

## The Authority's final decision and analysis on the application for certification as unbundled by Transmission Capital Partners Beatrice Limited

This document explains the Authority's<sup>1</sup> final decision on compliance by TC Beatrice OFTO Limited (the **Applicant**) with the requirements of the Third Package<sup>2</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 decision on the application for certification submitted by the Applicant, the Authority concludes that the Applicant complies with the requirements of the full 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 states that "*the ownership unbundling requirement is met by an applicant for certification if in relation to each of the five tests ... – (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 Applicant

3.1. TC Beatrice OFTO Limited is expected to become the licensed offshore transmission owner (**OFTO**) for the Beatrice offshore transmission project in January 2021.

<sup>1</sup> The Gas and Electricity Markets Authority (the **Authority**). In this document, the terms "**Authority**", "**Ofgem**", "**we**", "**our**" and "**us**" are used interchangeably.

<sup>2</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>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).

#### 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 Applicant has confirmed that it does not hold shares in, nor control, any other company. Furthermore, the Applicant has provided a signed undertaking that, during the term of its electricity transmission 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 Applicant 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. The Applicant 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 the Applicant confirms that none of its directors is also a senior officer of an electricity undertaking which is a relevant producer or supplier. The Applicant 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. The Applicant is controlled by International Public Partnerships Limited (**INPP**) and HUNT Companies, Inc. (**HUNT**). The Applicant has provided a comprehensive account of the corporate structures of its controllers. We note that HUNT has small scale generation interests in the UK and the USA. We consider that these small scale generation interests are not relevant producers or suppliers within the meaning of the GB unbundling legislation because they do not require a generation licence. 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 Applicant either controls, or has a majority shareholding in, a relevant producer or supplier. Therefore, the Applicant meets the requirements of the fourth and fifth tests.

## 5. European Commission Opinion

- 5.1. The Commission's opinion dated 29 May 2020 was received by Ofgem on 2 June 2020 (the **Opinion**).<sup>4</sup>
- 5.2. Pursuant to Article 3(2) of the Electricity Regulation, Ofgem is required to take "utmost account" of the Opinion in reaching its final certification decision.
- 5.3. As background to its assessment, the Commission noted 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 acknowledged that *"nevertheless there may be exceptions to the strict application of the EU unbundling rules"* and in particular *"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 interest to the detriment of other network users."*
- 5.4. The Commission agreed with Ofgem that, *"the generation and supply interests controlled by TC Beatrice's ultimate controllers which are located in the USA do not pose a risk as regards a possible conflict of interest"*.
- 5.5. Similarly, in relation to the UK based small scale interest, the Commission considered *"that given the small scale of this generation asset in the UK and the fact that the electricity is supplied directly to the final customer, there appears to be no scope for a conflict of interest between this generation interest and the transmission activities of TC Beatrice, nor a resulting risk of discrimination of other network users"*.
- 5.6. While the Commission accepted Ofgem's decision not to consider future projects for the purpose of the present certification, the Commission is of the view *"that Ofgem should monitor and assess the impact of each of the projects in question on TC Beatrice's compliance with the unbundling requirements at the time these projects become operational"* and furthermore that *"The Commission notes that HUNT appears to have the strategy to pursue, in the same market, investment opportunities both in transmission and distribution networks and, via its subsidiary Amber Infrastructure Group, in generation and supply assets. While the existing and planned generation and supply assets are currently relatively minor, this investment strategy could in the future result in a conflict with EU unbundling rules."*
- 5.7. The Commission concluded that *"in the present case, and subject to the continued monitoring of future generation projects by Ofgem, a refusal of certification would be disproportionate"*.

## 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 the Secretary of State on 13 February 2020 in accordance with section 10B(3) of the Electricity Act. On 15 April 2020, the Secretary of State concluded that certifying the Applicant would not put the

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<sup>4</sup> The Commission's opinions can be found at: <https://ec.europa.eu/energy/en/topics/markets-and-consumers/market-legislation>.

security of electricity supplies in the UK or any other EEA states at risk. The Commission also concluded the same in its Opinion.