



*Promoting choice and value for  
all gas and electricity customers*

To:  
Current and future electricity  
transmission; gas transportation;  
Electricity interconnector; and  
gas interconnector licensees

Our Ref: Certification of Unbundling

Email: unbundlingc@ofgem.gov.uk

Cc:  
European Commission; DECC

Date: 19 June 2012

Dear Colleague,

**Certification of transmission system operators ('TSOs') under the ownership unbundling requirements of the Third Package<sup>1</sup>**  
**Decision of the Gas and Electricity Markets Authority ('the Authority')**

The Electricity and Gas (Internal Markets) Regulations 2011 ('the GB Regulations') require TSOs to be certified as complying with the ownership unbundling requirements of the Third Package.

Current and future transmission and interconnector licensees<sup>2</sup> are required to apply for certification under the ownership unbundling requirements of the Third Package pursuant to the GB Regulations. The certification procedures are set out in the Electricity Act 1989 ('the Electricity Act') and in the Gas Act 1986 ('the Gas Act') as amended by the GB Regulations.

On 11 November 2011 Ofgem<sup>3</sup> published an open letter setting out information on our intended procedure for processing applications for certification under the ownership unbundling requirements of the Third Package.

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<sup>1</sup> The term 'Third Package' refers to 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 ('Electricity Directive'); 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 ('Electricity Regulation'); 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 ('Gas Directive'); 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 ('Gas Regulation'); and Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.

<sup>2</sup> Electricity transmission, gas transportation, electricity interconnector and gas interconnector licensees.

<sup>3</sup> Ofgem is the Office of the Gas and Electricity Markets Authority, which supports the Gas and Electricity Markets Authority, the regulator of the gas and electricity industries in Great Britain. The terms 'Ofgem' and 'the Authority' are used interchangeably in this document.

On 1 December 2011 National Grid Electricity Transmission plc<sup>4</sup> ('NGET' or 'the Applicant') submitted an application under section 10B(2) of the Electricity Act requesting to be certified pursuant to the ownership unbundling requirements (as set out in Article 9(1) of the Electricity Directive and transposed into GB law by section 10F of the Electricity Act).

This letter sets out Ofgem's final decision on the Applicant's application for certification under section 10D of the Electricity Act.

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## **Background**

The Third Package is a suite of legally binding European Union legislation. The Third Package imposes new obligations on certain industry participants.

The GB Regulations have amended relevant domestic legislation, including the Gas Act, the Electricity Act and the Utilities Act 2000.

The GB Regulations have designated the Authority as the National Regulatory Authority for GB and have given it the responsibility for administering the certification process for current and future GB electricity transmission, gas transportation and electricity and gas interconnector licensees.

## **Application for certification**

The Applicant holds an electricity transmission licence treated as granted under section 6(1)(b) of the Electricity Act and is a person required to be certified as independent under section 10A(1) of the Electricity Act.

The Authority received an application for certification under section 10B(2) of the Electricity Act on 1 December 2011. The application requested that the Applicant be certified on the first certification ground, which is set out in section 10E(3) of the Electricity Act. The first certification ground is that the Applicant meets the ownership unbundling requirement in section 10F of the Electricity Act.

The Authority is required to apply five tests in order to determine whether the Applicant meets the ownership unbundling requirement:

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<sup>4</sup> a company incorporated in England and Wales with company registration number 02366977 whose registered address is at 1-3 Strand, London WC2N 5EH

The first test is that the applicant—

- (a) does not control a relevant producer or supplier;
- (b) does not have a majority shareholding in a relevant producer or supplier; and
- (c) will not, on or after the relevant date, exercise shareholder rights in relation to a relevant producer or supplier.

The second test is that, where the applicant is a company, partnership or other business, none of its senior officers has been, or may be, appointed by a person who—

- (a) controls an electricity undertaking which is a relevant producer or supplier; or
- (b) has a majority shareholding in an electricity undertaking which is a relevant producer or supplier.

The third test is that, where the applicant is a company, partnership or other business, none of its senior officers is also a senior officer of an electricity undertaking which is a relevant producer or supplier.

The fourth test is that the applicant is not controlled by a person who controls a relevant producer or supplier.

The fifth test is that the applicant is not controlled by a person who has a majority shareholding in a relevant producer or supplier.

On the basis of the information contained in the application and the further information provided by the Applicant, the Authority considered that each of the five tests set out in section 10F of the Electricity Act was met by the Applicant.

The Authority made its preliminary decision under section 10D(1) of the Electricity Act on 21 February 2012 and decided that the Applicant should be certified as independent. The Authority's preliminary decision was notified to the European Commission ('the Commission') in accordance with section 10D(4) of the Electricity Act.

The Authority received the Commission's opinion on 19 April 2011. In accordance with Article 3(2) of the Electricity Regulation, the Authority has taken utmost account of that opinion in reaching its final decision which is set out below.

The Authority's final decision is that as of and from the date of this decision, the Applicant should be certified as independent on the basis that each of the five tests set out in section 10F of the Electricity Act was met by the Applicant.

In accordance with section 10H(2) of the Electricity Act, the Applicant, being a person who holds a licence specified in section 10H(1) of the Electricity Act and who is certified on the first certification ground, is designated as an electricity transmission system operator for the purposes of Article 10(2) of the Electricity Directive.

In accordance with sections 10D(7) and 10H(4) of the Electricity Act, the Authority hereby notifies the certification and designation of the Applicant to the Applicant, to the Commission and the Secretary of State.

In accordance with section 10I of the Electricity Act, the Authority will monitor whether the basis on which it decided to certify the Applicant continues to apply following the Authority's final decision and if appropriate will review its certification decision.

Attached to this letter is a copy of the certification decision granted by the Authority.

Yours sincerely,

Pamela Taylor  
Associate Partner, European Wholesale

**ELECTRICITY ACT 1989**  
**SECTION 10D**  
**CERTIFICATION**

Pursuant to section 10D of the Electricity Act 1989 ('the Act') the Gas and Electricity Markets Authority hereby gives to National Grid Electricity Transmission plc<sup>5</sup> as a person who is required to be certified as independent, certification as independent under the ground set out in section 10E(3) of the Act, subject to the attached Schedule.

Pamela Taylor

Authorised in that behalf by the Gas and Electricity Markets Authority  
19 June 2012

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## SCHEDULE

### PERIOD, CONDITIONS AND WITHDRAWAL OF CERTIFICATION

#### A. Interpretation and Definitions

In this certification

'the Authority'	means the Gas and Electricity Markets Authority established by section 1(1) of the Utilities Act 2000, as amended from time to time
'the Act'	means the Electricity Act 1989, as amended from time to time
'the Agency'	has the same meaning as in section 64 of the Act
'the certified person'	National Grid Electricity Transmission plc in its capacity as a person certified as independent under section 10D of the Act
'the Commission'	means the European Commission
'control'	has the same meaning as in section 10O of the Act
'person from a third country'	has the same meaning as in section 10O of the Act
'the relevant date'	has the same meaning as in section 10M of the Act
'shareholder right'	has the same meaning as in section 10O of the Act

#### B. Period

Subject to section D below, and pursuant to section 10D of the Act, this certification shall come into effect on the date that it is issued and will continue until it is withdrawn in accordance with section D.

#### C. Conditions

This certification is made subject to the following conditions:

1. The material provided by the certified person to the Authority in respect of its application for certification is true and complete.
2. If at any time the certified person knows or reasonably should know of any event or circumstance that has occurred or is likely to occur that may affect its eligibility for certification, the certified person shall as soon as reasonably

practicable notify the Authority in writing of the event or circumstance and the reasons it considers that the event or circumstance may affect its eligibility for certification.

3. If at any time from 3 March 2013 the certified person knows or reasonably should know that any event or circumstance has occurred, or is likely to occur, that may cause the Authority to think that the certified person is or may become a person from a third country, or that a person from a third country has or may take control of the certified person, the certified person shall as soon as reasonably practicable notify the Authority in writing.
4. If at any time from the relevant date the certified person exercises or is likely to exercise any shareholder right or right of appointment in the circumstances described in section 10M of the Act, the certified person shall as soon as is reasonably practicable notify the Authority in writing of the right that has been or is likely to be exercised and the effect of exercising that right.
5. By 31 July of each year the certified person shall provide the Authority with a written declaration, approved by a resolution of the board of directors of the certified person and signed by a director of the certified person pursuant to that resolution, setting out:
  - a. Whether any event or circumstance has occurred in the previous 12 month period, or such part of that 12 month period since the certified person was certified, that may affect the certified person's eligibility for certification, and if so, the reasons it considers that the event or circumstance may affect its eligibility for certification;
  - b. Whether any event or circumstance has occurred, or is likely to occur, that may cause the Authority to think that the certified person has become a person from a third country, or that a person from a third country has taken control of the certified person, in the previous 12 month period or such part of that 12 month period since the certified person was certified, providing that the certified person is only required to provide a written declaration under this paragraph (b) in relation to a period that occurs after 3 March 2013; and
  - c. Whether the certified person has exercised any shareholder right or right of appointment in the circumstances described in section 10M of the Act in the previous 12 month period or such part of that 12 month period since the certified person was certified and if so the effect of exercising that right, providing that the certified person is only required to provide a written declaration under this paragraph (c) where it has been certified on the certification ground in section 10E(3) of the Act and in relation to a period that occurs after the relevant date.

6. The certified person furnishes the Authority in such manner and at such times as the Authority may reasonably require, with such information as the Authority may reasonably require, or as may be necessary, for the purpose of:
  - (a) performing the functions assigned to it by or under the Act, the Gas Act, the Utilities Act 2000, the Energy Act 2004, the Energy Act 2008, or the Energy Act 2011, each as may be amended from time to time; or
  - (b) monitoring and review of the certification under section 10I of the Act; or
  - (c) reporting by the Authority as to any connection of the licensee with a country outside the European Economic Area under section 10K of the Act.
  
7. Should any of the grounds for withdrawal arise under section D of this certification, the Authority may amend this certification rather than withdraw the certification.

#### **D. Withdrawal**

Pursuant to section 10L of the Act, this certification may be withdrawn in the following circumstances:

1. This certification may be withdrawn by the Authority by giving a notice of withdrawal to the certified person not less than four months before the coming into force of the withdrawal in any of the following circumstances:
  - (a) where:
    - (i) the Authority considers that condition contained in paragraph C1 above is not met;
    - (ii) the Authority considers that the basis on which the Authority decided to certify the certified person does not continue to apply and has made a final decision that the certification should be withdrawn;
    - (iii) the certified person has a receiver (which expression shall include an administrative receiver within the meaning of section 251 of the Insolvency Act 1986, as amended from time to time) of the whole or any material part of its assets or undertaking appointed;
    - (iv) the certified person has entered into administration under section 8 of Schedule B1 to the Insolvency Act 1986;
    - (v) the certified person is found to be in breach of any national or European competition laws, such breach relating to the licensed activity of the certified person;
    - (vi) the certified person has failed to provide a declaration to the Authority pursuant to paragraph C5 above and the Authority has written to

certified person stating that the declaration has not been provided and giving the certified person notice that if the declaration remains outstanding past the period specified in the notice the certification may be withdrawn;

- (vii) the certified person has failed to comply with a request for information issued by the Authority under paragraph C6 above and the Authority has written to certified person stating that the request has not been complied with and giving the certified person notice that if the request for information remains outstanding past the period specified in the notice the certification may be withdrawn; or
- (viii) to ensure compliance with any legally binding decision of the Agency or of the Commission.

2. This certification may be withdrawn if the certified person notifies the Authority that it does not require to be certified and the Authority considers that the certified person is not a person who is required to be certified.