

## The Authority's final decision and analysis on the application for certification as unbundled by Thanet OFTO Limited

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This document sets out the Authority's final decision on compliance by Thanet OFTO Limited 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 decision on the application for certification submitted by Thanet OFTO Limited ( 'the Applicant'), the Authority<sup>3</sup> concludes that the Applicant complies 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 Applicant to the Authority 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/doc/certification/certifications\\_decisions.pdf](http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/certification/certifications_decisions.pdf)

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

### 3. The Applicant

3.1. The Applicant is currently a Preferred Bidder for owning and operating an offshore energy transmission system and is expected to become a licensed OFTO in 2013.

### 4. Summary of Ofgem 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 exercise shareholder rights in relation to a relevant producer or supplier.*

4.2. The Applicant has confirmed that it does not hold shares in nor controls any other company. Furthermore, the Applicant has provided a signed undertaking that, during the term of its OFTO licence, it will not exercise, or cause to be exercised on its behalf, any shareholder rights in relation to a relevant producer or supplier that it might acquire during the currency of the undertaking. Therefore the Applicant meets 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 Applicant has provided details of the process for appointing directors. The Applicant meets the requirements of the second test as none of its 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 Applicant confirms that none of its directors is also a senior officer of an electricity undertaking which is a relevant producer or supplier. The Applicant therefore meets 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; or, (b) has a majority shareholding in a relevant producer or supplier.*

4.8. The Applicant is ultimately wholly owned and controlled by Balfour Beatty plc ('BB plc'). BB plc is a listed company on the London Stock Exchange via a number of holding companies.

4.9. The Applicant has provided information on all entities in which BB plc has an equity interest and directly or indirectly controls. BB plc directly or through various subsidiaries controls electricity undertakings which are involved in the production of electricity.

4.10. The Balfour Beatty Pension Fund, whose corporate trustee is beneficially owned by BB plc, has an equity interest in a UK generator, namely Barking Power Limited ('Barking Power'). However, due to the governance arrangements for Barking Power we do not consider that BB plc controls Barking Power. In respect of equity interests in other electricity undertakings, we are satisfied that these interests are not relevant producers or suppliers within the meaning of section 100 of the Electricity Act. We are therefore satisfied that none of the controllers of the Applicant controls or has a majority shareholding in a

relevant producer or supplier. Therefore, the Applicant meets the requirements of the fourth and fifth tests.

## 5. European Commission Opinion

5.1. The Commission's opinion is dated 26 April 2013.

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

5.3. The Commission set out the relevant legislation in its opinion. Article 9(1)(b)(i) of the Electricity Directive prohibits the same person or persons from directly or indirectly exercising control over a transmission system operator (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 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 TSO.

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 BB plc, who control the TSO (ie the OFTO), do not lead to a situation the unbundling rules seek to prevent"* and *"an obstacle to certification cannot be identified"*. The Commission agreed to the basis of our preliminary decision and is satisfied with the preliminary decision based on the evidence available.

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.

5.8. 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 Applicant continues to apply, and will include a condition in our final certification decision which requires the Applicant to regularly report to us on the relevant circumstances in this respect.