

To: TC Dudgeon OFTO plc

CC: European Commission, BEIS

Email:
unbundlingcertification@ofgem.gov.uk

Date: 12 September 2018

Certification under the ownership unbundling requirements of the Third Package¹ Decision of the Gas and Electricity Markets Authority ('the Authority')²

TC Dudgeon OFTO plc (Dudgeon) submitted an application under section 10B(2) of the Electricity Act 1989 (the 'Electricity Act') on 13 February 2018, requesting to be certified pursuant to the ownership unbundling requirements (as set out in Article 9(1) of the Electricity Directive and transposed into GB law in section 10F of the Electricity Act).

This letter sets out the Authority's final decision on Dudgeon's application for certification, under section 10D of the Electricity Act.

Application for certification

Dudgeon (the 'Applicant'), is expected to become a licensed offshore transmission system owner ('OFTO') under section 6(1)(b) of the Electricity Act, and is ultimately controlled by International Public Partnerships Limited (hereafter "INPP") and HUNT Companies Inc (hereafter "HUNT").

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 In this document, the terms "Authority", "Ofgem", "we" and "us" are used interchangeably.

The Applicant requested certification on the first certification ground, which is set out in section 10E(3) of the Electricity Act. The first certification ground is that the Applicant meets the ownership unbundling requirement in section 10F of the Electricity Act.

Under section 10B(3) of the Electricity Act, if the Applicant is controlled by a person from a third country, the Authority must, as soon as is reasonably practicable, notify the Secretary of State and the European Commission (the 'Commission') that an application from such a person has been made. The Authority must also enclose with the notification to the Secretary of State any further information which, at the time of the notification, the Authority has in its possession and thinks is relevant to the question of whether the security of energy supplies in the United Kingdom or any other EEA state would be put at risk by the certification of the applicant.

The Authority is required to apply five tests set out in section 10F of the Electricity Act in order to determine whether the Applicant meets the ownership unbundling requirement:

The first test is that 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.

The second test is that, 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.

The third test is that, 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.

The fourth test is that the applicant is not controlled by a person who controls a relevant producer or supplier.

The fifth test is that the applicant is not controlled by a person who has a majority shareholding in a relevant producer or supplier.

On the basis of the information contained in the application and further information provided by the Applicant, the Authority considered that each of the five tests were met by the Applicant.

INPP and HUNT are controllers of the Applicant. INPP is incorporated and registered in Guernsey and HUNT is incorporated and registered in the USA, both of which are third countries for the purposes section 100 of the Electricity Act and this certification assessment. We notified our Government on 14 May 2018 in accordance with section 10B(3) of the Electricity Act. On 25 June 2018, our Government concluded that certifying the Applicant would not put the security of electricity supplies in the UK or any other EEA states at risk.

On 6 June 2018, the Authority made its preliminary decision under section 10D(1) of the Electricity Act to certify the Applicant as independent. The Authority's preliminary decision was notified to the Applicant, the Secretary of State and the Commission on 11 June, in accordance with section 10D(4) of the Electricity Act.

The Authority received the Commission's opinion on 8 August 2018. In accordance with Article 3(2) of the Electricity Regulation, the Authority has taken utmost account of that opinion in reaching its final decision.

Certification decision

The Authority's final decision is that the Applicant is certified as independent on the basis that it has met the ownership unbundling requirement under section 10F(1) of the Electricity Act, as each of the five tests set out in section 10F has been met by the Applicant.

On the date of the licence grant and in accordance with sections 10H(1) and 10H(2) of the Electricity Act, the Applicant will become an OFTO licence holder and will be designated as an electricity transmission system operator for the purposes of Article 10(2) of the Electricity Directive.

In accordance with section 10D(7) of the Electricity Act, the Authority hereby notifies the certification of the Applicant to the Applicant, the Secretary of State and the Commission.

In accordance with section 10I of the Electricity Act, the Authority will monitor whether the basis on which it decided to certify the Applicant continues to apply following the Authority's final decision and, if appropriate, will review its certification decision.

Attached to this letter is a copy of the certification decision made by the Authority.

Yours sincerely,

Cathryn Scott
Director, Wholesale Markets and Commercial

ELECTRICITY ACT 1989
SECTION 10D

CERTIFICATION – TC Dudgeon OFTO plc

Pursuant to section 10D of the Electricity Act 1989 ('the Act') the Gas and Electricity Markets Authority hereby gives to TC Dudgeon OFTO plc³ certification as independent under the ground set out in section 10E(3) of the Act, subject to the attached Schedule.

Cathryn Scott
Director, Wholesale Markets and Commercial
Authorised in that behalf by the Gas and Electricity Markets Authority
12 September 2018

³ This is a company incorporated in England and Wales with company registration number 11123266 whose registered address is 3 More London Riverside, London, United Kingdom, SE1 2AQ

SCHEDULE
PERIOD, CONDITIONS AND WITHDRAWAL OF CERTIFICATION

A. Interpretation and Definitions

In this certification

'the Authority'	means the Gas and Electricity Markets Authority established by section 1(1) of the Utilities Act 2000, as amended from time to time
'the Act'	means the Electricity Act 1989, as amended from time to time
'the Agency'	has the same meaning as in section 64 of the Act
'the certified person'	TC Dudgeon OFTO plc in its capacity as a person certified as independent under section 10D of the Act
'the Commission'	means the European Commission
'control'	has the same meaning as in section 100 of the Act
'person from a third country'	has the same meaning as in section 100 of the Act
'the relevant date'	has the same meaning as in section 10M of the Act
'shareholder right'	has the same meaning as in section 100 of the Act

B. Period

Subject to section D below, and pursuant to section 10D of the Act, this certification shall come into effect on the date that it is issued and will continue until it is withdrawn in accordance with section D.

C. Conditions

This certification is made subject to the following conditions:

1. The material provided by the certified person to the Authority in respect of its application for certification is true and complete.
2. If at any time the certified person knows or reasonably should know of any event or circumstance that has occurred or is likely to occur that may affect its eligibility for certification, the certified person shall as soon as reasonably practicable notify the Authority in writing of the event or circumstance and the reasons it considers that the event or circumstance may affect its eligibility for certification.
3. If at any time the certified person knows or reasonably should know that any event or circumstance has occurred, or is likely to occur, that may cause the Authority to think that the certified person is or may become a person from a third country, or that a person from a third country has or may take control of the certified person, the certified person shall as soon as reasonably practicable notify the Authority in writing.
4. If at any time from the relevant date the certified person exercises or is likely to exercise any shareholder right or right of appointment in the circumstances described in section 10M of the Act, the certified person shall as soon as is reasonably practicable notify the Authority in writing of the right that has been or is likely to be exercised and the effect of exercising that right.
5. By 31 July of each year, the certified person shall provide the Authority with a written declaration, approved by a resolution of the board of directors of the certified person and signed by a director of the certified person pursuant to that resolution, setting out:
 - a. Whether any event or circumstance has occurred in the previous 12 month period, or such part of that 12 month period since the certified person was certified, that may affect the certified person's eligibility for certification, and if so, the reasons it considers that the event or circumstance may affect its eligibility for certification;
 - b. Whether any event or circumstance has occurred, or is likely to occur, that may cause the Authority to think that the certified person has become a person from a third country, or that a person from a third country has taken control of the certified person, in the previous 12 month period or such part of that 12 month period since the certified person was certified; and
 - c. Whether the certified person has exercised any shareholder right or right of appointment in the circumstances described in section 10M of the Act in the previous 12 month period or such part of that 12 month period since the certified person was certified and if so the effect of exercising that right, providing that the certified person is only required to provide a written declaration under this paragraph (c) where it has been certified on the

certification ground in section 10E(3) of the Act and in relation to a period that occurs after the relevant date.

6. The certified person furnishes the Authority in such manner and at such times as the Authority may reasonably require, with such information as the Authority may reasonably require, or as may be necessary, for the purpose of:
 - a. performing the functions assigned to it by or under the Act, the Gas Act, the Utilities Act 2000, the Energy Act 2004, the Energy Act 2008, or the Energy Act 2011, each as may be amended from time to time; or
 - b. monitoring and reviewing of the certification under section 10I of the Act; or
 - c. reporting by the Authority as to any connection of the licensee with a country outside the European Economic Area under section 10K of the Act.
7. Should any of the grounds for withdrawal arise under section D of this certification, the Authority may amend rather than withdraw this certification.

D. Withdrawal

Pursuant to section 10L of the Act, this certification may be withdrawn in the following circumstances:

1. This certification may be withdrawn by the Authority by giving a notice of withdrawal to the certified person not less than four months before the coming into force of the withdrawal in any of the following circumstances where:
 - a. the Authority considers that condition contained in paragraph C1 above is not met;
 - b. the Authority considers that the basis on which the Authority decided to certify the certified person does not continue to apply and has made a final decision that the certification should be withdrawn;
 - c. the certified person has a receiver (which expression shall include an administrative receiver within the meaning of section 251 of the Insolvency Act 1986, as amended from time to time) of the whole or any material part of its assets or undertaking appointed;
 - d. the certified person has entered into administration under section 8 of Schedule B1 to the Insolvency Act 1986;
 - e. the certified person is found to be in breach of any national or European competition laws, such breach relating to the licensed activity of the certified person;

- f. the certified person has failed to provide a declaration to the Authority pursuant to paragraph C5 above and the Authority has written to certified person stating that the declaration has not been provided and giving the certified person notice that if the declaration remains outstanding past the period specified in the notice the certification may be withdrawn;
 - g. the certified person has failed to comply with a request for information issued by the Authority under paragraph C6 above and the Authority has written to the certified person stating that the request has not been complied with and giving the certified person notice that if the request for information remains outstanding past the period specified in the notice the certification may be withdrawn; or
 - h. the certified person has failed to ensure compliance with any legally binding decision of the Agency or of the Commission.
2. This certification may be withdrawn if the certified person notifies the Authority that it does not require to be certified and the Authority considers that the certified person is not a person who is required to be certified.

The Authority's final decision and analysis on the application for certification as unbundled by TC Dudgeon OFTO Plc

This document explains the Authority's final decision on compliance by TC Dudgeon OFTO plc ('the Applicant') with the requirements of the Third Package⁴ for transmission system operators ('TSOs') 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 decision on the application for certification submitted by the Applicant, the Authority⁵ 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 (the 'Electricity Directive')

- 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.⁶

3. The Applicant

- 3.1. TC Dudgeon OFTO plc is expected to become the licensed offshore transmission owner ('OFTO') for the Dudgeon offshore transmission project in autumn 2018.

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 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.

⁵ The Gas and Electricity Markets Authority (the 'Authority'). In this document, the terms "Authority", "Ofgem", "we", "our" and "us" are used interchangeably.

⁶ https://www.ofgem.gov.uk/system/files/docs/2017/08/certification_open_letter_2017.pdf

- 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 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 is dated 7 August 2018.⁷
- 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 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

⁷ The Commission's opinions can be found at: <https://ec.europa.eu/energy/en/topics/markets-andconsumers/market-legislation>

Commission invited Ofgem to “also *apply this approach to the senior officers controlling TSOs or their ultimate controllers*”. We note that two of Applicant’s senior officers 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 does not pose a risk of discrimination. We consider that the very small capacity of the GB generator, the fact that the solar array only connects directly to one final customer, and the limited role of OFTOs beyond the onshore transmission connection point mean that there is no realistic risk that the OFTO’s directors could discriminate in favour of the GB generation entity, and vice versa. In addition, the OFTO licensing regime provides significant disincentives for the Applicant’s senior officers to discriminate 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 TC Dudgeon as an OFTO does not own or operate the network beyond the connection point onshore, there appears to be no scope for a conflict of interest [...] not 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 TC Dudgeon.*”
- 5.6. The Commission confirmed that “*in the present case, and subject to the continued monitoring of future generation projects by Ofgem, a refusal of 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 our Government on 14 May 2018 in accordance with section 10B(3) of the Electricity Act. On 25 June 2018, our Government concluded that certifying the Applicant 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 7 Aug 2018.