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COMMISSION OPINION

of 6.1.2015

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of
Directive 2009/72/EC - Great Britain - Certification of Gwynt y Môr OFTO Limited**

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I. PROCEDURE

On 11 November 2014 the Commission received a notification from the national regulatory authority in the United Kingdom responsible for Great Britain, the Authority for Gas and Electricity Markets (hereafter, "Ofgem"), in accordance with Article 10(6) of Directive 2009/72/EC¹ (hereafter, "Electricity Directive"), of a draft decision on the certification of an offshore Transmission System Operator (TSO) for electricity. The applicant is Gwynt-y-Môr OFTO Limited (hereafter, "the Applicant").

Pursuant to Article 3(1) Regulation (EC) No 714/2009² (hereafter, "Electricity Regulation") the Commission is required to examine the notified draft decision and deliver an opinion to the relevant national regulatory authority as to their compatibility with Article 10(2) and Article 9 of Directive 2009/72/EC.

II. DESCRIPTION OF THE NOTIFIED DECISION

The Applicant is the preferred bidder for an offshore transmission operator and expected to be licenced to own the Gwynt-y-Môr offshore electricity transmission system (hereinafter "GyM") for the connection of wind generated electricity from offshore wind production at and its transportation to the onshore transmission system in Wales³.

The GyM wind farm has an installed capacity of 576MW, with the transmission system valued at approximately £346m. The wind farm is located off the north coast of Wales. Its onshore connection point is National Grid's transmission network in St. Asaph, North Wales.

The Applicant is ultimately controlled by Balfour Beatty plc (hereafter, "BB plc") and John Van Deventer described in Ofgem's notification as a British national and British resident.

Ofgem has analysed whether and to what extent the Applicant complies with the requirements of the ownership unbundling model, as laid down in the UK legislation transposing the Electricity Directive. In its draft decision, Ofgem has found that the Applicant complies with the requirements of the ownership unbundling model. On this basis, Ofgem submitted its draft decision to the Commission requesting an opinion.

¹ 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.

² 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.

³ Offshore transmission operators are specific to the UK; other Offshore transmission operators were the subject of Commission Opinion C(2012)3006, Commission Opinion C(2013)281 and Commission Opinion C(2013) 979.

III. COMMENTS

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

EXERCISE OF CONTROL AND RIGHTS IN THE APPLICANT

Article 9(1)(b)(i) 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 transmission system operator (TSO) or over a transmission system. Article 9(1)(b)(ii) 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.

Article 9(1)(c) Electricity Directive requires that members of the management of the TSO and persons that have the right to appoint them, must fulfil certain requirements of independence. In particular, the same person or persons are not entitled to directly or indirectly control or exercise any right over an undertaking performing any of the functions of production or supply and at the same time be or appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking.

GENERATION INTERESTS OF PERSONS CONTROLLING THE APPLICANT

Balfour Beatty Plc

BB plc has an indirect interest in Barking Power, which is a 1 GW power station using combined cycle gas turbines in England. This is the same interest as set out in relation to the applications for certification of Thanet OFTO (C(2013) 2566 final)⁴ and Greater Gabbard OFTO (C(2013) 3705 final)⁵. The Applicant has confirmed to Ofgem that there have been no changes to BB plc's interests in Barking Power since submitting those applications. Ofgem also notes that Barking Power is currently not generating and has announced it will be closing⁶.

BB plc also has interests in special purpose vehicles which have been established on the basis of private finance initiatives (hereafter, "PFI") or public private partnerships (hereafter, "PPP") for the design, build, financing and operation of infrastructures assets, some of which have backup generation facilities, and/or combined heat and power facilities (for example hospital PFI facilities), and/or micro generation installations (for example solar panels or wind turbines on schools). None of these have a capacity greater than 6 MW.

⁴ See the Commission Opinion of 16.04.2013 on Thanet OFTO http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/certification/2013_061_uk_en.pdf

⁵ See the Commission Opinion of 10.06.2013 on Greater Gabbard OFTO Limited http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/certification/2013_067_uk_en.pdf

⁶ Ofgem provides reference to the 'National Grid winter outlook 2014/2015' page 50-51 sections 160-161 <http://www2.nationalgrid.com/WorkArea/DownloadAsset.aspx?id=36714>

John Van Deventer

Mr Van Deventer controls seven onshore wind farms in different places of the UK, from Cornwall in the south to Stirling in the north. According to the application, these wind farms have a capacity above 20MW and are not technically capable of interacting with GyM. According to UK legislation such generators are not required to hold a generation licence, i.e. they are considered de minimis.

Mr Van Deventer also has ownership interests in some special purpose vehicles which are established on the basis of PFIs or PPPs for the design, build, financing and operation of infrastructure assets. A health centre and a student accommodation site have backup generation capabilities and/or combined heat and power facilities. Each of them has less than one MW of nominal capacity, and none are connected to GyM. The Applicant has confirmed that these small generation facilities do not engage in any separate trading activities.

OFGEM'S ASSESSMENT

In relation to Balfour Beatty, Ofgem considers that BB plc neither effectively exercises rights over, nor controls Barking Power. Ofgem further considers that the specific requirements on offshore transmission systems in the United Kingdom serve to minimise the risk of any discrimination.

Based on the evidence provided by the Applicant, Ofgem considers that the generation assets set out in relation to Mr Van Deventer are not relevant producers or suppliers within the meaning of the UK legislation given that they do not require a licence and that there is no realistic prospect of any of these generators seeking a connection to or directly interacting with GyM. These generators are not located in physical proximity to GyM, which means that the relationship between the Applicant and these generation facilities will not lead to discrimination by the Applicant in favour of the generation facilities.

In relation to the PFI/PPP entities with back-up, combined heat and power or micro generation facilities, Ofgem concludes that the small generation interests are incidental to the core business of the entities and that there is no realistic prospect of any of these entities seeking a connection to the GyM transmission system, nor could they have any impact on the operation of the Applicant's transmission system or any other transmission system.

COMMISSION VIEW

The Commission considered the generation interests of BB plc in relation to its ownership and control of Thanet OFTO (C(2013) 2566 final) and Greater Gabbard OFTO (C(2013) 3705 final). In those cases the Commission concluded that, notwithstanding the interests of BB plc, it was clear that there was no ability for BB plc to influence the decision making in the TSO with the intention to favour its generation, production and/or supply interests to the detriment of other network users. This conclusion relied primarily on the characteristics of the transmission system and its operation and on the fact that there is no direct interface between the generation interests and the planned transmission system. The Commission notes that these considerations also apply in relation to BB plc's generation interests in the present case. Given that the Applicant has confirmed that these interests have not changed in the interim, the Commission considerations continue to apply.

In relation to the interests of Mr Van Deventer, the Commission notes the small scale of the generation interests and the fact that the role of the Applicant as offshore transmission operator is limited as a result of its small size and restricted geographic scope. In effect this role is restricted to the lines which serve merely to connect specific wind generation facilities to the main grid. In addition to the small size of this system, day to day operation of the transmission is carried out by National Grid, a certified ownership unbundled transmission system operator. In particular, information regarding planned production and availability of generation connected to an offshore electricity transmission system is sent to National Grid and not the Applicant.

Thus, similarly to the interests of BB plc, the interests of Mr Van Deventer do not give rise to a risk of discrimination in the operation of the network of the Applicant or to adequate investment in that network. Consequently, the Commission considers that in this case a refusal of certification would run counter to the principle of proportionality given the fact that the interests of the persons controlling the TSO do not lead to a situation the unbundling rules seek to prevent.

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. Ofgem sets out in its preliminary decision that the certified party is required to inform them of any significant changes relevant to the certification and to provide in any case an annual update.

The Commission invites Ofgem to continue monitoring the case also after the adoption of the certification decision in order to satisfy itself that no new facts emerge which would justify a change of its assessment. The Commission furthermore invites Ofgem to include a condition in its final certification decision which requires the Applicant to regularly report to it on the relevant circumstances in this respect.

IV. CONCLUSION

Pursuant to Article 3(2) Electricity Regulation, Ofgem shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of the Applicant, and when it does so, shall communicate this decision 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 as regards the compatibility of any national implementing measure with EU law.

The Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. Ofgem is invited to inform the Commission within five working days following receipt whether it considers that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which it wishes to have deleted prior to such publication. Reasons should be given for any such request.

Done at Brussels, 6.1.2015

For the Commission
Miguel ARIAS CAÑETE
Member of the Commission

