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25 September 2020

Dear Jourdan,

**Ref: Consultation on proposed modifications to Offshore Transmission Licences**

*About RWE*

RWE is a leading energy player with four main operating companies, of which three are active in the UK, including the newest subsidiary RWE Renewables, which is one of the world's leading renewable energy companies and the second largest offshore wind developer in the world.

In the UK, RWE employ over 2,600 people and generate enough power for over 10 million homes, with a diverse portfolio of onshore and offshore wind, hydro, biomass and gas across England, Scotland, Wales and Ireland. For a broad picture of the scale of our projects in the UK and Ireland, please see our infographic [here](#).

RWE have made ambitious commitments to increase the generation of clean, reliable and affordable electricity. Alongside the ambition to be carbon neutral by 2040, we continue to invest heavily in wind power and other emerging technologies, such as hydrogen and floating offshore wind. RWE's planned gross growth capex spend 2020-2022 will be €8-9bn globally, of which around 30-35% will be in the UK, mostly on offshore wind, including Triton Knoll and Sofia. We have set our sights high, envisaging RWE will play a key role in developing the energy world of tomorrow and driving progress towards the UK's net-zero ambitions.

*RWE's response*

I refer to Ofgem's consultation on proposed modifications to OFTO Licences published on 25 August 2020 primarily concerning Ofgem's Income Adjusting Event ("IAE") policy and the operation of the IAE Condition in Amended Standard Condition E12-J3 of the OFTO Licence. Set out below, in corresponding order to the consultation paper, is RWE Renewables response to the IAE related proposed modifications.

Whilst generally we do not object to the proposed licence changes in Part A to implement the IAE policy, we see this as a band aid approach to the issue of 'uninsurability', which is fundamentally a result of the design of the UK offshore regime.

We urge Ofgem to carefully consider the insurance implications of any future regime design options under the recently announced review of the UK offshore regime. The inability of OFTOs and generators to procure adequate insurance cover has significant implications for the viability of both the current and future offshore regime.

With respect to the Part B proposed licence changes, we have concerns with a number of the proposals as they seek to remove checks and balances in the OFTO Licence designed to ensure Ofgem conducts an IAE determination in a timely manner. Whilst we recognise the inflexibility of a number of these provisions, we do not support their wholesale removal but would support their replacement with a more appropriate timeframe or mechanism. RWE has concerns generally with Ofgem's response times and accordingly does not wish to lessen the level of Ofgem's responsibilities in the IAE Condition.

## **Part A – Proposed Modifications to the IAE Condition, as set out in the IAE Policy Decision Document dated 28 November 2018**

### **A1. Deductibles for uninsurable claims**

Whilst we do not agree that the costs incurred by an OFTO under an IAE should be passed through to generators, we welcome this proposed change as a move in the right direction to a more appropriate allocation of risk between the parties. The OFTO has the opportunity to allocate sufficient sums to cover the proposed deductible, in the same way it would for an insurance deductible, in its TRS bid and will benefit from a reduction in its premium as a result of a higher deductible.

However, we do not agree that the definition of 'uninsurable' be included solely within the Guidance. The definition of 'uninsurable' is integral to the proposed modification and therefore must be included in the OFTO Licence. The effect of the definition sitting outside of the Licence is that Ofgem can unilaterally change a term of the OFTO Licence without conducting a section 11A statutory consultation as is required by the Electricity Act 1989. In effect, Ofgem is seeking the power to unilaterally vary a bilateral contract, which would not be allowable in a commercial context and, as section 11A makes clear, is also contrary to the requirements of the Electricity Act 1989.

Ofgem's proposed approach, in respect of the definition of 'uninsurable', also contradicts its actions with respect to the definition of Force Majeure. The definition of Force Majeure is being brought into the OFTO Licence so that it cannot be varied without the consent of the parties to the Licence.

## **A2. Force majeure**

We agree that the definition of force majeure should be included within the IAE Condition. It is not appropriate that a provision of a licence condition, equivalent to the clause of a contract, could be amended as a result of a modification to the definition of force majeure in the STC.

We also support removal of 'reference to the fault of plant and apparatus' and 'the requirement not to be able to perform an obligation under the STC' from the definition.

'Fault of plant or apparatus' is not commensurate with the other examples of force majeure in the definition nor is it commensurate with a contractual understanding of the nature of a force majeure event. Fault of plant or apparatus occur frequently on transmission assets and it is neither fair nor proportionate to include such an event as a type of force majeure event. The OFTOs, as the owners and operators of the transmission assets, are responsible for their maintenance and accordingly should bear the risk where such assets have not been maintained properly.

We consider it makes sense not to include 'the requirement not to be able to perform an obligation under the STC' within the definition of force majeure in the OFTO Licence because the relevant event or circumstance will no longer be 'force majeure under the STC'. In any event we consider that statement served no purpose: all IAE claimants to date were unable to identify an obligation under the STC that they were unable to perform as a result of the event at the centre of the claim, and it is difficult to see how it would be relevant for any future claims.

## **A3. IAE threshold**

Looking at the existing UK offshore wind farms and those currently under construction, it is clear that the generation capacity of offshore wind farms increases proportionate to the size and cost of the transmission assets. We therefore consider the proposed IAE threshold bands are proportionate to the increased revenue levels available to OFTOs from larger transmission systems.

Notably the higher thresholds are unlikely to limit OFTO claims, with the cost of repair of an offshore export cable significantly exceeding the proposed threshold level of £4m for the fourth band.

The £4m is also below the £5m deductible, effectively making £5m the threshold for 'uninsurable' claims made by OFTOs appointed from tender round 5 and beyond.

## **Part B – Other Proposed Modifications to the IAE Condition**

### **B1. Information requests**

We do not agree with an uncapped number of information requests. Ofgem is seeking to significantly downgrade checks and balances within the IAE Condition included to ensure it makes an IAE determination in an efficient manner. We accept that more than one information request may be necessary. However, to ensure Ofgem operates in an efficient and timely manner this should be restricted to a limited number of requests or alternatively, which is our preferred position, Ofgem should introduce an overall time limit on reaching an IAE determination (exclusive of quantum) of six months.

### **B2. Commercial recourse**

We support this proposal. Double dipping is not acceptable in a commercial or legal context and it would be wholly unfair to developer generators, who have already provided the warranties/contractual recourse to the OFTO, to pay for an IAE claim where the OFTO's losses have already been recovered.

We recognise the lengthy time taken to pursue a commercial claim. It therefore makes sense to separate what are effectively two parts to an IAE determination: the decision to grant an IAE and the quantum of a successful IAE claim. This is consistent with many judicial processes.

Our support for the partial revenue adjustment proposal is conditional on provision being made in the IAE Condition for the Authority to recover any overpayment made to an OFTO as a partial revenue adjustment. It is possible that an OFTO may recover more than it initially estimated. Provision in the OFTO Licence, that any such overpayment can be recovered, ensures clarity for the parties and avoids the need for any supplementary agreement for this purpose.

### **B3. Timing of determinations**

We do not agree with this proposal. There is no accountability with respect to timing proposed and RWE considers that there should be. More generally it does not appear Ofgem has considered how delays in IAE determinations impact the financial position of generators and OFTOs.

We consider the consultation can occur whilst the Authority is seeking further information. If Ofgem does not require further information, the claim is relatively straight forward and the three-month time limit should be sufficient. The Ofgem onshore team completed the complex Black Start IAE claim in the three month period allowed with a full public consultation and so it is unclear and, to our knowledge, unprecedented for why the offshore team is seeking an uncapped period of time for consultation. The IAE consultations that the offshore team have run to date are very limited in scope as compared with the Black Start IAE the offshore team completed in 3 months.

As stated above we consider there should be a maximum cap on the time Ofgem has to make an IAE determination of six months in all circumstances i.e. three months as currently drafted under paragraph 21 but an absolute maximum for any one claim of six months including all information requests. This is more than reasonable given a determination will be able to be made without determining quantum. Ofgem needs to be accountable for its performance and these Part B proposals are seeking to remove key express checks on ensuring an efficient process.

### **B4. Event or circumstance**

We are neutral on this proposal.

### **B5. Publication of IAE notice**

We do not agree to this proposal unless the paragraph also includes the words 'but in any event within 30 days of receipt of an Income Adjusting Event claim'. It does not take any more than a week to agree the confidential information and it is in the industry and broader public interest that the claim is made public as soon as possible. Industry require an objective standard of what is reasonably practicable because it does not have confidence in the timelines Ofgem has operated to in respect of the offshore IAE determinations to date.

## **B6. Amendment of revenue adjustment**

We do not agree to the proposal to allow Ofgem to amend an IAE determination. The determination should be cancelled and remade – not amended. The ability to amend a determination could result in Ofgem not giving the determination sufficient consideration in the first instance because it has a power to amend it. Further, developers require certainty in IAE determinations given the financial impact they have on developers. Notably the proposal does not include a time limit for any such amendment, further undermining such certainty.

The intention behind paragraph 24 of the IAE Condition is to allow the revocation of an IAE determination where the quantum ultimately falls below the threshold level. Ofgem is proposing to alter the intention of the paragraph. There is also no justifiable reason for a power to amend an IAE determination if Ofgem, subsequent to this consultation, has the power to delay the determination of quantum until all costs and commercial recourse have been determined.

I would be happy to discuss any aspect of our consultation response.

Yours sincerely,

(by email)

Nicola Percival

Senior Regulatory Affairs Manager

RWE Renewables