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**COMMISSION OPINION**

**of 15.2.2016**

**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 - Certification of TC Westernmost Rough OFTO  
Limited**

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### I. PROCEDURE

On 17 December 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"), of a draft decision on the certification of TC Westernmost Rough OFTO Limited (hereafter "WMR") as transmission system operator for electricity.

Pursuant to Article 3 of Regulation (EC) No 714/2009<sup>1</sup> (hereafter "Electricity Regulation") and Articles 10 and 11 of Directive 2009/72/EC<sup>2</sup> (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 Article 10(2) and Article 9 of Directive 2009/72/EC.

### II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

WMR is an offshore transmission system operator of wind-generated electricity from a designated area offshore to an onshore network. The wind farm and onshore transmission system are not part of WMR. The wind farm has an installed capacity of 205 MW and is situated in the North Sea off the coast of Yorkshire in England. Its onshore connection point is National Grid's transmission network in Salt End in England.

Transmission Capital Partners consortium (hereafter "TCP") was announced the preferred bidder for the WMR offshore transmission project on 15 May 2015. TCP is a joint venture formed between Amber Infrastructure Group Holdings Limited (hereafter "AIGHL") and Transmission Investment LLP. Hunt ELP Limited (hereafter "HELP") controls AIGHL which wholly owns both International Public Partnerships Limited (hereafter "INPP") and Amber Fund Management Limited (appointed as INPP's investment adviser and asset manager). TCP has been granted licences in respect of the following five OFTOs: TC Robin Rigg OFTO Limited, TC Gunfleet Sands OFTO Limited, TC Barrow OFTO Limited, TC Ormonde OFTO Limited and TC Lincs OFTO Limited. These OFTOs are within the same corporate group as WMR and were all certified within the last three years and prior to HELP becoming the ultimate controller of these OFTOs.

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<sup>1</sup> 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.

<sup>2</sup> 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.

INPP is a listed infrastructure investment company owned by over 2000 institutional and private investors. Its investments span a wide variety of infrastructure sectors, including health, education and custodial public-private partnership projects, as well as infrastructure investments in the road and rail sectors.

HELP is part of the Hunt group which was founded in 1947 and headquartered in El Paso, Texas, USA. The Hunt group is an international financial investor. To date, its core business is based in the USA, including real estate, social infrastructure (e.g.: housing), mortgage banking and investment management. It has clients from the private (e.g.: institutional investors) and public sectors (e.g.: government agency partners). There are no operating companies in the Hunt group above HELP which can take operational decisions.

In order to comply with the applicable rules on the unbundling of transmission system operators, WMR has applied for certification according to the Ownership Unbundling ("OU") model as laid down in Article 9 Electricity Directive.

In its preliminary decision Ofgem has analysed whether WMR complies with the unbundling rules of the OU model. Ofgem has come to the preliminary conclusion that WMR complies with these requirements.

### **III. COMMENTS**

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

#### **1. Exercising control and rights with regard to WMR**

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.

According to the draft decision, WMR's parent company, HELP, indirectly controls Unison Energy LLC which is 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. HELP also indirectly controls a renewable electricity generator which has a capacity of approximately 5 MW and is based in Hawaii, USA. [BUSINESS SECRET].

Ofgem notes that none of the applicant's controllers within INPP and HELP groups have any interests in an energy undertaking that is a relevant producer or supplier in the European Economic Area (EEA). Ofgem has examined the corporate structure charts of INPP, AIGHL and HELP and performed certain due diligence including examining the director appointment processes and verifying certain companies within the two ultimate controller's groups and has not found any evidence of majority shareholdings or controls in any electricity undertaking.

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, nor does it limit this definition to the EEA. However, 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 generators/producers, suppliers and TSOs. As explained in the

Staff Working Paper *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 for a shareholder in a TSO to influence the TSO's decision making in order to favour its generation, production and/or supply interest 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 Commission considers that given the very low levels of electricity production in the United States, the absence of any physical connection between the electricity systems of the United States and the United Kingdom and the fact that WMR as an OFTO does 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 located in the US held by the applicants' shareholders and the transmission activities of WMR, nor a resulting risk of discrimination of other network users. Therefore, the Commission considers that the generation interests held by HELP or its shareholders should not be an obstacle to the certification of WMR.

The Commission agrees with the condition imposed by Ofgem that WMR must immediately notify them of any potential or actual activation of any dormant or non-trading companies in the Hunt Group. The Commission considers that this condition is sufficient to ensure WMR's compliance with the unbundling requirements, but points out that any emerging generation or supply activities by companies in the same group as the TSO should be considered immediate grounds for a reopening of the certification procedure.

## **2. Application of Article 11 – Certification in relation to third countries**

As HELP, the ultimate controller of WMR is based in Texas, USA, Ofgem has applied Article 11 Electricity Directive which concerns certification in relation to third countries. Pursuant to Article 11, Ofgem is to refuse certification unless it is demonstrated, on the basis of an assessment, that granting certification does not put at risk the security of supply of the United Kingdom or the European Union.

Ofgem has asked the Department of Energy and Climate Change (DECC), which is the competent authority in this regard based on the national legislation implementing the Electricity Directive, for its analysis. DECC has informed Ofgem of its assessment and conclusion that the control over WMR exercised by HELP does not jeopardize security of supply.

DECC bases this conclusion on the following. Firstly, the offshore transmission line operated by WMR is connected with the onshore transmission network operated by National Grid on a point-to-point basis and is not part of the meshed network. National Grid manages the electricity flows beyond the onshore connected point, with the offshore transmission link having a limited scope. Moreover, none of the offshore transmission links indirectly controlled by HELP has a capacity more than 0.5% of the peak demand in the United Kingdom (54-60 GW). Secondly, INPP is able to maintain control over its investment as one of its directors remains the CEO and a director of AIGHL. AIGHL is also subject to the Financial Conduct Authority's regulation. Thirdly, HELP is a financial investor and its influence does not extend to the day-to-day management of WMR. The Hunt Group has board representation in AIGHL, but has no board representation in any of the companies controlled by AIGHL.

On the basis of the circumstances described above, the Commission agrees with the assessment made in Ofgem's draft decision and concludes that the control by HELP does not

put at risk the security of supply of the United Kingdom or the European Union as set out in Article 11 of the Electricity Directive.

### **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.

The Commission invites Ofgem to continue monitoring the case also after the adoption of the final certification decision in order to satisfy itself that no new facts emerge which would justify a change of its assessment in respect of the above-mentioned generation interests of HELP.

## **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 certification of WMR, 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, 15.2.2016

*For the Commission*  
*Miguel ARIAS CAÑETE*  
*Member of the Commission*

