



11th January 2012

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Ref: Gas Storage Licence Consultation, 7 December 2011

Dear Richard

Bord Gáis Energy (BGE) and Storengy, a company of GDF Suez, welcome the opportunity to respond to the consultation by the Utility Regulator on a Gas Storage Licence (the “**Consultation**”). As you are aware BGE and Storengy are currently engaged in the process of investigating the feasibility of developing an underground salt cavern storage facility in Northern Ireland, approximately one mile underground in the Larne area, Co. Antrim, under the mineral prospecting licence granted by the Department of Enterprise Trade and Investment in September 2008.

We are pleased that the Utility Regulator is continuing with work to flesh-out the regulatory regime in respect of gas storage. We are also somewhat surprised that the Regulator expects to reach a decision by the end of January. There are a number of significant questions regarding the licence that require consideration and these should be clarified before it is finalised. Our response to the Consultation is structured as follows:

- Part 1 : Some general comments on the draft licence.
- Part 2 : Our response to the specific questions raised in the Consultation.
- Part 3 : Some additional comments on specific conditions of the draft licence.

Part 1

1. It is worth bearing in mind that the draft form of licence is intended (potentially) to apply to storage operators operating under very different core regulatory regimes, being rTPA, nTPA and no TPA. It is important that the conditions of the ultimate licence, and in particular “generic” standard conditions which are applicable to all operators, are appropriate to all such regimes. Operators should not have to seek modifications to standard conditions under

Article 14(1)(aa) of the Gas (Northern Ireland) Order 1996 where those standard conditions are not appropriate to the regulatory regime applicable to those operators in the first instance.

2. The standard conditions of the draft licence contain multiple provisions regarding the provision and protection of information by the storage operator (including Conditions 1.4, 2.1.3, 2.2.3(1)(b), 2.3, 2.4 and 2.7). These provisions should be subject to careful review (see Part 3 below) to avoid duplication, achieve greater clarity and avoid the application to operators of conditions inappropriate to the regulatory regime to which they are subject.

Part 2

1. **Does the proposed licence condition [Condition 2.2.2, Independence of Gas Storage Business] cover the requirements of Article 15 of the Directive?**

The proposed licence condition is not compatible with Article 15 of the Directive because it purports to apply to all licence holders which are part of a vertically integrated undertaking. Article 15 of the Directive applies only to storage operators of storage facilities that are technically and/or economically necessary for providing efficient access to the system for the supply of customers pursuant to Article 33 (i.e. facilities that are subject to rTPA or nTPA). Article 15 does not provide any basis to impose an unbundling obligation on licence holders which are not subject to the TPA under Article 33.

In addition:

- (a) the second paragraph of Condition 2.2.2 should be made subject to a qualification as follows:

“provided that this shall not preclude the existence of appropriate coordination mechanisms to ensure that the economic and management supervision rights of the parent company in respect of a return on assets within the limits envisaged by the Directive”; and

- (b) in the third paragraph:
 - (i) sub paragraph (a) should be amended to reflect the scope of Article 15(2)(a) and (b) (i.e. non-participation in production/supply company structures and professional interests);
 - (ii) sub paragraph (b) should be deleted. This provision derives from Article 16 of the Directive. Disclosure of information is dealt with in detail elsewhere in the draft licence; and
 - (iii) sub paragraph (c) the word “and” should be replaced with the words “in order to”.

2. **Does the proposed licence condition [Condition 2.2.3, Duty to Promote Effective Competitive] cover the requirements of Article 3(1) and Article 16(3) of the Directive?**

Paragraph (a) of the proposed condition is misconceived. It purports to impose on licence holders a general obligation in regard to the promotion of competition which is wholly uncertain as to its meaning and scope. Neither Article 3(1) nor Article 16(3) of the Directive provides any basis to impose such a condition. Article 3(1) addresses the obligations of Member States and not natural gas undertakings. It requires Member States to ensure that natural gas undertakings comply with the applicable requirements of the Directive¹ with a

¹ An identical provision was contained in the Second Gas Directive and a similar one was contained in the First Gas Directive.

view to (i.e. with the purpose of on the part of the Member State) achieving a competitive, secure and environmentally sustainable market in natural gas. Member States should fulfil this obligation by imposing obligations on natural gas undertakings to comply with the **specific** requirements of the Directive applicable to those undertakings. It would not, however, be appropriate, in effect, to seek to delegate to natural gas undertakings the task of achieving the Member State's overall objective outlined above.

Paragraph (b) of this condition which seeks to implement Article 16(3) should be considered in the light of the multiple provisions of the draft licence concerning the disclosure of information. Furthermore in order to implement Article 16(3) correctly:

- (a) the words "will facilitate" should be replaced by the words "is necessary for"; and
- (b) paragraph (b) should be made subject to the same proviso as Article 16(3) (i.e. that the obligation to make information public is without prejudice to protecting commercially sensitive information).

3. **What are respondents' views on the requirement to contain a UIOLI condition within the licence?**

4. **What are respondents' views on the Utility Regulator approving the UIOLI condition?**

A licence condition that a licence holder's standard conditions must contain a UIOLI provision seems reasonable. BGE and Storengy understand the Utility Regulator's inclination to include a requirement that the UIOLI provision is subject to approval by the Regulator. However it is important that it is clear on the face of the licence condition that this approval process comprises a review by the Utility Regulator of the licence holder's proposed provisions and that this review is solely for the purposes of considering the efficacy of those provisions. We do not consider that there is any need (or basis) to impose an industry standard UIOLI clause.

The comments of the Utility Regulator on this issue in the Consultation seem to accord with such an approach. In order to clarify this we would suggest that Condition 3.1.2 be amended by deleting the words "approved by the Authority" and inserting the following additional sentence:

"In advance of their use, the Licensee shall prepare and submit such provisions to the Authority for approval provided that the Authority shall not decline to approve such provisions otherwise than where it reasonably concludes that they are ineffective".

5. **Where TPA does not apply, does the Utility Regulator need the authority to make directions to the terms of the contract between the storage system operator and a third party?**

It is entirely inappropriate for the Utility Regulator to seek to reserve any general power to give directions of this type and there is no basis for it to do so. These are good reasons for the creation of the three regulatory regimes that may apply to operators of different storage facilities (rTPA, nTPA and no TPA) and, as outlined in the Consultation, careful analysis is required in order to determine which regime is applicable in any case. There would seem little point in creating these distinct regimes and undertaking this analysis, and there would be no regulatory certainty for market participants, if a power like this is to be reserved by the Utility Regulator in any event. This condition should be deleted.

6. **Do respondents have any further general comments on the draft gas storage licence or on the specific licence conditions?**

See Parts 1 and 3 of this letter.

Part 3

1. **Condition 1.4 (Restriction of Certain Information) and Condition 2.4 (Confidentiality and restriction on use of certain information):** References to the conveyance of gas are not correct? Please clarify the intended differences between this condition 1.4.1 and Condition 2.4? Presumably Condition 2.4.3, should relate to commercially sensitive information only? Otherwise it would appear to impose an additional (and extremely far-reaching unbundling obligation) in all cases including where no unbundling obligation arises.
2. **Condition 1.9 (Disposal of Relevant Assets):** This condition is not appropriate to operators who are not subject to TPA obligations, at least in its current form. The condition is designed for operators of infrastructure who provide a highly regulated service (e.g. rTPA) and who might be prevented by a disposal of assets from providing this service. Furthermore its text contains references relating to transportation assets.
3. **Condition 2.1.2 (Licensee to operate an efficient storage facility):** Please clarify the term "good industry practice". This expression is new, does not reflect the language of the Directive and seems unnecessary having regard to the expectations in terms of safety and environmental matters referred to in the Criteria for Gas Licence Applications and Applications for Consent to Construct Major Pipelines or Gas Storage Facilities.
4. **Condition 2.1.3 (Capacity Statement):** Please clarify what this statement is expected to address.
5. **Condition 2.2.1 (Undue Discrimination):** The words "or any other person or class" are inappropriate and should be deleted. They do not reflect the provisions of Article 13 of the Directive and there is no basis to include them.
6. **Condition 2.7 (Provision of Information):** The information which an operator not subject to TPA is required to furnish under the provision (and indeed under Condition 2.3.1 (b)) presumably would not exceed that required under Article 19(4) of Regulation (EC) no 715/2009?
7. **Condition 2.9 (Additional Storage Facilities):** Please clarify if this provision relates to one or more separate storage facilities.
8. **Schedule 1 Part 1, Paragraph 3 (Negotiated Access):** In the case of nTPA the Regulator has no basis to audit the operator's tariffs and charges and underlying costs. In this context please note the clear provisions of Article 41(1)(n) and (10) of the Directive that the national regulator has no right to review or require modifications of tariffs in the case of nTPA

We hope you find the above comments useful in reaching a decision. Please do not hesitate to contact me should you have any comments or queries.

Yours sincerely,

Cathal Gallagher,

Bord Gáis Energy