

Anticipated acquisition by Telecom Plus plc of Electricity Plus Supply Limited and Gas Plus Supply Limited from Npower Limited

ME/6289/13

The OFT's decision on reference under section 33 given on 16 December 2013. Full text of decision published 20 December 2013.

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**Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.**

## **PARTIES**

1. **Telecom Plus Plc (TP)** is a public company registered in England & Wales and trades under the 'Utility Warehouse' brand. The company provides multi-utility services to domestic customers and small and medium-sized enterprises (SMEs). TP resells a range of utilities, including fixed line telephony, fixed line broadband, mobile telephony, gas and electricity as a bundle with the customer receiving a single bill. Telecom Plus holds a 20 per cent share holding in Opus Energy Group Limited (Opus),<sup>1</sup> an electricity and gas supplier to SME customers in the UK.
2. **Electricity Plus Supply Limited (EP)** and **Gas Plus Supply Limited (GP)** (together the '**targets**') were previously owned by TP and sold to Npower Limited in 2006.<sup>2</sup> The targets are used by Npower Limited as the exclusive vehicle for the retail sale of electricity and gas to domestic customers and SMEs who have been introduced by TP. Customers currently purchase their electricity and gas from the targets under the 'Utility Warehouse' brand.
3. **Npower Limited (Npower)** is a wholly owned subsidiary of RWE AG (RWE). Npower supplies gas, electricity and related services to UK residential and

<sup>1</sup> The other shareholders are Opus staff (50 per cent) and GDF SUEZ (30 per cent).

<sup>2</sup> 'Anticipated acquisition by Npower Limited of the electricity and gas businesses of Telecom Plus plc.' OFT, ME/2221/06, 19 April 2006.

business customers. Affiliates of Npower within the RWE Group operate and manage a portfolio of power stations. Npower holds a 0.6 per cent shareholding in TP.

## **TRANSACTION**

4. The transaction was announced on 20 November 2013. Under the transaction TP will purchase the entire issued share capital of EP and GP from Npower pursuant to a share purchase agreement (SPA) for a consideration of £218 million.
5. The parties notified the Office of Fair Trading (OFT) of the proposed acquisition on 20 November 2013 by way of a Statutory Merger Notice. The statutory deadline for the OFT to make a decision in this case is Tuesday 17 December 2013.

## **JURISDICTION**

6. A relevant merger situation arises when two or more enterprises cease to be distinct and either the UK turnover test or the share of supply test set out in section 23 of the Enterprise Act 2002 (the Act) is met.
7. The parties raised two points in relation to the question of jurisdiction. First, that the targets do not constitute enterprises as they constitute only the supply licences and customer contracts; no employees, billing or back office functions will be included in the transaction since these functions are already performed by TP (they were retained by TP at the time of the 2006 transaction). Second, the parties argue that the transaction does not constitute a merger qualifying for investigation because TP already has control over EP and GP and that, as a result of the transaction, there will be no substantive changes over the key parameters of competition.
8. The OFT has carefully considered the parties' arguments. The OFT notes that the targets are wholly owned subsidiaries of Npower. While the targets (or Npower) hold the relevant licences to supply energy to retail customers and the customer contracts are with the targets (that is, ultimately Npower/RWE), TP manages the relationship with EP and GP customers under the 'Utility Warehouse' brand. This means that the energy supplied to the target's customers is sold under the 'Utility Warehouse'

brand. On behalf of EP and GP, and under the terms of a Management Services Agreement (MSA), TP prepares and issues invoices to customers, collects payments and ensures the compliance with the licence obligations. TP sets the retail price for EP and GP to customers subject to Npower having control over the permitted range of prices. The electricity and gas itself is supplied by Npower.

9. This arrangement for delivering energy has been in place since the 2006 transaction. In effect, the sale of EP and GP to Npower in 2006 created a joint venture with TP and Npower acting as partners to operate the enterprises. The OFT therefore considers, on this basis, that the targets are components of an enterprise albeit with the other components already being contributed by TP prior to the transaction.
10. Whilst the OFT has not needed to conclude on the level of control TP currently has over the joint enterprise, it considers that the acquisition by TP of EP and GP represents an increase in control from the pre-merger situation. Accordingly the requirements of section 26(4) of the Act are satisfied.
11. For the year ending 31 December 2012, the combined turnover of the targets was £439 million. The turnover test in section 23(1)(b) of the Act is therefore satisfied.
12. The OFT therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

## **RATIONALE FOR THE MERGER**

13. The parties submit that the transaction is the result of regulatory changes. On 27 August 2013, Ofgem published a decision to modify domestic gas and electricity supplier licenses to give effect to 'Simpler Tariff Choices'.<sup>3</sup> This will oblige suppliers to offer no more than four 'core' tariffs per fuel (gas or electricity) for each payment type (for example, direct debit, pre-

<sup>3</sup> 'The Retail Market Review – Implementation of Simpler Tariff Choices and Clearer Information', Ofgem decision published on 27 August 2013. See at: [www.ofgem.gov.uk/sites/default/files/docs/decisions/the\\_retail\\_market\\_review\\_-\\_implementation\\_of\\_simpler\\_tariff\\_choices\\_and\\_clearer\\_information.pdf](http://www.ofgem.gov.uk/sites/default/files/docs/decisions/the_retail_market_review_-_implementation_of_simpler_tariff_choices_and_clearer_information.pdf)

payment meter) from 1 January 2014. Npower and TP have told the OFT that the merger is to enable EP and GP customers to continue to be supplied on their existing tariffs.

## **MARKET DEFINITION**

14. The European Commission (the Commission) and the OFT have examined a number of mergers relating to the energy market including the supply of electricity and gas.<sup>4</sup>

### **Product scope**

15. EP and GP are active in the retail supply of electricity and gas in Great Britain (GB). TP is active in these markets to the extent that it manages the operations of EP and GP, pursuant to the MSA. TP also holds a minority shareholding of 20 per cent in Opus, that supplies electricity and gas to SMEs.
16. Previous cases have generally considered the retail supply of gas and the retail supply of electricity to form separate product markets. Although a proportion of customers have dual fuel contracts, this varies between suppliers, reflecting their activity in offering these types of contracts. In Npower/Telecom Plus the OFT left open the possibility that there was a combined retail gas and electricity supply market for domestic customers.<sup>5</sup>
17. The OFT and the Commission have also distinguished between type of customer. For the retail of electricity, separate markets have been defined for domestic customers, small and industrial (I&C) customers that acquire electricity at non-half hourly (non-HH) rates and large I&C customers that acquire electricity at half hourly (HH) rates.<sup>6</sup> For the retail of gas, separate markets have been defined for domestic, small I&C customers and large industrial customers.<sup>7</sup>

<sup>4</sup> 'Anticipated acquisition by Npower Limited of the electricity and gas businesses of Telecom Plus plc', OFT, ME/2221/06, 11 May 2006; 'Anticipated acquisition by Centrica of 20 per cent of Lake Acquisitions', OFT, ME/4133/09, 7 August 2009; EDF/British Energy, COMP/M.5224, 22 December 2008; EDF/British Energy, COMP/M.5224, 22 December 2008.

<sup>5</sup> 'Anticipated acquisition by Npower Limited of the electricity and gas businesses of Telecom Plus plc', OFT, ME/2221/06, 11 May 2006.

<sup>6</sup> OFT, Anticipated acquisition by Centrica of 20 per cent of Lake Acquisitions, ME/4133/09, 7 August 2009, para 21; EC, EDF/British Energy, COMP/M.5224, 22 December 2008, para. 87.

<sup>7</sup> EC, Gaz de France/Suez, COMP/M.4180, 14 November 2006, para. 63.

18. The OFT has assessed the current merger on the following basis:
- i. the supply of electricity to domestic customers
  - ii. the supply of gas to domestic customers
  - iii. the supply of electricity to small I&C customers, and
  - iv. the supply of gas to small I&C customers.
19. The OFT considers that it is not necessary to reach a final view on the scope of any relevant frame of reference because, even when considered on a narrow disaggregated basis, no competition concerns arise. In adopting this cautious approach, the OFT has not considered it necessary to also assess the merger on the basis of the supply of dual fuel to domestic or small I&C customers.

### **Geographic scope**

20. The OFT notes that Ofgem grants electricity and gas supply licences that cover GB. During its investigation, competitors told the OFT that marketing strategies are usually conducted on a national basis, although electricity prices may vary between regions reflecting differences in transmission and distribution charges. One competitor also commented that it may adjust its pricing to reflect the market presence of other suppliers in different regions.
21. In previous decisions the OFT considered it likely that the geographic scope of these supply markets to be GB-wide, although it did not consider it necessary to conclude on this issue.<sup>8</sup> No evidence presented to or collected by the OFT suggested that it should depart from this approach. Consequently, the OFT has assessed the merger on a GB-basis.

## **HORIZONTAL ISSUES**

### **Shares of supply**

22. The parties provided share of supply estimates based on volumes of electricity and gas supplied to domestic customers and these are set out in the table below. The principal companies active in both markets, and which

<sup>8</sup> OFT, Anticipated acquisition by Centrica of 20 per cent of Lake Acquisitions, ME/4133/09, 7 August 2009, para 25.

account for 97 per cent of supply, are the 'Big Six' suppliers. As a consequence, the targets' market share does not exceed 1.3 per cent in the supply of electricity or gas. Apart from the management of the EP and GP activities, TP has no separate activities on this market. As a result, the transaction does not result in an increment in the retail supply of electricity or the retail supply of gas to domestic customers.

**Table 1 – Estimated shares of supply of electricity and gas to domestic customers in GB (12 months to 31/10/12)**

Supplier	Electricity (%)	Gas (%)
British Gas	25.4	40.1
EDF	13.2	8.9
Eon UK	16.7	13.4
RWE Npower	12.7	10.5
Scottish & Southern	18.2	15.3
Scottish Power	10.9	8.7
<b>The targets</b>	<b>1.3</b>	<b>1.3</b>
Others	1.7	1.7
Totals	100.0	100.0

Source: Cornwall Energy

23. With regard to TP's shareholding in Opus, the OFT notes that Opus supplies electricity and gas to small I&C customers in competition with the 'Utility Warehouse' brand. Opus supplies around 150,000 UK sites. The parties submit that TP has no material influence over Opus' corporate strategy under Opus shareholder agreements.
24. The OFT notes the parties' comments but, on a cautious basis, has considered the impact of the transaction on the supply of electricity and the supply of gas to small I&C customers. On the assumption that TP could influence Opus' policy such that it would be regarded as part of TP's undertaking for the purposes of the transaction, the overlap between Opus and the targets is minimal. At the narrowest level, Opus and the targets would overlap in the retail supply of electricity and gas to small I&C customers.
25. The parties submit that in practice there is little customer overlap as Opus tends to sell to the relatively larger, multi-site customers and TP sells to

small, single site customers. The parties estimate that a TP/Opus entity would have a share of supply of [0-five] per cent (increment of [0-five] per cent) of the retail supply of gas to small I&C customers and [five-10] per cent (increment of [0-five] per cent) of the retail supply of electricity to small I&C customers.

26. Given the limited increments and the fact that the targets and Opus are not considered to be close competitors, the OFT does not consider that the merger raises concerns over unilateral effects in the retail supply of electricity or the retail supply of gas to small I&C customers.

### **Barriers to entry and expansion**

27. The OFT received a number of comments from third parties who indicated that there are high costs of entry into the electricity retail market. In particular, competitors identified the need to establish a billing infrastructure and systems together with having a sufficient credit-rating to participate in the industry codes and to purchase energy.
28. However, as the merger does not raise competition concerns, the OFT has not needed to conclude on the strength of barriers to entry and expansion in the retail supply of electricity or the retail supply of gas to domestic and I&C customers.

### **Buyer power**

29. As the transaction does not raise competition concerns, it has not been necessary for the OFT to conclude on the extent of buyer power post merger.

### **VERTICAL ISSUES**

30. Post-merger, Npower will continue to supply wholesale electricity and gas to EP and GP through a Supply and Services Agreement. The terms of this agreement are such that Npower will supply [ ] of TP's energy requirements [ ] and [ ].
31. Whilst a number of third parties commented that these types of contracts are relatively common in the industry, others raised concerns, specifically, [

] liquidity in the wholesale market. The OFT notes these comments but in relation to this specific case, the OFT considers that there will be no merger effect as Npower currently supplies electricity and gas to the targets and will continue to do so post merger.

32. The OFT therefore does not consider that the transaction raises vertical concerns.

### **THIRD PARTY VIEWS**

33. The OFT contacted a range of third parties during the course of its investigation including competitors, customers, independent wholesalers and the industry regulator, Ofgem. In general, third parties were not concerned about the merger, with a number commenting that it represented little change from the current position.

### **ASSESSMENT**

34. EP and GP are active in the retail supply of electricity and gas to domestic and small I&C customers in Great Britain (GB). TP is active in this market to the extent that it manages the operations of EP and GP via a Management Services Agreement with Npower. Additionally, TP holds a minority shareholding of 20 per cent in Opus, which supplies electricity and gas to SMEs.
35. The merger has been assessed on the basis of the supply of (i) electricity to domestic customers, (ii) gas to domestic customers, (iii) electricity to small I&C customers, and (iv) gas to small I&C customers, in GB. Given the low shares of supply of EP and GP, the fact that the targets and Opus are not considered to be close competitors and the lack of third party concerns, the OFT does not consider that the merger raises concerns over unilateral effects on any of the relevant frames of reference identified.
36. In addition, the OFT considers that there will be no merger effect resulting from the long term supply agreement between Npower and TP as Npower currently supplies electricity and gas to the targets and will continue to do so post merger.



37. Consequently, the OFT does not believe that it is or may be the case that the merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

## **DECISION**

38. This merger will therefore **not be referred** to the Competition Commission under section 33(1) of the Act.

## **ENDNOTE**

1. With reference to paragraph 13, the parties clarified that Npower and TP told the OFT that the merger is to enable TP and Npower to each provide their own separate four tariffs to their respective customers. This clarification has no impact on the OFT's conclusions in this case.