

To all offshore transmission
owner licensees, current and
prospective bidders for Offshore
Transmission Licences, and other
interested parties

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Date: 17 November 2020

Dear stakeholders,

Decision on proposed modifications to the amended standard conditions of Offshore Transmission Licences

1. Introduction

1.1. In August 2020, the Authority¹ conducted a statutory consultation (the **Consultation**)² on proposed modifications to the amended standard conditions of the Offshore Transmission (**OFTO**) licences under section 11A of the Electricity Act 1989 (the **Act**). The modifications fall into three main groupings:

- (a) modifications for **all OFTO licences** to Amended Standard Condition E12-J3 ('Restriction of Transmission Revenue: Allowed Pass-through Items') (the **IAE Condition**) as set out in the 28 November 2018 Decision Document (the **Decision Document**)³;
- (b) clarificatory modifications for **all OFTO licences** to the IAE Condition that were not covered by the Decision Document; and
- (c) modifications for **certain OFTO licences** to Amended Standard Conditions E12-J9, E13, E12-D2 and E12-J11 (as relevant to each licensee).

1.2. Following careful consideration of the representations made in response to the Consultation, we have decided to proceed with the licence modifications, with some small alterations to address minor issues raised in consultation responses, and to ensure consistency in the licence drafting. These differences are discussed under Section 2 of this letter in our consideration of the Consultation responses.

¹ The terms "the Authority", "we" and "us" are used interchangeably in this document.

² <https://www.ofgem.gov.uk/publications-and-updates/statutory-consultation-proposed-modifications-offshore-transmission-licences>.

³ <https://www.ofgem.gov.uk/publications-and-updates/income-adjusting-events-policy-offshore-transmission-owner-licences>.

- 1.3. **Notices of licence modification are attached at Appendices 1 to 20 of this letter.** See section 3 of this letter for a table setting out the relevant Appendix for each licensee. Our decision to make these licence changes takes effect from 14 January 2021.

2. Consultation responses

- 2.1. We received eleven responses to the Consultation. All non-confidential responses have been published alongside this decision on the Ofgem website.
- 2.2. An assessment of the representations made, together with our views on the points raised and whether they impact the licence drafting, is set out in the following paragraphs in this decision letter under the headings of the relevant amended standard condition. References to the various modifications use the same titles as set out in the Consultation.

Modifications to amended standard conditions (ASC) E12-J1 and E12-J3: all OFTO Licences

Deductible Modification

- 2.3. The Authority proposed modifications to apply a deductible to the revenue adjustment for any successful income adjusting event (**IAE**) claim where a latent defect was, or became, effectively uninsurable for offshore transmission owners (**OFTOs**). We proposed that for OFTOs licensed before November 2018, we would apply a deductible at the same level as the insurance deductible included in their ITT bid – and that for OFTOs licensed after November 2018, we would set the deductible at £5m or the figure set out in their ITT bid, whichever was the higher.
- 2.4. The responses received on this issue were generally positive, with most representations supporting the modification and proposed deductible amount proposed. A couple of responses expressed concern about the potential impact of the £5m deductible for future projects. However, all bids since February 2018 have been submitted on this basis. As such, we do not consider the £5m deductible amount to be a concern for future projects. We have therefore decided to proceed with this amendment as proposed.
- 2.5. We note that the licences of Blue Transmission London Array Limited, Blue Transmission Sheringham Shoal Limited, Blue Transmission Walney 1 Limited, Blue Transmission Walney 2 Limited, Greater Gabbard OFTO plc, TC Ormonde Limited, Thanet OFTO Limited, TC Barrow OFTO Limited, TC Gunfleet Sands OFTO Limited and TC Robin Rigg OFTO Limited refer to 'income adjustment' rather than 'revenue adjustment' at paragraph 21 where the new 'Deductible' drafting has been introduced. To ensure consistency within the paragraph, we have therefore used the term 'income adjustment' in our final modification for those licences.
- 2.6. We further note that the original drafting, at paragraph 21(b) of the TC Barrow OFTO Limited, TC Gunfleet Sands OFTO Limited, TC Robin Rigg OFTO Limited, and Blue Transmission Walney 1 Limited Licences, does not reference that the costs and/or expenses are 'pursuant to paragraph 14' as in the other OFTO licences. To secure clarity in the Authority making a determination under paragraph 21(b), we have therefore included these words in our final modification. We do not consider that this changes the effect of the modification, but simply aids future interpretation.

Definition of uninsurable

- 2.7. Linked to the deductible modification addressed above is the need to define 'Uninsurable'. OFTOs did not express any significant issues with the definition of uninsurable itself, which we had already published, except for minor adjustments, in the Decision Document. One respondent, however, queried the inclusion of the words 'absolute discretion' in reference to the Authority determining whether an OFTO had become 'Uninsurable'. Having taken account of this representation, we have removed the words 'absolute discretion' from the definition of Uninsurable, to eliminate any inconsistencies in the Licence drafting generally, as well as to assist interpretation.
- 2.8. The main concern raised by consultation respondents was that the definition should be placed in the Licence itself, rather than in a separate guidance as proposed by the Authority. The representations reasoned, in summary, that placing the definition in the Licence would provide greater certainty for OFTOs and their investors.
- 2.9. Having considered this representation, we have therefore made a change to the modification as proposed and have drafted the definition of Uninsurable so that it is self-contained in amended standard condition E12-A1 or E12-J1 (as relevant to each licence).

Force Majeure Modification

- 2.10. The OFTO Licence presently refers to the definition of force majeure contained in the System Operator Transmission Owner Code (**STC** or **Code**). We proposed to insert a stand-alone definition of force majeure into the Licence, based on that set out in the STC but excluding any reference to:
- (a) 'fault or failure of plant and apparatus (which could not have been prevented by Good Industry Practice)'; and
 - (b) the requirement for a failure 'to perform any of its obligations under the Code'.
- 2.11. The effect of this modification is to ensure clarity of the meaning of force majeure in the Licence, and enable paragraph 15(a) of the Licence condition to not be dependent on the STC for modification, nor be subject to modification by the STC.
- 2.12. A couple of consultation responses supported this modification. However, a number of consultation responses strongly objected to the proposal, principally on the basis that such consultees considered that this would constitute a retrospective change to licence protections, which would then have a negative impact on investors' risk profiles and their confidence in the OFTO regime. In particular, the responses against the proposal were concerned that the negative impact would be a result of the removal of the reference to fault or failure of plant or apparatus. These responses generally agreed with the removal of the requirement to fail to perform obligations under the STC.
- 2.13. Other concerns raised were that:
- (a) this modification would mean that any claims relating to latent defects would be less certain as they must rely on paragraph 15(c) of the IAE condition;
 - (b) moving the definition of force majeure into the Licence will put at risk the technical veracity of the definitions that all parties need to rely on (as not open to the same level of stakeholder crafting and consultation); and

- (c) the proposed amendment will make the licence drafting inconsistent with other non-OFTO transmission licences.

We respond to these concerns at paragraph 2.14 below.

2.14. We do not consider that the modification will result in reducing the OFTOs' protection under the IAE Condition, nor introduce a material change to an OFTOs' risk profile, for the following reasons:

- (a) the circumstances under which fault or failure of plant/apparatus from a latent defect could amount to an IAE under paragraph 15(a) are already narrow for a variety of reasons. Firstly, this is because of the exclusion where the failure could have been prevented by the party's own good industry practice, or was indeed due to a third party's failure to abide by good industry practice. Secondly, adding to this limited scope, is the fact that a third party is, in our view, most likely to be at fault for a latent defect. Finally, the clause is also further narrowed as the force majeure event must also involve the failure to perform obligations under the STC;
- (b) in any event, deserving cases that could theoretically have fallen under paragraph 15(a) as originally drafted will continue to be able to be considered by the Authority under paragraph 15(c).

2.15. We also consider that, as outlined in the November Decision Document, the inclusion of the 'fault or failure of plant/apparatus' in a definition of force majeure is inapt. The reference is unsuitable in identifying those extreme supervening events which characterise the definition of force majeure.

2.16. In response to the concerns raised and summarised at paragraph 2.11 above:

- (a) We do not agree that this modification will make claims relating to latent defects less certain, particularly due to the narrow scope of the original drafting as discussed above and availability of limb (c) under which such claims can be considered.
- (b) We also do not agree that inserting a definition of force majeure into the Licence will put at risk the "technical veracity" of the definitions. As evidenced by this consultation, there are strict statutory requirements to be met in making modifications to licences which provide a clear platform for stakeholder engagement and appeal. The Authority also opted to conduct an earlier, non-statutory consultation, to feed into this modification.
- (c) The licences for Scottish Hydro Electricity Transmission and Scottish Power Transmission plc both contain provisions for income adjusting events, but without any reference to force majeure. It is therefore clear that there are already differences in the protections offered by OFTO and TO licences and we do not consider that this is a barrier to modifications to OFTO licences to which onshore TOs are not parties.

2.17. Having considered the consultation representations made, we have therefore decided to proceed with this modification as proposed.

Information Requests

2.18. The effect of this modification is to confirm the Authority's ability for the avoidance of doubt: (1) to make multiple requests for additional information when required; and (2) to extend the time permitted to respond to the information request.

- 2.19. Consultation responses were generally supportive of the information request modification - however there were some representations that suggested the introduction of a cap on the number of information requests and/or the extension of time permitted to respond to the information request.
- 2.20. Repeated requests for additional information were needed under all IAE claims that we have received to date. The responses to these requests can often then bring other questions to light. We therefore consider that limiting the number of requests would be impractical, as there would be a risk that we still need further information at the point where the limit had been reached.
- 2.21. In our experience determining claims to date, a number of the information requests have also in turn been followed by requests from OFTOs for an extension (or extensions) of time to provide the requested information. In terms of concerns that allowing extensions will hold up the determination process, we note that there is no restriction on parties responding to information requests before the stated deadline.
- 2.22. Given this, we have decided to proceed with the modification as proposed.
- 2.23. We note however that the licences for Blue Transmission London Array Limited, Blue Transmission Sheringham Shoal Limited, Blue Transmission Walney 2 Limited, Greater Gabbard OFTO plc, TC Ormonde OFTO Limited, Thanet OFTO Limited, Gwynt y Mor OFTO plc, TC Lincs OFTO Limited and WoDS Transmission plc refer to an existing time for responses to requests of 'not more than one month'. This wording will need to be replaced with the amendment implementing the proposal to extend the time permitted where appropriate, and has therefore been removed from those licences as part of this modification procedure.
- 2.24. We note, further, that the original drafting of the TC Barrow OFTO Limited, TC Gunfleet Sands OFTO Limited, TC Robin Rigg OFTO Limited, and Blue Transmission Walney 1 Limited Licences does not contain an explicit provision outlining a deadline for OFTOs to respond to information requests. We consider that it would be consistent with the proposed effect of this modification as outlined in the Notice, and within the scope and intent of the Notice, to modify these Licences to be consistent with the other OFTO Licences and include a deadline to respond to information requests, as well as the proposed modifications set out in the Notice. As this deadline will be able to be extended, we do not consider that this will negatively impact the OFTO, and will indeed provide some further certainty to parties in the timeline for determination of IAE claims.
- 2.25. Given this, we have decided to proceed with the modification as proposed and insert drafting into these Licences to ensure consistency between the OFTO Licences.

Commercial Recourse & Interim Awards

- 2.26. There was strong support of our proposed modification to confirm, for the avoidance of doubt, that the final revenue adjustment for successful IAE claims will be offset by the commercial recourse recoverable by OFTOs. There was also support for the modification to confirm, for the avoidance of doubt, that an interim revenue adjustment may be awarded in successful IAE claims where there is not yet sufficient information to determine the final revenue adjustment. There were, however, a number of representations made regarding the difficulties in estimating the quantum of potential recoveries, as well as the lengthy process often involved in pursuing commercial recourse. One respondent also proposed that an explicit provision to make interim awards only be made if an explicit provision is included confirming the Authority's right to recover any overpayments made.
- 2.27. Other suggestions included:

- (a) the inclusion of a provision allowing the Authority to be involved in the claims process and reduce the IAE award if the Authority considers that the OFTO is not acting in the best interests of the consumer;
- (b) removing the words “intends to claim” from the proposed modification;
- (c) for the Authority to award the full revenue adjustment, and then receive any funds recovered by way of commercial recourse once available.

2.28. We will consider IAE claims very carefully when received. At that point, provided we consider the event is an IAE, we would then need to consider whether an interim award was justified and what proportion of the total amount claimed to award, if any. This will depend on issues such as the total amount claimed, the level of deductible, the amount of any commercial recourse sought, and whether the OFTO is facing financial difficulties as a consequence. Given the bespoke nature of every IAE claim, we do not see it as practical to include a more detailed mechanism on these points within the Licence. We will, however, continue to monitor this and any future need to provide guidance or indeed further Licence modifications on the process.

2.29. In response to the suggestions raised and outlined at paragraph 2.27 above:

- (a) We do not consider that it is appropriate for the Authority to become involved in the commercial recourse claims process, as this is a process usually carried out in line with commercial agreements and arrangements to which the Authority is not a party.
- (b) We know from previous IAE claims that OFTOs may not have claimed commercial recourse yet at the point where they submit the IAE claim. Removing the words ‘intends to claim’ may therefore prevent the Authority from taking commercial recourse into account where this has been sought after the IAE notice has been submitted, and we therefore do not propose to amend the wording as consulted on.
- (c) As noted in one of the consultation responses, making interim awards for the full amount claimed by the OFTO could be problematic as the Authority might then need to recover overpayments. This may require the involvement of external parties which creates additional complexities.

2.30. Having taken account of the various representations from consultation respondents, we have therefore decided to progress with the modification as proposed in the Notice.

Timing of Determination

2.31. This modification is to carve out the consultation time period from the three-month decision-making deadline. A number of representations expressed concern that doing so would render ineffective the set deadline, cause delays in making the determination, and suggested that the three-month deadline should remain unchanged. Other representations supported the carve-out of a consultation period from the decision-making deadline, but suggested that this be explicitly capped. An alternative suggestion was made to cap the overall decision making deadline at six months from receipt of the Notice.

2.32. In the original licence drafting, with no carve-out for consultation time from our three-month decision-making period, any extension to a consultation greatly impacts the time available to the Authority to adequately consider the consultation responses and make the final determination. In line with the Authority’s consultation policy,⁴ the

⁴ Available at: <https://www.ofgem.gov.uk/consultations/our-consultation-policy>.

Authority would expect consultations under the Licence to be for four weeks. In our experience, however, it is not unusual for parties to request an extension to this consultation time period.

2.33. In terms of an overall decision-making deadline of six months, we note that all IAE claims to date from receipt of the initial notice to final determination have taken roughly 12 to 15 months. To impose such a cap would therefore be impractical.

2.34. We therefore have decided to proceed with the modification as originally proposed.

2.35. We have also noted that the licences for Blue Transmission Walney 1 Limited, TC Barrow OFTO Limited, TC Gunfleet Sands OFTO Limited and TC Robin Rigg OFTO Limited each have slightly different wording to all other OFTO licences on the setting of income adjustments where the Authority has not made any determination. We have, for consistency, introduced a new subparagraph 22(c) that outlines the procedure in determining the allowed income adjustment and deadline where the Authority has requested additional information. This parallels the position in other OFTO licences.

Event or Circumstance

2.36. No comments were received on this proposed modification to make consistent references to "event or circumstance" in the IAE Condition. We have decided to proceed as proposed.

Publication of the IAE Notice

2.37. This modification is to include the words 'as soon as reasonably practicable' in relation to the Authority's requirement to publish the IAE notice. Representations relating to it suggested that a deadline be imposed by which the Authority is required to have published the redacted Notice.

2.38. The original wording of this provision specified no timeframe by which the Notice was to be published and the intention of the proposed modification was to clarify the current practice of the Authority. We agree that ordinarily Notices will be able to be published within one month of receipt, however we note that there are circumstances where doing so will not always be possible, including difficulties arising in agreeing redactions with the OFTO.

2.39. We therefore have decided to proceed with the modification as set out in the Notice.

Amendment of IAE Determinations

2.40. The effect of this modification is to provide the Authority with the ability to amend an IAE revenue adjustment (in addition to the current ability to revoke). Some representations from consultees focused on concerns about the Authority's ability to revoke an IAE revenue adjustment, however this was not within the scope of the consultation: the IAE condition already allows for the Authority to revoke an IAE revenue adjustment, and the effect of this modification will be to broaden the provision to allow the Authority to also amend an IAE revenue adjustment under the same conditions (which includes the consent of the Licensee).

2.41. One consultation response suggested that should the Authority wish to alter an awarded IAE revenue adjustment, it should instead be revoked and remade, rather than altered under a new power to amend. We consider it likely that any amendment to an existing award would concern the quantum. We do not see what the advantage of revoking and remaking the award would be, other than further delaying certainty for

OFTOs and generators where such an adjustment is appropriate and would not represent best regulatory practice.

2.42. We therefore have decided to proceed with the modification as set out in the Notice.

Modifications to ASC E12-J9: OFTO licences granted in tender rounds 1 to 3

2.43. This modification relates to the charging statements submitted by OFTOs and removes the requirement for charging statements to be approved by the Authority each year for OFTO licences granted in tender rounds 1 to 3. No comments were received on this proposed modification except to suggest that the paragraphing of the condition be consistent with that included in later licences. We agree with this representation and therefore have decided to proceed as proposed however with paragraphing consistent with the same condition in later licences.

Modifications to ASC E12-D2: TC Lincs OFTO Limited

2.44. This modification provides further transparency in respect of equity transactions and provides the Authority with information on the appetite in the secondary equity market for investment in OFTOs. It makes the TC Lincs OFTO Limited licence consistent with all other OFTO licences. No comments were received on this proposed modification. We have decided to proceed as proposed.

Modifications to ASC E12-J11: Gwynt y Môr OFTO plc

2.45. This modification is to require the Licensee to share learning with electricity distribution licensees under the Network Innovation Competition Governance Document. It makes the Gwynt y Môr OFTO plc licence consistent with all other OFTO licences. No comments were received on this proposed modification. We note that ASC E12-J11 was introduced into the Gwynt y Môr OFTO plc licence by way of a modification in 2017, however that version did not include reference to sharing with electricity distribution licensees. We have therefore have decided to proceed as proposed, introducing this reference to distribution licensees, and with two further minor changes to clarify a cross-reference and correct a formatting error.

Modifications to ASC E13: OFTO licences granted in tender rounds 1 and 2

2.46. This modification is to ensure correct and clear interpretation of the STC 'special' conditions where relevant for the OFTO licences granted in tender rounds 1 and 2 and also makes the approach consistent across the OFTO licences. No comments were received on this proposed modification. We have decided to proceed as proposed.

3. Licence modification decisions

3.1. Modification decision notices together with relevant schedules have been published alongside this letter as follows:

Licensee	Modification Notice & Schedule
Blue Transmission London Array Limited	Appendix 1

Licensee	Modification Notice & Schedule
Blue Transmission Sheringham Shoal Limited	Appendix 2

Licensee	Modification Notice & Schedule
Blue Transmission Walney 1 Limited	Appendix 3
Blue Transmission Walney 2 Limited	Appendix 4
Diamond Transmission Partners BBE Limited	Appendix 5
Diamond Transmission Partners Galloper Limited	Appendix 6
Diamond Transmission Partners RB Limited	Appendix 7
Diamond Transmission Partners Walney Extension Limited	Appendix 8
Greater Gabbard OFTO plc	Appendix 9

Licensee	Modification Notice & Schedule
Gwynt y Mor OFTO plc	Appendix 10
Humber Gateway OFTO Limited	Appendix 11
TC Barrow OFTO Limited	Appendix 12
TC Dudgeon OFTO plc	Appendix 13
TC Gunfleet Sands OFTO Limited	Appendix 14
TC Lincs OFTO Limited	Appendix 15
TC Ormonde OFTO Limited	Appendix 16
TC Robin Rigg OFTO Limited	Appendix 17
TC Westernmost Rough OFTO Limited	Appendix 18
Thanet OFTO Limited	Appendix 19
WoDS Transmission plc	Appendix 20

4. Next steps

4.1. These licence changes will take effect from 14 January 2021.

4.2. If you have any questions in relation to this letter please contact Stephen Taylor, Networks at Stephen.Taylor@ofgem.gov.uk.

Yours sincerely

Jourdan Edwards

Head of the OFTO Regime, Networks