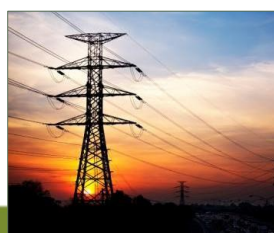


Final decision on certification of Belfast Gas  
Transmission Ltd. required under Article 10 of  
Directive 2009/73/EC and Article 3 of  
Regulation (EC) No. 715/2009

26 July 2013



## About the Utility Regulator

The Utility Regulator is the independent non-ministerial government department responsible for regulating Northern Ireland's electricity, gas, water and sewerage industries, to promote the short and long-term interests of consumers.

We are not a policy-making department of government, but we make sure that the energy and water utility industries in Northern Ireland are regulated and developed within ministerial policy as set out in our statutory duties.

We are governed by a Board of Directors and are accountable to the Northern Ireland Assembly through financial and annual reporting obligations.

We are based at Queens House in the centre of Belfast. The Chief Executive leads a management team of directors representing each of the key functional areas in the organisation: Corporate Affairs; Electricity; Gas; Retail and Social; and Water. The staff team includes economists, engineers, accountants, utility specialists, legal advisors and administration professionals.

### Our Mission

Value and sustainability in energy and water.

### Our Vision

We will make a difference for consumers by listening, innovating and leading.

### Our Values

Be a best practice regulator: transparent, consistent, proportional, accountable, and targeted.

Be a united team.

Be collaborative and co-operative.

Be professional.

Listen and explain.

Make a difference.

Act with integrity.

## Abstract

We are publishing our final decision on the certification of Belfast Gas Transmission Ltd. (BGTL) as required under Article 10 of Directive 2009/73/EC and Article 3 of Regulation (EC) No. 715/2009.

This paper sets out the Utility Regulator's final decision to certify BGTL as a fully ownership unbundled entity (FOU). It is divided into four sections, the first section is the introduction, the second section summarizes the Regulator's preliminary decision to certify BGTL as FOU; the third section reviews the issues raised by the Commission in their opinion; and the fourth section sets out the Regulator's final decision on certification taking the utmost account of the Commission's opinion.

## Audience

Industry, consumers & statutory bodies.

## Consumer impact

The certification of BGTL as fully ownership unbundled will ensure that the benefits of the Directive are realized in Northern Ireland.

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# 1. Introduction

- 1.1. The 3<sup>rd</sup> Internal Markets in Gas Directive (Directive 2009/73/EC) requires that Transmission System Operators (TSOs) are unbundled from production and supply interests. The Directive provides for four models of unbundling: Full ownership unbundling (FOU), Independent System Operator (ISO), Independent Transmission Operator (ITO) and ITO plus under Article 9(9). A TSO must be certified under the Directive and a number of grounds for certification are provided for in the domestic legislation implementing the Directive.<sup>1</sup>
- 1.2. On 27<sup>th</sup> March 2013 the Utility Regulator submitted to the European Commission its Preliminary Decision to certify Belfast Gas Transmission Limited (BGTL) as fully ownership unbundled (FOU) pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC.
- 1.3. The European Commission adopted its opinion on the 23<sup>rd</sup> May 2013 but this was not received until the 28<sup>th</sup> May. In accordance with Article 3(2) of Regulation (EC) No. 715/2009 (the Gas Regulation), the Utility Regulator must adopt its final decision regarding the certification of BGTL, taking the utmost account of the Commission's opinion, by 28<sup>th</sup> July 2013. This decision must be published alongside the Commission's opinion.
- 1.4. This paper sets out the Utility Regulator's final decision to certify BGTL as a fully ownership unbundled entity under Articles 9 and 10 of the Directive and Article 3(2) of the Gas Regulation. The paper is divided into four sections, the first section is the present introduction, the second section summarises Utility Regulator's preliminary decision to certify BGTL as FOU; the third section reviews the issues raised by the Commission in their opinion; and the fourth section sets out the Regulator's final decision on certification taking the utmost account of the Commission's opinion.

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<sup>1</sup> The Gas and Electricity (Internal Markets) Regulations (Northern Ireland) 2013. These Regulations did not provide for the ITO plus model to be applied to gas in Northern Ireland.

## 2. Summary of Utility Regulator Preliminary Decision

- 2.1. The intention behind the fully unbundled model (FOU) is that the transmission system is required to be owned and operated by an undertaking that is completely independent from electricity generation, gas production and/or supply interests.
- 2.2. In order to be certified as FOU an applicant must meet the tests for FOU. The legal tests required are set out in section 8G of the Gas (Northern Ireland) Order 1996. All five tests must be passed.
- 2.3. In the preliminary decision for BGTL the Utility Regulator concluded that each of the five tests was passed. We consider each test below.

### ***Utility Regulator assessment against the tests in the Gas Order***

- 2.4. **First test in section 8G(2) of the Gas Order** 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 exercise any shareholder rights it holds, or becomes the holder of, in relation to a relevant producer or supplier.
- 2.5. We considered that the first part of the first test is passed as there are no shares held by BGTL and no companies controlled by BGTL. Similarly the second part of the first test is passed as BGTL has no shareholdings. In respect of the third part of the test, BGTL submitted an undertaking that it will not exercise any shareholder rights it holds, or becomes the holder of, in relation to a relevant producer or supplier.
- 2.6. We therefore concluded that the first test was passed.

- 2.7. **Second test in section 8G(4) of the Gas Order** is that the applicant is not controlled by a person who controls a relevant producer or supplier.
- 2.8. The BGTL application set out the companies which directly or indirectly control BGTL. None of the subsidiary companies of Mutual Energy Limited (MEL) are a producer or supplier. There are no other companies controlled by any of the MEL group of companies other than those set out in the application. MEL itself is a private company limited by guarantee. This concept means that MEL has no share capital and therefore no shareholders. For these reasons BGTL is not controlled by anyone who controls an undertaking performing any of the functions of production, generation or supply.
- 2.9. We therefore concluded that the second test is passed.
- 2.10. **Third test in section 8G(6) of the Gas Order** is that the applicant is not controlled by a person who has a majority shareholding in a relevant producer or supplier.
- 2.11. BGTL submitted evidence of shareholdings for companies in the MEL group which demonstrated that none of the companies have any shares in companies outside the group. Also as part of the application process we sought additional information on the activities of BGTL directors and received information on relevant shareholdings. From this information we concluded that BGTL is not controlled by a person who has a majority shareholding in a relevant producer or supplier.
- 2.12. We therefore concluded that the third test is passed.
- 2.13. **Fourth test in section 8G(12) of the Gas Order** 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 a relevant producer or supplier other than an electricity generation or supply undertaking; or
  - (b) has a majority shareholding in a relevant producer or supplier other than a electricity generator or supply undertaking.
- 2.14. The BGTL Articles of Association indicate that the members of MEL have the power to appoint or remove BGTL's directors by ordinary resolution. It can also

be seen from the BGTL application that the Directors of BGTL are also the Directors of MEL.

2.15. There are at present 32 members who each have one vote each. Resolutions must be carried by simple majority and in the case of an equality of votes at a General Meeting the Chairman of the Board of Directors will have the casting vote. Members rights are outlined in the companies constitution and do not include a right of veto. In addition the members' policy obliges the members not to have any conflicts of interest and to declare if there are any interests which may be viewed as a conflict. Any connection with a producer or supplier would be covered by this requirement and no member has made any declaration of connection of a producer or a supplier. From this information we have concluded that none of the Members either controls or has a majority shareholding in a relevant producer or supplier.

2.16. We therefore concluded that the fourth test is passed.

2.17. **Fifth test in section 8G(13) of the Gas Order** is that where the applicant is a company, partnership or other business, none of its senior officers is also a senior officer of a relevant producer or supplier other than an electricity generation undertaking or electricity supply undertaking.

2.18. As part of the BGTL application information was provided on the appointments of each of its Directors. We sought supplementary information from BGTL on the appointments of some of its Directors. From this we concluded that none of BGTL's Directors is also a senior officer of a relevant gas producer or supplier.

2.19. We therefore concluded that the fifth test is passed.

#### 2.20. Overall conclusion of Assessment

On the basis of this assessment the Regulator concluded in its preliminary decision to the European Commission on 27<sup>th</sup> March 2013 that BGTL meets the five tests set out in the Gas (Northern Ireland) Order 1996.



## ***Detailed issues considered***

2.21. There were a few detailed issues considered in the preliminary decision and these are summarized below.

### Contracting of Control room services

2.22. BGTL currently subcontracts out certain routine tasks to 3rd parties such as maintenance and grid control. The preliminary decision therefore examined the compatibility of sub-contracting with the Directive requirements. In particular we considered:

- a) The compatibility of sub contracting with the Directive requirements in Article 9 and 13; and
- b) Whether BGTL has put appropriate measures in place to ensure the confidentiality of its information seen by staff in the control room.

2.23. We concluded that the sub-contracting of the physical tasks relating to operation of the transmission system is compatible with the requirements of the Directive, so long as BGTL retains overall control over the activities that are sub-contracted.

2.24. In relation to confidentiality we considered the arrangements in place and proposed for control room services to ensure that the security and confidentiality of data in the control room is appropriately safe guarded. We stated that we would review again the arrangements in place in advance of our final decision. In addition we stated our intention to place new licence requirements on BGTL and all other TSOs. Firstly where they contract for services then the licensee must put appropriate contractual measures in place to ensure the confidentiality and security of the licensees information and to ensure the licensee ongoing compliance with the Directive. Secondly a licence requirement on all TSOs to inform us if anything relevant to their certification changes.

### Independence of Directors

- 2.25. Another issue given detailed consideration in the preliminary analysis was the independence of BGTL Directors. We sought additional information from BGTL on the appointments its Directors may hold in any other undertaking and assurances that none of these undertakings is a gas undertaking which is a relevant producer or supplier.
- 2.26. The unbundling provisions of the Directive are implemented in Northern Ireland by Articles 8B-8L of the Gas Order, which among other things, provide that a relevant person (in this case BGTL) cannot be certified as FOU if any of its senior officers is also a senior officer of a relevant producer or supplier other than an electricity generation undertaking or electricity supply undertaking.<sup>2</sup> In order to be considered as a relevant producer a gas producer must carry out its production activity in a European Economic Area (EEA) state and have a relationship with the applicant for certification which the Utility Regulator thinks may lead the applicant to discriminate in favour of it.<sup>3</sup>
- 2.27. One of BGTL's directors is a non-executive director in a company with connections in the energy industry related to the Corrib gas field. The company is established in the Republic of Ireland but has no activities in Northern Ireland.
- 2.28. Having considered all the relevant information we concluded that the company is not a relevant gas producer as BGTL does not have a relationship with it which may lead the applicant to discriminate in favour of it. Consequently, the requirements of Article 9(1)(d)<sup>4</sup> are met.

#### Moyle Energy Investments Ltd.

- 2.29. The third issue given detailed consideration in the preliminary decision was Moyle Energy Investments Limited. This company is owned by Mutual Energy Limited and is intended to be the vehicle for acquiring and holding other energy assets and investments. The Regulator requested additional information in order to clarify the nature of these investments.

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<sup>2</sup> Article 8G(13) of the Gas (Northern Ireland) Order 1996.

<sup>3</sup> Article 8L(4) of the Gas (Northern Ireland) Order 1996.

<sup>4</sup> Article 9(1)(d) states that the same person is not entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of production or supply and a transmission system operator or transmission system.

2.30. After examination the Regulator considered that BGTL's satisfaction of the requirements of Article 9 in respect of ownership unbundling was not impaired by the activity of Moyle Energy Investments Limited. It was however considered necessary to ensure continued compliance that BGTL provide an undertaking to provide assurance that the requirements of certification on the grounds of full ownership unbundling are sustained in future. This will also assist in fulfilling BGTL's proposed licence obligation to ensure continued compliance with the requirements of certification. The licence will also specifically require BGTL to notify the Utility Regulator of any change in circumstance or any transaction which may require a reassessment of whether the grounds on which BGTL is certified continue to apply.<sup>5</sup>

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<sup>5</sup> See proposed condition 2.14.4 of BGTL's licence.

### 3. European Commission's Opinion

3.1. Pursuant to Article 3(2) of the Gas Regulation, the Utility Regulator is required to take “utmost account” of the Commission’s opinion in reaching its final certifications decisions. We have summarized the Commission’s opinion below but it is also published alongside this document. In this section we have set out how we have taken “utmost account” of the Commission’s opinion in reaching our final decision on certification. We have used the headings in the Commission’s opinion.

#### ***Conflicted Directors***

3.2. The European Commission in its opinion did not agree that all of BGTL’s directors met the requirements of Art. 9(1)(d). They considered that any director with an interest in the Corrib gas field inevitably faces a conflict of interest given the scale of the field and its proximity to Northern Ireland.

3.3. The Commission’s opinion therefore invites the Utility Regulator to verify that all of BGTL’s directors fully meet the requirements of Art. 9(1)(d).

#### Utility Regulator response

3.4. In light of the Commission’s opinion we carefully re-considered the interest that one of BGTL’s directors has in the Corrib gas field and concluded that the director concerned must step down as a BGTL Director in order for the Utility Regulator to certify the TSO as meeting the fully ownership unbundling requirements.

3.5. We have received confirmation that the Director concerned has resigned from the BGTL board.

3.6. We believe that this will effectively resolve the issue raised by the Commission.

## ***Contracting out of TSO services***

- 3.7. In relation to subcontracting the opinion states that this is acceptable in two cases – where the transmission system is operated jointly as part of a wider transmission system or if a fully resourced TSO makes an independent decision to sub-contract on efficiency grounds.
- 3.8. The Commission encourages the Utility Regulator to “*verify that this is the case and to ensure that each tender to provide TSO services has been fully evaluated against the potential of carrying out those functions in house and that the TSO has all the necessary resources to effectively oversee, control and provide instructions to the subcontractor.*”

### Utility Regulator response

- 3.9. In response to the Commission’s opinion Utility Regulator consider that the TSO should institute a process before any tender commences which explicitly considers the option of carrying out the activity in-house. This should be encapsulated in a business case for the tender considered by the company’s Board in good time to facilitate the option of carrying on the activities in-house, such as the recruitment of staff or the leasing of suitable premises or equipment.
- 3.10. Licence conditions allow us to review BGTL’s operating expenditure in particular to verify that their proposed operating expenditure is reasonable. These reviews consider whether BGTL is undertaking its obligations in the most efficient way. We will therefore check that the process above is in place as part of the next operating expenditure review that we undertake under BGTL’s licence. The next review will commence in 2014.
- 3.11. Furthermore, we fully agree with the Commission that BGTL should have sufficient resources to oversee, control and provide instructions to the subcontractor. This is already the case: we considered the resources available to BGTL at the last operating expenditure review in 2012 and which covered the period to September 2014. We will check that this remains the case on an ongoing basis as part of the operating expenditure reviews that we undertake

under BGTL's licence every three years. As above the next review will commence in 2014.

3.12. In relation to the unbundling requirements we have reviewed our analysis of the relationship between BGTL and its subcontractors to ensure that this would meet the requirements around 'control' in Article 9 of the directive. None of the contractors or proposed contractors have or will have any right under the sub-contract or otherwise (i.e. as a consequence of it) to exercise any control or right over BGTL or over the transmission system. Similarly BGTL (or any company within its group) has no right either under the sub-contract or otherwise to exercise any control or right over any of its subcontractors.

3.13. We will also put in place a new licence condition which ensures the confidentiality of information. Current and future contracts will be covered by the licence requirement to include provisions to maintain the confidentiality of information.

### ***European Renewable Energy Fund Ltd. Partnership***

3.14. The Commission agrees with the Utility Regulator that the investments by MEL in the European Renewable Energy Fund Ltd. Partnership :

*“do not constitute a barrier to the certification of PTL/BGTL as the interest of MEL is essentially confined to a financial interest in an investment fund and MEL does not exercise, directly or indirectly, either rights or control in any of the renewable energy undertakings, thus meeting the requirements of Article 9(1).”*

#### Utility Regulator response

3.15. There are no issues to consider further at this stage.

## 4. Final Decision on Certification

4.1. In accordance with Article 3(2) of Regulation (EC) No 715/2009, the Utility Regulator's final decision is to certify BGTL as a fully ownership unbundled transmission system operator. This certification will take effect from the same date as the licence modifications to implement the fully ownership unbundled model take effect. They will take effect from the date published in a notice on our website once the Department has given its consent to the modifications.

4.2. We will monitor BGTL's ongoing certification as required by the Directive.

4.3. In particular BGTL must do the following to maintain their certification and we will check that these actions have been carried out:

- BGTL must put in place processes to ensure that before any tender commences for the sub-contracting of TSO services, the option of carrying out the activity in-house is explicitly considered. The aim is to ensure that the services are carried out in the most efficient way possible – whether in-house or sub contracted. We will monitor the implementation of this process through the normal operating expenditure review processes for BGTL;
- BGTL must ensure that at all times they have all necessary resources to effectively oversee, control and provide instructions to the subcontractor. We will monitor this through the normal operating expenditure review processes for BGTL
- Implement proposed new licence condition 2.14 by means of appropriate contractual clauses and keep these in effect.