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**COMMISSION OPINION**

**of 7.8.2018**

**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 - Certification of TC Dudgeon OFTO plc**

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### I. PROCEDURE

By letter dating 6 June 2018, sent on 11 June 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 certification of TC Dudgeon OFTO plc (hereafter “TC Dudgeon”) 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 Articles 9, 10(2) and 11(7) of Directive 2009/72/EC.

### II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

According to Ofgem's preliminary certification, TC Dudgeon is applying for certification as Offshore Transmission Operator (hereafter "OFTO") according to UK national law. The purpose of the offshore transmission project operated by TC Dudgeon is to connect the Dudgeon wind farm, located off the coast of Norfolk and with an installed capacity of 402MW, with National Grid's onshore connection point in Necton, near Swaffham in Norfolk. Neither the wind farm<sup>3</sup> nor the onshore transmission network are owned or operated by TC Dudgeon.

Ofgem identifies International Public Partnerships Limited (hereafter "INPP") and HUNT Companies Inc (hereafter “HUNT”) as the ultimate controllers of TC Dudgeon.

The consortium controlling TC Dudgeon also controls six already certified OFTOs: TC Robin Rigg OFTO Limited, TC Gunfleet Sands OFTO Limited, TC Barrow OFTO Limited, TC Ormonde OFTO Limited, TC Lincs OFTO Limited and TC Westernmost Rough OFTO Limited.

INPP<sup>4</sup> 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

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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.

<sup>3</sup> Through the joint venture company Dudgeon Offshore Wind Limited, the wind farm is owned by Equinorv(formerly known as Statoil), Masdar (also known as the Abu Dhabi Future Energy Company) and China Resources (Holdings). Equinor is its operator (cf. <http://dudgeonoffshorewind.co.uk/>)

<sup>4</sup> <https://www.internationalpublicpartnerships.com>

INPP have not changed since their decision to certify TC Westermost Rough OFTO Limited, which was subject to a Commission Opinion of 15.2.2016<sup>5</sup>.

HUNT is registered in the United States of America (hereafter "USA") and, according to its website<sup>6</sup>, is a family-owned international financial investor whose core business is in the USA. However, part of the consortium is the Amber Infrastructure Group<sup>7</sup> headquartered in London which *inter alia* invests in sustainable energy projects, including in the EEA.

In its preliminary decision, Ofgem notes that TC Dudgeon has 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"<sup>8</sup>. However, Ofgem notes that the HUNT Group has small scale generation interests in the UK and in the USA.

Ofgem has analysed whether TC Dudgeon complies 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 TC Dudgeon complies with these requirements.

Furthermore, given that HUNT is registered in the USA and that INPP is registered in Guernsey, hence in third countries, Ofgem was also required to ascertain that granting the certification 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 draft decision to the Commission requesting an opinion.

### III. COMMENTS

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

#### 1. Generation and supply interests linked to TC Dudgeon's 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 TC Dudgeon, 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 TC Dudgeon could benefit this generation, not only due to the lack of physical proximity and the limited scope of both TC Dudgeon's transmission

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<sup>5</sup> C(2016) 975 final

<sup>6</sup> <http://www.huntcompanies.com/>

<sup>7</sup> <https://www.amberinfrastructure.com/our-sectors/sustainable-energy/>

<sup>8</sup> In the meaning of UK national legislation.

system 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 TC Dudgeon 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 distributions 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 TC Dudgeon has no incentive for discrimination.

Ofgem reports that according to information provided by TC Dudgeon about likely future investments, HUNT or its subsidiaries may in the future have interests in the following generation assets:

- [BUSINESS SECRETS]
- [BUSINESS SECRETS]
- [BUSINESS SECRETS]
- [BUSINESS SECRETS]

Since none of these producers or suppliers will be in place at the time TC Dudgeon is expected to be certified, Ofgem did not take them into account for the current assessment.

#### *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 INPP and HUNT 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 Commission notes that the transmission system to be operated by TC Dudgeon remains of a limited nature when compared with the size of the UK grid, its total capacity and peak loads. The TSO responsibilities of TC Dudgeon are limited to operating this specific offshore connection. The limited size of the transmission system, also viewed together with the other OFTOs controlled by the ultimate controllers of TC Dudgeon, 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 TC Dudgeon's 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 TC Dudgeon 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 held by the applicants' shareholders in the UK and the US and the transmission activities of TC Dudgeon, 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 TC Dudgeon.

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 TC Dudgeon's ultimate controllers. While the Commission accepts Ofgem's decision not to consider these projects for the purpose of the present certification, the Commission is of the view that Ofgem should monitor and assess the impact of each of the projects in question on TC Dudgeon's 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 refusal of certification would run counter to the principle of proportionality.

## **2. Application of Article 11 – 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 UK or the EU. In 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”)<sup>9</sup> if the certification of TC Dudgeon<sup>9</sup> would put the security of electricity supply of the UK or any other EEA States at risk.

BEIS concluded that this is not the case, since i) TC Dudgeon would only control a specific OFTO without much impact on the UK electricity system as a whole, and ii) from the

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<sup>9</sup> Ofgem notes that they have undertaken a formal review of the certification for the six already certified OFTOs mentioned in section II. since HUNT as one of their ultimate controllers is now a person from a third country and that they will submit a preliminary certification decision to the Commission shortly.

perspective of BEIS' wider work on potential risks of foreign investment in the UK energy system, companies from USA or Guernsey do not, in and of itself, trigger particular concerns.<sup>10</sup>

In relation to the first point, BEIS notes that the windfarm connected by TC Dudgeon has a capacity of 402 MW, whilst the UK has a peak demand of around 60GW, and is connected with the national transmission system on a point-to-point basis only and is thus not part of a meshed network.

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

#### *Commission assessment*

As regards Guernsey, the most recent Commission assessment was undertaken in the Commission Opinion of 12.4.2018 on the certification of Diamond Partners BBE Limited OFTO<sup>11</sup>. As noted on that occasion, 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 Treaties<sup>12</sup>, 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 supply<sup>13</sup>.

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,<sup>14</sup> 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 TC Dudgeon system and the limited impact of TC Dudgeon on the operation of the UK's national transmission system mentioned by BEIS, the Commission shares the view that the granting of certification to TC Dudgeon 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 certify TC Dudgeon, 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 particular, the start of operations of the future generation projects in which the ultimate controllers of TC Dudgeon hold participations may require a renewed assessment.

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<sup>10</sup> Ofgem forwarded BEIS' conclusion to the Commission on 26 June 2018.

<sup>11</sup> C(2018) 2266 final

<sup>12</sup> Official Journal of the European Communities, Special Edition, 27 March 1972.

<sup>13</sup> <https://www.electricity.gov.uk/customer-information/faqs/>

<sup>14</sup> The last meeting took place on 12 July 2018.

#### 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 TC Dudgeon, 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.

Since the UK notified on 29 March 2017 its intention to leave the EU, pursuant to Article 50 of the Treaty on European Union, the Treaties will cease to apply to the UK from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification, unless the European Council in agreement with the UK decides to extend this period. As a consequence, and without prejudice to any provisions of the withdrawal agreement, the EU legislation on which this opinion is based on and refers to will only apply to the UK until the UK ceases to be a Member State.

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, 7.8.2018

*For the Commission*  
*Günther OETTINGER*  
*Member of the Commission*

