

## The Authority's final decision and analysis on applications for certification as unbundled by Blue Transmission Walney 2 Limited, Blue Transmission Sheringham Shoal Limited and Blue Transmission London Array Limited

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This document sets out the Authority's final decision on compliance by the three applicants named above with the requirements of the Third Package<sup>1</sup> for offshore transmission system operators ('OFTOs') to unbundle from generation, production and supply undertakings as implemented into the domestic legislation in Great Britain ('GB').

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### 1. Certification Decision

1.1. Having taken utmost account of the European Commission's (the 'Commission') opinion<sup>2</sup> on our preliminary certification decisions on the applications for certification submitted by Blue Transmission Walney 2 Limited ('Walney 2'), Blue Transmission Sheringham Shoal Limited ('Sheringham Shoal') and Blue Transmission London Array Limited ('London Array') (collectively referred to as 'the Applicants'), the Authority<sup>3</sup> concludes that the Applicants comply with the requirements of the ownership unbundling model as set out in GB legislation and should therefore be certified as ownership unbundled.

1.2. This document provides a summary of the assessment of the information submitted by the Applicants to the Authority and the Commission for the purpose of assessing the Applicant's compliance with the unbundling requirements (the five tests as detailed below) and certification as independent from production, generation and supply undertakings under the GB legislation implementing the unbundling provisions of the Electricity Directive of the Third Package.

### 2. GB Legislation – Transposition of Directives 2009/72 and 2009/73

2.1. In GB the ownership unbundling requirements set out in Directive 2009/72 (the 'Electricity Directive') have been transposed through the Electricity and Gas (Internal Markets) Regulations 2011 (the 'Regulations') which insert new sections 10A to 10O into the Electricity Act 1989 (the 'Electricity Act'). Section 10F of the Electricity Act – 'The ownership unbundling requirement' – states that "*the ownership unbundling requirement is met by the applicant if each of the following five tests is passed*".

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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> The Commission's opinion can be viewed online on [http://ec.europa.eu/energy/gas\\_electricity/interpretative\\_notes/certification\\_en.htm](http://ec.europa.eu/energy/gas_electricity/interpretative_notes/certification_en.htm).

<sup>3</sup> The Gas and Electricity Markets Authority (the 'Authority'). In this document, the terms "Authority", "Ofgem", "we" and "us" are used interchangeably.

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### 3. The Applicants<sup>4</sup>

3.1. Currently Walney 2 holds a licence to own and operate an offshore wind energy transmission system. Both Sheringham Shoal and London Array are currently Preferred Bidders to own and operate an offshore energy transmission system and are expected to become licensed OFTOs in 2013.

3.2. Walney 2 and London Array are ultimately owned and controlled by the same persons, are part of the same corporate group and have the same sole business focus. They are a joint venture between an investment fund managed by Barclays plc, namely Barclays Integrated Infrastructure Fund ('BIIF'), and Mitsubishi Corporation ('Mitsubishi'). Sheringham Shoal is expected to be owned and controlled by the same joint venture when it starts operating as an OFTO. In addition, the three applicants all have the same sole business focus of transmission of offshore wind energy.

### 4. Summary of our analysis

4.1. *First test: 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.*

4.2. The Applicants have confirmed that they do not have any shareholding in nor do they control any other company. Furthermore, each of them has provided a signed undertaking that during the term of their OFTO licence, they will not exercise, or cause to be exercised on their behalf, any shareholder rights in relation to a relevant producer or supplier that they might acquire during the currency of the undertaking. Therefore the Applicants meet the requirements of the first test.

4.3. *Second Test: 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.*

4.4. The Applicants have provided details of the process for appointing directors, which is the same for all of them. The Applicants meet the requirements of the second test as none of their senior officers has been, or may be, appointed by a company or a natural 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.

4.5. *Third Test: 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.*

4.6. The information provided by the Applicants confirms that none of their directors or senior officers is also a senior officer of electricity undertaking which is a relevant producer or supplier. The Applicants therefore all meet the requirement of the third test.

4.7. *Fourth and Fifth Tests: The applicant is not controlled by a person who (a) controls a relevant producer or supplier; and, (b) has a majority shareholding in a relevant producer or supplier.*

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<sup>4</sup> Details of the relevant energy transmission systems are available online on <http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=13&refer=Networks/offtrans/roftt> and <http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=12&refer=Networks/offtrans/rttt>

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4.8. Walney 2 and London Array have provided a comprehensive account of the corporate structures of their ultimate controllers and identified their controllers, namely Barclays plc and Mitsubishi and certain associated entities. Sheringham Shoal submitted the same data as it expects to be owned and controlled by the same persons when it starts operating as an OFTO. Both Barclays and Mitsubishi directly or through various subsidiaries control electricity undertakings which are involved in the production of electricity. We are satisfied that these interests do not involve relevant producers or suppliers and that there is no realistic prospect of either of the Applicants discriminating in favour of these undertakings. We are therefore satisfied that none of the controllers of the Applicants controls or has a majority shareholding in a relevant producer or supplier. Therefore, the Applicants meet the requirements of the fourth and fifth tests.

## 5. European Commission Opinion

5.1. The Commission's opinion is dated 5 April 2013.

5.2. Pursuant to Article 3(2) of the Electricity Regulation the Authority is required to take "utmost account" of the Commission's opinion in reaching its final certification decisions. We summarise below how we have taken "utmost account" of the Commission's opinion on the Authority's preliminary certification decisions in relation to the Applicants.

5.3. The Commission set out the relevant legislation in its opinion. Article 9(1)(b) of the Electricity Directive 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, and vice versa.

5.4. Article 9(1)(c) and (d) of the Electricity Directive prohibits the same person or persons from controlling or exercising any right over an undertaking performing any of the functions of production or supply and at the same time be a member of or be entitled to appoint members of the supervisory board, the administrative board of a transmission system operator or bodies legally representing the transmission system operator.

5.5. The Commission noted that "*in this case a refusal of certification would run counter to the principle of proportionality given the fact that the generation interests of Barclays and Mitsubishi, who control the TSOs (ie the OFTOs), do not constitute a risk of discrimination in the operation of the networks or to adequate investment in the networks controlled by the Applicants and an obstacle to certification cannot be identified*".

5.6. The Commission recalled the obligation set out in Article 10(4) of the Electricity Directive to monitor the continuing compliance of TSOs with the unbundling requirements.

5.7. The GB legal framework provides a number of measures to ensure the robustness of our certification decisions on an ongoing basis. The Authority has an obligation under section 10I, 10J and 10L of the Electricity Act to monitor and review whether a certified person should remain certified according to the process set out in the Electricity Act. We require certified parties to inform the Authority of any significant changes that are relevant to our certification decisions promptly and to provide the Authority with an annual update.

In compliance with the GB legal framework and the Electricity Directive, we will continue to monitor whether the basis on which the Authority decided to certify the Applicants continues to apply, and will include a condition in our final certification decision which requires the Applicants to regularly report to us on the relevant circumstances in this respect.