

The Authority's final decision and analysis on the review of the certification of Greater Gabbard OFTO plc

1. Certification Decision

- 1.1. Having taken utmost account of the European Commission's (the 'Commission') opinion¹ on our preliminary decision on the review of the certification status of Greater Gabbard OFTO plc (the 'Certified Person'), the Authority² concludes that the certification of the Certified Person is continued as the certification basis continues to apply in accordance with the amended unbundling legislation, as detailed below.
- 1.2. This document explains the Authority's final decision and provides a summary of the Authority's assessment of information submitted by the Certified Person to the Authority and the Commission for the purpose of reviewing whether the basis on which the Authority granted certification continues to apply. The information comprised updates regarding a change to the circumstances of the Certified Person since its certification.

2. GB Legislation – Transposition of Directive 2009/72

- 2.1. In Great Britain ('GB'), the ownership unbundling requirements set out in the Directive 2009/72 (the '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*". In accordance with 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 appropriate and in line with our principal objective and general duties to do so.³
- 2.2. On 24 April 2017, the Electricity and Gas (Internal Markets) Regulations 2017 were introduced, which amended section 10O of the Electricity Act to modify the scope of the five unbundling certification tests.⁴ As a result, all interests in relevant production, generation and supply activities, regardless of whether they take place within or outside the EEA, must now be taken into account when assessing new certification applications and when reviewing the certification basis of certified persons.

3. The Certified Person

- 3.1. The Certified Person is a licensed offshore transmission system owner ('OFTO') responsible for the operation, maintenance and development of an offshore transmission system located inside the territorial waters of GB.

¹ The Commission's opinion can be viewed online at:

https://ec.europa.eu/energy/sites/ener/files/documents/2017_136_uk_en.pdf

² The Gas and Electricity Markets Authority (the 'Authority'). In this document, the terms "Authority", "Ofgem", and "us" are used interchangeably.

³ https://www.ofgem.gov.uk/system/files/docs/2017/08/certification_open_letter_2017.pdf

⁴ http://www.legislation.gov.uk/ukxi/2017/493/pdfs/ukxi_20170493_en.pdf

- 3.2. The Certified Person was certified as fully ownership unbundled on 2 August 2013 under the first certification ground set out in section 10E(3) of the Electricity Act.

Certification Review

- 3.3. The review of certification was triggered by a change in circumstances relevant to the basis of certification, in accordance with section 10I of the Electricity Act. The Certified Person provided information to the Authority regarding changes to its ultimate controllers and changes to its appointed directors. This change in circumstances also resulted in a person from a third country taking control of the Certified Person.
- 3.4. When originally certified, the Certified Person was a wholly owned subsidiary of Greater Gabbard OFTO Holdings Ltd (GG Holdco). The shares in GG Holdco were held in equal proportions (33%) by Equitix Transmission 2 Limited, AMP Capital Investors UK Cable Limited (AMP) and Balfour Beatty OFTO Holdings Limited (Balfour Beatty).
- 3.5. The Certified Person informed the Authority that the Equitix group has acquired a 100% shareholding in GG Holdco and the Certified Person. As a result, the ultimate controller of the Certified Person is now a natural person, who is a naturalised British citizen and UK resident (the 'Natural Person'). As a result of the shareholding change, new directors have also been appointed to the Certified Person.
- 3.6. This review was undertaken in accordance with the amendments to section 100 of the Electricity Act outlined above, in force at the time the review was triggered.

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 Certified Person has confirmed that it does not hold shares in, nor control, any other company. Furthermore, the Certified Person has previously 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 Certified Person continues to meet 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 Certified Person has provided updated details regarding the process for appointing directors. The Certified Person continues to meet 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 Certified Person provided updated information regarding changes to its appointed directors. Information provided by the Certified Person confirms that none of its new directors is also a senior officer of an electricity undertaking which is a relevant

producer or supplier. The Certified Person, therefore, continues to meet the requirements 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 Certified Person has provided updates on the corporate structure of its controllers following the change in shareholding. The Certified Person is now ultimately controlled by natural person (a naturalised British citizen and UK resident). Based on the updated information provided, we are satisfied that neither the ultimate controller of the Certified Person, nor intermediate controllers, control or have a majority shareholding in a relevant producer or supplier. Therefore, the Certified Person continues to meet the requirements of the fourth and fifth tests.

5. European Commission Opinion

- 5.1. The Commission's opinion is dated 20 December 2017.
- 5.2. Pursuant to Article 3(2) of Regulation (EC) No 714/2009, Ofgem is required to take "utmost account" of the Commission's opinion in reaching its final decision on the continuation of certification.
- 5.3. The Commission considered that it *'could not identify a risk of discrimination in the operation of GG that would pose an obstacle to its certification.'*
- 5.4. The Commission did, however, set out their view that the Directive does not specify any minimum threshold in the definitions of generation or supply in Article 2(1) or Article 2(19) respectively. Although, the Commission also stated that it considers that the objective which the unbundling rules in the Directive pursue is the removal of any conflict of interest between generators/producers, suppliers and TSOs.
- 5.5. The Commission noted that it had previously considered some of the small scale generation interests of the Certified Person's ultimate controller in its previous opinions in respect of Greater Gabbard's original certification, Thanet OFTO, Gwynt-y-Môr OFTO Limited and Humber Gateway OFTO Limited.
- 5.6. The Commission noted that, as in those cases, the transmission system operated by the Certified Person remains of a limited nature, and consists of a point-to-point cable. The TSO responsibilities of the Certified Person are limited to operation this specific offshore connection, and there is no direct interface between this system and the generation interests held by the ultimate controller.
- 5.7. The Commission concluded that *'in the present case a refusal of certification would run counter to the principle of proportionality given the fact that the interests of the persons controlling the TSO do not lead to a situation that the unbundling rules seek to prevent.'*
- 5.8. We therefore consider that the small scale generation interests of the Certified Person's ultimate controller do not raise any risk of discrimination, and the Certified Person continues to meet unbundling requirements in accordance with the Directive and the Electricity Act. We will continue to take into account the combined capacity and significance of generation assets held by a common shareholder or by its ultimate controller when reviewing compliance with unbundling requirements.

6. Controller from a Third Country

- 6.1. The Natural Person exercises control over the Certified Person through Pace Cayman Holdco Ltd (Pace Cayman), a company within the Equitix group that is registered in the Cayman Islands.
- 6.2. As the Cayman Islands is a third country, we notified the Secretary of State for Business, Energy and Industrial Strategy (BEIS) on 8 May 2017 and the European Commission on 18 April 2017 that a controller from a third country had taken control of the Certified Person, in accordance with section 10I(2) of the Electricity Act and Article 11 of the Electricity Directive. On 23 May 2017, the Secretary of State concluded that continuing the certification of the Certified Person would not put the security of electricity supplies in the UK or any other EEA states at risk. The Commission concluded the same.

7. Conclusion: Continuation of Certification

- 7.1. Having taken utmost account of the Commission's opinion, the outcome of which accords with the Authority's preliminary decision, the Authority concludes that its decision is to continue the certification of the Certified Person.

8. Monitoring

- 8.1. The Commission recalled the obligation set out in Article 10(4) of the Directive for national regulatory authorities to monitor continuing compliance of TSOs with the unbundling requirements.
- 8.2. In compliance with the GB legal framework and the Directive, we will continue to monitor whether the basis on which the Authority decided to certify the Certified Person continues to apply, and will include a condition in our certification decision which requires the Certified Person to regularly report to us on changes to the relevant circumstances.