

EXPLANATORY MEMORANDUM TO
THE ELECTRICITY (EXTENSION OF TRANSITIONAL PERIOD FOR PROPERTY
SCHEMES) ORDER 2013

2013 No. 968

1. This explanatory memorandum has been prepared by the Department of Energy and Climate Change and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

- 2.1 To extend the period in which an application can be made to the Gas and Electricity Markets Authority (“the Authority”) for a scheme to transfer property, rights and liabilities to the successful bidder for an offshore transmission licence.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 None

4. **Legislative Context**

- 4.1 The Order is made under section 6E of, and paragraph 5(3) of Schedule 2A to, the Electricity Act 1989. Schedule 2A enables the Authority, in certain circumstances, to make a scheme transferring property, rights and liabilities from the existing owner to the successful bidder for an offshore transmission licence (a “property scheme”). Paragraph 5(1) of Schedule 2A sets out that no application may be made for a property scheme after the end of the transitional period, and paragraph 5(2) defines the transitional period as, subject to paragraph 5(3), the period of 4 years beginning with the day on which section 92 of the Energy Act 2004 comes into force. Section 92 of the Energy Act 2004 was brought into force on 20 May 2009 by article 2 of the Energy Act 2004 (Commencement No.9) Order 2009 (SI 2009/1269).

- 4.2 Paragraph 5(3) of Schedule 2A empowers the Secretary of State to extend the transitional period by order before it ends, subject to the limitation set down in paragraph 5(5) of Schedule 2A (as amended by section 104(3) of the Energy Act 2011 (c.16)) that the total transitional period in any case must not exceed 16 years.

- 4.3 Paragraph 5(6), (7) and (8) of Schedule 2A requires the Secretary of State to give notice of the proposal to extend the transitional period for at least 28 days, serve a copy of that notice on the Authority and publish it in a manner appropriate for bringing it to the attention of other interested parties.

5. Territorial Extent and Application

5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 Under the offshore transmission regulatory regime, offshore wind developers have the choice of either constructing any associated offshore transmission assets themselves before handing them over to an Offshore Transmission Owner (OFTO) to own and operate, or having an OFTO appointed to construct (as well as own and operate) the assets. The Government expects that in most cases where an offshore generator has constructed a transmission asset, they will be able to come to a commercial arrangement concerning asset transfer with the successful bidder of the tender process to own and operate the asset. However, under Schedule 2A of the Electricity Act 1989, the Authority has the power to make a “property scheme” providing for the transfer of property, rights or liabilities to the successful bidder or the creation of rights in favour of the successful bidder.

7.2 The power for the Authority to make a Property Scheme is a last resort measure, to give generators and successful bidders an avenue for expediting the transfer of assets where commercial agreement could not be found. It has not been used to date. It was designed to provide certainty and reassurance to tender participants for transitional, generator build projects that the transfer of assets can be achieved. When the offshore transmission regime was initially put in place, it was envisaged that the provision for generators to build transmission assets would be transitional, and that when the regulatory regime became established OFTOs would always build, as well as own and operate, the assets. This situation would have rendered the Authority’s power to make a property scheme to transfer the asset redundant. Therefore under paragraph 5 of Schedule 2A, an application to the Authority for a property scheme can only be made during the “transitional period”. This is currently defined as a period of 4 years beginning with the day on which section 92 of the Energy Act 2004 came into force.

7.3 The Government is of the view that for the foreseeable future the need for these powers will remain, and the Secretary of State is therefore making this Order to extend the transitional period in which an application for a property scheme can be made by the maximum period possible: 12 years.

7.4 This is because in 2010 Government and the Authority decided on the back of consultation to maintain the generator build option in the enduring regime, alongside a

new OFTO build option. The Energy Act 2011 amended Schedule 2A of the Electricity Act 1989 to enable the transitional period to be extended until 19th May 2025.

7.5 The Authority's powers to make a property scheme will continue to be relevant to support the offshore transmission regime under the generator build option. These powers serve to encourage good faith in the negotiations over transmission asset transfer between the developer and the OFTO. Without them, OFTOs and generators would face a number of additional risks, which will be likely to increase risk premiums and therefore prices for consumers. These risks include:

- Generators becoming involved in disputes over pricing with OFTOs and third parties prior to transfer of assets, putting generators at risk of having their assets stranded.
- Generators being held to ransom by third parties who may refuse to transfer assets to the OFTO on reasonable terms (knowing that the generator faces stranding risk); and
- Failure to achieve a timely and fair transfer resulting in delays to receiving their revenue stream and thus higher costs of financing for the OFTO.

8. Consultation outcome

8.1 Notice was given on the intention to make the order on March 15th 2013 and 28 days allowed for representations. No representations were received. The Authority and the Department jointly consulted on this issue alongside a number of others relating to the offshore transmission regime in 2010. Most respondents to this consultation welcomed an extension of the property transfer scheme.

9. Guidance

9.1 The Authority has previously issued guidance on Transfer Agreements between OFTOs and generators, which covers the Authority's power to make a property transfer scheme. No further guidance is therefore necessary at this time.

10. Impact

10.1 An Impact Assessment has not been prepared for this instrument. The Order serves to continue an existing power to ensure that previously consulted on and agreed policy can fully work as intended. The power itself, whilst necessary for the full functioning of the offshore transmission regulatory regime, has never to date been used. There are currently two companies holding six OFTO licences between them. An impact assessment in respect of the Authority's power to make property schemes to transfer property, rights and liabilities from the existing owners to the successful bidder for an offshore transmission licence was prepared in 2008 and can be obtained from the Department of Energy and Climate Change, Future Electricity Networks team, 3 Whitehall Place, London, SW1A 2AW. Copies have been placed in the libraries of both Houses of Parliament.

11. Regulating small business

11.1 a Whilst the owner of any relevant property, rights or liabilities or any preferred or successful bidder for an OFTO licence may apply for a scheme, in practice all such firms have significant holdings; the six transmission assets licenced to date are together worth £1.1bn.

12. Monitoring & review

12.1 There are no formal monitoring or review requirements, as the Authority's power to make a property transfer scheme is a last resort measure designed to ensure relevant parties negotiate in good faith, and may never be used. If the power is ever used, DECC and the Authority will review the subsequent impact on the consumer, the parties concerned and the wider offshore market.

13. Contact

Ben White at the Department of Energy and Climate Change (Tel: 0300 068 6342 or email: ben.white@decc.gsi.gov.uk) can answer any queries regarding the instrument.