

The Authority's final decision and analysis on the application for certification as unbundled by Gwynt y Môr OFTO plc

This document explains the Authority's final decision on compliance by Gwynt y Môr OFTO plc with the requirements of the Third Package¹ for offshore transmission system operators ('OFTOs') to unbundle from generation, production and supply undertakings as implemented into the domestic legislation in Great Britain ('GB').

1. Certification Decision

1.1. Having taken utmost account of the European Commission's (the 'Commission') opinion² on our preliminary certification decision on the application for certification submitted by Gwynt y Môr OFTO plc (the 'Applicant', which has been renamed from Gwynt y Môr OFTO Limited since our preliminary decision), the Authority³ 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.

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

2.1. In GB the ownership unbundling requirements set out in the Electricity Directive have been transposed through the Electricity and Gas (Internal Markets) Regulations 2011 which inserted 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*".

3. The Applicant

3.1. The Applicant is currently a Preferred Bidder for owning and operating the Gwynt y Môr offshore transmission system and is expected to become a licensed OFTO in 2015.

¹ 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.

² The Commission's opinion can be viewed online at http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/certification/certifications_decisions_final_rev.pdf

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

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, on or after the relevant date, 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 control 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 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; and, (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 and John Van Deventer (a British national and British resident). Balfour Beatty plc owns 60% of the shares and John Van Deventer ultimately controls the remaining 40% of the Applicant through a number of intermediate entities. Neither of the two ultimate controllers, nor intermediate controllers, controls or has a majority shareholding in a relevant producer or supplier. We are therefore satisfied that none of the controllers of the Applicant control or have 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 6 January 2015.

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. In its opinion the Commission set out the relevant legislation. 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 it had previously considered BB plc's interests in respect of the Thanet and Greater Gabbard OFTOs where it opined that *"it was clear that there was no ability for BB plc to influence the decision making in the TSO with the intention to favour its generation, production and/or supply interests to the detriment of other network users."* The Commission then noted that BB plc had stated that nothing in respect of *".....these interests have changed in the interim, the Commission considerations continue to apply."*

5.6. Similarly, in respect of Mr. Van Deventer, the Commission noted that the limited interests that Mr. Van Deventer ultimately controls do not give rise to any concerns that would prevent certification.

5.7. Accordingly, the Commission considered that there was no legal barrier to certifying the Applicant.

5.8. 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.

5.9. 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.

5.10. 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.