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**COMMISSION OPINION**

**of 31.5.2016**

**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 Humber OFTO Limited**

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### I. PROCEDURE

On 4 April 2016, 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 Humber Gateway OFTO Limited (hereafter "HG") 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

HG is a private limited company registered in England which does not own any transmission system to date. HG was announced on 25 September 2015 by Ofgem as the preferred bidder in a tender to own and operate the Humber Gateway offshore transmission assets.

If granted the OFTO license, HG will have the sole business focus of transmitting wind-generated electricity from a designated wind farm with a capacity of 219MW located in the north east coast of England to National Grid's onshore connection point in Heddon, North East England.

According to Ofgem's preliminary decision, the two ultimate owners and controllers of HG are Balfour Beatty plc (hereafter "BB plc") and a natural person. BB plc is a global infrastructure services firm listed in the UK, whilst the natural person is a naturalised British citizen residing in the UK. Such control is exerted by both parties through a number of intermediary businesses, some of which hold interests in power generation and supply.

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

Ofgem has analysed whether and to what extent HG 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 HG complies with the requirements 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.

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.

#### **1. Exercising control and rights of HG's ultimate owners**

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 Ofgem's draft decision, both BB plc and the natural person at issue hold interests in power generation and supply.

In this context, it should be noted that some of the generation interests of BB plc were already considered in previous Commission Opinions in relation to its ownership and control of Thanet OFTO (C(2013) 2566 final), Greater Gabbard OFTO (C(2013) 3705 final) and Gwynt-y-Môr OFTO Limited (C(2015) 40 final).

#### **Generation and supply interests of BB plc**

According to Ofgem's draft decision, BB plc has a 25.5% indirect shareholding in Barking Power, an electricity generator in London with capacity of up to 1 GW. Ofgem notes that BB plc's shareholding in Barking Power is exercised through Balfour Beatty Pension Trust ("BBPT") and BBPT's management and governance arrangements secure its decision-making independence from BB plc for the purpose of the certification assessment. HG has stated that there have been no changes to BB plc's interests in Barking Power since submitting the applications considered in the above-mentioned Commission Opinions.

Moreover, BB plc is one of the investors in Balfour Beatty Infrastructure Partners LP, whose portfolio currently includes investments in McEwan Power and Alkane Energy. McEwan Power owns ten operational solar assets, diversely located throughout the south of the UK, with a total capacity of 71MW. None of the solar assets have a capacity more than 50MW nor hold a generation licence. Alkane Energy is an independent power generation business with 27 operational sites, the largest being 26MW and does not hold a generation licence.

BB plc holds further interests in other three UK generating plants that are at different stages of development and which are set to start generation between 2016 and 2018. These include a 49.5% shareholding in an 18MW waste treatment plant in Gloucestershire, a 37.5% shareholding in a 10.3MW waste wood gasification biomass plant in Birmingham and a 25% shareholding in a second 10.5MW waste wood gasification also near Birmingham.

BB plc also has interests in special purpose vehicles which have been established on the basis of private finance initiatives or public private partnerships 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 hospital PFI facilities), and/or micro generation installations (for example solar panels or wind turbines on schools).

Finally, BB plc holds an indirect participation in an electricity undertaking in the USA: Upper Peninsula Power Company is a regulated electric utility business that provides distribution and power supply services to approximately 52,000 residential, commercial and industrial customers in the Upper Peninsula of Michigan.

#### **Ofgem's assessment of BB plc's generation and supply interests**

As regards BB plc's stake in Barking Power, Ofgem considers that there is no realistic prospect of a physical connection or a profitable arbitrage trading between HG off the North East coast and Barking Power in London and therefore there is no risk of discrimination.

In relation to BB plc's other generation and supply interests in the UK, Ofgem considers that there is no realistic prospect of any of these generators seeking a connection to or directly interacting with HG because these generators are not located in physical proximity to HG, and that the relationship between HG and these generation facilities might not lead to discrimination by the HG in favour of the generation facilities.

As regards BB plc's generation interests in the US, Ofgem considers that, given the absence of any interface between the US and the UK electricity systems, there is no realistic prospect of a conflict of interest or discrimination to arise from this participation.

#### **Generation and supply interests of the natural person**

The natural person that is the other ultimate controller of HG, also holds controlling interests in a number of electricity undertakings in the UK, including seven onshore wind farms spread throughout the UK, with capacity below 20MW, and three energy from waste projects, below 24MW of capacity, none of which are technically capable of interacting with HG.

Moreover, the natural person indirectly holds ownership interests in some special purpose vehicles which are established on the basis of private finance initiatives or public-private partnerships for the design, build, financing and operation of infrastructure assets. A health centre and a student accommodation site have backup generation capabilities and/or combined heat and power facilities. Each of them has less than 1MW of nominal capacity, do not engage in any separate trading activities and are not connected to HG.

#### **Ofgem's assessment of the generation and supply interests of the natural person**

Ofgem considers that there is no realistic prospect of any of these generators seeking a connection to or directly interacting with HG, because these generators are not located in physical proximity to it. Therefore Ofgem is of the view that the relationship between HG and these generation facilities might not lead to discrimination by HG in favour of the generation facilities.

#### **Commission view regarding the generation and supply interests of HG's shareholders**

As a preliminary comment, the Commission recalls the fact 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 '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 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.

As indicated above, the Commission had previously considered the generation interests of BB plc in relation to its ownership and control of Thanet OFTO, Greater Gabbard OFTO and Gwynt-y-Môr OFTO Limited.

In those cases the Commission concluded that, notwithstanding the generation interests held by BB plc, it was clear that there was no ability for BB plc to favour its generation, production and/or supply interests to the detriment of other network users by influencing the decision making in the TSOs in which it holds participations. This conclusion relied primarily on the characteristics of the transmission systems in question and their operation and on the fact that there is no direct interface between the generation interests and the said transmission systems. The Commission notes that these considerations apply also in relation to BB plc's generation interests in the present case.

In particular, the Commission notes that the transmission system to be operated by HG is not a large network, but a single cable connecting a wind farm to the national grid which transports only the power generated by that wind farm and where third party access is not applied. The TSO responsibilities of HG are limited to operating this specific offshore connection.

The limited size of the transmission system and the limited possibilities of influencing its operations are relevant factors which limit the potential for discrimination in favour of any generation interests held by HG's controllers, as does the absence of a physical interface between the generation interests held by BB plc and the planned transmission system controlled by HG. Moreover, the small size, in terms of generation capacity, of the wind farm connected by the transmission system in question likewise diminishes the potential for any discriminatory behaviour of HG.

The above considerations apply both in relation to the transmission system to be operated by HG on its own and against the background of BB plc's stake in the three other OFTOs, as reviewed in the above-mentioned Commission Opinions. Notably, the total capacity of all four OFTOs in which BB plc holds participations amounts to approximately 1600MW and thus remains insignificant compared to the UK's total generation capacity. However, the Commission invites Ofgem to take into account the combined capacity and significance of OFTOs connected by a common shareholder when reviewing compliance with unbundling requirements.

The considerations set out in the above in relation to BB plc's generation interests are applicable also as regards the generation interests held by the natural person. Given the nature of HG's responsibilities, the size of its network and the lack of an interface with the generation interests held by the natural person the Commission could not identify a risk of discrimination in the operation of HG that would pose an obstacle to its certification.

Consequently, the Commission considers that in the present 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 that the unbundling rules seek to prevent.

## **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 United

Kingdom or the European Union. In present case, the application of Article 11 is triggered due to the fact that the natural person that is one of the two ultimate owners and controllers of HG exerts control over HG through an intermediate company within the Equitix Group, namely Pace Cayman Holdco Limited (hereafter "Pace Cayman"). Pace Cayman is registered in the Cayman Islands.

Under these circumstances, 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 existence of the intermediate holding company Pace Cayman 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.

DECC's conclusion is based in particular on the fact that HG is ultimately not controlled by Pace Cayman, but by the natural person, together with BB plc. The purpose of the intermediate company Pace Cayman is to hold the shares in HG for said person.

DECC states that the fact that the intermediary is based in the Cayman Islands does not, in and of itself, trigger particular concern.

DECC also points to the limited scope and capacity of HG's transmission system, noting that its capacity amounts to 219 MW, against the UK's peak demand of 54-60 GW, and that the transmission system is connected with National Grid's onshore network on a point-to-point basis and is not part of a meshed network. Hence, HG holds no responsibility for managing electricity flows beyond the onshore connection point.

The Commission shares the view that the granting of certification to HG would not put at risk the security of supply of the UK or the European 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.

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 HG.

## **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 HG, 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, 31.5.2016

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

