

Appendix 1: The Authority's analysis on the review of the certification of TC Robin Rigg OFTO Limited, TC Gunfleet Sands OFTO Limited, TC Barrow OFTO Limited, TC Ormonde OFTO Limited and TC Lincs OFTO Limited

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 TC Robin Rigg OFTO Limited, TC Gunfleet Sands OFTO Limited, TC Barrow OFTO Limited, TC Ormonde OFTO Limited and TC Lincs OFTO Limited (the 'Certified Persons'), the Authority² concludes that the certification of the Certified Persons is continued as the certification basis continues to apply in accordance with the 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 Persons 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 Persons since their 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' – provides that an applicant will meet the ownership unbundling requirement if it passes each of the five tests set out in section 10F. In January 2015, amendments to the Electricity Act³ came into force providing that where one or more of the tests is not passed, the Authority may decide to treat such tests as passed if the it 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.⁴
- 2.2. On 24 April 2017, amendments to section 10O of the Electricity Act came into force,⁵ which modified the scope of the five unbundling certification tests.⁶ 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.

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

https://ec.europa.eu/energy/sites/ener/files/documents/2018_145_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 Made by the Electricity and Gas (Ownership Unbundling) Regulations 2014

⁴ https://www.ofgem.gov.uk/system/files/docs/2017/08/certification_open_letter_2017.pdf

⁵ Made by the Electricity and Gas (Internal Markets) Regulations 2017

⁶ http://www.legislation.gov.uk/uksi/2017/493/pdfs/uksi_20170493_en.pdf

3. The Certified Persons

3.1. The Certified Persons are licensed offshore transmission owners ('OFTOs'), within the same corporate group, Transmission Capital Partners consortium ('TCP'), and were previously certified as fully ownership unbundled under the first certification ground set out in section 10E(3) of the Electricity Act. As the Certified Persons are part of the same corporate structure and have the same controllers, we have considered them together for the purposes of our review.

Certification Review

3.2. The review of certification was triggered by a change in circumstances relevant to the Certified Persons' basis of certification, in accordance with section 10I of the Electricity Act. The Certified Persons provided information to the Authority regarding changes to their ultimate controllers. This change in circumstances also resulted in a person from a third country taking control of the Certified Persons.

3.3. When originally certified, the ultimate controllers of the Certified Persons were International Public Partnerships Limited ('INPP') and Amber Infrastructure Group Holdings Limited ('AIGHL').

3.4. The Certified Persons informed the Authority that HUNT ELP Limited ('HELP'), a subsidiary within the HUNT Group, acquired a 50% interest in AIGHL on 27 May 2015, changing the Certified Persons' ultimate controllers. In April 2018, the Certified Persons notified us that the HUNT Group had restructured and that HELP had been replaced by HUNT FS Holdings I LLC ('HUNT FS I'). The HUNT Group further restructured in June 2018 when HUNT FS I was replaced by HUNT Amber Ownership, LLC ('HAO') – the HUNT Group has an 80% share in HAO, with 20% held by a 3rd party.

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 Persons have confirmed that they do not hold shares in, nor control, any other company. Furthermore, the Certified Persons have previously each provided a signed undertaking that, during the term of their OFTO licence, they will not exercise, or cause to be exercised on their behalf, any shareholder rights in relation to a relevant producer or supplier that they might acquire during the currency of the undertakings. Therefore, the Certified Persons continue 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 Persons have provided updated details regarding the process for appointing directors. The Certified Persons continue to meet the requirements of the second test as none of their senior officers have 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. Therefore, the Certified Persons continue to meet the requirements of the second test.

- 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 Persons pass the third test because none of their directors are senior officers of an electricity undertaking which is a relevant producer or supplier.
- 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 Persons are controlled by INPP and HUNT Companies Inc ('HUNT'). The Certified Persons have provided a comprehensive account of the corporate structures of their controllers. We note that HUNT has small scale generation interests in the UK and USA. We consider that these small scale generation interests are not relevant producers or suppliers within the meaning of the GB unbundling legislation because the UK interests do not require a generation licence, and in the case of US interests they would not require a licence if the generation activity were carried out in GB. We also consider that these small scale generation interests do not pose a risk of discrimination. We are therefore satisfied that none of the controllers of the Certified Persons either control or have a majority shareholding in a relevant producer or supplier. Therefore, the Certified Persons continue to meet the requirements of the fourth and fifth tests.

5. European Commission Opinion

- 5.1. The Commission's opinion is dated 8 October 2018.⁷
- 5.2. Pursuant to Article 3(2) of the Electricity Regulation (EC) No 714/2009, 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 the Applicant.
- 5.3. The Commission considered the small scale generation interests held by HUNT. As a preliminary comment, the Commission welcomed our recognition that the Electricity Directive "does not specify any "de minimis" or other thresholds in the definitions of generation or supply in Article 2, paragraphs (1) and (19)", and that we had included our assessment of those interests in our preliminary decision. However, the Commission invited Ofgem to "also apply this approach to the senior officers controlling TSOs or their ultimate controllers". We note that two persons who are senior officers of each of the Certified Persons are also senior officers of a small scale generation interest in GB. For the reason set out in paragraph 4.8, we consider that this undertaking is not a relevant producer or supplier for the purposes of section 100 of the Electricity Act. However, we note the Commission's view, and in line with the assessment in our preliminary decision, we consider that this arrangement does not pose a risk of discrimination. We consider that the very small capacity of the relevant GB generator, the fact that the solar array only connects directly to one final customer, and the limited role of OFTOs beyond the

⁷ The Commission's opinions can be found at:
https://ec.europa.eu/energy/sites/ener/files/documents/2018_145_uk_en.pdf

onshore transmission connection point mean that there is no realistic risk that the OFTOs' directors could discriminate in favour of the GB generation entity, and vice versa. In addition, the OFTO licensing regime provides significant disincentives against the Certified Persons' senior officers discriminating in favour of the small scale generation undertaking.

- 5.4. The Commission noted it "considers that the objective which the unbundling rules of the Electricity and Gas Directives pursue is the removal of any conflict of interest between, on the one hand, generators/producers and suppliers and, on the other hand, TSOs" and that "it would not be in line with this objective if certification of a TSO were to be refused in cases where it can be clearly demonstrated that there is no incentive and ability for a shareholder in a TSO to influence the TSO's decision making in order to favour its generation, production and/or supply interests to the detriment of other network users."
- 5.5. The Commission considered that, "given the small scope of electricity production in the UK and the fact that the electricity is supplied directly to the final customer, the absence of any physical connection between the electricity systems of the USA and the United Kingdom and the fact that TCP OFTOs as OFTOs do not own or operate the network beyond the connection point onshore, there appears to be no scope for a conflict of interest [...] nor a resulting risk of discrimination of other network users." The Commission concluded that "generation interests currently held by HUNT or its shareholders should not be an obstacle to the certification of the TCP OFTOs."
- 5.6. The Commission confirmed that "in the present case, and subject to the continued monitoring of future generation projects by Ofgem, a discontinuation of the certification would run counter to the principle of proportionality".

6. Controller from a Third Country

- 6.1. INPP is incorporated and registered in Guernsey and HUNT is incorporated and registered in the USA. As both are from a third country for the purposes of this certification assessment and section 100 of the Electricity Act, we notified this to our Government in accordance with section 10I(2) of the Electricity Act. In its letters of 25 June 2018 and 4 December 2015 our Government concluded that continuing the certification of the Certified Persons would not put the security of electricity supplies in the UK or any other EEA states at risk. The Commission also concluded the same in its opinion of 8 October 2018.

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 Persons.