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C(2013) 4657 final

COMMISSION OPINION

of 16.7.2013

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of
Directive 2009/73/EC – United Kingdom – Certification of Premier Transmission
Limited**

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I. PROCEDURE

On 24 May 2013 the Commission received a notification from the Authority for Gas and Electricity Markets (hereafter "Ofgem"), in accordance with Article 10(6) of Directive 2009/73/EC¹ (hereafter, "Gas Directive"), of a draft decision on the certification of the transmission system operator (hereafter, "TSO") for gas Premier Transmission Limited (hereafter, "PTL").

Pursuant to Article 3(1) Regulation (EC) No 715/2009² (hereafter, "Gas Regulation") the Commission is required to examine the notified draft decision and deliver an opinion to the relevant national regulatory authority as to its compatibility with Article 10(2) and Article 9 of Directive 2009/73/EC.

II. DESCRIPTION OF THE NOTIFIED DRAFT DECISIONS

The certification application of PTL concerns the Scotland Northern Ireland Pipeline (hereafter, "SNIP") – 135 kilometre of pipeline from Twynholm in Scotland to Ballylumford in Northern Ireland for which it is licenced to carry out transmission activities.

SNIP is operated as part of the wider Northern Ireland transmission system, with the performance of many functions sub contracted. PTL is wholly owned by Mutual Energy Limited (hereafter, "MEL"). MEL is a company limited by guarantee³ with the objective of owning and operating energy infrastructure in the island of Ireland for the long-term benefit of the energy consumers of Northern Ireland. MEL has no shareholders and financial surpluses are used for the benefit of all Northern Ireland energy consumers.

The Directors of MEL are also the Directors of PTL. The power to appoint Directors of MEL, and PTL resides with the Members of MEL. According to the Articles of Association, Members are not permitted to have any conflicts of interests. MEL had 15 employees in 2011⁴.

PTL has applied for certification as transmission system operator applying the full ownership unbundling model. As PTL was not part of a vertically integrated undertaking on 3 September 2009 this is the only unbundling model which they may implement in accordance with the Gas Directive.

¹ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211/94 of 14.8.2009

² Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, OJ L 211/36 of 14.8.2009

³ This form of undertaking is described at the MEL website: <http://www.mutual-energy.com/Mutualisation/Concept.php> and in the Articles of Association submitted with the respective applications for certification.

⁴ Mutual Energy limited Annual Report 2012 p. 72

In its notified preliminary certification decision Ofgem considers the situation of one Director in particular, who is a non-executive Director in companies active in the energy sector, i.e. Vermillion Energy Ireland Limited and Vermillion Energy Ireland Holdings Limited which have a 18.5% interest in the Corrib Gas venture established to develop the Corrib natural gas field off the west coast of Ireland. However, Ofgem considers the requirements of Article 9(1)(d) of the Gas Directive to be met as:

- Neither MEL, or PTL have any business relationships with Vermillion,
- The potentially conflicted Director is not involved in the day to day operations of Vermillion,
- the Vermillion companies do not hold or require a licence from the Irish energy regulator in respect of their activities. They also do not consider that the Vermillion companies would require a licence under section 7A of the Gas Act for its exploration activities if these were carried out in GB,
- It is not possible for any party in Northern Ireland to access gas from the Corrib field as the current infrastructure does not facilitate such access,
- In any case a Director may not participate in decisions, or count towards a quorum, where he has a material interest.

Ofgem also considers MEL's investments valued at over GBP 10 million in the European Renewable Energy Fund Limited Partnership, but considers these not to be in conflict with the requirements of Article 9(1) of the Gas Directive as the fund is managed on an arm's length basis by a third party, MEL's share of the fund amounts to just 7% and MEL does not exercise control directly or indirectly in any of the fund's investments.

Ofgem considers the subcontracting of services, including control room services, in relation to the Premier Transmission Pipeline System. These are currently carried out by Bord Gáis Éireann, the gas transmission operator for Ireland⁵, however Bord Gáis Éireann is not the preferred bidder in the on-going tender for a new service provider.

Ofgem states that PTL remains fully legally responsible for all activities and tasks associated with transmission system operation. The contractor in their view has no authority unless given to it by PTL and the contractor must also act fully in accordance with the instructions of PTL. Additionally, there are measures in place to ensure the confidentiality of data is retained. Ofgem thus considers that this subcontracting arrangement is fully in line with the requirements of Article 9(1)(a) of the Gas Directive.

III. COMMENTS

The Commission already adopted Opinion C(2013)3145 final in relation to the Certification of PTL as a transmission system operator in Northern Ireland. On the basis of the present notification the Commission has the following comments on the draft decision for certification in Great Britain, which fully reflects those set out in the Opinion in relation to the certification in Northern Ireland.

1. Conflicted directors

Ireland and Northern Ireland have been developing an all Island energy framework for almost a decade. This has resulted in the successful implementation of the single electricity market on the island of Ireland, and substantial work on the development of common arrangements for gas. Recently, the possibility for trading using the south-north pipeline between Ireland

⁵ See Commission Opinion C(2013) 3117 final on the Certification of the Bord Gais ITO.

and Northern Ireland has enhanced market integration. Both Northern Ireland and Ireland are closely linked to the gas market in Great Britain, and indeed SNIP is connected to the wider GB system via the interconnectors between Ireland and Great Britain. Further integration between Northern Ireland, Ireland and Great Britain will require the close cooperation of all transmission system operators, including PTL.

The Corrib gas field represents a potentially very significant contribution to the energy needs of Ireland and indirectly also Northern Ireland. The commercial value of the Corrib gas field will be impacted by the particular arrangement applying for trading between Ireland, Northern Ireland and Great Britain.

The Commission considers that a Director or other senior officer of a transmission system operator who holds an interest in a gas field of the scale of the Corrib gas field, located in such proximity to the relevant gas transmission system, inevitably faces conflicts of interest and cannot be considered to meet the requirement of Article 9(1)(d) of the Gas Directive.

The Commission invites Ofgem to ensure that prior to its final certification decision that all directors of the transmission system operator meet the requirements of Article 9(1)(d) of the Gas Directive.

2. European Renewable Energy Fund Limited Partnership

The Commission accepts the view of Ofgem that the investments by MEL in the European Renewable Energy Fund Limited Partnership do not constitute a barrier to certification of PTL as the interest of MEL is essentially confined to a financial interest in an investment fund and MEL does not exercise, directly or indirectly, either rights or control in any of the renewable energy undertakings, thus meeting the requirements of Article 9(1)(b) subparagraph (c) of the Gas Directive. However, the Commission invites Ofgem to keep under review whether a financial incentive could exist that could influence MEL's decision-making powers and, if that is the case, to ensure that remedies are put in place that effectively remove this conflict of interest.

3. Contracting out of TSO services

Under Article 9(1)(a) of the Gas Directive, each undertaking which owns a transmission system is required to act as a transmission system operator, including carrying out all the tasks of a transmission system operator under Article 12 Gas Directive. Compliance with ownership unbundling means that the undertaking which is the owner of the transmission system also acts as the transmission system operator, and is as a consequence responsible, among other things, for granting and managing third-party access on a non-discriminatory basis to system users, and for collecting access charges. As regards investments, the owner of the transmission system is responsible for ensuring the long-term ability of the system to meet reasonable demand through investment planning. Decisions related to the operation, maintenance and development of the network must be made by the transmission system operator and the network company must have enough resources at its disposal to carry out its tasks under Article 12 of the Gas Directive independently.

With the number of employees, MEL is unlikely to be able to carry out the full range of transmission system operator activities notwithstanding the small size of the Premier transmission system; consequently the operation of the Premier transmission system is to a large extent dependent of the use of sub-contracting.

In its opinion on Voralberger Übertragungsnetze GmbH⁶, the Commission set out that that the sub-contracting of core tasks of a transmission system operator to a vertically integrated

⁶ See Commission Opinion C(2012)2244 final.

undertaking was not compatible with the full ownership unbundling model. In that case, the Commission also expressed concerns about the availability of resources to the nominated transmission system operator to enable it to carry out its functions and stated that it should carry out the administration of the transmission system and the control room services itself.

The Commission considers that the contracting out of core transmission system operator functions can only be acceptable either if the transmission system is operated jointly as part of a wider transmission system or if a fully resourced transmission system operator makes an independent commercial decision to sub-contract services on efficiency grounds. In the second case, the tendering for services, including the planning of tendering procedures, should be organised in sufficient time to allow the transmission system operator to recruit staff etc. such that it could provide the services in house if necessary. The transmission system operator should itself have sufficient resources to oversee, control and provide instructions to the subcontractor. Only entities which meet the unbundling requirements for gas transmission system operation should be eligible to provide such services. Even when outsourcing the control room activity, the TSO should itself have sufficient resources to oversee, control and provide instructions to the subcontractor.

The Commission invites Ofgem to verify that this is the case and to ensure that each tender to provide transmission system operator services has been fully evaluated against the potential of carrying out those functions in-house and that the transmission system operator has all necessary resources to effectively oversee, control and provide instructions to the subcontractor.

IV. CONCLUSION

Pursuant to Article 3(2) Gas Regulation, Ofgem shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of PTL, 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 for such a request should be given.

Done at Brussels, 16.7.2013

For the Commission
Janusz LEWANDOWSKI
Member of the Commission

