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All interested parties,  
stakeholders in GB and beyond,  
and other regulatory bodies

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Date: 16 July 2014

Dear colleague,

### **Consultation on draft decisions on applications to be designated a Nominated Electricity Market Operator in GB**

On 27 February 2015 we published our decision on how we will designate Nominated Electricity Market Operators (NEMOs) in GB and our application of the designation criteria.<sup>1</sup> This is in line with the European Commission Regulation to establish a Guideline on Capacity Allocation and Congestion Management (the CACM regulation).<sup>2</sup>

We invited candidates to submit applications no later than 30 March 2015 to be designated through an initial designation process. We subsequently received applications from APX Commodities Limited (APX) and Nord Pool Spot AS (NPS) to be designated NEMOs in GB for day ahead and intraday coupling.

This letter sets out and consults on our draft decisions for both of these applications. It also sets out and consults on the meaning and terms of any successful designation, including draft designation notices provided in the appendices, and next steps for the wider regulatory framework for NEMOs in GB.

### **Designation and assessment process**

The CACM regulation requires designated NEMOs to establish and operate single day ahead and intraday coupling in coordination with Transmission System Operators (TSOs) and other NEMOs. It also creates a governance framework for NEMOs, which requires at least one NEMO to be designated in each member state by a designating authority within four months of entry into force of the CACM regulation.

In addition, the CACM regulation requires that designating authorities must assess whether candidates meet the criteria set out in Article 6 of the CACM regulation. These criteria must be applied regardless of whether one or more NEMOs are appointed and must avoid discrimination between applicants. It further states that designating authorities shall only refuse designations where the criteria are not met, unless there already exists a national legal monopoly for trading services.<sup>3</sup>

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<sup>1</sup> <https://www.ofgem.gov.uk/ofgem-publications/93711/decisiononnemoconsultationandinvitationforapplications.pdf>

<sup>2</sup> The CACM regulation was adopted by EU member states on 5 December 2014 and is expected to enter into force in summer 2015: <http://ec.europa.eu/energy/en/content/draft-regulation-establishing-guideline-capacity-allocation-and-congestion-management-0>

<sup>3</sup> Article 4.4 of the CACM regulation.

We set out in our consultation and decision letters that the Gas and Electricity Markets Authority (the Authority) will be the designating authority in GB.<sup>4</sup> We also set out that we would undertake an initial designation process to make sure we can designate at least one NEMO within four months of the CACM regulation entering into force. For this initial designation process we invited applications to the Authority until 30 March 2015. Following completion of this initial process we will accept applications to be designated as a NEMO in GB at any time through an ongoing process.

For both the initial and ongoing processes we will consult for 28 days on our draft decision on whether a candidate meets the designation criteria. We will take into account consultation responses in reaching a final decision. In the case of the initial process we will make a final decision only after entry into force of the CACM regulation and taking into account the deadline for designating at least one NEMO.

Following receipt of applications from APX and NPS we have assessed whether they meet the designation criteria set out in the CACM regulation. This has included assessment of the applications submitted to the Authority, together with separate assessment meetings with each candidate to discuss their submissions and where necessary request additional information to support their applications.

### **Draft decision**

On the basis of our assessment of the applications submitted by APX and NPS we consider both candidates meet the designation criteria set out in the CACM regulation and both should therefore be designated as NEMOs in GB for single day ahead and intraday coupling. We provide draft designation notices for both APX and NPS in Appendix 1 and Appendix 2 respectively.

We do not consider it appropriate to publish the evidence submitted by either candidate or our internal assessment. This is because the applications and assessments contain commercially sensitive information relating to the business and operational arrangements of APX and NPS. However, we do consider it appropriate to provide stakeholders, and other regulatory bodies, with the opportunity to comment on our process and draft decisions and to provide us with any evidence they consider may be relevant for us to take into account in making our final designation decisions.

During our designation process it was announced that APX Group and EPEX SPOT intend to integrate their businesses.<sup>5</sup> We have processed the application from APX on the basis that it must notify us in the event that there are any material changes to its application in relation to this integration. In the event that there are any material changes we will assess whether this impacts on our assessment of APX's application. Any material changes may affect our final decision, in terms of whether we consider APX meets the criteria and in making a final decision by the CACM regulation designation deadline.

### **Meaning and terms of a successful designation**

A successful designation in GB means the candidate is considered by the Authority to meet the criteria of the CACM regulation and is therefore a designated NEMO able to perform the tasks of NEMOs set out in the CACM regulation.<sup>6</sup> A designation is not, and should not be considered as, confirmation of ongoing compliance of a designated NEMO with the requirements of the CACM regulation, or compliance of the entity designated as a NEMO with wider requirements of EU and UK law. A designated NEMO will be responsible for and

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<sup>4</sup> The CACM regulation states that unless otherwise provided by member states, regulatory authorities shall be the designating authority, responsible for NEMO designation. Government has confirmed to us that we will be the designating authority in GB.

<sup>5</sup> Announced 17 April 2015: [https://www.epexspot.com/en/press-media/press/details/press/APX\\_Group\\_and\\_EPEX\\_SPOT\\_integrate\\_their\\_businesses](https://www.epexspot.com/en/press-media/press/details/press/APX_Group_and_EPEX_SPOT_integrate_their_businesses)

<sup>6</sup> The criteria are set out in Article 6 of the CACM regulation. NEMO tasks are set out in Article 7 of the CACM regulation.

be required to make sure it continues to comply with the criteria and its wider obligations and requirements set out in the CACM regulation and EU and UK law.

In particular, the assessment that an entity meets the criteria and is designated as a NEMO in GB does not prejudice future decisions to be taken under and in line with the CACM regulation, for example on capacity allocation and congestion management cost recovery.<sup>7</sup> Similarly, designation is not, and should not be considered as, an approval of the systems and processes required under the EU regulation on energy market integrity and transparency (No 1227/2011) (REMIT), or be used as a defence to any breaches of the entity's obligations under REMIT.

#### *Revocation and renewal*

In the event a designated NEMO fails to maintain compliance with the criteria and is not able to restore compliance within six months of being notified of such failure by the designating authority, the member state where the NEMO has been designated shall ensure that designation is revoked.<sup>8</sup> As the designating authority in GB we are responsible for NEMO designation and monitoring compliance with the criteria and so we will revoke a designation in GB if a NEMO fails to maintain compliance with the criteria and is not able to restore compliance within six months of notification in line with Article 4.8 and 9.8 of the CACM regulation.

In addition, we consider there may be other circumstances in which it would be appropriate for us to revoke a designation:

- A designated NEMO may itself wish to cease operation, in which case it should be able to request for its designation to be revoked. However, we do not consider it possible for a designated NEMO to transfer or novate its designation to a different entity. This is because the CACM regulation is clear that an entity can only be designated a NEMO if it is determined to have met the criteria by the designating authority.
- We also consider that in the case of insolvency, or if the Authority is satisfied that there has been a material misstatement of fact by or on behalf of a NEMO in making its application for designation as a NEMO, it may be appropriate to revoke a designation.

In revoking any designation we consider it may be necessary to allow for a reasonable period of time before revocation takes effect. This should take into account both the implications of any non-compliance and of revocation on the operation of the wholesale market and consumer interests.

Therefore, in the case of failure to restore compliance after notification or if a NEMO requests or otherwise agrees for its designation to be revoked, the Authority will give not less than 30 days' notice of our decision before the date the revocation will take effect. In the case of insolvency the Authority will give not less than 24 hours' notice, and in the case of any material misstatement of fact seven days.

Finally, the CACM regulation requires an initial designation term of four years. However, it does not set out the arrangements that follow this initial term.<sup>9</sup> We consider that six months prior to the expiry of this initial period designated NEMOs in GB should notify the Authority if they wish to continue to be designated in GB. This notification should include evidence that they continue to comply with the designation criteria. We will assess this evidence and, if appropriate, publish a decision to extend the NEMO's designation before its expiry date. We consider that any renewal of a designation following this initial four year designation should be for an ongoing period.

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<sup>7</sup> Title III *Costs* of the CACM regulation

<sup>8</sup> Article 4.8 of the CACM regulation

<sup>9</sup> Article 4.2 of the CACM regulation

## **Wider regulatory framework**

The CACM regulation sets out that the designating authority shall monitor all NEMOs performing single day ahead and / or intraday coupling within their member state, and ensure compliance by all NEMOs operating in GB with the CACM regulation.<sup>10</sup> NEMOs are new entities in GB, created by the CACM regulation to perform single day ahead and intraday coupling. We consider that changes may be needed to UK legislation to make sure we have sufficient power to request information from NEMOs and ensure their compliance when operating in GB.

Government has previously highlighted to stakeholders that changes to the GB framework may be required to make sure we have sufficient monitoring and enforcement powers with respect to NEMOs. We expect government to start the process of establishing what changes are necessary in autumn 2015. As part of this consultation on our draft decision we welcome stakeholder views of what changes may be necessary to provide a sufficient regulatory framework for NEMOs to fully implement the CACM regulation.

In the meantime, and in absence of any changes to the GB framework, any designated NEMO in GB must still comply with its obligations under the CACM regulation. Failure to do so may result in the Authority revoking the NEMO's designation if it fails to maintain compliance with the criteria and is not able to restore compliance within six months of being notified of such failure by the Authority.<sup>11</sup>

## **Next Steps and summary consultation issues**

We welcome any views from stakeholders and other regulatory bodies on:

1. Our draft decision to designate NPS and APX as NEMOs in GB for day ahead and intraday coupling. In particular we welcome any evidence that stakeholders and other regulatory bodies may consider relevant for us to take into account in reaching a final decision.
2. The meaning and terms of a successful designation and the draft designation notice set out in Appendices 1 and 2.
3. Changes necessary to provide a sufficient regulatory framework for NEMOs to fully implement the CACM regulation.

Responses should be received by 14 August 2015 and should be sent to [matthew.ramsden@ofgem.gov.uk](mailto:matthew.ramsden@ofgem.gov.uk). If you'd like your response to remain confidential, clearly mark the document to that effect and include the reasons for confidentiality. Put any confidential material in the appendices to your response. We will respect this request, unless the law requires us to disclose anything, for example under the Freedom of Information Act 2000 or the Environmental Information Regulations 2004. Unless marked confidential, all responses will be placed in our library and published on our website, [www.ofgem.gov.uk](http://www.ofgem.gov.uk).

Having taken into account responses to our consultation, we will publish a final decision on the applications, including notice of any successful designation, only after entry into force of the CACM regulation and by the date of the CACM regulation deadline for designation of at least one NEMO. We do not expect to publish any decision or notice of any successful designation significantly in advance of the CACM regulation designation deadline.

Yours faithfully,

Mark Copley  
Associate Partner, Markets

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<sup>10</sup> Article 4.5 of the CACM regulation

<sup>11</sup> Article 4.8 of the CACM regulation

## Appendix 1 – Draft Notice of Designation of APX Commodities Limited

### Initial Designation for the purpose of Articles 4(4) and 9(8) of the Commission Regulation, No. [.../..] of [date], establishing a Guideline on Capacity Allocation and Congestion Management (the CACM regulation), (the Designation)

#### Designation

1. The Gas and Electricity Markets Authority (the **Authority**), pursuant to Articles 4(4) (*NEMOs designation and revocation of the designation*) and 9(8)(a) (*Adoption of terms and conditions or methodologies*) of the CACM regulation, hereby designates: APX COMMODITIES LIMITED, a company registered in England and Wales under company number 03751681, whose registered office is situated at 18 King William Street, London, EC4N 7BP (**APX**), as a Nominated Electricity Market Operator (**NEMO**), for single day ahead and intraday coupling in GB for an initial term of four years. The Designation is subject to the conditions set out below.

#### Obligations

2. As a NEMO **APX** will be expected to comply with all obligations placed on **NEMOs** under and in connection with the CACM regulation.

#### Effective Date and Revocation

3. The Designation shall take effect at [12:00 am] on **[date]** 2015 and shall continue in force until [12:00 am] on **[date]** 2019, unless renewed in accordance with paragraph 11 below.
4. The Authority may at any time by Notice revoke the Designation: –
  - a) if **APX** agrees in writing with the Authority that the Designation should be revoked; or
  - b) if **APX** fails to maintain compliance with the criteria set out in Article 6 (*NEMO designation criteria*) of the CACM regulation and is not able to restore compliance within six months of being notified of its non-compliance by the Authority; or
  - c) if **APX** –
    - i. is unable to pay its debts (within the meaning of section 123(1) or (2) of the Insolvency Act 1986, but subject to paragraph 5 of this Notice of Designation) or has any voluntary arrangement proposed in relation to it under section 1 of that Act or enters into any scheme of arrangement (other than for the purpose of reconstruction or amalgamation upon terms and within such period as may previously have been approved by the Authority);
    - ii. has a receiver (which expression shall include an administrative receiver within the meaning of section 251 of the Insolvency Act 1986) of the whole or any material part of its assets or undertaking appointed;
    - iii. has entered into administration under section 8 of and Schedule B1 to the Insolvency Act 1986;
    - iv. passes any resolution for winding-up other than a resolution previously approved in writing by the Authority; or

- v. becomes subject to an order for winding-up by a court of competent jurisdiction; or
  - d) if **APX** is incorporated or has assets in a jurisdiction outside England and Wales and anything analogous to any of the events specified in subparagraph (c) occurs in relation to **APX** under the law of any such jurisdiction.
5. **APX** shall not be deemed to be unable to pay its debts for the purposes of paragraph 4 (c) (i) if any such demand as is mentioned in section 123(1)(a) of the Insolvency Act 1986 is being contested in good faith by **APX** with recourse to all appropriate measures and procedures or if any such demand is satisfied before the expiration of such period as may be stated in any notice given by the Authority under paragraph 4.
  6. For the purposes of paragraph 4 (a), the notice period for revocation shall be not less than [30] days from the date of the written agreement between **APX** and the Authority.
  7. For the purposes of paragraph 4 (b), **APX** will have six months to provide the Authority with evidence that it has restored compliance following its notification of non-compliance by the Authority. If, following consideration of this evidence, the Authority decides, in its total discretion, to revoke the Designation it will give **APX** no less than [30] days' notice.
  8. For the purposes of paragraph 4 (c), the notice period for revocation shall be not less than [24 hours'].
  9. The Authority may at any time revoke the Designation by giving no less than [seven] days' notice in writing to **APX** where the Authority is satisfied that there has been a material misstatement (of fact) by, or on behalf of **APX**, in making its application for designation as a NEMO.
  10. The Authority will publish any decision to revoke this Designation on its website.

#### Renewal

11. **APX** must confirm to the Authority six months before expiry of this initial designation, on [**date**], if it wishes to continue its designation on an ongoing basis and provide evidence that it continues to meet the criteria set out in Article 6 (*NEMO designation criteria*) of the CACM regulation.

#### Interpretation

12. References in this Designation to the provision of any enactment, where after the date of this designation -
  - a) the enactment has been replaced or supplemented by another enactment, and
  - b) such enactment incorporates a corresponding provision in relation to fundamentally the same subject matter.

shall be construed, so far as the context permits, as including a reference to the corresponding provision of that other enactment.

**Mark Copley, Associate Partner, Markets**

**Duly authorised on behalf of the Gas and Electricity Markets Authority  
[date]**

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## Appendix 2 – Draft Notice of Designation of Nord Pool Spot AS

### Initial Designation for the purpose of Articles 4(4) and 9(8) of the Commission Regulation, No. [.../..] of [date], establishing a Guideline on Capacity Allocation and Congestion Management (the CACM regulation), (the Designation)

#### Designation

1. The Gas and Electricity Markets Authority (the **Authority**), pursuant to Articles 4(4) (*NEMOs designation and revocation of the designation*) and 9(8)(a) (*Adoption of terms and conditions or methodologies*) of the CACM regulation, hereby designates: NORD POOL SPOT AS, incorporated and registered under the laws of Norway having a registered office at Vollsveien 17B, 1366 Lysaker, Norway and registered in the Bronnoysund Register under the company number 984 058 098, (**NPS**), as a Nominated Electricity Market Operator (**NEMO**), for single day ahead and intraday coupling in GB for an initial term of four years. The Designation is subject to the conditions set out below.

#### Obligations

2. As a NEMO **NPS** will be expected to comply with all obligations placed on **NEMOs** under and in connection with the CACM regulation.

#### Effective Date and Revocation

The Designation shall take effect at [12:00 am] on **[date]** 2015 and shall continue in force until [12:00 am] on **[date]** 2019, unless renewed in accordance with paragraph 11 below.

3. The Authority may at any time by Notice revoke the Designation: –
  - a) if **NPS** agrees in writing with the Authority that the Designation should be revoked; or
  - b) if **NPS** fails to maintain compliance with the criteria set out in Article 6 (*NEMO designation criteria*) of the CACM regulation and is not able to restore compliance within six months of being notified of its non-compliance by the Authority; or
  - c) if **NPS** –
    - i. is unable to pay its debts (within the meaning of section 123(1) or (2) of the Insolvency Act 1986, but subject to paragraph 5 of this Notice of Designation) or has any voluntary arrangement proposed in relation to it under section 1 of that Act or enters into any scheme of arrangement (other than for the purpose of reconstruction or amalgamation upon terms and within such period as may previously have been approved by the Authority);
    - ii. has a receiver (which expression shall include an administrative receiver within the meaning of section 251 of the Insolvency Act 1986) of the whole or any material part of its assets or undertaking appointed;
    - iii. has entered into administration under section 8 of and Schedule B1 to the Insolvency Act 1986;
    - iv. passes any resolution for winding-up other than a resolution previously approved in writing by the Authority; or

- v. becomes subject to an order for winding-up by a court of competent jurisdiction; or
  - d) if **NPS** is incorporated or has assets in a jurisdiction outside England and Wales and anything analogous to any of the events specified in subparagraph (c) occurs in relation to **NPS** under the law of any such jurisdiction.
4. **NPS** shall not be deemed to be unable to pay its debts for the purposes of paragraph 4 (c) (i) if any such demand as is mentioned in section 123(1)(a) of the Insolvency Act 1986 is being contested in good faith by **NPS** with recourse to all appropriate measures and procedures or if any such demand is satisfied before the expiration of such period as may be stated in any notice given by the Authority under paragraph 4.
  5. For the purposes of paragraph 4 (a), the notice period for revocation shall be not less than [30] days from the date of the written agreement between **NPS** and the Authority.
  6. For the purposes of paragraph 4 (b), **NPS** will have six months to provide the Authority with evidence that it has restored compliance following its notification of non-compliance by the Authority. If, following consideration of this evidence, the Authority decides, in its total discretion, to revoke the Designation it will give **NPS** no less than [30] days' notice.
  7. For the purposes of paragraph 4 (c), the notice period for revocation shall be not less than [24 hours'].
  8. The Authority may at any time revoke the Designation by giving no less than [seven] days' notice in writing to **NPS** where the Authority is satisfied that there has been a material misstatement (of fact) by, or on behalf of **NPS**, in making its application for designation as a NEMO.
  9. The Authority will publish any decision to revoke this Designation on its website.

#### Renewal

**NPS** must confirm to the Authority six months before expiry of this initial designation, on **[date]**, if it wishes to continue its designation on an ongoing basis and provide evidence that it continues to meet the criteria set out in Article 6 (*NEMO designation criteria*) of the CACM regulation.

#### Interpretation

10. References in this Designation to the provision of any enactment, where after the date of this designation -
  - c) the enactment has been replaced or supplemented by another enactment, and
  - d) such enactment incorporates a corresponding provision in relation to fundamentally the same subject matter.

shall be construed, so far as the context permits, as including a reference to the corresponding provision of that other enactment.

**Mark Copley, Associate Partner, Markets**

**Duly authorised on behalf of the Gas and Electricity Markets Authority  
[date]**