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COMMISSION OPINION

of 8.10.2018

pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Articles 10(6) and 11(6) of Directive 2009/72/EC – United Kingdom - Review of the certification of TC Robin Rigg OFTO Limited, TC Gunfleet Sands OFTO Limited, TC Barrow OFTO Limited, TC Ormonde OFTO Limited and TC Lincs OFTO Limited

(ONLY THE ENGLISH TEXT IS AUTHENTIC)

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I. PROCEDURE

By letter dating 6 August 2018 the Commission received a notification from the national regulatory authority in the United Kingdom (UK) responsible for Great Britain, the Office of Gas and Electricity Markets (hereafter "Ofgem"), of a preliminary decision concerning the review of the certification status of TC Robin Rigg OFTO Limited, TC Gunfleet Sands OFTO Limited, TC Barrow OFTO Limited, TC Ormonde OFTO Limited and TC Lincs OFTO Limited (hereafter "TCP OFTOs") as transmission system operators for electricity (hereafter "TSOs").

Pursuant to Article 3 of Regulation (EC) No 714/2009¹ (hereafter "Electricity Regulation") and Articles 10 and 11 of Directive 2009/72/EC² (hereafter, "Electricity Directive"), 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 Articles 9, 10(2) and 11(7) of Directive 2009/72/EC.

II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

According to Ofgem's notification, all TCP OFTOs are licensed Transmission System Operators and are Offshore Transmission Operators (hereafter "OFTOs") according to UK national law. The TCP OFTOs are part of the same corporate group, the consortium Transmission Capital Partners (hereafter "TCP").

Reason for the review undertaken by Ofgem are the changes to one of the ultimate controllers of the TCP OFTOs that could constitute a change of circumstances that may affect the basis of their certification. When the TCP OFTOs were initially certified³, two ultimate controllers were identified: International Public Partnerships (hereafter "INPP") and Amber Infrastructure Group Limited (hereafter "AIGHL"). Due to an ownership change of the latter, Ofgem now identifies INPP and HUNT Companies Inc (hereafter "HUNT") as ultimate controllers.

The purpose of the offshore transmission projects operated by TCP OFTOs is to connect several offshore wind farms with onshore substations: the Robin Rigg wind farms which are

¹ 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.

² 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.

³ Related Commission Opinions were C(2012) 3006 of 27.4.2012 and C(2013) 281 of 21.1.2013

owned by E.ON, located in the Solway Firth and have an installed capacity of together 180MW⁴, the Gunfleet Sands wind farm which is owned by Ørsted and the Marubenia Corporation, located in the Thames Estuary and has an installed capacity of 172MW⁵, Barrow wind farm owned by Ørsted, located in the East Irish Sea and has an installed capacity of 90MW⁶, Ormonde wind farm which is owned by Vattenfall and Swedish pension group AMF, located in the Irish Sea and has an installed capacity of 150MW⁷ and Lincs Wind Farm which is owned by Ørsted and Siemens, located of the east coast of England close to Skegness and has an installed capacity of 270MW⁸. Neither the wind farms nor the onshore transmission networks are owned or operated by the TCP OFTOs.

INPP⁹ is registered in Guernsey and is an infrastructure fund listed on the London Stock Exchange with no controlling shareholder. Ofgem notes that the circumstances in respect of INPP have not changed since the initial certification of the TCP OFTO's.

HUNT is registered in the United States of America (hereafter "USA" or "US") and, according to its website¹⁰, is a family-owned international financial investor whose core business is in the USA. However, part of the consortium is the Amber Infrastructure Group¹¹ headquartered in London which *inter alia* invests in sustainable energy projects, including in the EEA.

In its preliminary decision, Ofgem notes that the TCP OFTOs have confirmed that "none of the companies or persons in the Hunt corporate group has current investments in, or any control whatsoever over, any relevant producer or supplier in the EEA". However, Ofgem notes that the HUNT Group has small scale generation interests in the UK and in the USA, although these interests do not fall under the definition of "relevant producer or supplier" according to UK national legislation.

Ofgem has analysed whether the TCP OFTOs still comply with the requirements of the ownership unbundling model, as laid down in the UK legislation transposing the Electricity Directive. In its preliminary decision, Ofgem concludes that this is the case.

Furthermore, given that HUNT is registered in the USA and that INPP is registered in Guernsey, hence in third countries, Ofgem is also required to ascertain if the change in the ultimate controller would not put at risk the security of energy supply of the UK and the Union, in accordance with the requirements set out in Article 11 Electricity Directive.

On this basis, Ofgem submitted its preliminary review decision to the Commission requesting an opinion.

III. COMMENTS

⁴ <https://www.eonenergy.com/about-eon/our-company/generation/our-current-portfolio/wind/offshore/robin-rigg>

⁵ <https://orsted.com/en/Company-Announcement-List/2011/09/1044739>

⁶ <https://orsted.co.uk/Media/Newsroom/News/2014/12/DONG-Energy-acquires-full-ownership-of-the-Barrow-Offshore-Wind-Farm>

⁷ <https://corporate.vattenfall.co.uk/projects/operational-wind-farms/ormonde-offshore-wind-farm/>

⁸ <https://orsted.com/en/Company-Announcement-List/2009/12/917265>

⁹ <https://www.internationalpublicpartnerships.com>

¹⁰ <http://www.huntcompanies.com/>

¹¹ <https://www.amberinfrastructure.com/our-sectors/sustainable-energy/>

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

1. Generation and supply interests linked to the TCP OFTOs' controllers

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 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.

In relation to electricity generation or supply participations of the ultimate controllers of the TCP OFTOs, Ofgem notes that HUNT has small scale generation interests in the UK and in the USA.

In the UK, it has a controlling interest in a 6MW solar generation asset located in Castle Donnington, East Midlands, UK that supplies a retail outlet through a direct line. Ofgem concludes that it is unlikely that the TCP OFTOs could benefit this generation, not only due to the lack of physical proximity and the limited scope of both TCP OFTOs' transmission systems and the asset's generation capacity, but also due to the fact that all the generated electricity is sold via a direct line to a specific consumer.

In the USA, HUNT has interests in Unison Energy LLC: a US company that owns and operates on-site power generation solutions for clients using Combined Heat and Power primarily in New York State, USA. Total capacity is just over 7MW. HUNT also indirectly controls a renewable electricity generator with a capacity of approximately 5MW based in Hawaii, USA.

Ofgem concludes that mainly due to the geographical distance and lack of physical interconnection between the UK and the USA there is virtually no possibility that the TCP OFTOs could benefit these generation undertakings.

Ofgem furthermore notes that HUNT or its subsidiaries have a 4.4% non-controlling interest in Cadent Gas which owns and operates four of the eight gas distribution systems in Great Britain. Ofgem concludes that as a gas distribution system, Cadent Gas is not a relevant producer or supplier according to UK law.

In addition, Ofgem refers to the OFTO regime which prohibits OFTOs from engaging in discriminatory and preferential behaviour and provides mechanisms and financial incentives and disincentives to support this. Overall, Ofgem concludes that the TCP OFTOs have no incentive for discrimination.

Ofgem reports that according to information provided by the TCP OFTOs about likely future investments, HUNT or its subsidiaries may in the future have interests in a few generation assets both in the USA and in the UK. Since none of these producers or suppliers will be in place at the time the review of the TCP OFTOs' certification is expected to be completed, Ofgem has not considered them for the purpose of the present review.

Commission assessment

As a preliminary comment, the Commission welcomes the recognition by Ofgem of the Commission's position that the Electricity Directive does not specify any "de minimis" or other thresholds in the definitions of generation or supply in Article 2, paragraphs (1) and (19) and that Ofgem included in its assessment the small-scale generation interests and entities in which the ultimate controllers hold participations. However, the Commission invites Ofgem to also apply this approach to the senior officers controlling TSOs or their ultimate controllers.

The Commission considers that the objective which the unbundling rules of the Electricity and Gas Directives pursue is the removal of any conflict of interest between, on the one hand, generators/producers and suppliers and, on the other hand, TSOs. As explained in the Staff Working Paper 'Ownership Unbundling: The Commission's practice in assessing a conflict of interest including in the case of financial investors' (SWP (2013) 177), it would not be in line with this objective if certification of a TSO were to be refused in cases where it can be clearly demonstrated that there is no incentive and ability for a shareholder in a TSO to influence the TSO's decision making in order to favour its generation, production and/or supply interests to the detriment of other network users. It is therefore necessary to assess whether a risk for discrimination could be excluded in the present case.

The TCP OFTOs have the same ultimate controllers as TC Dudgeon OFTO plc (hereafter "TC Dudgeon") whose certification was subject to a recent Commission Opinion. Therefore, the Commission's assessment and comments are aligned with the Commission opinion on the certification of TC Dudgeon¹².

The Commission notes that the transmission systems operated by the TCP OFTOs remains of a limited nature when compared with the size of the UK grid, its total capacity and peak loads. The TSO responsibilities of the TCP OFTOs are limited to operating these specific offshore connections. The limited size of the transmission systems, also viewed together with other OFTOs controlled by the ultimate controllers of the TCP OFTOs, the limited possibilities of influencing its operations and the lack of a direct connection with the above-mentioned generation assets are relevant factors which limit the potential for discrimination in favour of any generation interests held by the TCP OFTOs' ultimate controllers.

In relation to these assets, the Commission considers that given the small scope of electricity production in the UK and the fact that the electricity is supplied directly to the final customer, the absence of any physical connection between the electricity systems of the USA and the United Kingdom and the fact that the TCP OFTOs as OFTOs do not own or operate the network beyond the connection point onshore, there appears to be no scope for a conflict of interest between the limited generation interests held by the applicants' shareholders in the UK and the USA and the transmission activities of the TCP OFTOs, nor a resulting risk of discrimination of other network users. Therefore, the Commission considers that the generation interests currently held by HUNT or its shareholders should not be an obstacle to the certification of the TCP OFTOs.

However, the Commission notes that the future generation and storage projects in which the applicants' shareholders hold participations are likely to add a significant amount of generation capacity to the portfolio of the TCP OFTOs' ultimate controllers. While the Commission accepts Ofgem's decision not to consider these projects for the purpose of the present review, the Commission is of the view that Ofgem should monitor and assess the

¹² C(2018) 5433 of 7.8.2018

impact of each of the projects in question on the TCP OFTOs' compliance with the unbundling requirements at the time these projects become operational.

In view of the above, the Commission considers that in the present case, and subject to the continued monitoring of future generation projects by Ofgem, a discontinuation of the certification would run counter to the principle of proportionality.

2. Application of Article 11 – possible risks to security of supply

Pursuant to Article 11, Ofgem is to refuse certification unless it is demonstrated, on the basis of an assessment, that the certification does not put at risk the security of supply of the UK or the EU. In the present case, the application of Article 11 is triggered due to the fact that INPP is registered in Guernsey and HUNT is registered in the USA.

In this context, Ofgem enquired with the Department for Business, Energy & Industrial Strategy (hereafter “BEIS”) if the certification of the TCP OFTOs would put the security of electricity supply of the UK or any other EEA States at risk.

BEIS concluded its letter to Ofgem of 25 June 2018 that this is not the case, since the TCP OFTOs are licensed to transmit electricity generated from designated areas and they are connected with the national transmission system on a point-to-point basis only and are thus not part of a meshed network. Generally, from the perspective of BEIS’ wider work on potential risks of foreign investment in the UK energy system, companies from the USA or Guernsey do not, in and of itself, trigger particular concerns.

As regards INPP, BEIS additionally notes that Guernsey is a Crown Dependency of the UK and has a close relationship with both the UK and the EU.

Commission assessment

Guernsey is not a sovereign country, but as Crown Dependency a territory for which the UK is responsible. The close link of Guernsey with the UK and the EU is enshrined in EU legislation: According to Protocol 3 (Channel Islands and the Isle of Man) to the Act concerning the Conditions of Accession [of Denmark, Ireland and the UK] and the Adjustment of the Treaties¹³, Guernsey is part of the customs territory of the EU and “the rights enjoyed by Channel Islanders [...] in the UK shall not be affected by the Act of Accession”. Finally, via Jersey, Guernsey is closely linked by interconnectors with the French electricity grid from which it receives around 85% of its electricity supply¹⁴.

The USA are an OECD member and – as also most EU Member States – a member of the International Energy Agency (IEA), an organisation which has among its main tasks to increase the security of the energy supply of its members. Both the EU and the USA are cooperating on energy issues in the G7 context and are partners through the multilateral ITER Project. Energy cooperation was further enhanced in 2009 with the creation of the EU-US Energy Council. The Council meets regularly,¹⁵ chaired by high-level representatives of the EU and the USA.

In view of the above, and given both the limited amount of generation capacity connected via the TCP OFTOs' systems and the limited impact of the TCP OFTOs on the operation of the UK's national transmission system for the reasons outlined by BEIS, the Commission shares

¹³ Official Journal of the European Communities, Special Edition, 27 March 1972.

¹⁴ <https://www.electricity.gg/customer-information/faqs/>

¹⁵ The last meeting took place on 12 July 2018.

the view that the continuation of the certification of the TCP OFTOs would not put at risk the security of supply of the UK or the Union.

3. 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.

Should Ofgem decide to maintain the certification of the TCP OFTOs, the Commission invites Ofgem to continue monitoring the case also after the adoption of the final review decision in order to satisfy itself that no new facts emerge which would justify a change of its assessment. In particular, the start of operations of the future generation projects in which the ultimate controllers of the TCP OFTOs hold participations may require a renewed assessment.

IV. CONCLUSION

Pursuant to Article 3 Electricity Regulation, Ofgem shall take utmost account of the above comments of the Commission when taking its final decisions regarding the review of the certification of the TCP OFTOs, and when it does so, shall communicate its decisions 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, on 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 therein to be confidential. Ofgem is invited to inform the Commission within five working days following receipt whether and why they consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which they wish to have deleted prior to such publication.

Done at Brussels, 8.10.2018

For the Commission
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Member of the Commission

