ABO WIND NI LTD

RESPONSE TO DEPARTMENT OF ENTERPRISE TRADE & INVESTMENT CONSULTATION

ON

CLOSURE OF THE NORTHERN IRELAND RENEWABLES OBLIGATION TO NEW ONSHORE WIND IN 2016

Date: 14th October 2015

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Executive Summary

ABO Wind N.I. Ltd is a subsidiary of the German-based ABO Wind AG, one of Europe's most experienced wind energy developers. The company was founded in 1996 and has over 300 employees in Germany, France, Spain, Scotland, Ireland and Argentina. ABO Wind has been successful in developing, constructing and maintaining wind farms with over 1000 MW of rated capacity in Europe. ABO Wind currently has 128MW at various stages of the planning process in Northern Ireland. We had planned a long-standing commitment to the local Northern Ireland market and economy over the coming years and would have contributed substantially to UK renewable energy targets with a substantial pipeline of projects anticipated, but will be reviewing our investment strategy for the UK when we see the final policy decisions.

Having reviewed the consultation document we would highlight a number of critical points in particular.

i. The effect of the proposals and recent new announcements from DECC are fundamentally different in the two jurisdictions which if not rectified will lead to unequal and discriminatory treatment of developers in NI.

ii. DECC are much better protected from legal challenges / litigation as the changes are being introduced under an Act of Parliament in GB while in NI it is proposed to do this by way of Order. This leaves DETI exposed to legal challenges on several fronts including:

   a. Insufficient consultation leading to challenges on the basis of unreasonableness and procedural impropriety
   b. There is case law precedent to suggest that the proposed order could be successfully challenged on the grounds that the effect of the Order would pre-date the Order itself and that such retrospective change would be unlawful.
   c. The different grid connection policies implemented by SONI and historically by NIE could leave them exposed to litigation cases. Particularly NIE, where the Utility Regulator recently decided that that NIE's interpretation of Article 20 of the Electricity (Northern Ireland) Order 1992 had been incorrect and that it was unlawful for them to discriminate against projects without planning permission seeking to make a grid connection application.

iii. In their most recent announcement DECC are acknowledging that where planning authorities in GB fail to issue planning permissions in a timely manner then it is appropriate that they be given an additional grace period, while at the same time insisting that, in the case of NI, where grid operators fail to issue a connection offer in a timely manner no grace period can be provided. This appears entirely inconsistent and unreasonable.

iv. The combined effect of all of DECC's grace period proposals is to put projects in GB in the same or perhaps even better position than they would have been in had the original deadlines been maintained. The chaotic manner in which this has been handled will no doubt cause significant reputational damage to GB and NI but this will be mitigated in GB due to the positive impact of these proposed grace periods. This will not be the case in NI if the Order proceeds as outlined.

Proposed Solution

For NI, given the different grid connection policies described above, the requirement for an accepted grid connection offer should be changed to the submission of a valid grid application. In addition the deadline for making the application in order to avail of the grace period needs to be changed to some reasonable time after the date of the Order coming into force. ABO Wind believe that this would mitigate the reputational damage already caused and would insulate DETI and the grid operators from potential legal challenges and litigation cases.

It is assumed that DETI will seek to ensure that the further grace periods as described in DECC's recent announcement relating to financing and planning delays would be made to apply equally in NI.

In addition we understand that Ofgem will only be able to assess eligibility for grace periods once it is content that all other eligibility criteria have been met and the project has been commissioned.

This implies that an applicant must carry out all of the work, right up to Commissioning, at risk, with no indication from Ofgem that the developer has satisfied the grace period criteria until after the wind turbine commissions. This is unreasonable. It would be judicious to expect Ofgem to assess the criteria, at an early stage, before additional expenditure has been incurred by the applicant.

We would also strongly suggest that the Utility Regulator should be in contact with SONI as a matter of some urgency to address their enduring refusal to issue connection offers.

1.0 Legal standing / Potential Legal Challenges

We have sought a number of legal opinions in relation to the RO / NIRO closure proposals and have been advised that in the case of GB, as these changes are being made under an Act of Parliament, they are more legally robust and would be quite difficult to challenge under law. In the case of NI as they are being made by way of a consultation followed by publication of an NI Order it will not be so well protected from challenge. In addition, the proposals in their current form could potentially expose NIE and SONI to claims for their failure to issue connection offers in a timely manner. This would apply particularly to NIE given the recent regulator decision in the Solar Ventures case, but it is our view that SONI's enduring policy of not issuing connection offers in the absence of planning consents will be also be successfully challenged. We would highlight the following potential issues:

i) A judicial review of the decision could be sought on the grounds of insufficient consultation. This would likely fall under the broad headings of unreasonableness and procedural impropriety. There is a case to be made here in circumstances where the commercial repercussions for the renewable industry are so great and the period to respond so short that it could well be found that DETI would not have acted in a reasonable manner.

ii) Minister Bell's announcement on 18th June 2015 advising he had no intention of closing the NIRO early following the DECC announcement could raise the issue of "legitimate expectation". i.e. The wind industry in NI had a reasonable expectation that NIRO support would not end early and suffered prejudice on the basis of investment decisions made subsequent to this announcement.

iii) A precedent for challenge to variation of renewables subsidies arises in the decision of the Court of Appeal in *Secretary of State for Energy and Climate Change v Friends of the Earth and others* ([2012] EWCA Civ 28). This challenge related to the reduction in subsidies under the Feed-in Tariff ("FiT") in England for solar PV. In brief terms the Court held in that case that a proposed retrospective reduction in the FiT was unlawful as the legislation providing for changes to the FiT only allowed for prospective amendments. Importantly, the Court found that the legislation did not provide for changes to FiT rates that would take effect before the modification came into effect. The above case is not a direct parallel to the situation facing the NIRO as the proposed changes are prospective (i.e. withdrawal of support from 1 April 2016). However, it appears arguable that there is some comparison insofar as the proposed grace period cut-off dates are retrospective. This means that operators are potentially facing prejudice by not meeting criteria that will not be brought into force until the enabling legislation is published "in due course" (as stated in the consultation). It is noted that a similar set of circumstances will arise in GB in relation to grace period cut off dates, however the enabling legislation to bring in those changes will be in the form of an Act of Parliament (as opposed to secondary legislation). This makes the changes much more difficult to challenge due to the principle of "parliamentary sovereignty". Clearly the changes are being carried out this way by Westminster to seek to minimise the prospects of a legal challenge. The changes in the NIRO are not insulated in this way. Accordingly, there may be grounds for challenge against the changes to the NIRO on the basis that, in part, they are intended to have retrospective effect.

iv) The decision to differentiate between cluster connections and non-cluster connections could perhaps also be challenged on the grounds that it is discriminatory. Given that cluster connections are generally expected to take up to 18months longer than

dedicated connections, a decision to extend the grace period by just a few weeks suggests a level of bias towards a particular cluster, in order to give certain projects preferential treatment.

v) The early closure grace period criteria as currently formulated requires developers to be in possession of an accepted grid connection offer. It is worth noting that up until recently grid connection policy was being implemented in a fundamentally different way to GB. NIE would not accept grid connection applications until a project had received planning permission whilst in GB these processes could be twin tracked. This policy approach was recently challenged by Solar Ventures Ltd. in a dispute they took against NIE. On the 30th July 2015 the Utility Regulator in NI published their determination on this dispute and concluded that NIE's interpretation of Article 20 of the Electricity (Northern Ireland) Order 1992 had been incorrect and that it was unlawful for them to discriminate against projects without planning permission seeking to make a grid connection application. It is perhaps best to illustrate the problem this has created by way of example: A project that was granted planning in NI on say 27th July could only apply for its grid connection on that day. So assuming it takes 90 days for NIE to issue a connection offer, the earliest this project could meet the grace period criteria would be 26th October. Had NIE been in compliance with this Electricity Order and implemented connection policy in the same way as in GB this project could have already been in possession of its connection offer and complied with the early closure grace period criteria on the 27th July. The financial impact on a project of not making the RO deadlines is severe and should the closure order be implemented as described, NIE may also be considered to have some liability for these losses, particularly given the regulator decision. The contradiction in NI and GB grid application terms have therefore until recently, put NI at a distinct disadvantage in relation to achieving the criteria set out in the DECC paper in order to achieve ROCs. To apply the same criteria in NI as in GB would be discriminatory and wholly unreasonable. Under Article 6 of NIE's Distribution Licence it states that NIE have 3 months within which to furnish an applicant with a grid connection offer from the date of application. Therefore, any NI project capable of submitting a grid application following the Utility Regulator decision would not be able to avail of a grid connection offer until 30th October 2015 at the earliest under these terms. This would apply to both cluster and non-cluster connections equally. It is also worth noting that at this time SONI are still refusing to issue connection offers to projects which do not have planning.

2.0 Damage to Investor Confidence in Northern Ireland

The decision by DECC to end the RO early has already caused significant harm to GB's reputation as a place to do business. Developing large infrastructure projects is a complex, time consuming and expensive process and the importance of policy stability cannot be overstated. This is particularly the case in NI where the planning process is one of the slowest and most expensive of all jurisdictions in which ABO Wind operate.

Where governments identify a need to change from one set of policy goals to another this should be done gradually, in a controlled manner and the likely changes flagged up early so that developers can make appropriate and sensible investment decisions and adjust their investment strategies to adapt to changing policy objectives.

The constantly changing policy positions and announcements in recent months is extremely damaging and creates the impression that energy policy is being formulated in an almost chaotic manner. While it is acknowledged that this is being driven by DECC and it seems clear that DETI have been pushing strongly for a more sensible approach, this will still be extremely damaging to investor confidence. Particular damage will be done to future prospects for the renewable industry but it also has the potential to damage confidence in all major investment decisions where government policy stability is a pre-requisite.

We have included a confidential appendix to our submission, which details our investment in Northern Ireland to date and our intended further investment plans for NI. The vast majority, if not all of this, would likely be lost to NI if this decision proceeds and no future scheme introduced.

As noted in the consultation, following DECC's decision in June 2015 to close the RO scheme to new applications 12 months earlier than originally promised, there have been a number of attempts to reduce the effect of this on Developers in GB. In addition to the grace periods and eligibility criteria currently being consulted on, DECC have in the last days also announced their intention to grant further grace periods as outlined below:

- An amendment to offer those projects which meet the grace period criteria additional time to seek accreditation if they can provide evidence that they have been unable to secure financing between 18 June (the date of the initial announcement) and Royal Assent. This "investment freezing condition" amendment takes into account evidence from industry and other stakeholders that investors may be unwilling to provide finance for projects during the passage of the Bill due to legislative uncertainty created by the Bill making its way through its Parliamentary stages. Some investors seem unwilling to finance GB projects until Royal Assent when there will be absolute certainty in relation to the final position on grace periods. We believe that this could affect projects which satisfy the "approved development condition", including those which have already started construction.

- An amendment to ensure projects remain eligible for the pre-existing grace period which entitles projects affected by unforeseen grid and radar delays to an additional 12 month period in which to accredit. The Government amendments would therefore allow projects which are seeking to accredit by the new closure date (31 March 2016), or the existing closure date (if they satisfy the "approved development condition") or 31 December 2017 (if they satisfy the "investment freezing condition") with an additional period of 12 months in which to accredit if they suffer from unforeseen grid/radar delays. This amendment is intended to provide a consistent approach to all onshore wind projects in GB eligible to accredit under the RO.

- An amendment to extend the "approved development condition" so that this would capture projects which had their planning permission refused on or before 18 June, or where the relevant planning authority failed to determine a planning application where a decision was due (under the relevant statutory timescales) by 18 June, and which are then subsequently granted consent at appeal. The Government believes it is appropriate to extend the grace period to these projects on the grounds that had a correct or timely decision been made by the planning authority, such projects would have met the grace period criteria announced on 18 June.

The impact of these changes in relation to GB projects is effectively to put them back into the same, or in fact possibly better position than they would have been in had no changes been

proposed to the RO closure date. This will have the effect of reducing to some extent the reputational damage done to GB. However as already noted, the different approach to grid connection policy means that this will not have the same impact for NI projects. In particular the additional flexibility proposed for projects in the planning appeals process would be of no benefit at all to NI projects. If DETI proceed with this decision, in effect they are allowing DECC to damage Northern Irelands' reputation as a place to do business while at the same time protecting GB's position.

To further emphasize the point, DECC are acknowledging that where planning authorities in GB fail to issue planning permissions in a timely manner then it is appropriate that they be given an additional grace period, while at the same time saying that, in the case of NI, where grid operators fail to issue a connection offer in a timely manner no grace period can be provided. This appears entirely inconsistent and unreasonable.

3.0 Interests of the Consumer

It is noted that under early closure arrangements set out in the consultation document, approximately 480MW onshore wind will meet the grace period criteria delivering approximately 30% of electricity consumption from renewable sources. This would see NI falling shy of its 2020 target by 10%. In recognition of changes to the energy and renewable energy market over the last few years and in preparation for the planned mid- term review of SEF in 2015-2016, DETI appointed Ricardo–AEA to produce an updated and extended analysis of previous (2009) baseline figures and estimates of the costs and benefits arising from the 40% target. The emerging findings of the Cost Benefit Analysis (CBA) commissioned by DETI to inform the paper were published as part of the earlier consultation and states:

- Increasing consumption of electricity from renewables sources up to the Executive's target 40% level will have a positive effect on the Northern Ireland economy overall.
- Achieving the 40% target level will provide a net benefit of £120m to the Northern Ireland economy across the lifetime of the renewable energy generation.

Having reviewed the accompanying data, it appears the difference in cost to the consumer between 15% and 40% Renewable Energy deployment is only 1%. This is negligible compared to the potential impact of higher fuel prices on energy costs. It seems inconceivable therefore that in light of the historic and likely future instability of fossil fuel prices, that NI would not strive to reach 40% RE deployment which would provide a very good hedge against this risk.

While the study DETI commissioned makes a convincing case for the further development of wind in NI the detailed basis for these figures have still not been made available. If policy was being formulated in a more carefully considered manner, we would expect that the basis of all of these figures would be published and feedback sought before these extremely significant policy decisions are made. If cost to consumers is the primary concern we would also point to the cost of the proposed support scheme for nuclear power in GB compared to the much more modest levels of support required for renewable projects. In fact in ROI, the REFIT support scheme has been shown to be cost neutral, with PSO contributions being balanced by the downward pressure that wind exerts on market prices.

Some comparisons between the wholesale cost of nuclear energy in GB compared to the equivalent cost of onshore wind in Germany is also included in our appendix. In summary

GB Nuclear - €116/MWhr rising to €227/MWhr with a 35 year PPA, 2% CPI assumed.

GB On shore wind CfD - €119/MWhr to €156/MWhr over a 15 year CfD PPA, 2% CPI assumed.

Germany low wind sites - €89 / MWhr fixed for 20 years, no indexation.

Germany high wind sites - €49 / MWhr fixed for 20 years, no indexation.

It should be noted that in Germany planning policies acknowledge the need for newer / larger turbine technologies than is currently considered acceptable in NI and grid connection costs for projects are generally significantly less.

The general point is that if policies are properly considered and consulted upon, this would likely show that the consumer actually stands to benefit significantly from the further development of onshore wind. It is ABO's view that the concern regarding £5.00 p.a. on consumer bills may later prove to have been extremely short sighted.

It is perhaps also worth noting that the cost to consumers associated with the additional projects in GB that will be constructed under these new grace periods, would likely be socialised across all of the UK including NI consumers. Given the short consultation time and the difficulty accessing this information we do not have figures as to the impact of this on NI consumers, but it seems entirely unreasonable even from a principle stand point, to introduce new grace periods that can only be availed of by GB developers where NI consumers pay a portion of the costs.

4.0 Proposed Solution

For NI, given the different grid connection policies described above, the requirement for an accepted grid connection offer should be changed to the submission of a valid grid application. In addition the deadline for making the application in order to avail of the grace period needs to be changed to some reasonable time after the date of the Order coming into force. ABO Wind believe that this would mitigate the reputational damage already caused and would insulate DETI and the grid operators from potential legal challenges and litigation cases.

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In addition we understand that Ofgem will only be able to assess eligibility for grace periods once it is content that all other eligibility criteria have been met and the project has been commissioned.

This implies that an applicant must carry out all of the work, right up to Commissioning, at risk, with no indication from Ofgem that the developer has satisfied the grace period criteria until after the wind turbine commissions. This is unreasonable. It would be judicious to expect Ofgem to assess the criteria, at an early stage, before additional expenditure has been incurred by the applicant.

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