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COMMISSION OPINION

of 27.4.2012

pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC – United Kingdom - Certification of TC Robin Rigg OFTO Limited, TC Gunfleet Sands OFTO Limited, TC Barrow OFTO Limited and TC Ormonde OFTO Limited

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I. PROCEDURE

On 2 March 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 draft decisions on the certification of four offshore Transmission System Operators (TSOs) for electricity. The four applicants are TC Robin Rigg OFTO Limited (hereafter, "Robin Rigg"), TC Gunfleet Sands OFTO Limited (hereafter, "Gunfleet Sands"), TC Barrow OFTO Limited (hereafter, "Barrow") and TC Ormonde OFTO Limited (hereafter, "Ormonde") (hereafter, "the Applicants").²

Pursuant to Article 3(1) Regulation (EC) No 714/2009³ (hereafter, "Electricity 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 Directive 2009/72/EC.

II. DESCRIPTION OF THE NOTIFIED DECISION

Background

Three of the Applicants (namely, Robin Rigg, Gunfleet Sands and Barrow) hold licences to operate offshore electricity transmission systems for the connection of wind generated electricity in designated areas to the onshore national grid or distribution networks. Ormonde is expected to become a licensed offshore transmission system operator under UK legislation in 2012.

The Applicants have applied for certification in accordance with the ownership unbundling model. As the transmission systems of the Applicants were not in place on 3 September 2009,

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 These notifications are registered under CIRCA-references 013-2012-UK, 014-2012-UK, 015-2012-UK and 016-2012-UK.

³ 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.

the only unbundling option provided for these operators under the Electricity Directive is the full ownership unbundling option.

All of the Applicants are ultimately owned and controlled by the same two persons: International Public Partnerships Limited (hereafter, "INPP") and Amber Infrastructure Group Holdings Limited (hereafter, "AIGHL").

Ofgem has analysed whether and to what extent the Applicants comply 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 Applicants comply with the requirements of the ownership unbundling model. On this basis, Ofgem submitted its draft decision to the Commission requesting for an opinion.

III. COMMENTS

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

EXERCISE OF CONTROL AND RIGHTS IN THE APPLICANTS AND INDEPENDENCE OF DIRECTORS

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 or over a transmission system. Article 9(1)(b)(ii) prohibits the same person(s) 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 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 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.

Two natural persons act as directors of all four the applicant companies. The Applicants are ultimately owned and controlled by the same two legal persons, INPP and AIGHL. INPP is listed on the London Stock exchange and invests in public infrastructure projects. AIGHL is owned by five individuals and a trust. Two of these individuals control AIGHL through shareholdings, one of whom also acts as a director of INPP and as one of the two directors of the four Applicants.

Ofgem has examined whether the two directors of the Applicants also control or have a majority shareholding in any relevant producer or supplier and has come to the conclusion, on the basis of an assessment of the list of the Directorships of the two persons, that this is not the case. The Commission considers that as the requirements of Article 9(1) also relate to the exercise of rights in production or supply undertakings, Ofgem should also verify that the two persons do not exercise rights in undertakings performing any of the functions of production or supply of electricity or gas.

On the basis of the information provided in Ofgem's draft decisions, AIGHL is owned by five individuals and a trust who either control or exercise rights in relation to that company. Ofgem has assessed the activities of the two directors of the Applicants one of whom also controls AIGHL, but not of the other persons owning AIGHL. The Commission considers that before reaching its final decision Ofgem should verify that these persons do not control a production or supply undertaking and that any individual who has control or joint control of AIGHL does not exercise rights in a production or supply undertaking.

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 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, 27.4.2012

For the Commission
Günther OETTINGER
Member of the Commission

<p>CERTIFIED COPY For the Secretary - General</p> <p>Jordi AYET PUIGARNAU Director of the Registry</p>
