

## The Authority's final decision and analysis on the applications for certification as unbundled by National Grid North Sea Link Limited and National Grid IFA2 Limited

This document explains the Authority's final decision on compliance by National Grid North Sea Link Limited ('NGNSL') and National Grid IFA2 Limited ('NGIFA2') with the requirements of the Third Package<sup>1</sup> for transmission system operators ('TSOs') to unbundle from generation, production and supply undertakings as implemented into 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 decisions on the applications for certification submitted by NGNSL and NGIFA2, the Authority<sup>2</sup> concludes that NGNSL and NGIFA2 comply with the requirements of the ownership unbundling model as set out in GB legislation and should each 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 an applicant for certification if in relation to each of the five tests below – (a) the Authority thinks that it is passed, or (b) it is treated as passed by virtue of subsection (7), (9) or (9A)*". In accordance with subsection 10F(9A), 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.<sup>3</sup>

### 3. The Applicants

3.1. NGNSL and NGIFA2, the 'Applicants', are private companies limited by shares. The Applicants are wholly owned subsidiaries of National Grid Interconnector Holdings Ltd (NGIH Ltd), which in turn is a wholly owned subsidiary of National Grid Holdings One plc

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

<sup>3</sup> [https://www.ofgem.gov.uk/system/files/docs/2017/08/certification\\_open\\_letter\\_2017.pdf](https://www.ofgem.gov.uk/system/files/docs/2017/08/certification_open_letter_2017.pdf)

(NGHO plc), which is a wholly owned subsidiary of National Grid plc (NG plc). The Applicants are both ultimately controlled by NG plc.

3.2. As the Applicants have the same ultimate controller, ownership structure and are part of the same corporate group within GB, we have considered their applications together for the purposes of our certification assessment, and the analysis below applies to both of the Applicants.

#### NGNSL

3.3. NGNSL holds an electricity interconnector licence, granted on 20 June 2013 under section 6(1)(e) of the Electricity Act 1989.<sup>4</sup> This licence authorises NGNSL to participate in the operation of the North Sea Link ('NSL') interconnector between GB (Blyth) and a place within the jurisdiction of another country or territory, being Norway (Kvilldal).

3.4. NGNSL therefore has the sole business focus of electricity interconnector operator, owning 50% of the NSL interconnector between GB and Norway. The Applicant will participate in the operation of the interconnector only in GB. Statnett SF, a TSO wholly owned by the Norwegian state, will operate the other 50% of the interconnector in Norway.

#### NGIFA2

3.5. NGIFA2 holds an electricity interconnector licence, granted on 12 November 2014 under section 6(1)(e) of the Electricity Act 1989.<sup>5</sup> This licence authorises NGIFA2 to participate in the operation of the IFA2 interconnector between GB (Chilling) and a place within the jurisdiction of another country or territory, being France (Tourbe).

3.6. NGIFA2 therefore has the sole business focus of electricity interconnector operator, owning 50% of the IFA2 interconnector between GB and France. The Applicant will participate in the operation of the interconnector only in GB. Réseau de transport d'électricité ('RTE'), a TSO predominantly owned by the French state, will operate the other 50% of the interconnector in France.

### **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. NGNSL and NGIFA2 have both confirmed that they do not hold shares in, nor control, any other company. Furthermore, NGNSL and NGIFA2 have provided signed declarations in their applications for certification, where they undertake that they will not exercise, or cause to be exercised on their behalf, any shareholder rights in relation to a relevant producer or supplier (RPoS). Therefore, NGNSL and NGIFA2 meet the requirements of the first test.

<sup>4</sup> <https://www.ofgem.gov.uk/publications-and-updates/national-grid-nsn-link-limited-notice-grant-electricity-interconnector-licence>

<sup>5</sup> <https://www.ofgem.gov.uk/publications-and-updates/national-grid-ifa-2-limited-notice-grant-electricity-interconnector-licence>

- 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 right to appoint the directors for each of the Applicants sits with each Applicant's Board, and with National Grid Interconnector Holdings Ltd (NGIH Ltd), which is the sole direct 100% shareholder of both of the Applicants. Neither NGNSL, NGIFA2, nor NGIH Ltd controls nor has a majority shareholding in any RPoS.
- 4.5. However, the appointment of senior officers of NGNSL and NGIFA2 can be influenced by NG plc (their ultimate controller), according to information provided by the Applicants. NG plc controls undertakings in the United States of America (USA), which includes the following interests that are considered RPoS:
- 'National Grid Generation LLC', a wholly-owned subsidiary of National Grid plc, fossil fuel electric generation capacity of approximately 3,600MW located on Long Island, New York;
  - 'National Grid Glenwood Energy Centre LLC', a wholly-owned subsidiary of National Grid plc. A Delaware limited liability company and is an exempt wholesale generator ('EWG') of approximately 80MW electric peaking capacity on Long Island, New York;
  - 'National Grid Port Jefferson Energy Centre LLC', a wholly-owned subsidiary of National Grid plc. A Delaware limited liability company and is an exempt wholesale generator ('EWG') of approximately 80MW electric peaking capacity on Long Island, New York.
- 4.6. In practice, NG plc has involvement in and oversight of the appointment of NGNSL and NGIFA2's directors, by virtue of internal governance arrangements within the National Grid group. Section 10F(9A) of the Electricity Act provides that the Authority may use its discretion to treat one or more of the five tests as passed in certain circumstances. NGNSL and NGIFA2 have asked Ofgem to exercise its discretion with respect to the second test, and have provided evidence as to why there is no risk of discrimination.
- 4.7. NGNSL and NGIFA2 have demonstrated to our satisfaction that the National Grid group has appropriate governance arrangements in place, and that there is no risk that NG plc's involvement could lead to discrimination on the part of NGNSL, NGIFA2 or NG plc to benefit generation interests in the USA controlled by National Grid. We are therefore satisfied that NGNSL and NGIFA2 do not have relationships with these RPoS that might lead NGNSL or NGIFA2 to discriminate in favour of these RPoS.
- 4.8. On the basis of information provided by the Applicants, the Authority considers it is appropriate to treat the second test as passed in accordance with section 10F(9A) of the Electricity Act. The Applicants therefore meet the requirements of the second test.
- 4.9. *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.*

- 4.10. The information provided by NGNSL and NGIFA2 confirms that none of the directors of either Applicant is also a senior officer of an electricity undertaking which is a RPoS. The Applicants therefore meet the requirements of the third test.
- 4.11. *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.*
- 4.12. As set out in paragraph 3.1, NGNSL and NGIFA2 are both controlled by NG plc, who also controls RPoS in the USA.
- 4.13. NGNSL and NGIFA2 have provided information on all companies in which NG plc (the ultimate parent of the Applicants) has an interest. This shows that the Applicants are controlled by a person (NG plc) which controls and has a majority shareholding in interests in the USA that qualify as RPoS.
- 4.14. Section 10F(9A) of the Electricity Act provides that the Authority may use its discretion to treat one or more of the five tests as passed in certain circumstances.
- 4.15. Based on our assessment of information provided by the Applicants, we consider that the generation interests in the USA controlled by NG plc do not give rise to a risk of discrimination or a conflict of interest, particularly as the RPoS located in the USA have no direct interface with the GB or European Economic Area ('EEA') transmission systems. The Applicants have demonstrated to our satisfaction that they do not have a relationship with NG plc's RPoS interests in the USA that might lead the either NGNSL or NGIFA2 to discriminate in favour of those RPoS.
- 4.16. On the evidence provided, the Authority considers it is appropriate in these cases to treat the fourth and fifth tests as passed in accordance with section 10F(9A) of the Electricity Act. The Applicants therefore meet the requirements of the fourth and fifth tests.

## **5. European Commission Opinion**

- 5.1. The Commission's opinion is dated 8 April 2019.
- 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 decisions in relation to NGNSL and NGIFA2.
- 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 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.

### Generation and supply interests linked to NG plc as the ultimate controller of NSL

- 5.4. The Commission noted that it "*shares Ofgem's view that given absence of any physical connection between the electricity systems of the United States and the UK, there appears to be no scope for a conflict of interest, nor a resulting risk of discrimination by*

*NG IFA2 or NG NSL of network users in the UK.” Therefore, the Commission considered “that the generation and supply interests currently held by NG plc in the United States should not constitute an obstacle to the certification of NG IFA2 or NG NSL.”*

### Operation of NGNSL

- 5.5. As the NSL interconnector is an interconnector with a country outside the EU, the Commission considers *“it essential that effective operation of the interconnector in accordance with Union energy law is ensured”*. The Commission considers that this requirement is met due to Norway's obligation as a signatory to the EEA Agreement to transpose and implement the Electricity Directive and other core elements of EU energy law.
- 5.6. The Commission highlighted that certification of the operator of the Norwegian part of the NSL interconnector should be pursued as soon as possible.
- 5.7. With reference to the joint ownership of the NSL interconnector, for the avoidance of doubt, NGNSL is not a joint venture company. The NSL interconnector is an unincorporated joint venture between NGNSL and Statnett SF, with the two companies cooperating on the development and procurement of the interconnector on a contractual basis within the framework of a formal Ownership Agreement. Ofgem has been in contact with the Norwegian national regulatory authority, NVE, during the analysis of the NGNSL certification application. NVE has informed us that it will be processing the certification for the Norwegian part of the interconnector owned by Statnett SF, in accordance with domestic requirements.

## **6. Ongoing monitoring**

- 6.1. We note that the Commission highlighted the obligation in the Electricity Directive for national regulatory authorities to monitor continuing compliance of TSOs with the unbundling requirements.
- 6.2. 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.
- 6.3. 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 NGNSL and NGIFA2 continues to apply.