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COMMISSION OPINION

of 9.3.2015

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of
Directive 2009/72/EC - Great Britain - Certification of WoDS Transmission Limited**

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I. PROCEDURE

On 15 January 2015 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 (TSO) for electricity WoDS Transmission Limited (hereafter, "WoDs" or "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 the West of Duddon Sands offshore electricity transmission system for the connection of wind generated electricity from offshore wind production and its transportation to the onshore transmission system. The WoDs wind farm has an installed capacity of 389MW, with the transmission system valued at approximately £296m. The wind farm is located off the Cumbrian coast in northwest England. Its onshore connection point is National Grid's transmission network in Heysham in northwest England.

WoDs is a 100% subsidiary of WoDs Transmission HoldCo Limited, which in turn is 100% owned by WoDs Transmission TopCo limited. The owners of WoDs Transmission TopCo limited are ultimately the 3i Group plc (hereafter, "3i") and the Macquarie Group limited (hereafter, "Macquarie") both parties holding a 50% share.

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.

III. COMMENTS

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

1. EXERCISE OF CONTROL AND RIGHTS IN THE APPLICANT

Article 9(1)(b)(i) of the Electricity Directive prohibits the same person or persons from directly or indirectly exercising control over an undertaking performing any of the functions of production or supply, and directly or indirectly exercising control or exercising any right over a transmission system operator or over a transmission system.

In its preliminary decision Ofgem has assessed the two companies ultimately owning the shares in WoDs in order to establish whether or not they perform the functions of generation, production or supply of gas or hold participations in companies that perform such activities and to what extent that influences WoDs's compliance with Great Britain's legislation transposing Article 9(1)(b)(i) of the Electricity Directive.

The Commission has the following comments with regard to the assessment by Ofgem of both shareholders.

3i

According to Ofgem 3i is the sole party exercising control over WoDs, the reason for which is the fact that the rights of Macquarie as a shareholder are limited to such an extent that it cannot be deemed to have control over WoDs. 3i is also the majority owner of a small number of minor generation assets (<30MW) in the UK and Italy. The Commission has already considered the generation interests of 3i in relation to its ownership and control of the Blue Transmission Companies³. In that case the Commission concluded that a refusal or revocation of certification would run counter to the principle of proportionality given the fact that the generation interests of 3i do not constitute a risk of discrimination in the operation of the networks or to adequate investment in the networks controlled by the applicants and therefore an obstacle to certification cannot be identified.

The Commission considers that the considerations set out in the above referenced Commission Opinion also apply in relation to WoDs. The Applicant has also confirmed that these interests have not changed in the interim.

Macquarie

Macquarie is an Australian investor which controls significant generation assets in the EU⁴ and specifically also in the UK. According to Ofgem it does however not exercise control (despite its 50% shareholding) over the Applicant and hence it passes the unbundling tests laid down in the British legislation transposing the Electricity Directive. The reason Macquarie has no control over WoDs is because it is a so-called 'restricted investor' which means *inter alia* that it [BUSINESS SECRET]. Ofgem also concludes that Macquarie does not exercise control as a 50% shareholder in the shareholder meeting [BUSINESS SECRET]. Additionally, Ofgem has established that Macquarie cannot exercise de facto control, for instance through economic links.

³ Commission Opinion C(2014) 679 final

⁴ Ofgem's assessment does not contain a comprehensive list of Macquarie's interests in energy and gas undertakings but lists three controlling interests in companies that hold generation licences in the UK and that operate various types of generation units, in the UK, totalling some 2200MW.

The British implementing legislation demands that the Applicant is not controlled by a person who also controls or has a majority shareholding in a relevant producer or supplier. Hence, whilst Macquarie does not control the Applicant, Ofgem concludes that this requirement is met.

As to the presence of control related to Macquarie's shareholding, the Commission notes that pursuant to the recital 13 of the Electricity Directive, the concept of control should be interpreted and assessed in accordance with Merger Regulation⁵ and in particular the Merger Jurisdictional Notice⁶. In addition, the Commission notes that on the basis of Article 9(1)(b)(i) of the Electricity Directive it is also not possible for a person exercising control over an undertaking active in the generation or supply of electricity or gas to exercise *any right* over a transmission system operator. Article 9(2) Electricity Directive clarifies that the exercise of *any right* includes in particular 1) the exercise of voting rights, 2) the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, and 3) the holding of a majority share.

The Commission notes that Ofgem does not carry out the complete assessment which Article 9(1)(b)(i) and Article 9(2) Electricity Directive require. It therefore invites Ofgem to apply in its final decision a full assessment of whether Macquarie exercises control within the meaning of the Merger Regulation, notably as a result of its voting rights at the shareholding meeting on strategic matters including investments above certain thresholds, as well as an assessment of the question whether the rights that Macquarie has as a 'restricted investor' amount to 'any rights' in the sense of Article 9(2).

In that context it is relevant to note that Article 9(2) does not exclude the holding of purely passive financial rights related to a minority shareholding, i.e. the right to receive dividends, without any voting rights or appointment rights attached to them. Thus, it is not impossible for Macquarie to continue to hold its rights in WoDs as long as these are purely passive. The Commission has developed a consistent approach when it comes to financial investors with generation and/or supply activities taking participations in European TSOs, in a number of previous certification opinions, and provided guidance on its application in the Staff Working Document entitled 'Ownership unbundling - The Commission's practice in assessing the presence of a conflict of interest including in case of financial investors'.⁷ It is essential to put the objective which the unbundling rules pursue central in the analysis, which is the removal of any conflict of interest between generators/producers, suppliers and transmission system operators. Such analysis has not sufficiently been carried out in Ofgem's preliminary decision. The Commission's TIGF Opinion⁸ is of particular interest as in that case a similar structure was accepted whereby the voting rights of the vertically integrated undertaking EDF, via its subsidiary Société C31, in the TSO TIGF were restricted to such an extent that they could no longer jeopardize the independent operation and development of the network.

The Commission invites Ofgem to take the above mentioned elements into account in finalizing its certification decision. In this assessment particular attention should hence be given to the areas where Macquarie still retains voting rights as a shareholder and the extent to which these areas exclusively covers matters that are necessary for Macquarie to maintain the necessary minimum level of oversight over its financial interests. An additional element that the Commission retains of relevance in the present case is the fact that the TSO at hand is not a large network, such as in the case of TIGF, but a single cable connecting a wind farm to

⁵ Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 24/1, 29.1.2004

⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF>

⁷ http://ec.europa.eu/energy/sites/ener/files/documents/swd_2013_0177_en.pdf.

⁸ https://ec.europa.eu/energy/sites/ener/files/documents/2011_002_tigf_en.pdf

the national grid which transports only the power generated by that wind farm and where third party access is not applied. The limited size of the TSO and the limited possibilities of influencing its operations appear to be relevant factors for the final assessment. Finally, in case of a positive certification decision, the Commission recalls the importance of on-going monitoring of compliance with the unbundling requirements, including any relevant changes in circumstances (see Article 10(4) Electricity Directive).

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.

Done at Brussels, 9.3.2015

For the Commission
Miguel ARIAS CAÑETE
Member of the Commission

