the Value Added Tax Regulations 1995 SI 1995/2518 ("the VAT Regulations")) of all land and other capital items which are used in the course or furtherance of the Business to which Part XV of the VAT Regulations could apply. No such adjustment as is referred to in regulations 112 to 116 of the VAT Regulations [has been made or should have been made and no such adjustment] is likely to have to be made in respect of the current interval in relation to any such capital items.
- 14.2.6 The Vendor has in relation to the Business not made exempt supplies such or of such amount that it is unable or would be unable if not a member of the VAT group to obtain full credit for input tax paid or suffered by it.
- 14.2.7 The Vendor (or any of the Vendor's predecessors within the meaning of paragraph 5 (5A) Sch 4 VATA 1994) was or is entitled to credit for the whole or any part of the VAT on the supply, acquisition or importation of all of the Assets (VAT: deemed supplies).

OR

The Vendor has disclosed in writing to the Purchaser details of all the Assets in respect of the supply, acquisition or importation of which neither the Vendor (nor any of the Vendor's predecessors, within the meaning of paragraph 5 (5A) Schedule 4 VATA 1994) is or was entitled to credit for input tax.

14.3 Industrial Buildings and Capital Allowances

- 14.3.1 The Vendor warrants that it has not made, nor will make any capital allowance claims in respect of expenditure incurred on the Assets.
- 14.3.2 If the Vendor has made, or will make any capital allowances claims in respect of expenditure incurred on the Assets, the Vendor has disclosed in writing to the Purchaser details of the expenditure incurred and capital allowance claims made, if any, and if so the current tax written down value in respect of:
- (A) such parts of the Site as are leasehold, of all fixtures, within the meaning of Section 173(1) of the CAA, which are treated by virtue of Part 2, Chapter 14 of that Act as belonging to the Vendor and including a breakdown of which of those fixtures are "Integral Features" for the purpose of section 33(A)(5) of the CAA and which are not;
 - (B) such parts of the Site as are freehold, of all fixtures, as aforesaid, that are treated, as aforesaid, as belonging to a person other than the Vendor;
 - (C) such items of plant and machinery in relation to which it has claimed capital allowances on the basis that those items are "long life assets" within the meaning of section 91(1) CAA;
 - (D) such items of plant and machinery in relation to which it has claimed capital allowances on the basis that those items are not "long life assets" within the meaning of section 91(1) CAA; and
 - (E) such other items of plant and machinery expenditure in relation to which no capital allowances have been claimed by the Vendor.
- 14.3.3 The Vendor warrants that its qualifying expenditure on the items mentioned in paragraph 14.3.2 above is at least £[to be specified in each case].

14.4 Inheritance tax

- 14.4.1 None of the Assets is subject to an outstanding HM Revenue and Customs charge (as defined in Section 237 of the Inheritance Tax Act 1984).
- 14.4.2 No circumstances exist such that a power of sale could be exercised in relation to any of the Assets pursuant to section 212 of the Inheritance Tax Act 1984 (contingent liability of transferee for unpaid capital transfer tax or inheritance tax).

14.5 Stamp duty

All documents in the possession or under the control of the Vendor or to the production of which the Vendor is entitled which are necessary to establish the title of the Vendor to any of the Assets and which, in the United Kingdom or elsewhere, attract either stamp duty or require to be stamped with a particular stamp denoting that no duty is chargeable or that the document has been produced to the appropriate authority, have been properly stamped; and no such documents which are outside the United Kingdom would attract stamp duty if they were brought into the United Kingdom.

14.6 Intangibles

The Disclosure Letter sets out full particulars of all the intangible fixed assets of the Business to which Part 8 of the CTA 2009 applies.

15. PENSIONS

The Vendor has no obligation to contribute towards or otherwise provide any relevant benefits (as defined in section 393B of the Income Tax (Earnings and Pensions) Act 2003) for or in respect of any person in relation to the Business. Nor has the Vendor given any undertaking or assurance to provide or contribute towards any such benefits.

LIMITATIONS ON LIABILITY – EXAMPLE SCHEDULE

SCHEDULE [X]

LIMITATIONS ON LIABILITY

1. DISCLOSURE

The Vendor shall not be liable in respect of a Claim to the extent that the facts and circumstances giving rise to the Claim are fairly disclosed in the Disclosure Letter.

2. NOTIFICATION OF CLAIMS AND TIME LIMITS

2.1 The Vendor shall not be liable for any Common Claim unless the Purchaser gives to the Vendor written notice containing reasonable details of the Common Claim as far as is known to the Purchaser, on or before the date being [X] years from Completion.

2.2 The Vendor shall not be liable for any Tax Claim unless the Purchaser gives to the Vendor written notice containing reasonable details of the Tax Claim as far as it is known to the Purchaser, on or before the date being [X] years from Completion.

2.3 A Claim shall not be enforceable against the Vendor and shall be deemed to have been withdrawn unless legal proceedings in respect of such Claim are commenced (by being issued but not necessarily served) within [X] months of service of notice of the Claim on the Vendor pursuant to paragraphs [2.1] and/or [2.2] above.

3. MONETARY LIMITS

3.1 The liability of the Vendor in respect of the aggregate of all Claims shall not exceed £[total amount or value or proportion of consideration under this Agreement].

3.2 The Vendor shall have no liability in respect of any Claim unless the amount of the liability of the Vendor in respect of all Claims exceeds £[de minimis] in which case the Vendor shall be liable [only for the excess over £[de minimis]/for the full amount of the Claims not just the excess].

3.3 The Vendor shall have no liability in respect of any Claim unless the Claim (or the aggregate of a series of connected Claims or Claims arising out of similar facts or circumstances) exceeds £[individual de minimis] in which case the Vendor shall be liable [only for the excess over £[de minimis]/for the full amount of the Claims not just the excess].

3.4 Regardless of whether the Vendor's liability for a Claim is excluded pursuant to paragraph 3.3 of this Schedule, the full amount of the Claim shall be treated as a Claim for the purposes of calculating whether the threshold in paragraph 3.2 has been reached.

4. PURCHASER'S ACTIONS

4.1 The Vendor shall not be liable in respect of a Claim to the extent that the Claim would not have arisen but for an act or omission of the Purchaser after Completion or to the extent that the Claim would not have arisen but for a breach of this Agreement by the Purchaser.

4.2 The Vendor shall not be liable in respect of a Claim to the extent that the Claim would not have arisen but for an act, omission or transaction occurring before

Completion at the written direction of or with the prior written consent of the Purchaser.

5. CHANGES IN LAW, REGULATION AND PRACTICE

5.1 The Vendor shall not be liable in respect of a Claim to the extent that the Claim arises or is increased as a result of:

- 5.1.1 a change in law, administrative practice or published interpretation of the law after the date of this Agreement;
- 5.1.2 any change in generally accepted accounting practice after the date of this Agreement;
- 5.1.3 any change in the accounting policies or practice of the Purchaser or its Affiliates after the date of this Agreement; or
- 5.1.4 the passing of any legislation, or making of any subordinate legislation after the date of this Agreement.

6. INSURANCE

The Vendor shall not be liable in respect of a Claim to the extent that the Claim relates to any loss which is recoverable by the Purchaser (or any assignee or successor in title thereof) from its insurers or which would have been so recoverable if at all times following Completion there had been maintained valid and adequate insurance cover of a type, and affording the same degree of cover as that in force in relation to the Business or the Assets at the date of this Agreement.

7. SUMS RECOVERABLE FROM THIRD PARTIES

7.1 Where the Purchaser is entitled to recover from any person any sum in respect of any matter or event which gives rise to a Claim, the Purchaser shall use its reasonable endeavours to recover that sum and shall keep the Vendor informed of the conduct of such recovery. The Purchaser shall not be restricted from pursuing that or any other Claim in relation to the same subject matter against the Vendor.

7.2 Any sum recovered by the Purchaser before settlement or final determination of the Claim (less any costs and expenses reasonably incurred by the Purchaser in recovering the sum and any Taxation attributable to or suffered in respect of the sum recovered) will reduce the amount of the Claim by an equivalent amount.

7.3 If recovery is delayed until after the Claim has been satisfied by the Vendor, the Purchaser shall (subject to the remaining provisions of this paragraph) repay to the Vendor the amount so recovered (less any costs and expenses reasonably incurred by the Purchaser in recovering the sum and any Taxation attributable to or suffered in respect of the sum recovered).

7.4 If the amount so recovered exceeds the amount of the Claim satisfied by the Vendor the Purchaser shall be entitled to retain the excess.

8. ACTIONS BY THIRD PARTIES

8.1 If the Purchaser becomes aware of any claim action or demand made against it by a third party (a "Third Party Claim") which may give rise to a Claim:

- 8.1.1 the Purchaser shall, as soon as practicable, notify the Vendor giving reasonable details, so far as are known to the Purchaser, of the relevant facts and circumstances relating to the Third Party Claim; and
- 8.1.2 the Purchaser shall keep the Vendor reasonably informed of all material developments in relation to the Third Party Claim within its knowledge.

9. INFORMATION PROVIDED BY THE VENDOR

9.1 The Vendor expressly disclaims all liability and responsibility for any conclusion, opinion, forecast or evaluation contained within or derived or capable of being derived

from:

- 9.1.1 any investigation carried out or made by or on behalf of the Purchaser in the course of any due diligence or other enquiry prior to the Parties entering into this Agreement; or
- 9.1.2 any other data, document, record or information disclosed by the Vendor to the Purchaser.

10. MITIGATION

Nothing in this Schedule restricts or limits any general obligation at law of the Purchaser to mitigate any loss or damage which it may suffer or incur as a consequence of any breach of any Warranty.

11. INDIRECT AND CONSEQUENTIAL LOSS

The Vendor shall not be liable to the Purchaser for any indirect or consequential loss or punitive damages.

Appendix 10 – Tax

1 VAT AND CAPITAL ALLOWANCES

VAT

1.1 Where a supply for VAT purposes is made under or as contemplated by this Agreement, the recipient of the supply shall, in addition to the consideration otherwise given for such supply, pay an amount equal to the VAT (if any) which is properly chargeable in respect of such supply against the production of a valid VAT invoice.

1.2 Subject always to Clause [1.1], having seen a letter from HM Revenue and Customs to Ofgem dated [•] and on the basis of (1) the economic activity of the preparatory work already undertaken in relation to the Business and the Assets and (2) the warranties in Clause [1.3] below, the Vendor and the Purchaser consider that the sale of the Business and the Assets should be treated as a transfer of a business as a going concern and that the Business is capable of separate operation for the purposes of both section 49(1) VATA and article 5 of the Value Added Tax (Special Provisions) Order 1995 SI 1995/1268, and the Parties shall use their reasonable endeavours to procure that the sale of the Business and the Assets pursuant to this Agreement is treated by HM Revenue and Customs as such⁴⁰.

1.3 The Purchaser warrants:

- 1.3.1 that it intends to use the Business and the Assets for the purposes of and will carry on the business of the transmission and/or distribution of electricity for a period of at least 12 months commencing immediately on Completion;
- 1.3.2 that it, or the representative member of its VAT group, is registered for VAT and has provided the Vendor with a copy of its Certificate of Registration;
- 1.3.3 that it, or a relevant associate for the purposes of Part 1 of Schedule 10 to VATA, has exercised an option to tax in relation to any land comprised in the Assets to be sold pursuant to the terms of this Agreement for the purposes of Part 1 of Schedule 10 to VATA;
- 1.3.4 that it shall not revoke, nor allow any other person to revoke, nor allow anything to be done which could result in HM Revenue and Customs revoking the option to tax described in Clause [1.3.3] either before or after Completion to the extent that such revocation would or could prejudice the treatment described at Clause [1.2];
- 1.3.5 that it, or its relevant associate (if applicable) has given written notification of the option to tax described in Clause 1.3.3 to HM Revenue and Customs in accordance with paragraph 20 of Schedule 10 to VATA; and
- 1.3.6 that it has provided the Vendor with a copy of such notification referred to in Clause [1.3.5] and shall provide a copy of the acknowledgement by HM Revenue and Customs of such notification as and when received by the Purchaser.

⁴⁰Explanatory Note: the parties are referred to the letter from HMRC to Ofgem dated 14 December 2009 regarding the likely VAT treatment of these transactions. The example VAT clauses are drafted on the basis that the underlying transaction will constitute a transfer of a going concern for UK VAT purposes. Parties should, however, seek their own independent tax advice regarding whether a specific transaction will qualify as a transfer of a going concern.

1.4 The Purchaser hereby notifies the Vendor that paragraph 5(2B) Value Added Tax (Special Provisions) Order 1995 does not apply to the Purchaser.

1.5 ⁴¹[The Vendor has made a written application to HM Revenue and Customs for confirmation that the sale of the Business and Assets pursuant to this Agreement will be treated as a transfer of a going concern capable of separate operation, for the purposes of VAT BUT has not, at Completion, received a response from HM Revenue and Customs.

1.6 The Purchaser shall at the same time as the Consideration becomes payable pursuant to this Agreement pay into the Escrow Account an amount equal to the VAT arising on the Consideration (the "Escrow Amount"). The Escrow Amount shall be held in the Escrow Account to the Purchaser's order.

1.7 In the event that a response from HM Revenue and Customs to the written application to be made under Clause [1.5] is received after the Completion Date but before the VAT due date⁴², the parties hereby agree as soon as practicable to instruct the Escrow Bank to deal with the Escrow Amount in the following manner:

- 1.7.1 to pay the Escrow Amount (including any accrued interest) to the Purchaser in the event that HM Revenue and Customs confirm that the sale of the Business and Assets pursuant to this Agreement will be treated as a transfer of a going concern capable of separate operation, for the purposes of VAT; or
- 1.7.2 to pay the Escrow Amount (including any accrued interest) to the Vendor in the event that HM Revenue and Customs confirm that the sale of the Business and Assets pursuant to this Agreement does not in their view constitute a transfer of a going concern capable of separate operation, for the purposes of VAT (whereby the Vendor agrees to provide the Purchaser with a valid VAT invoice).

1.8 In the event that a response from HM Revenue and Customs to the written application to be made under Clause [1.5] is not received by the VAT due date the Vendor may, in its sole discretion, seek the Purchaser's agreement (such agreement not to be unreasonably withheld) to instruct the Escrow Bank to pay the Escrow Amount (including accrued interest) to the Vendor no later than three Business Days after the VAT due date (whereby the Vendor agrees to provide the Purchaser with a valid VAT invoice).

1.9 If a payment is made to the Vendor pursuant to Clause [1.10] and HM Revenue and Customs subsequently confirm, in response to the written application to be made under Clause [1.5] that the sale of the Business and Assets pursuant to this Agreement will be treated as the transfer of a going concern capable of separate operation, for the purposes of VAT, the Vendor shall as soon as reasonably practicable issue to the Purchaser a VAT credit note equal to the Escrow Amount.]

1.10 The Vendor shall retain and preserve all records of the Business in relation to VAT up to Completion for six years following Completion, and shall allow the Purchaser reasonable access to such records in accordance with section 49(5) VATA. Any copies of such records which the Purchaser wishes to make pursuant to section 49(5) VATA shall be made at the Purchaser's cost.

⁴¹ Explanatory Note: should the parties wish to apply to HMRC for a ruling on whether a specific transaction is a transfer of a going concern, they may wish to use the example clauses 1.6 to 1.10 to set out the procedure that they will follow.

⁴² Explanatory Note: if VAT is chargeable by reference to the transfer of the Business and Assets, the parties may wish to restructure the transaction in such a way as to reduce or eliminate the costs of funding the VAT.

Capital Allowances⁴³

1.11 The Vendor shall provide to the Purchaser and its professional advisers such information as is in its possession, as shall be requested in writing by the Purchaser from time to time and as shall reasonably be required to enable the Purchaser to make or substantiate a claim for capital allowances in respect of the value of plant and machinery installed and included within the Assets agreed to be sold and purchased pursuant to this Agreement. Nothing shall prevent the Vendor from making claims for capital allowances in respect of periods prior to Completion.

1.12 It is agreed by the Vendor and the Purchaser that the sum of £[•] ("the Agreed Fixtures Sum") is apportioned from the Consideration to the sale and purchase of the Fixtures pursuant to this Agreement. For the purposes of this Clause the expression "Fixtures" means all items which are so installed or otherwise fixed on or to the Site comprised in the Assets to be transferred pursuant to this Agreement as to become, in law, part of the Site, (other than plant and machinery that is an Integral Feature) and which qualify as plant or machinery for the purposes of a claim for capital allowances under the Capital Allowances Act 2001 ("CAA").

1.13 It is agreed by the Vendor and the Purchaser that the sum of £[•] ("the Agreed Integral Features Sum") is apportioned from the Consideration to the sale and purchase of the Agreed Integral Features pursuant to this Agreement. For the purposes of this Clause the expression "Integral Features" means all items which are so installed in or otherwise fixed on or to the Site comprised in the Assets to be transferred pursuant to this Agreement as to become, in law, part of the Site (which are integral features for the purposes of section 33A(5) of the CAA) and which may qualify as machinery or plant for the purposes of a claim for capital allowances under the CAA.

1.14 The Purchaser agrees that it shall not under any circumstances claim capital allowances in respect of expenditure incurred by it on the Fixtures or the Integral Features pursuant to this Agreement except in respect of an amount which in aggregate is equal to the Agreed Fixtures Sum or the Agreed Integral Features Sum, respectively⁴⁴.

1.15 The Vendor and the Purchaser agree that they shall, provided that they are so entitled, jointly make an election pursuant to section of the 198 CAA that the Agreed Fixtures Sum and the Agreed Integral Features Sum shall be fixed as the portion of the Consideration which shall be treated as expenditure incurred by the Purchaser on the provision of the Fixtures and the Integral Features (respectively) for the purposes of section 198 of the CAA and that they shall give notice of such election in the form, or

⁴³ Explanatory Note: the parties should seek their own independent advice as to the status for capital allowances purposes, of the relevant Assets being transferred, and the Purchaser may wish to apply to HMRC for clearance. Bidders may wish to seek clarification from the Vendor regarding any capital allowances which the Vendor intends to retain. Ofgem intends to assume for the purposes of its estimate of costs and calculation of the indicative transfer value that the Purchaser will obtain the full benefit of all available capital allowances. To the extent that the Vendor retains the benefit of capital allowances claimed on the Assets, the Transfer Price determined by Ofgem will be reduced by the amount of the benefit retained and in support of this they will be required to provide Ofgem with all information it considers necessary for this purpose. In relation to plant or machinery which are not Fixtures or Integral Features, the Purchaser will, broadly, be entitled to claim capital allowances by reference to the amount it pays for that plant or machinery. The parties will therefore need to allocate part of the Consideration to such plant or machinery, and should note that there may be both capital allowances and non-capital allowances consequences of agreeing that the allocation of consideration to each plant or machinery is higher than market value.

⁴⁴ Explanatory Note: the parties should consider carefully the amounts which will constitute the Agreed Fixtures Sum and the Agreed Integral Features Sum, depending on their respective capital allowances positions. If the Vendor agrees that all capital allowances previously claimed by it should be clawed back, so that the Purchaser takes the benefit of all capital allowances, the amounts fixed should be the maximum permitted under section 198(3) of the CAA. If the parties agree that the Vendor will retain the benefit of any capital allowances it has claimed, but subject to that, the Purchaser should be entitled to the maximum available allowances, the amounts should be fixed at the tax written down value. If the Vendor has not claimed and will not claim capital allowances, the parties should agree a just and reasonable apportionment for the amounts.

substantially in the form, of the draft annexed hereto and thereupon the Vendor shall, (with the authority of the Purchaser which is hereby given by the Purchaser) submit such notice to the Vendor's Inspector of Taxes⁴⁵.

1.16 The parties agree, in making the election referred to in Clause [1.17], to comply with all the requirements of section of the 201 CAA and other requirements of legislation and HM Revenue & Customs practice from time to time in force and shall comply with all relevant time limits. In particular, but without prejudice to the generality of the foregoing, the Vendor and the Purchaser shall each provide a notice of election to HM Revenue & Customs as in the form required by sections 198 and 201 of the CAA in the agreed terms and shall ensure that a copy of the notice shall accompany its return for its "relevant period" for the purposes of section 201(4) of the CAA. The Vendor and the Purchaser shall take such other action as the Vendor shall reasonably require to give effect to an election.

1.17 To the extent that the Consideration exceeds the aggregate of the Agreed Fixtures Sum and the Agreed Integral Features Sum the Parties agree that it shall be apportioned to the items comprised in the Assets other than Fixtures or the Integral Features.

⁴⁵ Explanatory Note: the parties should note that if the Purchaser has not claimed capital allowances in respect of the Fixtures and/or the Integral Features, they will not be entitled to make an election pursuant to section 198 CAA as envisaged by this clause. In those circumstances, the parties should apportion value to those assets on a just and reasonable basis, and amend the clauses which refer to an election under section 198 CAA accordingly.

NOTICE OF ELECTION

(Form of joint election)

HM Inspector of Taxes,

[Address - one letter to each local inspector]

[Date]

Dear Sirs,

[] ("THE VENDOR")

- [TAX DISTRICT AND REFERENCE NUMBER]

[] ("THE PURCHASER")

- [TAX DISTRICT AND REFERENCE NUMBER]

We hereby give notice to the Board of our joint election pursuant to Section 198 of the Capital Allowances Act 2001 for the portion of the Sale Price to be brought into account for the purposes of Part 2 of the Capital Allowances Act 2001 as expenditure incurred by the Buyer on the provision of the Fixtures to be fixed at £[] and on the provision of Integral Features to be fixed at £[] in each case in relation to the Sale of the Property (the expressions "Sale Price", "Fixtures", "Integral Features", "Sale" and "Property" all being defined below).

For the purposes of this notice:

1. "Fixtures" means all items of machinery and plant, expenditure in respect of which qualifies or has qualified for capital allowances, so installed or otherwise fixed on or to the Property which is the subject of the Sale (as defined below), as to become, in law, part of the Property, and which are no Integral Features (as defined below) and details of which are as follows: [].
2. "Integral Features" means all items of machinery and plant that are integral features for the purposes of section 33A(5) of the Capital Allowances Act 2001, expenditure in respect of which qualifies or has qualified for capital allowances and which are comprised in the Property which is the subject of the Sale (as defined below) and details of which are as follows: [].
3. The "Property" means [full description of the interest in the property which is to be acquired by the Purchaser. If there is more than one property being acquired, the parties will need to make a separate election in respect of the Fixtures and Integral Features at each property].
4. The "Sale" means the sale of the Property by the Seller to the Buyer pursuant to an Agreement dated [] and the sale is the disposal in respect of which this election applies.
5. The "Sale Price" means £[].

The tax district address and reference of each of the Seller and the Buyer is as follows:

[Seller] [tax district and reference]

[Buyer] [tax district and reference]

.....

For and on behalf of

[]



.....

For and on behalf of

[]

Appendix 11 – Boilerplate Provisions

1. ANNOUNCEMENTS AND CONFIDENTIALITY

Announcements

1.1 No Party shall release any announcement or, except as provided in this Agreement, despatch any announcement or circular relating to this Agreement unless the form and content of such announcement or circular have been submitted to, and agreed by, the other Party (such approval not to be unreasonably withheld or delayed). Nothing in this Clause [1.1] shall prohibit any Party from making any announcement or despatching any circular as required by law or any regulatory body in which case, the announcement shall only be released or despatched after consultation with the other Party and after taking into account the reasonable requirements of the other Party as to the content of such announcement.

Confidentiality

1.2 Each Party undertakes to the other that, subject to Clause [1.3], unless the prior written consent of the other Party shall first have been obtained (such consent not to be unreasonably withheld or delayed) it shall, and shall procure that its officers, employees, advisers and agents shall, keep confidential and shall not by failure to exercise due care or otherwise by any act or omission disclose to any person whatever, or use or exploit commercially for its or their own purposes, any of the confidential information of the other Party. For the purposes of this Clause [1], "confidential information" includes the contents of this Agreement and any other agreement or arrangement contemplated by this Agreement and:

- 1.2.1 information of whatever nature concerning the business, the assets, liabilities, dealings, transactions, Know-how, customers, suppliers, processes or affairs of the other Party and its Affiliates; and
- 1.2.2 information which is expressly indicated to be confidential in relation to the Party disclosing it or its Affiliates,

which any Party may from time to time receive or obtain (verbally or in writing or in electronic form) from the other Party as a result of negotiating, entering into or performing its obligations pursuant to this Agreement and provided that such information regarding the Business and the Assets in relation to the period before Completion shall not be confidential information of the Vendor following Completion and such information concerning the Business and the Assets in relation to the period after Completion shall be confidential information of the Purchaser.

1.3 The restrictions imposed by Clause [1.2] shall not apply to the disclosure of any information by a Party (the "disclosing party"):

- 1.3.1 to the extent that the relevant confidential information is in the public domain otherwise than as a result of a breach of such undertaking of confidentiality;
- 1.3.2 to its officers, employees, advisers and agents, in each case, to the extent required to enable such Party to carry out its obligations under this Agreement and who shall in each case be made aware by such Party of its obligations under this Agreement and shall be required by such Party to observe the same restrictions on the use of the relevant confidential information as are contained in this Clause;
- 1.3.3 to the extent required by or in accordance with applicable law or regulation or under any Industry Document to be disclosed to any person who is

- authorised or required by such applicable law or regulation or Industry Document to receive the same;
- 1.3.4 to a court, arbitrator or administrative tribunal in the course of proceedings before it to which the disclosing party is a party in a case where such disclosure is required by such proceedings;
- 1.3.5 which the disclosing party lawfully possessed prior to obtaining it from the other Party; and
- 1.3.6 pursuant to the terms of this Agreement.

Continuance of Obligations

1.4 The obligations in this Clause shall continue to apply after Completion or termination of this Agreement without limit in time.

2. MISCELLANEOUS

Joint and several liability

2.1 Where in this Agreement any liability is undertaken by two or more persons the liability of each of them shall be joint and several.

Assignment

2.2 Neither Party may assign (whether absolutely or by way of security and whether in whole or in part), transfer, mortgage, charge or otherwise dispose in any manner whatsoever of the benefit of this Agreement and neither Party may sub contract or delegate in any manner whatsoever its performance under this Agreement, without the prior written consent of the other Party (such consent not to be unreasonably withheld or delayed).

2.3 In the event of an assignment consented to pursuant to Clause [2.2], the original contracting Party remains liable to procure the performance of its obligations under the Agreement by the assignee.

2.4 Notwithstanding any other provisions of this Agreement or any of the other agreements entered into by the Vendor and the Purchaser under or in connection with this Agreement (together, the "Acquisition Agreements") the Purchaser may grant security over or assign by way of security all or any of its rights under any of the Acquisition Agreements (the "Rights") for the purposes of or in connection with the financing (whether in whole or in part) by the Purchaser of:

- 2.4.1 the acquisitions contemplated by this Agreement; or
- 2.4.2 its working capital or any other requirements of the Purchaser and its Affiliates, and

its liquidator or administrator, or any receiver or other person or entity entitled to enforce any of such security may enter into any other assignments or transfers of any of the Rights.

Entire agreement

2.5 Each of the Parties confirms that this Agreement together with the documents in the agreed terms, represents the entire understanding, and constitutes the whole agreement, in relation to its subject matter and supersedes any previous agreement between the Parties with respect thereto and, without prejudice to the generality of the foregoing, excludes any warranty, condition or other undertaking implied at law or by custom, usage or course of dealing.

2.6 Each Party confirms that:

- 2.6.1 in entering into this Agreement it has not relied on any representation or warranty, assurance, covenant, indemnity, undertaking or commitment

which is not expressly set out in this Agreement or the documents in the agreed terms; and

- 2.6.2 in any event, without prejudice to any liability for fraudulent misrepresentation or fraudulent misstatement, the only rights or remedies in relation to any representation, warranty, assurance, covenant, indemnity, undertaking or commitment given or action taken in connection with this Agreement or with any of the documents in the agreed terms are those pursuant to this Agreement or such document in the agreed terms, and without limitation, no Party has any other right or remedy (whether by way of a claim for contribution or otherwise) in tort (including negligence) or, save as expressly provided for in this Agreement, for misrepresentation (whether negligent or otherwise, and whether made prior to, and/or in, this Agreement).

Unenforceable provisions

2.7 The invalidity, illegality or unenforceability of any provision of this Agreement under the law of any jurisdiction shall not affect the validity, legality or enforceability of:

- 2.7.1 any other provision of this Agreement under the law of that jurisdiction; or
2.7.2 any provision of this Agreement under the law of any other jurisdiction.

Further assistance

2.8 The Vendor shall after Completion execute all such deeds and documents and do all such things as the Purchaser may require for perfecting the transactions intended to be effected under or pursuant to this Agreement and for vesting in the Purchaser the full benefit of the Business including the Assets.

Completion

2.9 So far as it remains to be performed this Agreement shall continue in full force and effect after Completion. The rights and remedies of the Parties shall not be affected by Completion.

Third party rights

2.10 No term of this Agreement is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a Party to this Agreement.

Taxation of payments

2.11 All payments made by or due from any person (the "Payer") under, or pursuant to the terms of, this Agreement to another person (the "Recipient") shall be free and clear of all deductions or withholdings for or on account of Tax (a "Tax Deduction") save only for any Tax Deduction required by law.

2.12 If any Tax Deduction is required by law, or any payments (other than the Consideration) made by or due from the Payer under this Agreement are liable for Taxation in the hands of the Recipient or would have been liable for Taxation but for the utilisation of any tax relief in respect of such liability, the Payer shall be liable to pay to the Recipient such further sums as shall be required to ensure that the net amount received by the Recipient will equal the full amount which would have been received under the relevant provisions of this Agreement in the absence of any such Tax Deduction or Taxation liabilities.

2.13 If a payment which any person is entitled to receive pursuant to this Agreement is increased by the operation of Clause [2.12] above, and the Recipient determines (in its discretion, acting reasonably) that it has obtained a Tax credit, repayment or other Tax benefit as a result of the increased payment, the Recipient shall pay to the Payer an amount which it determines (in its discretion, acting reasonably) will leave it (after the making of that payment) in the same after-Tax position as it would have been in had no

Tax Deduction been required to be made by the Payer, or the payment had not been liable for Taxation in the hands of the Recipient.

Waiver

2.14 The rights and remedies of the Parties shall not be affected by any failure to exercise or delay in exercising any right or remedy or by the giving of any indulgence by any other Party or by anything whatsoever except a specific waiver or release in writing and any such waiver or release shall not prejudice or affect any other rights or remedies of the Parties. No single or partial exercise of any right or remedy shall prevent any further or other exercise thereof or the exercise of any other right or remedy.

Counterparts

2.15 This Agreement may be executed in any number of counterparts and by the Parties to it on separate counterparts, each of which when executed and delivered shall be an original but all the counterparts together constitute one instrument.

Variation

2.16 No variation of this Agreement (or any of the documents referred to in it) shall be valid unless it is in writing and signed by or on behalf of each of the Parties. The expression "variation" includes any variation, supplement, deletion or replacement however effected.

No set off, deduction or counterclaim

2.17 Every payment payable by the Vendor or the Purchaser under this Agreement shall be made in full without any set off or counterclaim howsoever arising and shall be free and clear of, and without deduction of, or withholding for or on account of, any amount which is due and payable to the Vendor or the Purchaser (as the case may be) under this Agreement.

Powers of the Authority

2.18 The Parties acknowledge that, following an application under Schedule 2A to the Electricity Act 1989, the Authority is entitled to effect a property scheme in relation to all or any part of the Business or the Assets, and that this Agreement may survive (in whole or in part), be amended by or be terminated by any such property scheme in the absolute discretion of the Authority.

3. COSTS

The Parties shall pay their own costs in connection with the preparation and negotiation of this Agreement and any matter contemplated by it.

4. NOTICES

4.1 A notice (including any approval, consent or other communication) in connection with this Agreement and the documents referred to in it:

- 4.1.1 must be in writing;
- 4.1.2 must be left at the address of the addressee or sent by pre paid recorded delivery (airmail if posted to or from a place outside the United Kingdom) to the address of the addressee or sent by facsimile to the facsimile number of the addressee in each case which is specified in this Clause in relation to the Party to whom the notice is addressed, and marked for the attention of the person so specified, or to such other address or facsimile number in England or Wales and/or marked for the attention of such other person, as the relevant Party may from time to time specify by notice given in accordance with this Clause.

The relevant details of each Party at the date of this Agreement are:

Vendor

Address: [Ensure address and fax number are in England or Wales]

Facsimile:

Attention:

Purchaser

Address: [Ensure address and fax number are in England or Wales]

Facsimile:

Attention:

4.1.3 must not be sent by electronic mail.

4.2 In the absence of evidence of earlier receipt, any notice shall take effect from the time that it is deemed to be received in accordance with Clause [4.3].

4.3 Subject to Clause [4.4], a notice is deemed to be received:

4.3.1 in the case of a notice left at the address of the addressee, upon delivery at that address;

4.3.2 in the case of a posted letter, on the third day after posting or, if posted to or from a place outside the United Kingdom, the seventh day after posting; and

4.3.3 in the case of a facsimile, on production of a transmission report from the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety to the facsimile number of the recipient.

4.4 A notice received or deemed to be received in accordance with Clause [4.3] on a day which is not a Business Day or after 5 p.m. on any Business Day, according to local time in the place of receipt, shall be deemed to be received on the next following Business Day.

4.5 Each Party undertakes to notify the other Party by notice served in accordance with this Clause if the address specified herein is no longer an appropriate address for the service of notices.

5. GOVERNING LAW AND JURISDICTION

5.1 This Agreement and any dispute or claim arising out of or in connection with it or its subject matter, existence, negotiation, validity, termination or enforceability (including non-contractual disputes or claims) shall be governed by and construed in accordance with English law.

5.2 Each Party irrevocably agrees that the Courts of England shall have exclusive jurisdiction in relation to any dispute or claim arising out of or in connection with this Agreement or its subject matter, existence, negotiation, validity, termination or enforceability (including non-contractual disputes or claims).

5.3 Each Party irrevocably waives any right that it may have to object to an action being brought in those Courts, to claim that the action has been brought in an inconvenient forum or to claim that those Courts do not have jurisdiction.

5.4 Each Party agrees that without preventing any other mode of service, any document in an action (including, but not limited to, a claim form or any other document to be served under the Civil Procedure Rules) may be served on any Party by being delivered to or left for that Party at its address for service of notices under Clause [4] and each Party undertakes to maintain such an address at all times in the United Kingdom and to notify the other Party in advance of any change from time to time of the details of such address in accordance with the manner prescribed for service of notices under Clause [4].

Appendix 12 – Definitions used in Example Clauses and Example Interpretation Clauses

DEFINITIONS AND INTERPRETATION

1. INTERPRETATION

1.1 In this Agreement each of the following words and expressions shall have the following meaning:

"the 2006 Act" means the Companies Act 2006;

"Affiliate" means:

(A) if the Party is a subsidiary of another company, the Party's ultimate holding company and any subsidiary (other than the Party itself) of the Party's ultimate holding company; or

(B) if the Party is not a subsidiary of another company, any subsidiary of the Party;

"Ancillary Property Contracts" means the Licences, the Easement Deeds and the Wayleave Agreements brief particulars of which are set out in Schedule [X] (Sites and Property Contracts) and "Ancillary Property Contract" shall mean any one of them;

"Assets" means all property, assets and rights which are necessary to carry out the Business in accordance with Good Industry Practice (including the Sites and the rights of the Vendor under any Property Contracts) and which are agreed to be sold and purchased pursuant to this Agreement, as listed in Schedule [X] (Assets) and Schedule [X] (Sites and Property Contracts);⁴⁶⁴⁷

"Assumed Liabilities" has the meaning set out in Clause [X] (Assumed Liabilities definition)⁴⁸;

"Authority" means the Gas and Electricity Markets Authority (also known as "**GEMA**"). The Authority is a "Non-Ministerial Government Department" and is a Crown Body staffed by civil servants working for and giving effect to the executive decisions of the Authority through Ofgem, "Ofgem", "GEMA" and the "Authority" may be used interchangeably in this Agreement and in various other documents relating to this Agreement;

"Business" means the development, construction, ownership, maintenance and operation of the Offshore Transmission System by the Vendor;

"Business Day" means a day (not being a Saturday) on which banks are open for general banking business in the City of London;

"Business Intellectual Property Rights" means the Intellectual Property Rights owned by the Vendor and relating to or used in connection with the Business at the Completion Date, as listed in Schedule [X] (Intellectual Property);

"Business Records" means all the information and records of the Vendor in relation to

⁴⁶ Explanatory note: whether the assets to be transferred include leases or licences of the Designated Area (as defined in the Round 1 and Round 2 Leases) and whether a deed of variation has been entered into under which the Designated Area has been removed from the Site will be project-specific.

⁴⁷ Explanatory note: the example clauses have been drafted on the basis that the generation assets (to be retained by the Vendor) and the offshore transmission assets (to be transferred to the Purchaser) are distinguishable and separable. If necessary, separate arrangements should be documented in relation to the sharing of assets, for example, in relation to mutual access rights on the offshore platform.

⁴⁸ See Appendix 5.

the Offshore Transmission System and/or the Business, including:

- (A) all books of account, income records, and other records and price lists;
- (B) lists of customers and suppliers of the Business;
- (C) all other accounting, financial, marketing, sales, supply, personnel, management and technical information, correspondence and literature;
- (D) all Know-how;
- (E) the original Contracts;
- (F) all correspondence relating to Payables, Receivables and/or any other Assumed Liabilities; and
- (G) all drawings, software, disks and other material embodying or incorporating or constituting any of the Business Intellectual Property Rights,

in each case, in whatever form or medium it is held or recorded (but excluding any records of the Business in relation to VAT);

"**CAA**" means the Capital Allowances Act 2001;

"**Claim**" means a Common Claim and/or a Tax Claim;

"**Common Claim**" means a claim for breach of any of the General Warranties;

"**Completion**" means completion of the sale and purchase of the Business in accordance with Clause [X] (Completion of Sale and Purchase)⁴⁹;

"**Completion Date**" means the day on which Completion occurs;

"**Consideration**" means the consideration payable for the Business and the Assets in accordance with the terms of this Agreement;

"**Construction Agreement**" has the meaning set out in the CUSC;

"**Contracts**" means all contracts, undertakings, arrangements, understandings and agreements entered into prior to Completion by the Vendor to the extent the foregoing relate exclusively to the Offshore Transmission System and/or to the Business, (except the Excluded Contracts and to the extent a Contract relates to the Excluded Assets) in each case to the extent that on the Completion Date the same remain to be completed or performed (including IP Licences and Information Technology Agreements);⁵⁰

"**CTA 2009**" means the Corporation Tax Act 2009;

"**CTA 2010**" means the Corporation Tax Act 2010;

"**CUSC**" means the Connection and Use of System Code;

"**Decommissioning**" means the decommissioning, removal, demolition or dismantling of the Offshore Transmission System;

⁴⁹ See Appendix 7.

⁵⁰ Explanatory note: the example clauses have been drafted on the basis that separate contracts (including construction contracts and potentially also IP Licences and Information Technology Agreements) have been entered into in relation to generation assets (to be retained by the Vendor) and offshore transmission assets (to be transferred to the Purchaser). Composite contracts relevant to both the generation assets and the offshore transmission assets will need to be split or apportioned on a project-specific basis, for example, apportionment of limitations on liability and performance security obligations through bilateral or tripartite back to back arrangements.

["**Deferred Consideration**" means that part of the Consideration to be determined and paid by the Purchaser following Completion in accordance with Clause [X]⁵¹ and Clause [X] (Deferred Consideration)^{52 53};

"**Deposits**" means all cash sums belonging or referable to customers or potential customers of the Business which are held by or deposited with the Vendor as deposits for, or advance or instalment payments in relation to, anything (including any service) to be provided or made available by the Purchaser or so held or deposited in relation to any future contract or service which any such person may place with the Business (each such amount a "Deposit");

"**Disclosed**" means fairly disclosed in writing by the Vendor to the Purchaser in the Disclosure Letter (and "**Disclosure**" shall be construed accordingly);

"**Disclosure Letter**" means the letter dated the same date as this Agreement from the Vendor to the Purchaser in relation to the Warranties [including any annexures that have been signed for identification by or on behalf of the Vendor and the Purchaser];

"**Easement Deed**" means any deed of grant of easement or similar of which the Vendor has the benefit as at the Completion Date and which is necessary for the operation of the Business, brief particulars of which are set out in Part A(1) of Schedule [X] (Sites and Property Contracts);

"**Encumbrance**" means any equity or interest (other than by virtue of this Agreement) of any person (including any right to acquire, option, right of pre-emption or conversion) or any mortgage, charge, pledge, lien, assignment, hypothecation, security interest, title retention or any other security agreement or arrangement, or any agreement or arrangement to create any of the above;

"**Environment**" means the natural and man-made environment and all or any of the following media namely air (including air within buildings and air within other natural or man-made structures above or below ground), water (including territorial and coastal and inland waters, groundwater, water under or within land and water within any natural or man-made structure), land (including buildings or structures on them, land under water, surface land and sub-surface land) and any living organisms or ecological systems or habitats supported by those media;

"**Environmental Law**" means each applicable law (including statute, secondary legislation, directives, regulations, resolutions, statutory guidance and codes of practice having the force of law, civil, criminal or administrative law, common law, a notice, order, judgment, decision, ruling or other requirement from any governmental, administrative or regulatory agency or body or a court, tribunal or other assembly conducting judicial business) relating to pollution or protection or remediation of the Environment, or human health and safety, or the generation, transportation, storage, treatment, disposal or presence of any Hazardous Substances;

"**Environmental Matters**" means any one or more of the following matters arising from or in relation to the Business, the Assets and/or the Offshore Transmission System:

- (A) compliance with, breach of or liability or obligation under any Environmental Permit and/or Environmental Law;
- (B) pollution, contamination, harm, and/or damage to the Environment; and/or
- (C) noise, vibration, nuisance, electromagnetic fields and/or radiation;

⁵¹ Explanatory note: reference to be to the second sub-clause under the clause entitled "Consideration".

⁵² See Appendix 3.

⁵³ It is intended that Ofgem will finalise the assessment of costs and determine the Final Transfer Value prior to Licence grant. This example definition is included as a reference in the event that deferred consideration is payable.

"Environmental Permit" means any licence, consent, authorisation, certification, registration or other permit required under Environmental Law;

"Environmental Warranties" means the warranties given in paragraph [X] of Schedule [X] (Warranties)⁵⁴;

"Escrow Account" means an interest bearing deposit account in the joint names of the Purchaser's Solicitors and the Vendors' Solicitors to be opened at the Escrow Bank and operated in accordance with the Escrow Agreement;

"Escrow Agreement" means the document in the agreed terms setting out how the Escrow Account is to be operated;

"Escrow Bank" means [X];

"Excluded Assets" means the property and assets which are not necessary to carry out the Business in accordance with Good Industry Practice and which are not to be transferred to the Purchaser pursuant to this Agreement as listed in Schedule [X] (Excluded Assets and Contracts);

"Excluded Contracts" means the contracts which are not necessary to carry out the Business in accordance with Good Industry Practice and which are not to be assigned or novated to the Purchaser pursuant to this Agreement as listed in Schedule [X] (Excluded Assets and Contracts);

"Excluded Liabilities" means the liabilities referred to in Clause [X] (Excluded Liabilities definition)⁵⁵ and which are not to be transferred to the Purchaser pursuant to this Agreement;

"Final Transfer Value" means the value of the Business and the Assets determined by Ofgem following completion of the Offshore Transmission System in accordance with the Tender Regulations and notified to the Parties;

"Fixed Assets" means the fixed assets and plant and equipment that form part of, or relate to, the Offshore Transmission System and/or form part of, or are annexed to, the Sites at the Completion Date, including, without limitation, the assets of which brief particulars are set out in Schedule [X] (Fixed and Moveable Assets);

"Full Title Guarantee" means with the benefit of the implied covenants set out in Part 1 of the Law of Property (Miscellaneous Provisions) Act 1994 when a disposition is expressed to be made with full title guarantee;

"General Warranties" means the warranties given in Schedule [X]⁵⁶ (Warranties), other than the Tax Warranties;

"Good Industry Practice" means the application of those methods and practices customarily used in good and prudent offshore wind farm and transmission system practice in the United Kingdom Continental Shelf with that degree of diligence and prudence reasonably and ordinarily exercised by experienced operators engaged in the United Kingdom Continental Shelf in a similar activity under similar circumstances and conditions, as amended from time to time;

"Governmental Agency" means any person having legal and/or regulatory authority or enforcement powers that are binding on any of the Parties, including, without limitation, the Authority, any court of law or tribunal in any jurisdiction, any governmental, semi-governmental or judicial entity or authority or any Taxation authority;

⁵⁴ See Appendix 9.

⁵⁵ See Appendix 5.

⁵⁶ See Appendix 9.

"Hazardous Substances" means any substance or organism which alone or in combination with others is capable of causing harm to the Environment or human health;

"Indicative Transfer Value" means the estimate of the economic and efficient costs of constructing and developing the Assets calculated by Ofgem in accordance with the Tender Regulations and included in the ITT document as the 'indicative transfer value' for the project;

"Industry Document" means any and all licences, contractual agreements and codes relating to the generation, transmission, distribution and supply of electricity, and including, but not limited to, the STC, the CUSC, the Grid Code and the Great Britain Security and Quality of Supply Standard;

"Information Technology Agreements" means any agreements relating to the Information Technology Systems, including all insurance policies, licence, lease, development, maintenance, support, escrow, security, disaster recovery, website hosting, outsourcing, facilities management, utilisation, bureau, on-line services and service agreements;

"Information Technology Systems" means all communication systems and computer systems used in connection with the Business including all hardware, Software and websites but excluding networks generally available to the public;

[**"Initial Purchase Price"** means the amount equal to 75 per cent. of the Indicative Transfer Value, as adjusted in accordance with the terms of this Agreement⁵⁷];

"ITA" means the Income Tax Act 2007;

"Intellectual Property Rights" means all inventions (whether patentable or not), design rights, database rights, copyright and related rights moral rights, semiconductor topography rights, unregistered trade and service marks, logos, domain names, get-up and trade names and, in each case, the goodwill attaching to them, all Registered Intellectual Property Rights, Know-how, and any rights or forms of protection of a similar nature and having equivalent or similar effect to any of them which subsist anywhere in the world;

"IP Licences" means all licences, agreements, authorisations and permissions pursuant to which the Vendor uses any Intellectual Property Rights belonging to any third party in relation to the Business;

"Key Contracts" mean the Contracts (including IP Licences and Information Technology Agreements) which are necessary to carry out the Business in accordance with Good Industry Practice and are material to the Business, as listed in Part A of Schedule [X] (Key Contracts and Key Permits);

"Key Non-Transferable Permit" means those Key Permits which are incapable of being transferred, assigned or novated to the Purchaser, as listed in Part C of Schedule [X] (Key Contracts and Key Permits);

"Key Non-Transferable Site Consent" means those Key Site Consents which are incapable of being transferred, assigned or novated to the Purchaser, as listed in Part C of Schedule [X] (Sites and Property Contracts);

"Key Permits" means those Relevant Permits which are necessary to carry on the Business in accordance with Good Industry Practice and are material to the Business;

⁵⁷ It is intended that Ofgem will finalise the assessment of costs and determine the Final Transfer Value prior to Licence grant. This example definition is included as a reference in the event that deferred consideration is payable.

"Key Transferable Permit" means those Key Permits which are capable of being transferred, assigned or novated to the Purchaser, as listed in Part B of Schedule [X] (Key Contracts and Key Permits);

"Key Transferable Site Consent" means those Key Site Consents which are capable of being transferred, assigned or novated to the Purchaser, as listed in Part B of Schedule [X] (Sites and Ancillary Property Contracts);

"Key Site Consent" means those Site Consents which are necessary to carry on the Business in accordance with Good Industry Practice and are material to the Business;

"Know-how" means all know-how, trade secrets and confidential information, in any form (including paper, electronically stored data, magnetic media, film and microfilm) including without limitation financial and technical information, drawings, formulae, test results or reports, project reports and testing procedures, information relating to the working of any product, process, invention, improvement or development, instruction and training manuals, tables of operating conditions, information concerning intellectual property portfolio and strategy, market forecasts, lists or particulars of customers and suppliers, sales targets, sales statistics, prices, discounts, margins, future business strategy, tenders, price sensitive information, market research reports, information relating to research and development and business development and planning reports and any information derived from any of them;

"Leases" means the leases and/or underleases of seabed or shore or onshore or offshore substations and other premises vested in the Vendor in connection with the Business brief particulars of which are set out in Part A(2) of Schedule [X] (Sites and Property Contracts) and "Lease" shall mean any one of them;⁵⁸

"Licences" means the licences relating to the situation and use of electricity cable either in or under seabed or shore or onshore vested in the Vendor in connection with the Business brief particulars of which are set out in Part A(1) of Schedule [X] (Sites and Property Contracts) and "Licence" shall mean any one of them;

"Losses" means any losses, liabilities, costs, charges, expenses, Taxation (including, without limitation, the loss of any relief in relation thereto), claims, demands, proceedings and damages suffered whether directly or indirectly arising from any particular act, omission, event or circumstance and including consequential and economic loss;

"Notice of Election" means the notice of election substantially in the form set out in Schedule [X] (Notice of Election);

"Offshore Transmission Licence" has the meaning given to that term in section 6C(5) of the Electricity Act 1989;

"Offshore Transmission System" means the offshore and onshore interface and transmission system from [X] to [X], known as the [X] Project.⁵⁹

"Ofgem" means the Office of Gas and Electricity Markets;

"Party" or **"Parties"** means a party or the parties to this Agreement;

"Payables" means all amounts (each a "Payable") owed, owing, incurred or payable by the Vendor as at the Completion Date in respect of the Business or the Assets, excluding all liabilities in relation to Taxation;

⁵⁸ Explanatory note: the example clauses have been drafted on the basis that the Sites are leasehold interests. The Developer will need to include clauses in the transfer agreement on a project-specific basis if any freehold title is to be transferred.

⁵⁹ Explanatory note: the contents of these brackets will depend on the stage the particular project has reached at the time of Completion.

"Property Contracts" means the Leases and the Ancillary Property Contracts and **"Property Contract"** shall mean any one of them;

"Purchaser" means the party acquiring the Business pursuant to the terms of the [transfer agreement].

"Receivables" means all amounts (each a "Receivable") of the book and other debts receivable by or owing to the Vendor in connection with the Business or the Assets as at the Completion Date;

"Registered Intellectual Property Rights" means all patents, utility models, registered designs, registered copyrights, plant variety rights, registered trade and service marks and domain names as listed in Schedule [X] (Intellectual Property), together with:

- (A) the goodwill attaching to any of the foregoing;
- (B) any applications for registration and rights to grant of any of the foregoing; and
- (C) any rights or forms of protection of a similar nature to any of the foregoing anywhere in the world;

"Relevant Permit" means any regulatory consent, licence, authorisation or permit, including an Environmental Permit relating to the Assets;

"Site" means all the real property (including any land, buildings, seabed, shore or substations or other real property used or occupied under the Property Contracts) used or occupied or necessary to be used or occupied by the Vendor in connection with the Business (and each and every part of it and them) and independent and permanent construction rights held by the Vendor in connection with the Business;

"Site Consent" means any consent, licence, approval or waiver of any landlord or other third party required for the assignment or transfer of a Site or the Assets to the Purchaser or the creation or grant of a lease, licence, easement or other covenant or similar obligation relating to the operation of the Offshore Transmission System and/or the Business on or before Completion;

"Software" means all software used in connection with the Business, including third party software sold in a standard configuration and readily available to the public on standard terms and conditions and firmware that relates to or is comprised in hardware, together with all supporting documentation and materials necessary to enable a user to make full use of the functionality of, or to administer effectively such software and firmware;

"STC" means the System Operator and Transmission Owner Code;

"Taxation" means all forms of tax, duty, rate, levy or other imposition whenever and by whatever authority imposed and whether of the United Kingdom or elsewhere, including (without limitation) income tax (including income tax required to be deducted or withheld from or accounted for in respect of any payment), corporation tax, advance corporation tax, capital gains tax, capital transfer tax, inheritance tax, development land tax, petroleum revenue tax, VAT, customs duties, excise duties, rates, stamp duty, capital duty, stamp duty reserve tax, stamp duty land tax, national insurance and other similar contributions, any liability arising under section 698 ITA or section 746 CTA 2010 and any other taxes, levies, duties, charges, imposts or withholdings corresponding to, similar to, replaced by or replacing any of them together with any interest, penalty or fine in connection with any such Taxation and regardless of whether any such taxes, levies, duties, imposts, charges, withholdings, penalties or interest are chargeable directly or primarily against or attributable directly or primarily to the Vendor or the Business or any other person and of whether any amount in respect of any of them is recoverable from any other persons;

"Taxes Act" means the Income and Corporation Taxes Act 1988;

"Tax Claim" means a claim for breach of any of the Tax Warranties;

"Tax Warranties" means the warranties given in paragraph [X] of Schedule [X] (Warranties)⁶⁰;

"Tender Regulations" means the Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2013 as amended from time to time;

"Third Party Consent" means any consent or agreement required from a third party for the transfer of the benefit of any of the Assets and/or the transfer of any rights to or assumption by the Purchaser of obligations under any of the Contracts;

"VAT" means the tax imposed by Directive 2006/112/EC and any national legislation implementing that directive together with legislation supplemental thereto, or any similar sales or turnover tax, whether of the UK or elsewhere;

"VATA" means the Value Added Tax Act 1994;

"Vendor" means the seller of the Business pursuant to the [transfer agreement];

"Warranties" means together the General Warranties and the Tax Warranties; and

"Wayleave Agreement" means any wayleave agreement or similar arrangement of which the Vendor has the benefit as at the Completion Date and which is necessary for the operation of the Business, brief particulars of which are set out in Part A(1) of Schedule [X] (Sites and Property Contracts).

Example Interpretation Clause

1.1 In this Agreement, words and expressions defined in the 2006 Act shall bear the same meaning as in the 2006 Act unless expressly stated otherwise.

1.2 In this Agreement, except where the context otherwise requires:

- 1.2.1 any reference to this Agreement include the Schedules to it each of which forms part of this Agreement for all purposes;
- 1.2.2 a reference to an enactment or statutory provision shall include a reference to any subordinate legislation made under the relevant enactment or statutory provision and is a reference to that enactment, statutory provision or subordinate legislation as from time to time amended, consolidated, modified, re-enacted or replaced;
- 1.2.3 words in the singular shall include the plural and vice versa;
- 1.2.4 references to one gender include other genders;
- 1.2.5 a reference to a person shall include a reference to a firm, a body corporate, an unincorporated association, a partnership or to an individual's executors or administrators;
- 1.2.6 a reference to a Clause, paragraph, Schedule (other than to a schedule to a statutory provision) shall be a reference to a Clause, paragraph, Schedule (as the case may be) of or to this Agreement;
- 1.2.7 if a period of time is specified as from a given day, or from the day of an act or event, it shall be calculated exclusive of that day;
- 1.2.8 references to any English legal term for any action, remedy, method of judicial proceeding, legal document, legal status, court, official or any legal concept or thing shall in respect of any jurisdiction other than England be deemed to include what most nearly approximates the English legal term in

⁶⁰ See Appendix 9.

that jurisdiction and references to any English statute or enactment shall be deemed to include any equivalent or analogous laws or rules in any other jurisdiction;

- 1.2.9 a person shall be deemed to be connected with another if that person is connected with another within the meaning of section 1122 of the CTA 2010;
- 1.2.10 references to writing shall include any modes of reproducing words in any legible form and shall include email except where expressly stated otherwise;
- 1.2.11 a reference to a balance sheet or profit and loss account shall include a reference to any note forming part of it;
- 1.2.12 a reference to "includes" or "including" shall mean "includes without limitation" or "including without limitation";
- 1.2.13 references to documents "in the agreed terms" or any similar expression shall be to documents agreed between the Parties, annexed to this Agreement and initialled for identification by the Vendor and the Purchaser;
- 1.2.14 the contents page and headings in this Agreement are for convenience only and shall not affect its interpretation; and
- 1.2.15 references to this Agreement include this Agreement as amended or supplemented in accordance with its terms.

Appendix 13 – The Authority’s Powers and Duties

1.1. Ofgem is the Office of Gas and Electricity Markets which supports the Gas and Electricity Markets Authority ('the Authority'), the regulator of the gas and electricity industries in Great Britain. This Appendix summarises the primary powers and duties of the Authority. It is not comprehensive and is not a substitute to reference to the relevant legal instruments (including, but not limited to, those referred to below).

1.2. The Authority's powers and duties are largely provided for in statute (such as the Gas Act 1986, the Electricity Act 1989, the Utilities Act 2000, the Competition Act 1998, the Enterprise Act 2002 and the Energy Acts of 2004, 2008 and 2010) as well as arising from directly effective European Community legislation.

1.3. References to the Gas Act and the Electricity Act in this Appendix are to Part 1 of those Acts⁶¹. Duties and functions relating to gas are set out in the Gas Act and those relating to electricity are set out in the Electricity Act. This Appendix must be read accordingly.⁶²

1.4. The Authority's principal objective is to protect the interests of existing and future consumers in relation to gas conveyed through pipes and electricity conveyed by distribution or transmission systems. The interests of such consumers are their interests taken as a whole, including their interests in the reduction of greenhouse gases and in the security of the supply of gas and electricity to them.

1.5. The Authority is generally required to carry out its functions in the manner it considers is best calculated to further the principal objective, wherever appropriate by promoting effective competition between persons engaged in, or commercial activities connected with,

- the shipping, transportation or supply of gas conveyed through pipes;
- the generation, transmission, distribution or supply of electricity; and
- the provision or use of electricity interconnectors.

1.6. Before deciding to carry out its functions in a particular manner with a view to promoting competition, the Authority will have to consider the extent to which the interests of consumers would be protected by that manner of carrying out those functions and whether there is any other manner (whether or not it would promote competition) in which the Authority could carry out those functions which would better protect those interests.

1.7. In performing these duties, the Authority must have regard to:

- the need to secure that, so far as it is economical to meet them, all reasonable demands in Great Britain for gas conveyed through pipes are met;
- the need to secure that all reasonable demands for electricity are met;
- the need to secure that licence holders are able to finance the activities which are

⁶¹ Entitled 'Gas Supply' and 'Electricity Supply' respectively.

⁶² However, in exercising a function under the Electricity Act the Authority may have regard to the interests of consumers in relation to gas conveyed through pipes and vice versa in the case of it exercising a function under the Gas Act.

the subject of obligations on them⁶³; and

- the need to contribute to the achievement of sustainable development.

1.8. In performing these duties, the Authority must have regard to the interests of individuals who are disabled or chronically sick, of pensionable age, with low incomes, or residing in rural areas.⁶⁴

1.9. Subject to the above, the Authority is required to carry out the functions referred to in the manner which it considers is best calculated to:

- promote efficiency and economy on the part of those licensed⁶⁵ under the relevant Act and the efficient use of gas conveyed through pipes and electricity conveyed by distribution systems or transmission systems;
- protect the public from dangers arising from the conveyance of gas through pipes or the use of gas conveyed through pipes and from the generation, transmission, distribution or supply of electricity; and secure a diverse and viable long-term energy supply, and shall, in carrying out those functions, have regard to the effect on the environment.

1.10. In carrying out these functions the Authority must also have regard to:

- the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed and any other principles that appear to it to represent the best regulatory practice; and
- certain statutory guidance on social and environmental matters issued by the Secretary of State.

1.11. The Authority may, in carrying out a function under the Gas Act and the Electricity Act, have regard to any interests of consumers in relation to communications services and electronic communications apparatus or to water or sewerage services (within the meaning of the Water Industry Act 1991), which are affected by the carrying out of that function.

1.12. The Authority has powers under the Competition Act to investigate suspected anti-competitive activity and take action for breaches of the prohibitions in the legislation in respect of the gas and electricity sectors in Great Britain and is a designated National Competition Authority under the EC Modernisation Regulation⁶⁶ and therefore part of the European Competition Network. The Authority also has concurrent powers with the Office of Fair Trading in respect of market investigation references to the Competition Commission

⁶³ Under the Gas Act and the Utilities Act, in the case of Gas Act functions, or the Electricity Act, the Utilities Act and certain parts of the Energy Acts in the case of Electricity Act functions.

⁶⁴ The Authority may have regard to other descriptions of consumers.

⁶⁵ Or persons authorised by exemptions to carry on any activity.

⁶⁶ Council Regulation (EC) 1/2003.