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COMMISSION OPINION

of 4.4.2019

pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC – United Kingdom - Certification of National Grid IFA2 Limited and National Grid North Sea Link Limited

(ONLY THE ENGLISH VERSION IS AUTHENTIC)

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I. PROCEDURE

On 8 February 2019, the Commission received two notifications from the national regulatory authority in the United Kingdom (UK) responsible for Great Britain, the Office of Gas and Electricity Markets (hereafter “Ofgem”) of preliminary decisions concerning the certification of the following entities as transmission system operators (TSOs):

1. National Grid IFA2 Limited (hereafter “NG IFA2”) and
2. National Grid North Sea Link Limited (hereafter “NG NSL”).

Pursuant to Article 3 of Regulation (EC) No 714/2009¹ (hereafter "Electricity Regulation") and Article 10 of Directive 2009/72/EC² (hereafter, "Electricity Directive"), the Commission is required to examine the notified draft decisions and deliver an opinion to the relevant national regulatory authority as to its compatibility with Articles 9 and 10(2) of Directive 2009/72/EC.

Since both NG IFA2 and NG NSL are subsidiaries of the same ultimate controller, National Grid plc, the Commission delivers the result of its examination of both draft decisions in one opinion.

II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

Both NG IFA2 and NG NSL are entities whose sole business purpose is to own and operate an electricity interconnector.

NG IFA2 owns 50% of the IFA2 interconnector between Chilling in Hampshire (Great Britain) and Tourbe in Normandy (France). The other 50% are owned by the French company Réseau de transport d'électricité (hereafter “RTE”). Whereas a joint venture company was created for the construction of the interconnector, the operation will be undertaken on a contractual basis via a Joint Operating Agreement concluded between NG IFA2 and RTE.

NG NSL owns 50% of the North Sea Link interconnector between Blyth in Northumberland (Great Britain) and Kvilldal in the Suldal municipality in Rogaland county (Norway). The

¹ Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, OJ L 211/15 of 14.8.2009.

² Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211/55 of 14.8.2009.

other 50% are owned by the Norwegian company Statnett SF. Both the construction of the interconnector and its operation will be undertaken on a contractual basis via the North Sea Link Ownership Agreement concluded between NG NSL and Statnett SF.

Both NG IFA2 and NG NSL will only own the half of the respective interconnectors towards the UK and will only participate in operation of the interconnector in the UK.

Ofgem identifies National Grid plc (hereafter “NG plc”) as ultimate controller of NG IFA2 and of NG NSL. NG IFA2 and NG NSL are 100% subsidiaries of National Grid Interconnector Holdings Ltd, which is a 100% subsidiary of National Grid Holdings One plc, which in turn is a 100% subsidiary of NG plc.

NG plc is an investor-owned utility company whose subsidiaries distribute gas, own the electricity transmission network in England and Wales, the gas transmission network in Great Britain, electricity transmission networks in the North-eastern United States, and operate the electricity transmission system in GB (England, Wales and Scotland).

Ofgem has analysed whether NG IFA2 and NG NSL comply with the requirements of the ownership unbundling model, as laid down in the UK legislation transposing the Electricity Directive. In its preliminary decision, Ofgem concludes that NG IFA2 and NG NSL comply with these requirements.

On this basis, Ofgem submitted its draft decision to the Commission requesting an opinion.

III. COMMENTS

On the basis of the present notification the Commission has the following comments on the draft decision.

1. Generation and supply interests linked to NG plc as the ultimate controller of NG IFA2 and NG NSL

Article 9(1)(b)(i) of the Electricity Directive prohibits the same person(s) from directly or indirectly exercising control over an undertaking performing any of the functions of generation or supply, and directly or indirectly exercising control or exercising any right over a TSO or over a transmission system. Article 9(1)(b)(ii) of the Electricity Directive prohibits the same person(s) from directly or indirectly exercising control over a TSO or over a transmission system, and directly or indirectly exercising control or exercising any right over an undertaking performing any of the functions of generation or supply.

According to Ofgem's preliminary certification decision, NG plc as the ultimate controller of NG IFA2 and NG NSL, does not operate any energy production, generation or supply assets in Great Britain. According to the information provided by Ofgem, neither of NG IFA2's and NG NSL's four Directors is Director in an undertaking producing or supplying electricity.

However, NG plc owns electricity generation and supply interests in the United States:

- ‘National Grid Generation LLC’, a wholly-owned subsidiary of NG plc, owns fossil fuel electric generation capacity of approximately 3,600MW located on Long Island, New York.
- ‘National Grid Glenwood Energy Centre LLC’, a wholly-owned subsidiary of NG plc and a Delaware limited liability company, is an exempt wholesale generator

(‘EWG’) of approximately 80MW electric peaking capacity on Long Island, New York. It also sells wholesale capacity, energy, and ancillary services at market-based rates pursuant to authority granted by the Federal Energy Regulation Commission (hereafter “FERC”).

- ‘National Grid Port Jefferson Energy Centre LLC’, a wholly-owned subsidiary of NG plc and a Delaware limited liability company, is an exempt wholesale generator (‘EWG’) of approximately 80MW electric peaking capacity on Long Island, New York. It also sells wholesale capacity, energy, and ancillary services at market-based rates pursuant to authority granted by FERC.
- ‘Massachusetts Electric Company’, a wholly-owned subsidiary of NG plc, is a solar energy company of approximately 20MW capacity, delivering electric energy to retail customers in Massachusetts. This company is subject to the jurisdiction of the Massachusetts Department of Public Utilities and FERC.
- ‘East Hampton Energy Storage Center LLC’, in 50% ownership of NG plc (other 50% owned by NextEra Energy), is a battery storage facility. The project holds a 20-year power purchase agreement with the Long Island Power Authority.

In its draft certification, Ofgem has assessed whether there is any risk of discrimination resulting from the ownership of the above-listed generation and supply interests, also taking into account the conditions in the respective electricity interconnector licenses of NG IFA2 and NG NSL. Ofgem notes that there is no direct interface between the electricity transmission systems or networks in the UK and the United States, and no possibility that the actions of NG IFA2 or NG NSL as system operator in the UK could benefit any generation or supply undertakings in the United States controlled by NG plc. Ofgem adds that the generation interests located in the United States do not have any market share of the electricity generation in the UK energy market and that NG plc’s share in the US generation market from a US national market perspective is minimal.

Ofgem concludes that there is no opportunity for NG IFA2 or NG NSL to discriminate in favour of generators or suppliers controlled by NG plc, in particular, since NG plc has no market share of the electricity generation in the GB energy market and since there is no physical interface between the GB and US electricity markets.

Commission assessment

The Commission considers that the objective which the unbundling rules of the Electricity Directive pursue is the removal of any conflict of interest between, on the one hand, generators/producers and suppliers and, on the other hand, TSOs. As explained in the Staff Working Paper ‘Ownership Unbundling: The Commission’s practice in assessing a conflict of interest including in the case of financial investors’ (SWP (2013) 177), it would not be in line with this objective if certification of a TSO were to be refused in cases where it can be clearly demonstrated that there is no incentive and ability for a shareholder in a TSO to influence the TSO’s decision making in order to favour its generation, production and/or supply interests to the detriment of other network users.

In relation to the generation and supply assets held by NG plc in the United States and in line with the Commission Opinion of 25 September 2018 on the Certification of National Grid

Electricity System Operator Limited³, the Commission shares Ofgem's view that given absence of any physical connection between the electricity systems of the United States and the UK, there appears to be no scope for a conflict of interest, nor a resulting risk of discrimination by NG IFA2 or NG NSL of network users in the UK. Therefore, the Commission considers that the generation and supply interests currently held by NG plc in the United States should not constitute an obstacle to the certification of NG IFA2 or NG NSL.

2. Operation of NG NSL

As regards the operation of the NG NSL interconnector, as an interconnector with a third country, the Commission considers it essential that the effective operation of the interconnector in accordance with Union energy law is ensured, despite the fact that NG NSL only owns and operates the section of the interconnector in the UK.

In the present case, the Commission considers that the requirement is met due to Norway's obligation as a signatory to the EEA Agreement to transpose and implement the Electricity Directive and other core elements of EU energy law. It should be highlighted that certification of the operator of the Norwegian part of the interconnector should be pursued as soon as possible.

3. Ongoing monitoring

The Commission recalls the obligation set out in Article 10(4) of the Electricity Directive for national regulatory authorities to monitor the continuing compliance of TSOs with the unbundling requirements of Article 9 Electricity Directive.

Should Ofgem decide to certify NG IFA2 or NG NSL, the Commission invites Ofgem to continue monitoring the cases also after the adoption of the final certification decision in order to satisfy itself that no new facts emerge which would justify a change of its assessment.

IV. CONCLUSION

Pursuant to Article 3 Electricity Regulation, Ofgem shall take utmost account of the above comments of the Commission when taking its final decisions regarding the certification of NG IFA2 and NG NSL, and when it does so, shall communicate its decisions to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* national regulatory authorities on any other notified draft measures concerning certification, or *vis-à-vis* national authorities responsible for the transposition of EU legislation, on the compatibility of any national implementing measure with EU law.

³ C(2018) 6306 final

The Commission will publish this document on its website. The Commission does not consider the information contained therein to be confidential. Ofgem is invited to inform the Commission within five working days following receipt whether and why they consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which they wish to have deleted prior to such publication.

Done at Brussels, 4.4.2019

For the Commission
Phil HOGAN
Member of the Commission

