

The Authority's final decision and analysis on the application for certification as unbundled by WoDs Transmission Limited

This document explains the Authority's final decision on compliance by WoDs Transmission Limited 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 WoDs Transmission Limited (the 'Applicant'), 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*".
- 2.2. For avoidance of doubt, the latest amendments to the ownership unbundling provisions in the Electricity Act 1989 and Gas Act 1986 through the Electricity and Gas (Ownership Unbundling) Regulations 2014⁴ do not apply to this application, as the application was received by the Authority before the day on which these Regulations came into force.

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/sites/ener/files/documents/certifications_decisions.pdf.

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

⁴ http://www.legislation.gov.uk/uksi/2014/3333/pdfs/ukxi_20143333_en.pdf

3. The Applicant

- 3.1. The Applicant is currently a Preferred Bidder for owning and operating the West of Duddon Sands offshore transmission system and is expected to become a licensed OFTO in 2015.

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 a joint venture ultimately owned by 3i Group plc ('3i') and Macquarie Group Limited ('Macquarie'). We accept the Applicant's arguments that 3i has sole ultimate control – as set out in the EUMR - over the Applicant, because the entity within Macquarie's group who directly holds the interest is currently considered a 'Restricted Investor' and as such does not control the Applicant. As a Restricted Investor, the shareholders' agreement limits the shareholder undertaking's rights over the Applicant, as fully set out in the shareholders' agreement.

4.9. We are therefore satisfied that none of the controllers (all are within the 3i group) 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 9 March 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 prohibit 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 being a member of, or being 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 the 3i group's, the sole controlling group's, interests in respect of the OFTOs which are jointly controlled by 3i⁵ and that it had considered that there was no obstacle to certification in 3i's group structure.

5.6. In respect of Macquarie, the Commission asked us to: (i) more fully analyse whether control exists under the EUMR, and (ii) examine whether Macquarie has 'any rights' within the meaning of Article 9(1)(b) and 9(2) Directive.

(i) the EUMR

5.7. The Commission raised the question as to whether Macquarie could have control through negative control.

5.8. The matters that ordinarily confer control are 'Board Reserved Matters' which require approval of a Special Board Majority – this Special Board Majority requires 75% approval of the directors appointed by shareholders. Thus, Frontier Power-appointed directors cannot vote. Furthermore, Macquarie cannot appoint directors to the Board as a Restricted Investor.

5.9. Accordingly, only directors appointed by 3i can vote on Board Reserved Matters and there is no undertaking that could have negative control.

⁵ Commission Opinion C(2014) 679 final

5.10. 3i therefore has sole control of the Applicant.

(ii) Article 9(1)(b) and 9(2) Directive

5.11. The Commission considered our assessment and noted the context of this case, e.g. the Applicant will be an OFTO of a "limited size" with "limited opportunities to influence ... third party access". The Commission did not raise a concern as to the certifiability of the Applicant, but requested Ofgem to consider whether Macquarie's shareholder rights were "any rights" and were "necessary for Macquarie to maintain the necessary minimum level of oversight over its financial interests."

5.12. The rights that Macquarie has in the Applicant are "any rights" as they are shareholder rights.

5.13. Macquarie is a 50% shareholder not having control over the Applicant and has provided substantial investment in the Applicant and overall group structure.

5.14. Ordinarily a 50% shareholder-investor has joint control with another 50% shareholder-investor (i.e. a 50-50 two-parent shareholding). In this case, as Macquarie's rights in the Applicant fall below the threshold of joint-control, they are below an equal status. Therefore, as a non-controlling 50% shareholder-investor, Macquarie has limited its oversight to such an extent that we consider its oversight of the Applicant to be proportionate to the level of its investment, in line with the principle of minority shareholder protections.

5.15. Accordingly, taking utmost account of the opinion, Ofgem has determined that it is not unreasonable for Macquarie to have the rights to maintain the necessary minimum level of oversight over its financial interests.

5.16. 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.

5.17. 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.

5.18. 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.