

Roisin McLaughlin
Northern Ireland Authority for Utility Regulation,
Queens House,
14 Queens St.,
Belfast BT1 6ED

17th June 2013

Re: Consultation on Licence modifications to implement the fully ownership unbundled model in the gas transmission licences

Dear Roisin,

BGE(UK) welcomes the opportunity to respond to NIAUR on “Consultation on Licence modifications to implement the fully ownership unbundled model in the gas transmission licences” (the Consultation).

We look forward to progressing in due course our application for Full Owner Unbundling as the sale of BG Energy progresses – this will in time supersede our current ITO certification application that NIAUR are currently considering.

We wish to make the following comments on the proposed new conditions based on the fact that the modifications eventually decided on for the Fully Ownership Unbundled (FOU) model are also likely to be appropriate for inclusion in the licence of any gas TSO certified as FOU.

We have reviewed the proposed Licence Conditions in the context of both the Directive and the Gas and Electricity (Internal Markets) Regulation (Northern Ireland) (the “Regulations”).

We note (1.15) that the licence modifications proposed can only be finalised once the Commission’s opinion is received and may need to be reviewed as a consequence. We agree. Naturally, and as required by the Internal Market in Gas Directive, national regulators are to consult and co-operate with each other, and any final licence modifications must be drafted in a way that ensures regulation consistent with the approach taken by the Commission and, so far as possible, the relevant national regulators, NIAUR, CER and Ofgem. In these circumstances BGE (UK) reserves the right to comment on any further proposed modifications or variations to the proposed modifications in due course. It follows that nothing in this response should be taken as acceptance by BGE(UK) of any of the modifications suggested in the consultation. To do so would be premature as such. Any modifications must be considered in the context of the relevant factual and regulatory background in place at the time.

Specific comments relating to Chapter 2 FOU required conditions

Amendments to condition 1.5

With respect to condition 1.5.1 (b), we have a concern regarding the existing language. We respectively suggest that the obligation appears to be on the licensee to procure that protected information is not used by any other person for the reasons as identified in 1.5.1(b). This would appear to oblige the licensee to take action against a third party to secure the non-utilisation of protected information.

Specific comments relating to New Condition 2.12 Independence of the Licensee

- 2.12.2(d) *any Energy Business may not use or have access to:*
- (i) *premises or parts of premises occupied by persons engaged in the management or operation of the Authorised Business;*
 - (ii) *systems for the recording, processing or storage of data to which persons engaged in the management or operation of the Authorised Business also have access;*
 - (iii) *commercially sensitive or confidential information relating to, or derived from, the Authorised Business;*
 - (iv) *equipment, facilities or property employed for the management or operation of the Authorised Business; or*
 - (v) *the services of any persons who are (whether or not as their principal occupation) engaged in the management or operation of the Authorised Business;*

BGE(UK) would appreciate if NIAUR could clarify that 2.12.2(d) shall not for example, on a practical level, prohibit access by an Energy Business (i.e. supplier/shipper) to premises or systems of the TSO for the purpose of conducting legitimate licensed activities e.g. pursuant to the Network Code.

2.12.2 (f) *in so as far as it is legally possible, prevent any person who has ceased to be employed by the Authorised Business from being employed by, or engaged in the activities of, any Energy Business which, at any time in the six months prior to the date that the person ceased to be employed by the Authorised Business was an affiliate or related undertaking of the Licensee, until the expiry of an appropriate time from the date on which he ceased to be engaged by the Authorised Business.*

The drafting of paragraph 2.12.2 (f) is unclear, e.g. as to the timings involved, and would benefit from restructuring.

2.12.3 Undertaking

The Licensee shall procure that the Ultimate Holding Company of the Licensee shall deliver to the Authority not later than seven days after the date on which this Condition comes into full force and effect, a legally enforceable undertaking from the Ultimate Holding company in favour of the Authority, which is expressed to remain in force for so long as the Licensee remains the holder of the Licence, in which the Ultimate Holding Company undertakes to the Authority that it shall refrain, and shall procure that each other Holding Company of the Licensee shall refrain, from taking any action which would cause the Licensee to be in contravention of this Condition. "

The objectives of Article 9 can also be achieved through the obligations imposed on the licence holder without the necessity for the undertaking. If the ultimate holding company, or indeed any holding company, takes action which might cause or result in the licensee being in contravention of the condition the Authority has enforcement rights with respect to the licensee with respect to such contravention.

BGE (UK) notes that the proposed drafting for paragraph 2.12.3, is substantially different from the long standing GB and NI approach in the networks context. A precedent exists in GB and NI to deal with such issues primarily on a licensee/regulator basis i.e. at most an ultimate controller undertaking is secured in favour of the licensee. This allows for continued regulation via the licence relationship and does not necessitate a direct relationship with the ultimate controller. This approach would also be consistent with the Internal Market in Gas Directive.

It would be useful for BGE (UK) to understand NIAUR's preference for choosing to deviate from the GB and NI approach and we would welcome the opportunity to discuss this matter further.

BGE (UK) has also consulted its proposed "ultimate controller" about the proposed undertakings. Bord Gais Eireann ("BGE") has significant concerns about the proposal and its position is that under FOU there is no justification to extend liability to BGE.

BGE has invested significantly in infrastructure that benefits Northern Ireland. One basis on which it has invested is that Northern Ireland regulatory liability rests with BGE (UK) and the BGE (UK) licence was granted in 2002 on this basis.

Against this background, BGE has real difficulty in understanding why regulatory liability falls to be extended in the FOU context. FOU is the Commission's preferred approach, and is the least risk structure: given that under FOU no group company is involved in energy supply or power generation activities. If FOU is achieved the concerns about the involvement of a parent in commercial decisions about a networks subsidiary should reduce, in particular given that there is significant regulatory oversight of the decisions of the subsidiary.

Further, if a group changes its status from that of a Vertically Integrated Undertaking to FOU, (as is the declared public objective of BGE), obligations which constrain legitimate parental involvement fall to be reviewed from first principles, as critical regulatory policy concerns about vertical integration have been addressed.

If BGE is to be placed under significant additional liability, BGE will need to control that liability. As a consequence, in order to ensure that it does not breach the proposed undertaking BGE will need to take a greater and not a lesser interest in BGE (UK) operations.

An extension of liability will increase investor concern, at a time when it is accepted by the Commission and many others that network investment is essential. Under FOU the objective should be to simplify the regulatory background.

Any proposal to extend liability to BGE must be assessed against all relevant legal obligations. The proposal will have to be assessed against European, United Kingdom and Republic of Ireland requirements for corporate governance. It will also have to be assessed against European and Republic of Ireland energy regulatory requirements. None of these requirements can be discounted, in particular given the significant European law background.

The proposal must be assessed against BGE and group wide contractual obligations. BGE is funded and insured against a background that involves no direct liability for BGE (UK) regulatory requirements. BGE would have to fully review the impact of the acceptance of any such liability before accepting it.

In all the circumstances BGE will face real difficulty in accepting an extension of liability in this way and, as stated above, it is BGE's position is that under FOU there is no justification to extend liability to BGE.

2.12.4 Additional Definitions

BGE (UK) seeks clarification on the distinction between "Authorised Business" and "Licensed Business".

"Energy Business"

means any business that is involved in the generation or supply of electricity or in the production, purchase or supply of gas;

BGE (UK) would appreciate clarification that purchase or sale of gas (e.g. balancing actions) by the TSO is performance of TSO function and is not included in this definition.

BGE (UK) note that Storage is not included as part of the "Authorised Business" nor of the Energy Business, and we would suggest that Storage should be covered in some form or other.

Specific comments relating to New Condition 2.14

2.14.2 Sub-Contracting - General

Subject to paragraph 2.14.3, the requirement in paragraph 2.14.1 shall not prevent the Licensee from making contractual arrangements under which a third party carries out the activities of conveying gas through the Network or has contractual responsibility for operating, maintaining and developing the Network in accordance with the instructions of the Licensee.

BGE (UK) seeks clarity as to whether sub-contracting could be in whole or in part e.g. on the third line after carries out insert "some or all of" and on the fourth line after "the Network" insert "in whole or in part". Consequential changes should be made to clause 2.14.3.

2.14.3 Sub-Contracting - Terms and Conditions

Where the Licensee makes contractual arrangements under which a third party carries out the activities of conveying gas through the Network or has contractual responsibility for operating, maintaining and developing the Network in accordance with the instructions of the Licensee, the Licensee shall ensure that the contractual arrangements contain such terms and conditions which ensure:

In 2.14.3 at the end of paragraph the word "ensure" appears inappropriate – terms and conditions may provide or oblige a third party to act or not to act in a particular way. They cannot ensure that the party acts or does not act accordingly.

BGE (UK) looks forward to further engagement with NIAUR, as we work together with the other Regulatory Authorities in GB and ROI towards Third Directive Compliance and progress towards our application for Full Ownership Unbundling.

Yours sincerely



Brian Murphy

Regulation Manager

