

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

19<sup>th</sup> April 2013

### **IME3: Further Technical Modifications to Gas and Electricity Licences**

Dear Briege,

BGE (UK) welcomes the opportunity to respond to NIAUR on “Consultation on Further Technical Modifications to Gas and Electricity Licences” (the Consultation).

We wish to make the following comments on the proposed new Conditions for BGE (UK). 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”).

#### **Specific comments relating to 2.6**

Proposed new Paragraph:

*“Without prejudice to any other provision of this Condition, the Licensee shall, on request, give the Authority and/or the Department (as the case may be) access to the Licensee’s accounting records, policies and statements referred to in this Condition.”*

Currently, under Condition 1.2.7<sup>1</sup> of the BGE (UK) Gas Conveyance Licence, BGE (UK) is obliged to provide the Authority with a set of financial statements and auditor’s reports.

BGE (UK) believes that the above condition already satisfies the requirement of Article 30 of the Gas Directive, when combined with the Authority’s other existing powers to gather information.

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<sup>1</sup> BGE (UK) Gas Conveyance Licence Condition 1.2.7: The Licensee shall provide the Authority with a copy of each set of financial statements and auditor’s reports required under this Condition as soon as reasonably practicable and in any event not later than six months after the end of each financial year.

Based on the above BGE(UK), suggest that the proposed drafting of the new provision in the accounts section is already covered by the existing License condition and is not required.

We would also note that the proposed power is unfettered, whereas Article 10A(2)(c) of the 1996 Order as amended restricts the right of access to a specified purpose, viz ensuring compliance with the requirements of Article 31 of the Directive. Accordingly the proposed amendment steps significantly out with the scope of article 10A (2)(c). If the Authority insists on making this amendment then it should in our view as a minimum be qualified as follows:

*“Without prejudice to any other provision of this Condition, the Licensee shall, on request, give the Authority and/or the Department (as the case may be) access to the Licensee’s accounting records, policies and statements referred to in this Condition, provided that such request is made for the purpose of ensuring compliance with Article 31 of the Directive”*

The power should be restricted so that a licensee is not compelled to produce any documents which he could not be compelled to produce in civil proceedings in the High Court or any information which he could not be compelled to give in evidence in any such proceedings.

## Specific comments relating to 5.15

Proposed modifications:

### *“2.4A.1 Agreements for interoperability of systems*

*Where, under Article 10H of the Order or this Licence, the Licensee is designated as a transmission system operator or a distribution system operator (as the case may be), it shall enter into an agreement with any person holding a licence granted under Article 8(1)(a), 8(1)(b) or 8(1)(xx) of the Order to enter into an agreement relating to the interaction or interoperability of its Network with that person’s gas transmission system, gas distribution system, gas storage facility or LNG facility (as the case may be) such that will ensure the conveyance of gas in a manner compatible with the secure and efficient operation of both systems or facilities.*

### *2.4A.2 Minimum Requirements – Technical Rules*

*Each agreement entered into by the Licensee in accordance with Condition 2.4A.1 shall set out (either directly or by reference to a separate document) the Licensee’s technical design and operational requirements as applicable to the connection, interaction and interoperability between the relevant systems and/or facilities, which requirements shall be objective and shall not show any undue discrimination between persons or classes of person.”*

Article 8 does not expressly require agreements. In any event BGE (UK) questions whether this provision is workable. In particular:

- (i) Will the Article 8(1)(a), 8(1)(b) and 8(1)(xx) licensees also be required to enter into agreements in terms of their licences? If not BGE (UK) will be required to enter into an agreement with a person who is not under a like requirement. It is difficult to see how compliance can be achieved in such circumstances as agreements require the consent of both parties but there will be no compulsion on the proposed counter-party to agree. In any event an obligation to reach agreement is something that is inherently difficult to comply with. At most it would be reasonable to require the licensees to *offer* to enter into an agreement.
- (ii) The condition does not say what happens if the licensee does not enter into an agreement. This may be through no fault of its own, as an example the other licensee may adopt a position on material issues that is not acceptable to the licensee, acting reasonably.
- (iii) The objectives of the agreement should be clearer: as an example, the onus should not solely be placed on a transmission licensee to take steps to ensure compatibility etc. BGE (UK) believes that the Proposed modification for

Condition 2.4A.1<sup>2</sup> could imply that the Licensee would be solely responsible for the “secure and efficient operation of both systems or facilities.” That could have cost implications, ultimately for consumers.

- (iv) The interaction of this provision with the Network Code, and agreements under the Network Code, also require consideration. The risk is that a further layer of complexity is added to gas network arrangements.
- (v) What is the position as regards facility operators who are exempt? Exemptions for storage of gas are common in Great Britain.

On the drafting, we presume the reference to 10H is meant to be a reference to 8H. Is that correct?

### **Specific comments relating to 5.17**

BGE (UK) has no objection to the proposal, to modify Condition 2.4.2(b) of BGE (UK)’s licence to add sub paragraph (iv), to include the following provision:

*(iv) the technical safety criteria applicable to the operation of the Network;*

### **Specific comments relating to 5.19**

Section 5.19 (Costs & Benefits) states that:

*“The modifications will not impose any additional costs on the licensees unless and until a storage or LNG facility is built and licensed in Northern Ireland.”*

BGE (UK) believe that that there could potentially be costs associated with modifying the Connection Policy to take account of new licence conditions, and would like to clarify that such costs will be recoverable if Licensee updates its Connection Policy when its new licence is issued.

BGE (UK) would like to clarify that in the event of a storage or LNG facility being built and licensed in NI, how any additional Licensee costs be treated and that allowance will be given by the Authority for recovery of costs involved with regard to interaction or interoperability of such activity.

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<sup>2</sup> Where, under Article 10H of the Order or this Licence, the Licensee is designated as a transmission system operator or a distribution system operator (as the case may be), it shall enter into an agreement with any person holding a licence granted under Article 8(1)(a), 8(1)(b) or 8(1)(xx) of the Order to enter into an agreement relating to the interaction or interoperability of its Network with that person’s gas transmission system, gas distribution system, gas storage facility or LNG facility (as the case may be) such that will ensure the conveyance of gas in a manner compatible with the secure and efficient operation of both systems or facilities.

## Specific comments relating to 5.24

BGE(UK) previously requested further clarity on a proposed modification re Cross Border Capacity, in a consultation response (dated 8th November 2011) to NIAUR<sup>3</sup>, and commented that we are of the opinion that the Licence Condition should more closely reflect the language of Article 13 (2) of the Directive and should encompass more forms of co-operation than those which only concern the United Kingdom border.

Notwithstanding the above, NIAUR concluded that the new condition should be implemented without change.

The Proposed Modification drafting in Section 5.24:

*“Condition XX - Cross Border Capacity*

*Interconnected Networks*

*1. This Condition applies where any part of the Licensee’s Network is connected to a transmission pipe-line that is not wholly or mainly located in the United Kingdom (the Other Network).*

*Integration and Capacity Demand*

*2. Where this Condition applies, the Licensee shall, in developing, operating and maintaining the Licensee’s Network, ensure that it has sufficient capacity to:*

*(a) optimise integration between the Licensee’s Network and the Other Network; and*

*(b) accommodate all economically reasonable and technically feasible demands for cross-border capacity,*

*taking into account (in each case) security of gas supply.”*

The obligation to “optimise integration” is difficult to understand, and in our view, the types of steps required to optimise integration need to be described.

Article 13(2) of the Directive does not refer to optimisation. BGE (UK) does not understand the relationship between proposed licence condition paragraph 2(a) and Article 13(2), which contains no “optimisation” obligation. The requirements of 2(a) clearly exceed the requirements of Article 13(2), and (a) cannot be said to be required by Article 13(2). We cannot identify any power within the 1996 Order as amended, (Article 10A) which refers to this. Accordingly we cannot at present identify the Authority’s powers/vires to implement this change. Please set out the basis on which the Authority has the vires to make this change.

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<sup>3</sup> IME3: Proposed Amendments to the BGE(UK) Licence

It is also to be noted that Regulation 715/2009 on conditions for access to the natural gas networks (the Regulation), deals in some detail with matters such as the maximisation of capacity and the integration of transmission networks. The Regulation is directly effective. This amendment risks leading to inconsistencies with the 2009 Regulation and the various processes taking place under that Regulation.

We do not see Article 13(2) as being restricted as envisaged by the consultation. It involves an overly literal construction of “cross-border” capacity. It must, logically, include all transmission capacity that affects and accommodates cross border flows. It must therefore include the SNIP which would be relevant to cross-border flows between GB and Northern Ireland, and then on to continental Europe and/or ROI as the case may be. Properly understood an obligation to construct cross-border capacity must in our view include other transmission capacity in Northern Ireland, as any material increase in cross-border capacity will generally require deeper reinforcement. If it did not the objective of the Article would be frustrated. BGE (UK) seeks clarity on if this proposed modification also refers to the SNIP, and such other capacity.

Further, the 2009 Regulation, which is also relevant here, in the context of maximisation of capacity, is not restricted to connections between Member States; it applies equally in our opinion to transmission infrastructure within States.

The fact that this condition is drafted only to cover infrastructure directly connected to infrastructure in another Member State counter to the objectives and requirements of the Directive and the Regulation. Any optimisation and construction obligations should apply to all licensees equally.

As regards proposed licence condition paragraph 2 (b), there are a range of matters that need to be clarified in this context. As an example, the interaction between investment decisions/network development and capacity allocation is not presently clear. Plainly such a licence condition can only operate and apply to activities in Northern Ireland, however the reality is that cross-border investments engage other licensees in other jurisdictions, including the ROI and GB, and a licence condition such as this, on its own, does not address such matters.

## **Specific comments relating to 5.30**

BGE (UK) has no objection to the proposal (as outlined in paragraph 5.30) to introduce a new Condition 2.8A.

*“Condition 2.8A: Regional Co-operation*

*Application*

*This Condition shall apply where:*

*(a) any affiliate or related undertaking of the Licensee is carrying on the activities of an Associated Business; and*

*(b) the Licensee has, in conjunction with any Other Transmission System Operator, established an undertaking (the Joint Undertaking) for the purposes of engaging in Regional Cooperation.*

*Compliance Programme*

*Where this Condition applies the Licensee shall:*

*(a) use its reasonable endeavours to ensure that the Joint Undertaking prepares and submits to the Agency for its approval a compliance programme; and*

*(b) appoint a senior officer to act as compliance officer for the purpose of monitoring the Joint Undertaking’s compliance with the compliance programme.*

*Non-Discrimination*

*The compliance programme shall set out the measures the Joint Undertaking intends to take to ensure that it does not, in carrying on its activities :*

*(a) unduly discriminate as between any persons or class or classes of persons; or*

*(b) restrict, prevent or distort competition in the conveyance, storage, or supply of gas.*

*Definitions*

*In this Condition:*

*“Agency”*

*means the Agency for the Cooperation of Energy Regulators as established under Regulation (EC) 713/2009 of the European Parliament and of the Council.*

*“Associated Business”*

*means any business of any affiliate or related undertaking of the Licensee which is carrying out activities consisting of the production, conveyance, storage or supply of gas in any member state of the European Union*

;

*“Other Transmission System Operator”*

*means any person responsible for operating, maintaining and/or developing a gas transmission system in another member state of the European Union; and*

*“Regional Cooperation”*

*means the cooperation of transmission system operators at a regional level, in respect of such geographical areas as are defined in accordance with Article 12(3) of Regulation (EC) No. 713/2009 or as otherwise agreed between relevant transmission system operators, in respect of cross-border issues for the purpose of creating a competitive internal market, fostering consistency and facilitating integration.”*



## **Specific comments relating to 5.40**

BGE (UK) has no objection to the proposal (as outlined in paragraph 5.40)

*“Condition XX - Competition and Effective Functioning of the Market*

### *Publication of Information*

*1. The Licensee shall, in so far as it is consistent with its compliance with, and the efficient discharge of, its obligations under the Licence, publish such information as is held, available or known to it that will facilitate:*

- (a) effective competition between persons engaged in Northern Ireland in, or in commercial activities connected with, the conveyance, storage, and supply of gas; and*
- (b) the effective functioning of the gas industry in Northern Ireland.*

### *Duty not to restrict, distort or prevent competition*

*2. In carrying on the Licensed Business and in complying with its obligations under the Order, the Energy Order, the Gas Regulation and the Licence, the Licensee shall not restrict, distort or prevent competition in the conveyance, storage, and supply of gas.*

### *Additional Definitions*

*3. In this Condition:*

*Gas Regulation*

*means 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.”*

## Specific comments relating to 5.45

In accordance with the BGE(NI) Transportation Network Code, BGE(NI) continues as always, to act as and perform its obligations as a Reasonable and Prudent Operator (RPO).

The BGE(NI) Transportation Network Code definition for RPO differs from the proposed licence modification:

Proposed Modification :

*"Reasonable and Prudent Operator" or "RPO" means a person **acting in good faith with the intention of performing its obligations** under the Licence and who in so doing and in the general conduct of its undertaking, exercises that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be exercised by a skilled and experienced operator complying with applicable law and engaged in the same type of undertaking and under the same or similar circumstances and conditions*

BGE(NI) Transportation Network Code definition:

*"Reasonable and Prudent Operator" and its abbreviation "RPO" means a person **seeking in good faith to perform its contractual obligations** and, in so doing and in the general conduct of its undertaking, exercising that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected of a skilled and experienced operator complying with applicable law and engaged in the same type of undertaking and under the same or similar circumstances and conditions;*

BGE(UK) has no objection to the proposal (as outlined in paragraph 5.45) , but would suggest that the definitions in both the Transportation Network Code and licence are consistent.

## Conclusion

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.

Yours sincerely

A handwritten signature in black ink, appearing to read "PP Padraic O'Connell", enclosed in a light gray rectangular box.

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Padraic O'Connell

Head of Markets & Regulation