

24th September 2020

Mr Jourdan Edwards
Head of OFTO Regime, Networks
Ofgem
10 South Colonnade
Canary Wharf
London
E14 4PU

Dear Jourdan,

Consultation on proposed modifications to Offshore Transmission Licences

Thank you for the opportunity to respond to this consultation issued on 25 August 2020. We have provided comments on the consultation Covering Letter, sections A, B and C, followed by specific comments on Appendices D and H:

Covering Letter section A

- 1) A1, bullet 1: We agree with Ofgem's proposal for setting the deductible at the same level as that shown in the bid document since this keeps the OFTO risk profile consistent.
- 2) A1, bullet 2: We have previously expressed our concern with Ofgem's proposal regarding the post 28 Nov 2018 OFTOs, where Ofgem acts as the insurer of last resort then it will set a deductible of £5m or 30% of the repair costs, whichever is higher. Our position remains the same and we consider that this approach will stifle innovation amongst OFTOs because they will be effectively forced to adopt a £5m deductible for their insurance policy (to be competitive with other OFTOs) and then take a view on how often they will incur such a high deductible. The reality is that highly geared OFTOs cannot effectively manage multiple deductibles of this magnitude: if they make provision for it then they will probably be uncompetitive; if they do not make a provision they are gambling on there being limited occasions where the deductible is called. This is precisely the circumstances where it does not represent value for money for an OFTO to price the risk. We believe that it should be for the OFTO to identify the optimum level of deductible following detailed discussions with the insurance market and that there should be additional protections if multiple events with the same root cause were to occur.
- 3) A2, generally: Any changes to the STC need to be approved by the Authority, therefore we cannot understand why Ofgem see the need to create a separate definition of Force Majeure to the one that appears in the STC. By Ofgem creating their own definitions that are not open to the same level of stakeholder crafting and consultation as the STC definitions we believe it will put at risk the technical veracity of the definitions that all parties need to rely on.
- 4) A2, bullet 1: If a separate definition is required or if Ofgem proposed to change the STC definition by removing "fault of plant and apparatus (which could not have been prevented by Good Industry

Practice)” from the Force Majeure definition, then we do not agree to the change for the following reasons:

- a. The STC drafting has been crafted, and accepted, by industry experts and while Ofgem may consider that it is not possible to have such a fault without a corresponding failure of GIP then it should propose the change is made to the STC definition so that all transmission operators can give their views.
 - b. Removing this part of the definition could lead to a dispute in circumstances where it is not possible to determine whether the root cause of a failure is a faulty / defective component or an act of sabotage / vandalism (the former would qualify but the latter would not). If the definition is not changed then this potential area for dispute is removed and consumers remain protected by the ‘Good Industry Practice’ caveat.
 - c. It is not clear why OFTO TOs should be subject to a different risk profile compared to other TOs (and a different risk profile to that on which they bid for the OFTO).
- 5) A2, bullet 2: We do agree that limb (a) of paragraph 15 of the IAE provisions should remove the requirement “and which results in or causes the failure of that Party to perform any of its obligations under the Code” but that can be established in the drafting of limb (a) rather than creating a separate Force Majeure definition.

For example:

15. An Income Adjusting Event in Relevant Year t may arise from any of the following:

(a) an event or circumstance constituting force majeure under the STC, except that the licensee is not required to demonstrate that the event has caused a failure to perform its STC obligations:

- 6) A3, bullets 1 and 2: We do not believe that there is a linear correlation between the total value of the OFTO assets and the point at where unforeseen costs become significant. Granted that the larger OFTOs will earn more revenue, but this has to pay for the upkeep of more expensive assets. For this reason, we believe that the threshold should be set at £1m for all OFTOs valued above £100m.

Covering Letter section B

- 7) B1: We agree with Ofgem that the information required by Ofgem from an OFTO to support an IAE claim can be significant. We consider that the Licence should set out that where Ofgem requests significant information from the Licensee then it may extend the period for the Licensee to respond by up to two weeks.
- 8) B2: We agree that any commercial recourse obtained by the OFTO should offset the level of an IAE award. However, we are concerned that pursuing commercial recovery from third parties can be an expensive and lengthy process, as such there needs to be a mechanism where the OFTO and Ofgem can agree what is an optimal recovery both in terms of time and quantum.
- 9) B3: We support the need for Ofgem to include time for a consultation window within their decision of an IEA submission. However, we believe that it is essential for the Licence to set a defined time period that Ofgem can use for such consultations.

- 10) B4: We support the proposal to include the words 'or circumstance' in paragraph 16 of ASC E12-J3.
- 11) B5: We support the need for Ofgem to consult with the Licencee when agreeing the text that should be redacted. This should be completed in a timely manner and the Licence should set out the maximum time required for considering the acceptability of such redactions.

Covering Letter section C

- 12) C1: We are supportive of this proposal to remove the regulatory burden on Tender Round 1-3 OFTOs by bringing them in to line with later OFTOs in not having to have their annual revised charging statements approved by the Authority.
- 13) C2: We have no comment, this it is an issue for TC Lincs only.
- 14) C3: We are supportive of this proposal to bring the reference to the STC in Tender Round 1 and 2 OFTOs in line with the wording in later OFTOs to ensure correct and clear interpretation of the STC reference to 'special' conditions.

Appendix D

- 15) 10, b): The proposed definition of Force Majeure would prevent an OFTO submitting an IAE claim for an event caused by a *Latent Defect*. In the proposed definition of *Latent Defect* (in Appendix H) it is stated to be *an actual defect in material workmanship design plan or specification*, this is inconsistent with Ofgem's proposed definition of Force Majeure, which states that the definition will exclude *reference to 'fault of failure of Plant and Apparatus (which could not have been prevented by Good Industry Practice)*. This would suggest that the OFTO would be prevented from submitting an IAE claim for an *Uninsurable* event where this event is due a *Latent defect* which is due to a *material defect in workmanship design plan or specification*.
- 16) E12-J3, clause 15: We believe it would provide clarification if Ofgem were to include an additional limb, *limb (d)*, under which an IAE might be granted. Where limb (d) relates solely to a defect that has occurred on an asset that is *Uninsurable* in accordance with the criteria set out in Appendix H.

Appendix H - Draft Guidance on the Definition of Uninsurable

- 17) 1.2, b): It would be helpful if Ofgem could provide guidance on the criteria that the Authority would use to judge *the Insurance premium payable for insuring that Risk is at such a level that the Risk is deemed as not being insurable ...?*
- 18) 1.2, g) It would be helpful if Ofgem could provide guidance on the criteria that the Authority would use to judge what is an *exhaustive search* in the context of a *Worldwide Offshore Transmission Asset Insurance Market with reputable insurers of good standing ...?*

Please do not hesitate to contact the undersigned should you wish to discuss any of the comments presented in this letter.

Yours Faithfully

A handwritten signature in blue ink, appearing to read "John Sinclair", enclosed in a light blue rectangular box.

John Sinclair

On behalf of The Humber Gateway OFTO Limited