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COMMISSION OPINION

of 10.6.2013

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of
Directive 2009/72/EC - Certification of Greater Gabbard OFTO Limited - United
Kingdom**

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On 10 April 2013 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 (TSOs) for electricity. The applicant is Greater Gabbard OFTO Limited (hereafter, "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 an offshore electricity transmission system for the connection of wind generated electricity from offshore wind production and its transportation to the onshore transmission at Harwich in the east of England³.

The total export capacity of the offshore transmission system is 504 MW via 132kV x 3 lines, 45.5 KM in length; its size in terms of assets is provisionally £316.6m. The Applicant has applied for certification in accordance with the ownership unbundling model. As the transmission system of the Applicant was not in place on 3 September 2009, the only unbundling option provided for such operators under the Electricity Directive is the full ownership unbundling option.

The Applicant is ultimately controlled by Balfour Beatty plc (hereafter, "BB plc"), Equitix Fund II LP and AMP Strategic Infrastructure Trust of Europe (SITE). Each of the shareholders holds an equal proportion shareholding of 33.3% of the Applicant through a holding company.

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

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.

³ Offshore transmission operators are specific to the UK; other Offshore transmission operators were the subject of Commission Opinion C(2012)3006, Commission Opinion C(2013)281 and Commission Opinion C(2013) 979.

the requirements of the ownership unbundling model. 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.

EXERCISE OF CONTROL AND RIGHTS IN THE APPLICANT

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 transmission system operator (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.

Article 9(1)(c) and (d) Electricity Directive requires 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 directly or indirectly 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.

GENERATION INTERESTS OF PERSONS CONTROLLING THE APPLICANT

Balfour Beatty Plc

BB plc has established the Balfour Beatty Pension Fund (hereafter, "BBPF")⁴. BBPF provides defined benefit and defined contribution pensions to BB plc employees.

Balfour Beatty Pension Trust limited (hereafter "BBPTL") is the corporate trustee of BBPF, which has the responsibility of managing BBPF in trust for the beneficiaries, i.e. for the current and former employees of BB plc.

BB plc controls BBPTL, however, BBPTL is obliged to act in the best interests of the beneficiaries of BBPF and not the interests of BB plc.

BBPTL owns 50% of Thames power Limited (hereafter, "TPL"), [BUSINESS SECRET] who likewise owns 50% of TPL. TPL owns 51% of Barking Power Limited (hereafter, "BPL"), a 1 000 MW power station using combined cycle gas turbines. Two other shareholders own the remaining 49% of BPL.

[BUSINESS SECRET]. However, in its application for certification, the Applicant argues that, despite this, it does not exercise control over BPL, [BUSINESS SECRET].

[BUSINESS SECRET].

BB plc also has interests in special purpose vehicles which have been established on the basis of private finance initiatives (hereafter, "PFI") or public private partnerships (hereafter, "PPP") for the design, build, financing and operation of infrastructures assets, some of which have backup generation facilities, and/or combined heat and power facilities (for example

⁴ BBPF is a registered pension scheme for the purposes of Part 4 of the UK Finance Act 2004.

hospital PFI facilities), and/or micro generation installations (for example solar panels or wind turbines on schools). None of these have a capacity greater than 6 MW.

AMP Strategic Infrastructure Trust of Europe

SITE, through a subsidiary company, currently owns 53% of the share capital in Kenyeri, a 1.7MW hydro-power generating facility in Hungary. [BUSINESS SECRET].

A sister company of the fund manager for SITE, namely AMP Capital Investors (UK) Limited, currently manages 10 small wind farms that operate in different locations in Northern Ireland and Ireland for the Irish Infrastructure Trust. Each of these wind farms has a capacity under 32MW. In its application for certification the Applicant confirmed that SITE and Irish Infrastructure Trust are two separate funds, owned by different investors with different investment objectives, and managed independently by their respective fund managers.

OFGEM'S ASSESSMENT

In relation to the PFI/PPP entities with back-up, combined heat and power or micro generation facilities, Ofgem concludes that the small generation interests are incidental to the core business of the entities and that there is no realistic prospect of any of these entities seeking a connection to the Greater Gabbard transmission system, nor could they have any impact on the operation of the Applicant's transmission system or any other transmission system.

In relation to BPL, Ofgem considers the grounds for certification as a fully ownership unbundled TSO to be satisfied as any rights that Balfour Beatty PLC and other associated entities have over BPL are effectively removed by the existence of the independently managed BBPTL and the measures that are in place to help ensure such independence. Ofgem considers the governance arrangements that are in place in relation to the rights of shareholders in BPL negate the controlling interest of BBPTL in that power station.

Ofgem therefore concludes that the BB plc neither effectively exercise rights over, nor controls BPL. Ofgem further considers that the specific requirements on offshore transmission systems in the United Kingdom serve to minimise the risk of any discrimination.

In relation to the interests of SITE, Ofgem does not consider the generation facility in Hungary to be a relevant producer according to UK law, as they would not require a licence to operate if they were located in the United Kingdom. In addition, they consider that there is no realistic prospect for a connection between a facility in Hungary with the Applicant in Eastern England.

In relation to the interests in Ireland and Northern Ireland, Ofgem considers that as these wind farms have a capacity under 32MW they do not require a licence to operate in the UK or would not require a licence even if they operated in the UK. Consequently they do not meet the criteria of relevant producer set out in UK law. Furthermore, Ofgem is satisfied that, as SITE and Irish Infrastructure Trust are two separate funds, owned by different investors with different investment objectives, and managed independently by their respective fund managers that there is no material risk of discrimination by the Applicant in favour of these small wind farms.

COMMISSION VIEW

The Commission considered the generation interests of BB plc in relation to its ownership and control of Thanet OFTO (C(2013) 2566 final). In that case the Commission concluded that, notwithstanding the interests of persons controlling the Applicant, it was clear that there was no ability for those persons to influence the decision making in the TSO with the intention to favour its generation, production and/or supply interests to the detriment of other network users. The Commission considers that the considerations set out in Commission Opinion C(2013)2566 continue to apply in relation to BB plc.

The role of the applicant as offshore transmission operator is limited as a result of its small size and restricted geographic scope. In effect this is restricted to the 132 kV lines which serve merely to connect specific wind generation facilities to the main grid. As well as the small size of this system, day to day operation of the transmission is carried out by National Grid, a certified ownership unbundled transmission system operator. In particular, information regarding planned production and availability of generation connected to an offshore electricity transmission system is sent to National Grid and not the Applicant. Taking the two OFTOs controlled by BB plc together, their collective size is small compared to the wider UK system, and the potential information available to the Applicant continues to be extremely limited.

In relation to the interests of SITE's existing investment in Hungary and those of its sister fund in Ireland and Northern Ireland, there is no interface between those generation interests and the transmission system controlled by the Applicant. The size and market share of the generation activities are small on an individual and collective basis. None would be required to report its output under the congestion management guidelines set out in Annex I of the Electricity Regulation or the draft Commission Regulation on submission and publication of data in electricity markets and amending Annex I to the Electricity Regulation⁵. Therefore, the Commission accepts that these interests would not create an incentive to influence the decision making in the transmission system operator to the detriment of other network users.

In addition to these factors, the Commission also notes that the activities of Fund Managers are governed by financial legislation which requires that the fund must act in the interests of the investors in the fund and must implement appropriate ring-fencing between different businesses. Compliance is overseen by the Financial Services Authority which has a range of disciplinary, criminal and civil sanctions which it can impose or propose to a Court.

Consequently, the Commission considers in this case a refusal of certification would run counter to the principle of proportionality given the fact that the interests of the persons controlling the TSO do not lead to a situation the unbundling rules seek to prevent.

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. Ofgem sets out in its preliminary decision that the certified party is required to inform them of any significant changes relevant to the certification and to provide in any case an annual update.

The Commission invites Ofgem to continue monitoring the case also after the adoption of the certification decision in order to satisfy itself that no new facts emerge which would justify a change of its assessment. The Commission furthermore invites Ofgem to include a condition

⁵ Due to be adopted by the Commission shortly following the end of the scrutiny period and following the procedures set out in Article 5(a)(1) and Article 7 of Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission

in its final certification decision which requires the Applicant to regularly report to it on the relevant circumstances in this respect.

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.

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, 10.6.2013

For the Commission
Maria Damanaki

Member of the Commission

