

## KEY CONSIDERATIONS WHEN DEALING WITH THE DIVESTMENT OF PROPERTY INTERESTS ON OFTO TRANSACTIONS

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The acquisition and divestment of property interests can be complex even for small generation projects connected to onshore distribution or transmission grids. For OFTO transactions, this complexity increases given the need to acquire and divest of property interests located:

- Offshore, which means dealing with The Crown Estate (TCE);
- Foreshore, which means dealing with either TCE, or the Duchies of Lancaster or Cornwall who are the other main landowners of the UK foreshore; and
- Onshore, which means dealing with individual property owners, local authorities, and a whole host of others who have property interests such as easements and wayleaves.

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### 1. OFFSHORE

In early tender rounds, the generator held one lease with TCE, which needed to be “split” between it and the OFTO. This was done via a surrender of the original lease, and the grant of two new leases to the generator: one covering the wind farm and the second covering the offshore cable route and, usually, the offshore substation. The second lease was then transferred to the OFTO with TCE’s consent (given by way of a licence to assign).

In later tender rounds, incorporating lessons learned, generators obtained two leases from TCE from the start of project development. As previously, the second lease was then transferred to the OFTO.

Whilst the process with TCE is now fairly standardised, there are still issues that can arise which could delay the transfer of the offshore substation lease to the OFTO. These include the following:

## Producing the right plans for both TCE leases

The production of new 'as built' plans and co-ordinates for the generation and transmission assets can take time, particularly if any issues arose during construction which required detours along the cable routes. Generators should prioritise producing these plans and sharing them with TCE and the OFTO as quickly as possible as technical teams for all three parties will need to approve them.

## Obtaining consent letters

Where a new TCE lease is granted or an existing one transferred, a key part of the process is obtaining consent letters from the owners of offshore infrastructure crossing or in close proximity to the transmission cables, offshore substation or wind farm. These consent letters need to be issued to TCE, usually as a requirement of the licence to assign the OFTO TCE lease. Crossed parties can range from large oil majors to telecoms companies and, in some cases, it is not always simple to identify the owners of infrastructure on the seabed. Early engagement is recommended with the owners of such infrastructure, as contacting the right person can be time consuming, because:

- it's not always easy to identify the correct person (and thus the request gets passed from pillar to post);
- the crossed party uses a land agent and will not engage directly; or
- the crossed party and/or its agent may have their own internal processes for providing such consents, which may not necessarily accord with the OFTO timeline.

## Crossing Agreements and Proximity Agreements

In addition to the consent letters, the parties will also need to ensure that any crossing or proximity agreements relating to nearby/crossed pipes and/or cables are novated to the OFTO. Generators should start discussions with their counterparties to these agreements early as issues relating to consent letters apply equally to these agreements and the novation of these agreements can often take time to be agreed, particularly because there is no real impetus for the counterparties to act quickly.

## 2. FORESHORE

If the foreshore is not owned by TCE (which owns c.50% of the UK foreshore), permission for the installation of transmission cables across the foreshore will be contained within a separate agreement with the relevant landowner. Other foreshore owners include the Duchies of Lancaster and Cornwall. Where separate agreements are in place for the foreshore section of the transmission cables, the terms of these documents should be considered early in the OFTO process to ascertain whether the landowner's consent is required to the transfer to the OFTO and what, if any, conditions may be attached to the giving of such consent. Where any consents are required from landowners, early engagement is strongly advised to ensure consents are provided within the OFTO timeline.

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## 3. ONSHORE

The generator will have negotiated property agreements, such as leases or easements, with the landowners that are affected by the route of the onshore section of the transmission cables and acquired either a leasehold or freehold interest in the land which houses the onshore substation. As with any agreements that are in place for the foreshore section of the transmission cables, the terms of these documents should be considered early in the OFTO process to ascertain whether the landowner's consent is required to the transfer to the OFTO and what, if any, conditions may be attached to the giving of such consent. Where the generator owns the freehold interest in the onshore substation site, it will need to consider whether its freehold interest should be transferred to the OFTO outright, or whether it needs to retain any land for its own purposes, in which case a lease is more commonly granted to the OFTO. This may be a more likely scenario as projects become larger and more complex, being built over phases – see our previous article in this series.

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There may also be in place onshore crossing or proximity agreements relating to crossed or nearby pipes and cables, which will need to be novated to the OFTO. As mentioned above, where such agreements are in place, early engagement with the counterparties to these agreements is recommended, to avoid any delays in agreeing a novation within the OFTO timescale.

Other considerations for an OFTO, which can cause delays if not resolved early in the process are as follows:

#### **Title issues**

If there are any sections of the transmission cables for which there is no agreement in place with the relevant landowner and/or if there are any adverse title matters such as restrictive covenants affecting the substation site and/or the land through which the transmission cables are laid and/or the relevant landowner cannot be identified (rare but it has happened!), it will be important to ensure that there is adequate title indemnity insurance in place which benefits successors in title and their lenders.

#### **Turning options into leases**

If the generator still has option agreements in place for the onshore land interests and has not called for the grant of the easements or leases when the OFTO process begins, this has the potential to cause delays, as the OFTO will expect any such easements or leases to have been completed such that these interests can then be transferred to the OFTO. The longer the onshore cable route, the more potential there is for delay – from more serious disagreements about the terms of the agreements to more mundane delays caused by landowners living abroad.

#### **Outstanding payments**

If there are outstanding compensation payments due to landowners relating to matters such as reinstatement and crop loss obligations, agreement should be sought on these matters as early as possible in the OFTO process to avoid protracted negotiations with landowners delaying the OFTO completion.

## Term of land rights

If any of the onshore property agreements consist of leases and are granted for a term less than that of the TCE lease and there are insufficient rights for the tenant to renew the lease at the end of the initial term, an OFTO may require a variation to the lease to ensure it is of sufficient duration. If a variation to any of the leases is required to address said concerns, early discussions with the landlord are recommended so that documenting such a variation does not delay the OFTO completion.

## Interaction with National Grid

If National Grid Electricity Transmission (NGET) has been relying on contractual rights to access its equipment (if any) in the onshore substation, and not on its own land rights, it should be confirmed with them whether they will require proprietary rights in connection with this equipment going forward, as parting with occupation and/or possession of the substation may be a breach of the terms of the substation lease, unless the landlord's prior consent is obtained. If the landlord's consent is required to any sharing of occupation of the substation, or to the grant of an underlease to NGET, this consent should be applied for early in the OFTO process so that there is sufficient time to document any such arrangement with the landlord.

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## SUMMARY

In order to avoid delays in dealing with the divestment of the property interests on an OFTO sale, we recommend the following steps are taken:

- early identification of the land interests to be transferred to the OFTO and the method of transfer;
- early engagement with landowners/landlords where their prior consent is required to the transfer of any property agreement to the OFTO; and
- early resolution of any outstanding issues relating to the land interests in place for the transmission assets whether they relate to title matters, rent payments or compensation payments due to the landowners.

All of these have the capacity to delay the process if not addressed early.

If you would like to discuss any of the issues raised in this article, do get in touch! We would be happy to hear from you.

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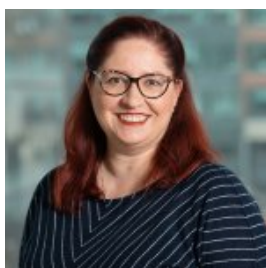
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