



Brussels, 12.4.2013
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COMMISSION DECISION

of 12.4.2013

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of
Directive 2009/72/EC – United Kingdom (Northern Ireland) – SONI / NIE**

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2009/72/EC concerning common rules for the internal market in electricity¹, and in particular, Article 9(10) thereof,

Having regard to Regulation (EC) No 714/2009 on conditions for access to the network for cross-border exchanges in electricity², and in particular, Article 3(6) thereof,

Whereas:

1. Introduction

- (1) Directive 2009/72/EC sets out rules which aim at ensuring the effective separation of networks from the activities of production and/or supply and removing any conflict of interests between producers and/or suppliers, on the one hand, and network operators, on the other hand, or unbundling.
- (2) In Northern Ireland, the functions of transmission system operation are currently shared between the Northern Ireland Electricity Ltd. (hereafter, "NIE") and SONI Ltd (hereafter, "SONI").
- (3) NIE is the owner of the transmission assets and distribution system operator in Northern Ireland. NIE is owned by the Electricity Supply Board (hereafter, "ESB"), a publicly owned company established by statute in Ireland. ESB is an electricity and gas supplier through its ring-fenced business unit Electric Ireland. ESB power generation is likewise a ring-fenced business of ESB.
- (4) NIE is therefore part of a vertically integrated undertaking.
- (5) SONI is the transmission system operator and is owned by Eirgrid plc (hereafter, "Eirgrid"). Eirgrid is owned by the Irish State; it holds the licence for transmission system operation in Ireland as well as owning and operating the interconnector between Great Britain and Ireland. Eirgrid is independent of ESB, with the relationship between the two companies confined to their common public ownership. The issue of this common ownership is addressed in the Commission Decision in relation to the certification of the transmission system operation arrangements in Ireland.
- (6) Article 9(9) of Directive 2009/72/EC allows arrangements already in place on 3 September 2009 to be retained if they ensure more effective independence of the transmission system operator than the rules provided for under the independent

¹ OJ L 211, 14.08.2009 p. 55.

² OJ L 211, 14.08.2009 p. 15.

transmission operator unbundling model set out in Articles 17 to 23 of Directive 2009/72/EC.

- (7) NIE applied to the Northern Ireland Authority for Utility Regulation (hereafter, "Utility Regulator"), the regulatory authority responsible for Northern Ireland, for the arrangements in Northern Ireland to be certified in accordance with Article 9(9) of Directive 2009/72/EC. The application was considered by a special joint subcommittee (hereafter, "the SEM Committee") of the Utility Regulator and the Commission for Energy Regulation (hereafter, "CER") which acts as the decision making body for both authorities in matters relating to the operation of the Single Electricity Market (hereafter "SEM") in place in Ireland and Northern Ireland.
- (8) On 15 February 2013 the Utility Regulator notified its preliminary certification decision to the Commission. The Utility Regulator's assessment is that the system of legislation, licence obligations, enforcement powers and the involvement of SONI in transmission system operation arrangements applying in Northern Ireland brings benefits compared to the independent transmission operator model, and therefore allows for certification under Article 9(9) of Directive 2009/72/EC. Furthermore, the Utility Regulator proposes that this system be clarified and enhanced in certain respects to further improve the independence of system operation in Northern Ireland.
- (9) Pursuant to Article 10(6) of Directive 2009/72/EC, the Commission must verify that the arrangements being certified clearly guarantee more effective independence than the independent transmission operator model. Article 3(6) of Regulation (EC) No 714/2009 requires the Utility Regulator to comply with the decision of the Commission in relation to certification.

2. Unbundling requirements of Directive 2009/72/EC

2.1 Three unbundling models

- (10) Directive 2009/72/EC sets out three models of unbundling for transmission system operators. These are:
 - full ownership unbundling, which requires the appointments of the owner of the transmission system as transmission system operator and its independence from production or supply interests.
 - the independent system operator model under which an undertaking with production or supply interests may continue to own the transmission system, but appoints an independent entity to carry out all the functions of the transmission system operator.
 - the independent transmission operator model under which an undertaking with production or supply interests may continue to own the transmission system, but with stringent ring fencing provisions based on a pillar of organisational measures and a pillar of measures related to investment. These are complemented *inter alia* by cooling off periods governing the movement of staff between the transmission system operator and the production or supply functions of the vertically integrated undertaking.
- (11) Each model should deliver effective unbundling, albeit with a different mix of structural and regulatory solutions.

2.2 Article 9(9)

- (12) Article 9(9) of Directive 2009/72/EC provides that Member States may chose not to apply any of the three models described above, only where on 3 September 2009 the transmission system belonged to a vertically integrated undertaking and at that date arrangements were in place which guarantee more effective independence of the transmission system operator than the specific provisions concerning the independent transmission operator model under Articles 17-23 of Directive 2009/72/EC.
- (13) Article 9(10) of Directive 2009/72/EC requires the Commission to verify that the arrangements in place clearly guarantee more effective independence than the independent transmission operator model. The regulatory authority must follow the decision of the Commission in this respect.³
- (14) The Commission considers it appropriate to assess the effectiveness of the independence of transmission system operation by taking into particular consideration the aim of the unbundling rules of Directive 2009/72/EC,⁴ as well as the role and tasks of the transmission system operator, set out therein,⁵ since the application of Article 9(9) should always ensure that the aim of Directive 2009/72/EC is fully achieved.

2.3 Effective independence under the independent transmission operator model

- (15) The independent transmission operator model requires the establishment of an independent separate legal entity within the vertically integrated undertaking. Recital (19) of Directive 2009/72/EC indicates that the rules on the independent transmission operator aim to provide an appropriate regulatory framework to guarantee fair competition, sufficient investment, access for new market entrants and the integration of electricity markets, four specific outcomes which should result in effective independence and unbundling. It goes on to explain that effective unbundling and independence of the independent transmission operator provisions is based on:
- a pillar of organisational measures and measures relating to the governance of transmission system operators;
 - a pillar of measures relating to investment, connecting new production capacities to the network and market integration through regional cooperation; and
 - *inter alia*, ‘cooling-off’ periods during which no management or other relevant activity giving access to the same information as could have been obtained in a managerial position is exercised in the vertically integrated undertaking.
- (16) The detailed requirements of the independent transmission operator model, set out in Chapter V of Directive 2009/72/EC (Articles 17 to 23), address the barriers that

³ See Article 3(6) of Regulation (EC) No 714/2009.

⁴ Recital 12 of Directive 2009/72/EC makes clear that "any system for unbundling should be effective in removing any conflict of interests between producers, suppliers and transmission system operators, in order to create incentives for the necessary investments and guarantee the access of new market entrants under a transparent and efficient regulatory regime". Without such effective unbundling there will continue to be an inherent risk of discrimination in the operation of the network and in the incentives for vertically integrated undertakings to invest adequately in their networks.

⁵ See, for example, Article 12 of Directive 2009/72/EC for the tasks of transmission system operators. These include, *inter alia*, ensuring the long term ability of the system to meet reasonable demands for electricity, contributing to security of supply, managing flows on the system, ensuring non-discrimination between users of the system, providing users with the information they need for efficient access to the system. These tasks involve both short and long term activities, as well as investment in new transmission infrastructure and facilitating other investments in generation. A transmission system operator should efficiently integrate these activities to minimise the costs for system users.

vertical integration presents to fair competition, sufficient investment, access for new market entrants and the integration of electricity markets.

(17) The main provisions of the independent transmission operator model are:

- Article 17 of Directive 2009/72/EC sets out the essentials of legal and functional unbundling which must apply under the independent transmission operator model. As well as being responsible for carrying out the general tasks of a transmission system operator, the independent transmission operator model creates an explicit requirement that additional tasks are attributed to the transmission system operator. Not only must personnel necessary for the activity of the transmission operation be employed by the transmission system operator, there is also a prohibition on the leasing (secondment) of personnel from the vertically integrated undertaking. The transmission system operator is also not allowed to share IT systems or equipment, share premises or security systems with the vertically integrated undertaking.
- Article 18 provides for the independence of the independent transmission operator. It includes the ability to raise capital itself on the capital markets.
- Article 19 provides for the independence of the staff and management of the transmission system operator. In particular persons responsible for management or members of the administrative bodies of the independent transmission operators may have no other professional position or interest with the vertically integrated undertaking. Their remuneration may not depend on the activities of the vertically integrated undertaking, and there is a minimum four year cooling off period before they can take up employment with the vertically integrated undertaking.
- Article 20 establishes a Supervisory Body which is responsible for decisions of the independent transmission operator relating to decisions which may have a significant impact on the value of the assets of the shareholders in the transmission system operator. It may not be involved in the development of the network development plan. The same independence obligations applying to the majority of the management of the independent transmission operator apply to one half, minus one, of the Supervisory Body.
- Article 21 establishes a compliance officer, appointed by the Supervisory Body and approved by the national regulatory authority, to whom the independence obligations applying to the management of the independent transmission operator apply as well. The compliance officer may not have any other professional links with the vertically integrated undertaking. The compliance officer is responsible for reporting on the compliance of the independent transmission operator with its obligations. The compliance officer attends meetings of both the supervisory board and of management or administrative bodies of the independent transmission operator.
- Article 22 requires the independent transmission operator to develop a ten year network development plan, which is monitored and evaluated by the national regulatory authority. The national regulatory authority has the power to require the independent transmission operator to execute the investments or take other measures to ensure the investment is made and can compel the independent transmission operator to increase its capital. The national regulatory authority

can require the independent transmission operator to agree to the financing or construction of the investment by any third party.

- Article 23 sets out in detail the obligations of the independent transmission operator relating to connecting new generation to its transmission system.
- (18) In summary, despite being owned by a vertically integrated undertaking, the independent transmission operator is an independent entity whose management and/or members of its administrative bodies and employees have no interest in the performance of the vertically integrated undertaking and who may not work for the vertically integrated undertaking after leaving the independent transmission operator before the expiry of a cooling off period. The vertically integrated undertaking has no influence on, or visibility of, operation of the transmission system, granting of new connections or network planning issues.
- (19) The vertically integrated undertaking's interests are looked after by a supervisory board, which is primarily concerned with decisions which may have a significant impact on the value of the assets of the shareholders in the independent transmission operator. However, the national regulatory authority has the power to compel the independent transmission system operator to increase its capital, including by taking on new investors.
- (20) A compliance officer, who is fully independent of the vertically integrated undertaking, oversees this system. In particular it can report to the national regulatory authority any problems which arise. This reporting aims to facilitate the intervention of the national regulatory authority to compel new investments.

3. The Northern Ireland Arrangements

- (21) The Northern Ireland Arrangements have their origin in legislation, in particular the Electricity (Northern Ireland) Order 1992, as subsequently amended, the Energy (Northern Ireland) Order 2003, the Electricity (Single Wholesale Market) (Northern Ireland) Order 2007 and the Electricity Regulations (Northern Ireland) 2007, as well as in licences granted in accordance with this legislation.
- (22) The Northern Ireland Arrangements in some respects resemble, and were modelled on, those applying in Scotland, a point addressed by NIE in its application. The Commission adopted a positive decision (C(2012)3284) in relation to the application of Article 9(9) of Directive 2009/72/EC to the Scottish transmission arrangements. However, there are differences between Northern Ireland and Scotland, in particular because the Scottish arrangements operate as part of a Great Britain trading and transmission arrangements, whereas the Northern Ireland arrangements operate within the context of the cross border Single Electricity Market between Ireland and Northern Ireland.

3.1 Transmission system operation in Northern Ireland

3.1.1 Real time operation

- (23) SONI is responsible for real time operation of the transmission systems. This means it is responsible for all dispatch decision relating to individual power stations and the procurement of all ancillary services for the transmission system in Northern Ireland. NIE has no role in relation to real time operation.

3.1.2 Access and charging

(24) SONI is the contractual counterparty for system users and is responsible for calculating charges for access to the transmission system in line with the regulatory approved methodology. SONI collects charges from all system users. Revenues due to NIE for the use of their systems are collected by SONI before being transferred to NIE.

3.1.3 New connections

(25) SONI has overall responsibility for managing requests for connection to the system in Northern Ireland and acts as the interface with system users.

(26) SONI makes connection offers, which must be backed by a construction offer from NIE.

(27) NIE is exclusively responsible for determining the costs and timescale of the connection. NIE is responsible for carrying out all works necessary to effect new connections.

3.1.4 Investments and planning

(28) SONI is responsible for developing a seven year transmission capacity statement. NIE prepares a seven year transmission investment plan taking into account SONI's planning assumptions.

(29) The Utility regulator indicates in its preliminary decision that it will use its existing powers to secure the transfer of responsibility for planning to SONI. This is aimed at ensuring the continuing efficiency and effectiveness of the Northern Ireland arrangements. NIE will continue to be responsible for executing the investment plan.

3.1.5 Summary

(30) In summary, the Northern Ireland Arrangements have the effect of SONI and NIE sharing the functions of transmission system operation in Northern Ireland. SONI is responsible for the day to day operation of the transmission system. NIE has an important role regarding connections, planning and carrying out of the actual necessary work but not interacting with system users. NIE plans the Northern Ireland system and is responsible for financing and carrying out the necessary developments.

4. Assessment

(31) The arrangements described above were in place on 3 September 2009 and continue to be in place. NIE was part of a vertically integrated undertaking on 3 September 2009 and continues to be so today.

4.1 Ensuring independence in the Northern Ireland arrangements: NIE

(32) The Article 9(9) test requires that effective independence be in place for all aspects of transmission system operation. This means that NIE must be able to perform its transmission related functions independently.

(33) As the Article 9(9) test is in comparison to the independent transmission operator model, it is appropriate to assess the rules governing NIE, in comparison to the rules applying to independent transmission operators.

4.1.1 Assets, equipment, staff and identity and independence of NIE

(34) NIE retains legal ownership of the transmission system and is holder of the transmission asset owner licence. NIE is specifically prohibited from holding any shares in any electricity undertaking active in generation or supply on the island of Ireland. The Commission considers that in the context of the completion of the internal

market this provision should be extended to specifically include all electricity and gas undertakings active in generation or supply in the internal market.

- (35) NIE is a legally separate company. NIE owns all the transmission assets, and is prohibited from disposing of transmission assets except in accordance with regulatory approved procedures. Furthermore, there are specific licence conditions preventing NIE from creating cross-default obligations, charges or encumbrances against the transmission assets. These have the effect of preventing the assets from being used to support the generation or supply activities of ESB, or of creating so-called risk bridges from those activities to the transmission activity.
- (36) According to the preliminary decision submitted by the Utility Regulator, most work related to the transmission business of NIE has been carried out by NIE Powerteam limited (hereafter, "NIE Powerteam") – a legally separate company owned by ESB. NIE considers that NIE Powerteam and NIE in fact form an integral part of the transmission and distribution businesses and furthermore, that NIE's licences, which treat the role of NIE Powerteam directly, also serve to ring-fence NIE Powerteam.
- (37) The Utility Regulator states that cross directorships between NIE and NIE Powerteam effectively mean that NIE Powerteam reports to ESB. The Utility Regulator proposes NIE's licences to be amended so as to clarify that all ring-fencing and regulatory requirements applicable to NIE apply equally to NIE Powerteam.
- (38) NIE is required to ensure that the transmission activities have sufficient premises, system, equipment, facilities, personnel, data and management resources to ensure efficient and effective managerial and operational independence. Associated businesses (i.e. other businesses with a relationship to ESB) are specifically prohibited from having access to those premises, systems, equipment facilities etc. Associated businesses are likewise prohibited from having access to the services of persons employed by NIE.
- (39) The Utility Regulator proposes to amend the NIE licence to ensure that provision of corporate services such as IT, human resources, etc. by ESB is not permitted.

4.1.2 *Independence of the staff and management*

- (40) The day to day management of NIE is carried out by an Executive Committee under the supervision of NIE's Board of Directors. All decisions relating to transmission activities are taken by Directors of NIE or persons employed in the operation and management of the transmission and distribution business.
- (41) NIE is obliged to establish the full managerial independence of its transmission activities. A majority of its board must be independent and NIE must ensure that none of its directors are also directors of associated businesses active in generation or supply. The Utility Regulator proposes to require a licence change to ensure that Directors and Executives of NIE shall have their contract of employment with NIE and shall not have any contractual entitlements by virtue of employment with any other company.
- (42) NIE is obliged to ensure that information, not in the public domain, held by virtue of its carrying out transmission activities is not used to obtain unfair commercial advantage and is not disclosed without the prior consent of the person to whom it relates. Furthermore, NIE is specifically obliged to ensure that information it receives is only divulged to authorised persons and not used by any person other than for authorised purposes. The Utility Regulator has the authority to issue directions to NIE to take the necessary steps to comply with these obligations.

- (43) As noted, the staff of NIE is not at the disposal of associated businesses.
- (44) NIE is obliged to prevent persons who cease to be engaged in the management or operation of the transmission business from being engaged in the activities of any associated business that is active in generation or supply for an appropriate period of time, currently being at least three months for those engaged in management, and currently three months, for those previously engaged in operation. The implementation of these provisions is set out in the compliance plan developed by NIE, to which the Utility Regulator may require amendments it considers necessary or expedient, including in relation to the cooling off periods. .
- (45) As noted in the case of the Scottish arrangements, the fact that the licence allows a cooling off period to be defined on a case by case basis and under the control of the Utility Regulator provides important protection against influence being exerted by the vertically integrated undertaking. The Commission considers that the rules of Directive 2009/72/EC applicable to the independent transmission operator model should be seen as an appropriate cooling off period.

4.1.3 Supervisory Body

- (46) In the independent transmission operator model the Supervisory Body is concerned with decisions which affect the financial interests of the shareholders within the transmission system operator.
- (47) The role of Supervisory Body envisaged by the independent transmission operator model is not replicated in the Northern Ireland arrangements. In line with UK legal traditions NIE maintains a unitary board structure. As noted already, this board is composed of a majority of independent members and no members may be employed by associated businesses active in generation or supply, and will in the future not be able to have contractual entitlements by virtue of their employment with other companies.
- (48) As the role of the transmission asset owner is established within a fully legally and functionally unbundled entity, a majority independent board, with restrictions on the other contractual entitlements of Board members, this contributes to a stronger degree of independence than the supervisory body under the independent transmission operator model.

4.1.4 Compliance officer and compliance programme

- (49) NIE is required to prepare a compliance plan which is subject to the approval of the Utility Regulator. This compliance plan relates to practices, procedures, systems and rules of conduct implemented by NIE to secure the independence of the transmission activities, including rules relating to cooling off periods, information management, access to premises etc.
- (50) The compliance plan also covers legally enforceable undertakings from the holding company of NIE that the holding company will not exercise its corporate governance role in such a way as to distort, restrict or prevent competition in the supply or generation of electricity on the island of Ireland. The Commission considers that in the context of the completion of the internal market these undertakings should be extended to specifically include the internal market.
- (51) The compliance plan is overseen by a compliance manager, who monitors the effectiveness of the plan and the compliance of NIE with the plan. The compliance manager must have access to staff, premises, information etc. as needed to fulfil the

duties of the role. The compliance manager submits an annual report to the Utility Regulator.

- (52) The compliance manager is appointed following consultation with the Utility Regulator.
- (53) In relation to the realisation of planned investments, the role of the compliance manager in the independent transmission operator model is effectively replaced by the independent role of SONI.

4.1.5 Network development and powers to make investment decisions

- (54) The Utility regulator intends to transfer the investment planning to SONI. As SONI is fully independent of generation or supply interests, this serves to increase the independence of this function. This step will also result in the Northern Ireland Arrangements more closely resembling those in Ireland, helping to facilitate cross-border integration.
- (55) NIE is obliged to act in such a manner to secure sufficient resources, including management and financial resources, to enable it to carry out the transmission asset owner function and comply with its obligations under the Northern Ireland Arrangements.
- (56) NIE is further required to submit a certificate on an annual basis confirming that it has sufficient resources available to it to carry out these functions. Finally, NIE is prohibited from making a dividend payment or other form of distribution if it does not have or would not have sufficient resources as a result of that distribution.
- (57) NIE is obliged to secure a legally enforceable undertaking from its ultimate controller(s) (i.e. ESB) that it will refrain from any action which would cause NIE to breach its obligation in this or other regards. This undertaking has the effect of requiring ESB to commit not to demand dividend or other payments if this would result in NIE not having sufficient resources available. NIE is also obliged to maintain investment grade credit rating.
- (58) This is in addition to the provisions to prevent the transmission assets being used as security for purposes other than investments in generation.
- (59) The Commission recognises that such obligations can help ensure access to finance for, and thus the independence of, the transmission activities, and considers the clear separation of the transmission activities and assets from the other activities to be an important factor in ensuring independence in new investments.
- (60) Northern Ireland legislation provides for the possibility of entities other than NIE being granted transmission licences. For example, the Moyle interconnector connecting the Great Britain and Northern Ireland transmission system has been granted a transmission licence. If NIE is unable to finance required investments, it is open to the Utility Regulator to bring in another entity, including SONI, to realise and own such investments.

4.1.6 Connection of new plant to the system

- (61) The framework for the processing of new connections is laid out in detail in a regulatory approved transmission interface agreement between SONI and NIE. SONI is responsible for interactions with system users. The planning and the actual physical connection to the system is effected by ESB, overseen by SONI.
- (62) Finally, the Utility Regulatory has a dispute resolution role.

4.2 Ensuring independence in the Northern Ireland arrangements: SONI

4.2.1 Common Ownership by the Irish State

- (63) The Commission recognises that most transmission system operation tasks rest with SONI and that it was specifically established in order to ensure maximum independence in carrying out those tasks. The Commission also recognises that the links between SONI and Eirgrid support regional integration and the effective independence of transmission system operation.
- (64) In its decision related to the Irish Arrangements, the Commission set out that ensuring effective independence of transmission system operation requires that the exercise of rights in relation to appointments and the exercise of strategic direction of Eirgrid be explicitly attributed to a separate public body than that which controls ESB.

4.3 Conclusion

- (65) The key difference between the arrangements applying in Northern Ireland and the independent transmission operator model is the role of NIE in the functions of the transmission system operator alongside the strong independence of SONI.
- (66) SONI brings a level of independence and responsibility to transmission system operation in Northern Ireland which would not be present in the independent transmission operator model.
- (67) The different approach taken in the Northern Ireland Arrangements and the limited role of NIE envisaged in the preliminary decision notified by the Utility Regulator compared to the independent transmission operator mean that there are different rules applicable to NIE than apply in the independent transmission operator model. In particular the legally enforceable guarantee from the ultimate controller and the majority independent board adds a layer of independence not present in the independent transmission operator model.
- (68) On the basis of the above, the Commission considers that, the arrangements notified by the Utility Regulator according to which the tasks of transmission system operation are shared between SONI and NIE deliver more effective independence than the independent transmission operator model.

HAS ADOPTED THIS DECISION:

Article 1

The arrangements in place in relation to the vertical integration and operation of the transmission systems belonging to NIE existing on 3 September 2009, as set out in the Utility regulators preliminary decision, meet the requirements of Article 9(9) of Directive 2009/72/EC and could clearly guarantee more effective independence of the transmission system operators than the provisions of Chapter V of Directive 2009/72/EC.

SONI shall be certified as the transmission system operator for Northern Ireland.

Article 2

This Decision is addressed to the Northern Ireland Authority for Utility Regulation.

Done at Brussels, 12.4.2013

For the Commission

Siim KALLAS

Vice-President

CERTIFIED COPY
For the Secretary - General

Jordi AYET PUIGARNAU
Director of the Registry