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COMMISSION OPINION

of 19.4.2012

pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC and to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC - United Kingdom - Certification of National Grid Electricity Transmission plc, National Grid Gas plc and National Grid Interconnectors Limited

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pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC and to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC - United Kingdom - Certification of National Grid Electricity Transmission plc, National Grid Gas plc and National Grid Interconnectors Limited

I. PROCEDURE

On 23 February 2012, 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 "National Grid Electricity Transmission plc" (hereafter, "NGET") as a Transmission System Operator (TSO) for electricity.

On 23 February 2012, the Commission also received a notification from Ofgem, in accordance with Article 10(6) of Directive 2009/73/EC² (hereafter, "Gas Directive"), of a draft decision on the certification of "National Grid Gas plc" (hereafter "NGG") as a Transmission System Operator (TSO) for gas.

On 2 March 2012, the Commission received a notification from Ofgem, in accordance with Article 10(6) the Electricity Directive, of a draft decision on the certification of "National Grid Interconnectors Limited" (hereafter, "NGIL") as a Transmission System Operator (TSO) for electricity.³

Pursuant to Article 3(1) Regulation (EC) No 714/2009⁴ (hereafter, "Electricity Regulation") and Article 3(1) Regulation (EC) No 715/2009⁵ (hereafter, "Gas Regulation"), the Commission is required to examine the notified draft decisions and deliver an opinion to the relevant national regulatory authority as to their compatibility with Article 10(2) and Article 9 of the Electricity Directive and Article 10(2) and Article 9 of the Gas Directive.

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 Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211/94 of 14.8.2009

³ These notifications are registered under CIRCA-references: 010-2012-UK, 011-2012-UK and 012-2012-UK

⁴ 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.

⁵ Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, OJ L 211/36 of 14.8.2009

II. DESCRIPTION OF THE NOTIFIED DECISIONS

NGET is a transmission system operator for electricity in the United Kingdom which owns and operates those parts of the UK National Electricity Transmission System (hereafter, "UK NETS") situated in England and Wales. The remaining onshore parts of the UK NETS are owned by Scottish Power Transmission Limited and Scottish Hydro-Electric Transmission Limited. NGET does not own any offshore electricity transmission assets or interconnectors.

NGIL is a transmission system operator for electricity in the United Kingdom which owns 50% of the assets constituting the HVDC interconnector Interconnexion France Angleterre (hereafter, "IFA") which connects the electricity transmission systems of the UK and France. The French Transmission System Operator RTE owns the other 50% of the assets constituting IFA. The 50% ownership of NGIL includes all land based assets in the UK and 4 of the 8 subsea cables between the shoreline cable joints in Folkestone (UK) and the shoreline cable joints in Sangatte (France). The relationship between NGIL and RTE as joint owners and operators of the HVDC Interconnector is laid down in the IFA Framework Agreement which sets out the governance framework and contractual relationship between the two companies concerning joint operation and control of the assets.

NGG is a transmission system operator for gas in the United Kingdom, owning and operating the Great Britain gas transmission system, which consists of approximately 7,600 kilometres of high pressure pipelines and 23 compressor stations. Gas is delivered to NGG at nine entry-points connecting production sites or interconnector pipelines, and is subsequently transported to one of eight connected distribution networks or to directly connected consumers.

NGET, NGIL and NGG (hereafter, "Applicants") are ultimately wholly owned subsidiaries of National Grid plc, which is listed on the London Stock Exchange.

The Applicants have applied for certification in accordance with the ownership unbundling model. In accordance with the Electricity and Gas Directives, this choice is available to the Applicants.

Ofgem has come to the preliminary conclusion that the Applicants comply with the requirements of the ownership unbundling model as laid down in the UK legislation transposing the Electricity and Gas Directives in Great Britain. Ofgem has submitted its draft decisions to the Commission requesting for an opinion.

III. COMMENTS

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

1. EXERCISE OF CONTROL AND RIGHTS IN THE APPLICANTS

Article 9(1)(b)(i) of the Electricity and Gas Directives 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.

It appears from Ofgem's draft decisions that no person who controls or may exercise rights in relation to the Applicants, controls an undertaking performing any of the functions of generation, production or supply of electricity or gas. Ofgem also refers to an applicable provision in the legislation transposing the Electricity and Gas Directives in Great Britain which prohibits any person from exercising shareholder rights in relation to the certified entity, in case the same person also controls a relevant producer or supplier in electricity or gas. The same prohibition also applies to the exercise of rights to appoint a senior officer of the certified entity. According to Sections 10M and 10N of the Energy Act and Section 8O and 8P of the Gas Act, the exercise of such rights or the appointment of senior officers in such cases is voidable on an application to the court. Similar provisions also apply to persons controlling certified transmission system operators in relation to the exercise of rights in, or the appointment of directors to, producers or suppliers. The Commission welcomes this approach which aims to ensure ongoing compliance with the requirements of the ownership unbundling model.

2. NATIONAL GRID PLC'S PARTICIPATION IN PRODUCTION AND SUPPLY ACTIVITIES

Article 9(1)(b)(ii) of the Electricity and Gas Directives prohibits the same person or persons from directly or indirectly exercising control over a transmission system operator or over a transmission system, and directly or indirectly exercising control or exercising any right over an undertaking performing any of the functions of production or supply. Article 9(3) Electricity Directive includes a cross reference to transmission system operators and undertakings performing any of the functions of production and supply within the meaning of Gas Directive. Vice versa article 9(3) of the Gas Directive contains a similar provision regarding undertakings performing generation or supply in relation to electricity.

As set out in Ofgem's draft decision, National Grid plc, the ultimate controller of the Applicants, employs a number of activities in subsidiaries and associated companies. Some of these subsidiaries, under the umbrella of National Grid USA, a wholly owned subsidiary of National Grid plc, are involved in the generation of electricity in the United States. Ofgem concludes that these interests are not to be considered relevant interests as the national legislation transposing the Electricity Directive in Great Britain considers generators and suppliers operating outside the European Economic Area (EEA) as not relevant for certification purposes. Whilst the Commission points out that Article 9(1)(b)(ii) of the Electricity and Gas Directives is not restricted to generators, producers and suppliers operating in the EEA, it considers that, notably in view of the absence of any interface between the US and the UK electricity systems, the activities of National Grid in the United States are not of such nature as to prevent certification of the Applicants.

3. INDEPENDENCE OF BOARD MEMBERS

Article 9(1)(c) and (d) of the Electricity and Gas Directives require 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 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.

The Commission agrees that in the case of the three Applicants, which are ultimately controlled by National Grid plc, it is necessary not only to assess the compliance with the independence requirements of members of the direct management of the Applicants, but also of members of the management of National Grid plc.

Ofgem's draft decisions point out that a non-executive director and senior independent director of National Grid plc is also the chairman of a recycling, renewable energy and waste management company, which has a number of power plants at waste management facilities across the UK. Ofgem does not consider these interests to be relevant as they, individually, lie below the licensable threshold applicable in the UK in view of their limited capacity and output. The Commission considers that Ofgem should satisfy itself that these interests, also when taken in aggregate, and having assessed how the electricity generated is marketed, will not adversely affect the independence of the director concerned by creating an incentive to influence the decision making in the transmission system operator in order to favour these interests to the detriment of other network users.

From Ofgem's draft decisions it furthermore appears that a non-executive director of National Grid plc is also a non-executive director in a mining company which operates coal-fired electricity generation in Kazakhstan and in an integrated energy company with interest in power generation and gas production in Canada, India, Indonesia, Madagascar, Nigeria, Australia and Vietnam. Another non-executive director of National Grid plc is also a non-executive independent director of an oil and gas asset acquisition vehicle which is currently in the process of merging with a large oil producer in Iraq. Ofgem considers that interests related to activities carried out outside the EEA are not relevant for the assessment of the independence requirements. However, as the Commission considers that Article 9(1)(c) and (d) of the Electricity and Gas Directives is not restricted to activities of generators, producers or suppliers operating in the EEA, it invites Ofgem to satisfy itself that these activities will not adversely affect the independence of the directors concerned, even if at first sight it appears unlikely that there is a relevant degree of interdependence between these activities and the transmission activities in the UK.

IV. CONCLUSION

Pursuant to Article 3(2) of the Electricity and Gas Regulations, Ofgem shall take utmost account of the above comments of the Commission when taking its final decisions regarding the certification of the Applicants, and when it does so, shall communicate these decisions to the Commission.

The Commission's position on these particular notifications 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, 19.4.2012

For the Commission
Máire GEORHEGAN-QUINN
Member of the Commission

