

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

This document explains the Authority's final decision on compliance by Humber Gateway OFTO Limited ('HG') 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') opinion on our preliminary certification decision on the application for certification submitted by HG, the Authority² concludes that HG 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 Directive 2009/72

- 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 so³.

3. The Applicant

- 3.1. HG is expected to become the licensed OFTO for the HG offshore transmission project in Q3 2016.

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.*

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

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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. HG has confirmed that it does not hold shares in, nor control any, other company. Furthermore, HG 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 HG 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. HG 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 HG confirms that none of its directors is also a senior officer of an electricity undertaking which is a relevant producer or supplier. HG 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. HG is ultimately controlled by Balfour Beatty plc ('BB plc', a UK listed company) and Mr. Reade Griffith (a naturalised British citizen and British resident). 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.
- 4.9. We note interests in generation and supply within the two ultimate controllers' groups. BB plc identified a relevant producer or supplier in their group with a capacity up to 1 GW - namely Barking Power. The facts submitted by the Applicant in respect of the relationship between BB plc and Barking Power are the same as those presented in previous applications for certification for Thanet OFTO Limited, Greater Gabbard OFTO Limited and Gwynt y Môr OFTO Limited. In this respect, the European Commission agreed with us that BB plc's ownership interests in Barking Power did not prevent the certification of the OFTOs. We maintain the same view in this case that BB plc does not control Barking Power. BB plc also has an interest in generation and supply in the USA through Balfour Beatty Infrastructure Partners LLP. Through this alternative investment vehicle, the Fund's limited partners have an investment in Upper Peninsula Power Company in the Upper Peninsula of Michigan.
- 4.10. Reade Griffith indirectly controls a number of electricity undertakings in the UK through Equitix Holdings Ltd which controls infrastructure funds that have generation undertakings in their portfolios. The Applicant considers that none of these undertakings is a relevant producer or supplier.
- 4.11. We consider that all these interests for BB plc and Reade Griffith are not relevant producers or suppliers within the meaning of the GB unbundling legislation because they do not require or hold a generation licence and do not pose a risk of

discrimination. We are therefore satisfied that none of the controllers of the HG controls or has a majority shareholding in a relevant producer or supplier. Therefore, HG meets the requirements of the fourth and fifth tests.

5. European Commission Opinion

- 5.1. The Commission's opinion is dated 31 May 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 HG.
- 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, and does not specify any threshold in the definition of generation and supply. The objective pursued by the unbundling rules is to remove any conflict of interest between generators/producers, suppliers and TSO's.
- 5.4. The Commission noted that it had previously considered BB plc's interests in respect of the Thanet, Greater Gabbard and Gwynt y Môr OFTOs where it opined that *"it was clear that there was no ability for BB plc to favour its generation, production and/or supply interests to the detriment of other network users by influencing the decision making in the TSOs in which it holds participations."*
- 5.5. Similarly, in respect of Mr. Reade Griffith, the Commission noted that *"The considerations set out above in relation to BB plc's generation interests, are applicable also as regards the generation interests held by the natural person."*
- 5.6. The Commission also noted that *"the total capacity of all four OFTOs in which BB plc holds participations amounts to 1600MW and thus remains insignificant compared to the UK's total generation capacity."* The Commission invited Ofgem to take into account the combined capacity and significance of OFTOs connected by a common shareholder when reviewing compliance with unbundling requirements.
- 5.7. The Commission commented that *"The Commission invites Ofgem to continue monitoring the case also after the adoption of the final certification decision in order to satisfy itself that no new facts emerge which would justify a change of its assessment in respect of the above mentioned generations of HG"*. 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 HG continues to apply, and will include a condition in our final certification decision which requires HG to regularly report to us on the relevant circumstances.

6. Controller from a third country

- 6.1. As Mr. Reade Griffith is from a third country, the Cayman Islands, we notified our Government on 2 March 2016 in accordance with section 10B(3) of the Electricity Act. On 30 March 2016, our Government concluded that certifying HG would not put the security of electricity supplies in the UK or any other EEA states at risk. The Commission also concluded the same.