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COMMISSION OPINION

of 26.4.2013

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of
Directive 2009/72/EC - Certification of Thanet - United Kingdom**

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On 28 February 2013 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 Thanet 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 and operate an offshore electricity transmission system for the connection of wind generated electricity from one offshore wind farm in the south east of England to the onshore distribution networks³.

The total export capacity of the offshore transmission system is 300 MW via 132kV x 2 lines, its size in terms of assets is provisionally £163m. 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 wholly owned and controlled by Balfour Beatty plc (hereafter, "BB plc"), a listed company on the London Stock Exchange, via a number of holding companies.

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 notifications 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 BB PLC.

BB plc has established the Balfour Beatty Pension Fund (hereafter, "BBPF")⁴. BBPF provides defined benefit and defined contribution pensions to BB plc employees.

Balfour Beatty Pension Trust limited (hereafter "BBPTL") is the corporate trustee of BBPF, which has the responsibility of managing BBPF in trust for the beneficiaries, i.e. for the current and former employees of BB plc.

Within the meaning of the Merger Regulation BB plc controls BBPTL. However, BBPTL is obliged to act in the best interests of the beneficiaries of BBPF and not the interests of BB plc.

BBPTL owns 50% of Thames power Limited (hereafter, "TPL"), [BUSINESS SECRET] who likewise owns 50% of TPL. TPL owns 51% of Barking Power Limited (BPL), a 1 000 MW power station using combined cycle gas turbines. Two other shareholders own the remaining 49% of BPL.

[BUSINESS SECRET]. However, in its application for certification, the Applicant argues that, despite this, it does not exercise control over BPL, as [BUSINESS SECRET].

[BUSINESS SECRET].

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.

OFGEM'S ASSESSMENT

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

⁴ BBPF is a registered pension scheme for the purposes of Part 4 of the UK Finance Act 2004

core business of the entities and that there is no realistic prospect of any of these entities seeking a connection to the Thanet transmission system, nor could they have any impact on the operation of the Applicant's transmission system or any other transmission system.

In relation to BPL, Ofgem considers the grounds for certification as a fully ownership unbundled TSO to be satisfied as any rights that Balfour Beatty PLC and other associated entities have over BPL are effectively removed by the existence of the independently managed BBPTL and the measures that are in place to help ensure such independence. Ofgem considers the governance arrangements that are in place in relation to the rights of shareholders in BPL negate the controlling interest of BBPTL in that power station.

Ofgem therefore concludes that the BB plc does not effectively exercise rights over, nor control BPL.

Ofgem further considers that the specific requirements on offshore transmission systems in the United Kingdom serve to minimise the risk of any discrimination.

COMMISSION VIEW

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 BB plc 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.

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 x 2 lines which serve merely to connect specific wind generation facilities to a distribution network. The system in question is therefore not directly connected to the wider British transmission system, and is in many respects more similar to a distribution system than a transmission system.

As well as 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, as there is no interface between generation interests of BBPTL or any other entity controlled by BB plc. and the planned transmission system controlled by the Applicant, this limits any potential information flows.

In relation to the PFI and PPP special purpose vehicles controlled by BB plc, it could be accepted that where generation is truly incidental to the core activity of an undertaking (as, for example, in this case the provision of school or hospital premises to the public sector), and the quantity of energy is also insignificant, this should not act as a barrier to the certification of a transmission system operator under the ownership unbundling model.

In relation to the situation of BPL the size of BBPF's interest in BPL, by comparison with the size of its overall fund, is of relevance when assessing the steps taken to address any conflict of interest.

The Commission notes that the activities of Pension Funds and Pensions Trusts are governed by national legislation, which requires that investments be in the interests of the beneficiaries of the fund and that Pension Funds and the activities of pension trustees are overseen by the UK Pensions Regulator. We note in particular the view of Ofgem that "there is legislation and adequate measures in place to help BB pension trust maintain its independence." This can help mitigate the risks which the unbundling provisions of the third package are designed to address.

Furthermore, in this case, the framework for decision making at BPL, [BUSINESS SECRET], serves to further mitigate any potential risk for discrimination.

Therefore, notwithstanding the interests of persons controlling the Applicant, it is clear that there is no ability 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 parties are 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, 26.4.2013

For the Commission
Johannes HAHN
Member of the Commission

CERTIFIED COPY
For the Secretary - General

Jordi AYET PUIGARNAU
Director of the Registry