

# The Authority's final decision and analysis on the application for certification as unbundled by TC Westermost Rough OFTO Ltd

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This document explains the Authority's final decision on compliance by TC Westermost Rough OFTO Limited ('WMR') 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').

## 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 WMR, the Authority<sup>3</sup> concludes that WMR 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 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*". According to the Electricity and Gas (Ownership Unbundling) Regulations 2014 which came into force in January 2015, where one or more of the tests is not passed, we may decide to treat such tests as passed if the Authority is satisfied that there is no risk of discrimination and it would be in line with our principal objective and general duties to do so<sup>4</sup>.

## 3. The Applicant

- 3.1. WMR currently owns and holds a licence to operate the WMR offshore transmission project.

## 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.*

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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 at

[https://ec.europa.eu/energy/sites/ener/files/documents/2015\\_126\\_wmr\\_uk\\_en.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/2015_126_wmr_uk_en.pdf).

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

<sup>4</sup>

[https://www.ofgem.gov.uk/sites/default/files/docs/2015/03/certification\\_arrangements\\_in\\_great\\_britain\\_following\\_amendments\\_to\\_the\\_ownership\\_unbundling\\_requirements\\_of\\_the\\_gas\\_act\\_1986\\_and\\_the\\_electricity\\_act\\_1989\\_1.pdf](https://www.ofgem.gov.uk/sites/default/files/docs/2015/03/certification_arrangements_in_great_britain_following_amendments_to_the_ownership_unbundling_requirements_of_the_gas_act_1986_and_the_electricity_act_1989_1.pdf)

- 4.2. WMR has confirmed that it does not hold shares in, nor control any, other company. Furthermore, WMR 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 WMR 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. WMR has provided details of the process for appointing directors. It 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 WMR confirms that none of its directors is also a senior officer of an electricity undertaking which is a relevant producer or supplier. WMR 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. WMR is ultimately controlled by International Public Partnerships Limited ("INPP") and Hunt ELP Limited ('HELP'). INPP is listed on the London Stock Exchange and invests in public infrastructure projects. The HELP group is an international financial investor. Its core business is based in the USA, including real estate, social infrastructure (e.g. housing), mortgage banking and investment management.
- 4.9. We note two minor interests in generation and supply within the two ultimate controllers' groups. Both of the interests are held by HELP and based in the USA. We consider that these interests are not relevant producers or suppliers within the meaning of the GB unbundling legislation. We are therefore satisfied that none of the controllers of the WMR controls or has a majority shareholding in a relevant producer or supplier. Therefore, WMR meets the requirements of the fourth and fifth tests.

## **5. European Commission Opinion**

- 5.1. The Commission's opinion is dated 15 February 2016.
- 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 our preliminary certification decision in relation to WMR.
- 5.3. In its opinion the Commission set out the relevant legislation. Articles 9(1)(b)(i) and 9(1)(b)(ii) 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. The Commission also set out their view that the Electricity

Directive does not limit consideration of relevant producers or suppliers to those in the EEA. The objective pursued by the unbundling rules is to remove any conflict of interest between generators/producers, suppliers and TSO's.

- 5.4. In respect of the interests in generation and supply in the USA held by HELP or its shareholder, the Commission said, "*there appears to be no scope for a conflict of interest between the limited generation interests ... and the transmission activities of WMR, nor a resulting risk of discrimination of other network users. Therefore, the Commission considers that the generation interests ... should not be an obstacle to the certification of WMR.*"
- 5.5. The Commission noted GB's measures to ensure the robustness of our certification decisions on an ongoing basis. It commented specifically that "*any emerging generation or supply activities by companies in the same group as the TSO should be considered immediate grounds for a reopening of the certification procedure*". 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 WMR continues to apply, and will include a condition in our final certification decision which requires WMR to regularly report to us on the relevant circumstances.

## **6. Controller from a third country**

- 6.1. As HELP is from a third country, the USA, we notified our Government on 27 November 2015 in accordance with section 10B(3) of the Electricity Act. On 4 December 2015, our Government concluded that certifying WMR would not put the security of electricity supplies in the UK or any other EEA states at risk. The Commission also concludes the same.