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COMMISSION OPINION

of 15.2.2013

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of
Directive 2009/72/EC – United Kingdom – Blue Transmission Walney 1 limited**

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I. PROCEDURE

On 20 December 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 (TSOs) for electricity. The applicant is Blue Transmission Walney 1 limited (hereafter, "the Applicant").²

Pursuant to Article 3(1) Regulation (EC) No 714/2009³ (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 an offshore transmission operator which holds a licence to own and operate an offshore electricity transmission system for the connection of wind generated electricity in designated areas off North West England to the onshore national grid or distribution networks at Heysham. The total export capacity of the offshore transmission system is 184 MW via a 132kV line. The Applicant has applied for certification in accordance with the ownership unbundling model. As the transmission system of the Applicant was not in place on 3 September 2009, the only unbundling option provided for such operators under the Electricity Directive is the full ownership unbundling option.

The Applicant is a joint venture between Barclays Infrastructure Funds Management Limited and Diamond UK transmission and is ultimately owned and controlled by Barclays PLC (hereafter, "Barclays") and Mitsubishi Corporation (hereafter, "Mitsubishi").

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 for 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 This notification is registered under CIRCA-references 054-2014-UK

³ 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.

III. COMMENTS

On the basis of the present notifications the Commission has the following comments on the draft decisions.

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 MITSUBISHI AND BARCLAYS

Both Barclays and Mitsubishi directly or through various subsidiaries control or have rights in electricity undertakings which are involved in the production of electricity. These interests are located in the UK and in Italy in the case of Barclays and in the case of Mitsubishi in Spain, France and Bulgaria.⁴

Barclays interests comprise:

- [BUSINESS SECRET] of renewable generation located in Scotland, [BUSINESS SECRET] owned by a fund manager which is a subsidiary company of Barclays;
- a total of [BUSINESS SECRET] of distribution connected generation in the UK [BUSINESS SECRET], [BUSINESS SECRET] owned by a fund manager which is a subsidiary company of Barclays;
- [BUSINESS SECRET] of solar panels located across the UK, [BUSINESS SECRET] owned by a fund manager which is a subsidiary company of Barclays;
- [BUSINESS SECRET] of onshore wind in the UK, [BUSINESS SECRET] owned by a fund manager which is a subsidiary company of Barclays;
- a total of [BUSINESS SECRET] of solar plants across [BUSINESS SECRET] locations in Italy [BUSINESS SECRET] owned by a fund manager which is a subsidiary company of Barclays and plans to acquire a [BUSINESS SECRET] ownership of a further [BUSINESS SECRET] .

Mitsubishi interests comprise:

- [BUSINESS SECRET] MW of renewable generation at different locations in Spain, [BUSINESS SECRET] owned by Mitsubishi;

⁴ See table 1 of Appendix 2 of the notified preliminary decision by Ofgem.

- [BUSINESS SECRET] MW of renewable energy in Spain, [BUSINESS SECRET] owned by Mitsubishi;
- [BUSINESS SECRET] MW of renewable energy in Portugal, [BUSINESS SECRET] owned by Mitsubishi;
- [BUSINESS SECRET] MW of renewable energy in France, [BUSINESS SECRET] owned by Mitsubishi (with restricted veto right);
- [BUSINESS SECRET] MW of renewable energy in France, [BUSINESS SECRET] owned by Mitsubishi;
- [BUSINESS SECRET] MW of renewable energy in France, [BUSINESS SECRET] owned by Mitsubishi;
- [BUSINESS SECRET] MW [BUSINESS SECRET] in Bulgaria, [BUSINESS SECRET] owned by Mitsubishi.

OFGEM'S ASSESSMENT

Ofgem sets out that the generation interests described above do not involve relevant suppliers or producers within the meaning of the legislation transposing the unbundling obligations in Great Britain, because the capacity of each is below the 50 MW threshold above which a generation licence is required in Great Britain.

Ofgem further sets out a number of reasons why the risk of the Applicant discriminating in favour of these undertakings is minimal. Ofgem sees no realistic prospect of the Applicant discriminating in favour of any of the electricity undertakings active outside Great Britain; in relation to Barclay's UK interests, Ofgem points out that these are not connected to the offshore transmission system which the applicant controls and are not located in close physical proximity to it. Ofgem considers that both the specific requirements on offshore transmission systems in the United Kingdom and additionally, the rules governing the independence of investment funds and the associated compliance arrangements serve to minimise the risk of discrimination.

COMMISSION VIEW

The Commission notes that the Electricity Directive does not specify any threshold in the definitions of generation or supply in Article 2(1) and Article 2(19) respectively. The Commission welcomes the analysis undertaken by Ofgem to satisfy itself that the Applicant's independence in acting as TSO will not be compromised to the detriment of particular network users in addition to satisfying the test set out in UK legislation.

In the present case, the Commission considers that all the information provided in the draft decision supports the conclusion of Ofgem that the existing production or supply interests of Barclays and Mitsubishi do not constitute a risk of discrimination in the operation of the network or to adequate investment in the network controlled by the Applicant. Consequently, an obstacle to certification cannot be identified. The rationale for this consideration is based on several factors.

There is no interface between the generation interests of the applicants and the transmission system controlled by the Applicants. 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 is restricted to the 132 kV line which serves merely to connect specific wind generation facilities to the main grid. As well as the small size of this system, the need to ensure the

effective operation of the wider Great Britain system⁵ means that the day to day operation of the offshore transmission is carried out by National Grid and information regarding planned production and availability of generation connected to an offshore electricity transmission system are sent to National Grid and not the Applicant. These factors limit any potential information flows between the Applicant and the generation interests of Mitsubishi and Barclays.

Mitsubishi's interests are entirely located in another Member States without any interface with the offshore transmission system controlled by the Applicant. Although largely located in the UK, Barclay's interests do not interface with the offshore transmission system controlled by the Applicant.

The size and market share of the generation activities are small on an individual and collective basis: Individually each of the generation units are of minimal size. None would be required to report its output under the congestion management guidelines set out in Annex I of the Electricity Regulation or the draft Commission Regulation on submission and publication of data in electricity markets and amending Annex I to the Electricity Regulation (which the Electricity Cross Border Committee has given a positive opinion on and which the Commission will adopt if neither the European Parliament nor the Council oppose the draft measure).

The plants in which Barclay's has an interest total to approximately 170 MW which is insignificant in relation to the total capacity of the Great Britain system. The plants in which Mitsubishi has an interest total to approximately 28 MW spread across several Member States. This is insignificant compared to the total capacity of any of the concerned Member States.

The distribution connected generation in which Barclays has an interest primarily provides short term operating reserve to National Grid and the various interests in renewable generation benefit from various forms of public support which reduce the incentive to manipulate the electricity market.

In addition to these factors, the Commission also notes that the activities of Fund Managers controlled by Barclay's are governed by financial legislation⁶ which requires that the fund must act in the interests of the investors in the fund and must implement appropriate ring-fencing between different business. Compliance is overseen by the Financial Services Authority which has a range of disciplinary, criminal and civil sanctions which it can impose or propose to a Court.

Therefore, notwithstanding the interests of persons controlling the Applicant, it is clear that there is no incentive for those persons to influence the decision making in this TSO with the intention to favour its generation, production and/or supply interests to the detriment of other network users. In this case the Commission considers 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. Ofgem sets out in its preliminary decision that certified

⁵ This is described Annex 2 of Appendix 2 of Ofgem's preliminary decision.

⁶ The operation of this oversight framework is described at Annex 1 of Appendix of Ofgem's preliminary decision

parties are required to inform them of any significant changes relevant to the certification and to provide in any case an annual update⁷. Ofgem's preliminary decision also refers to Mitsubishi being engaged in negotiations to take an interest in additional electricity undertakings active in electricity generation, but specifically does not consider this as relevant to the current application. 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 in respect of the existing generation interests of Barclays and Mitsubishi. 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, 15.2.2013

For the Commission
Günther OETTINGER
Member of the Commission

⁷ Appendix 2 Section 6.