

## **Consultation on the Implementation of the EU Third Internal Energy Package**

This response incorporates the comments of Phoenix Natural Gas Ltd (PNG) to the Utility Regulator's (UR) consultation on the Implementation of the EU Third Internal Energy Package and focuses on the draft licence conditions proposed by UR to give effect to the gas distribution systems provisions of the Directive. PNG has commented on each of the draft licence conditions proposed below.

PNG requests that UR provides a mark-up of the proposed licence amendments against its current licence to ensure that any proposed amendments are fully transparent.

As a general comment, PNG accepts that modifications to its licence will be necessary to implement the requirements of the Directive. However PNG strongly objects to any licence modification proposals which are not a specific requirement of the Directive. It must be recognised that there are always cost implications for consumers in delivering licence requirements and it is therefore inappropriate for UR to propose licence modifications which are outside the remit of the Directive given that the requirements of the Directive are stringent and PNG is already subject to a challenging regulatory regime and rigorous legislative requirements.

### **[New] Condition A: Systems to Facilitate Change of Supplier**

PNG notes that it will be required to ensure that its practices, procedures and systems facilitate supplier transfers within 15 working days. This requirement mirrors the current timeframe within PNG's Network Code hence these provisions arguably already ensure that PNG is meeting the requirements of the Directive. PNG accepts the need to enshrine this timeframe within its licence and inform UR should it become apparent that the volumes of registrations are jeopardising its compliance.

However PNG is of the view that paragraph 2 goes beyond the requirements of the Directive and should be removed. PNG sees no basis in the Directive for the reporting requirements to UR and is of the view that it remains appropriate for reporting activities to sit outside licence requirements which allow PNG and UR opportunity to discuss and develop templates appropriate to the size and maturity of the competitive supply market and as PNG's customer switching system develops e.g. PNG's systems facilitate supplier transfers within 15 working days but suppliers have the choice to lengthen this period up to three months – it would therefore be inappropriate to report such switching activity as "out of standard" when it is not due to any failure by PNG to comply with the 15 working day timescales. Furthermore despite numerous discussions with UR, the information in paragraphs 2(b) and

2(c) has not been requested to date and PNG has already agreed for the provision of switching information to UR by the end of the following month following the quarter to which it relates. PNG therefore requests that paragraph 2 be removed to ensure flexibility for both UR and PNG in developing appropriate reporting templates as competition advances.

As regards a direction that UR may make to PNG to improve and review its practices, procedures and systems for switching (paragraph 5), we note PNG would have to comply with the direction by the date specified therein. This may not always be practicable and PNG therefore suggests that paragraph 6 is amended to compliance by a date it agrees with UR.

PNG advises that any change in supplier process which is contained within the Network Code must be consulted upon with industry via an appropriate Network Code modification process to allow all interested parties opportunity to respond and provide their views on any proposed changes.

#### **[New] Condition B: Distribution Marketing Code**

PNG is unclear why UR believes there is a need to introduce this provision for conveyance licence holders in NI as licences already include ample provision to regulate marketing activities of distribution system operators (DSOs) and the obligations in the Directive relate to suppliers rather than distributors.

It is unclear what this Condition aims to achieve and whether it is even required given that it covers the same areas as proposed licence Conditions E and 2.7.1(a). For example, the objectives of the code in paragraph 3(a) as regards gas distribution marketing activities such as avoiding discrimination as regards gas suppliers, non-distortion or prevention of competition and no confusion regarding the relationship between gas distribution and gas supply activities are already covered by other licence conditions. The restrictions in paragraph 3(b) with respect to information provided by PNG are excessive and we comment further on communications with consumers under proposed amendments to Conditions 1.16, 1.17 and 2.7 below.

In fact the proposed Distribution Marketing Code may not be the most transparent source of information for consumers. PNG is of the view that it would be more appropriate for the Marketing Code of Conduct developed by the Consumer Council (CCNI) to monitor the marketing activities of suppliers to be extended to include the marketing activities of DSOs. In PNG's view this will ensure the highest level of transparency for consumers and avoid consumer confusion about the relationship between activities of gas distribution and gas supply. It would be counterproductive and confusing for two separate marketing codes to be developed given the size of the NI natural gas market and the opening of the market to

supply competition over the next few years and more so given the relevant objectives of the Code are provided for within Conditions 1.16, 1.17 and 2.7 of PNG's licence.

PNG therefore suggests that UR and CCNI, in consultation with gas supply and gas distribution licence holders, complete a review of the current Marketing Code of Conduct and update this with any changes deemed appropriate in line with the requirements of the Directive.

### **[New] Condition C: Complaints Handling Procedure**

PNG's Codes of Practice charter aims to inform natural gas consumers on the range of support services available from PNG. The codes are not a current licence requirement and have been developed by PNG in consultation with UR and CCNI to make sure PNG's product and services meet the needs of natural gas consumers.

PNG's Service Charter consists of three simple guides:

1. Using Gas Efficiently In Your Home
2. Using Gas Efficiently In Your Business
3. Making A Complaint

These provisions arguably already ensure that PNG is meeting the requirements of the Directive.

PNG notes the provisions of Annex 1(f) of the Directive require resolution of complaints "*preferably within three months*". This wording should be replicated in Paragraph 3(a) as while PNG may make all reasonable attempts to resolve complaints as quickly as possible, there may be events outside of PNG's control which prevent resolution of every complaint within three months.

Consideration will need to be given to the proposed Guaranteed Service Standards in Gas<sup>1</sup> regulations to ensure that these are consistent with the provisions within any code for handling consumer complaints.

### **[New] Condition D: Consumer Information Code**

PNG understands that the purpose of this Code of Practice is to ensure that potential consumers can readily access information about the processes and procedures which need to be followed in order to obtain a connection to PNG's network.

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<sup>1</sup> Guaranteed Service Standards in Gas: Consultation Proposals July 2011

PNG is of the view it is only good business practice to make the information proposed within the Consumer Information Code readily available hence this information is already readily available on PNG's website which ensures that potential consumers who follow the simple steps provided can quickly connect their home and start enjoying the benefits and convenience of natural gas. PNG also publishes its Gas Connection Agreement, its performance against its service standards, making a complaint and its terms and conditions which apply to all connected properties on its website. Each webpage also includes a link informing consumers of what to do in the event of an emergency.

Under Condition 2.4 of PNG's current licence, PNG is obliged to publish and have approved by UR a statement on connection charges and terms for connection, meter connections and disconnections. Arguably this already covers the second element of the Consumer Information Code which is terms and conditions for connection. The provision on complaints handling information is already covered by the proposals on complaint handling procedures above.

Therefore the only elements that remain to be addressed by the proposed Consumer Information Code are the procedures and processes for obtaining a connection and contact details in the case of an emergency.

However PNG would question how DSOs may jointly prepare a common Consumer Information Code. Each DSO will have their own processes for obtaining a connection etc and therefore whilst the subjects covered within each licensee's Code can be harmonised, the processes therein may differ. PNG is therefore of the view that references to *'together with all other licensed gas distributors'* throughout Condition D should be removed to allow licensees to develop individual Codes, separate from those of other licensees, to account for differences in processes and procedures for connection and emergency contact details.

#### **[New] Condition E: Prohibition of Discrimination in provision of services**

We refer to the GB gas transporter licence standard special condition A33(3) that provides that a licensee must operate its transportation business in a way to ensure it does not restrict, prevent or distort competition as regards supply and shipping of gas. This wording adheres more closely to that in the Directive and is similar to that in Condition 2.7.1(b) of PNG's Licence.

As noted in our response to the proposed amendments to Condition 2.7.1 below, the Directive only requires that a DSO does not discriminate between system users or classes of system users. This obligation under the Directive is already adequately reflected in its current licence (Condition 2.7.1), having regard to the words *"unfair commercial advantage in any business in the storage, supply or conveyance of gas"*, which already deals with supply of gas. The introduction of Condition E is inappropriate.

**[New] Condition F: Provision of Information to Gas Suppliers**

PNG already provides information to gas suppliers in accordance with the provisions within its Network Code. PNG will respond to suppliers' requests for information if the information is readily available and there are no data protection issues. In responding to a Customer Information Request PNG would therefore require confirmation from the gas supplier that they were entitled to this information.

The licence amendment would require information to be provided within 5 days. This timescale is arbitrary and unworkable e.g. a request received on Thursday would have to be answered on Tuesday i.e. 3 working days.

In June 2011 PNG received approval from UR for a Network Code modification which stipulates timescales for the provision of information to gas suppliers. As part of this modification PNG produce and publish a SMP response statement which details the level of information which can be provided. Fulfilling any information request is dependent on several things; the number of SMPs which are contained in a supplier request, the type of SMP for which data is being requested e.g. DM SMP information takes longer to prepare than NDM SMP information as it contains daily consumption history for the last 365 days, and the resources available to PNG for customer switching at the time of the request which are under UR's guidance.

PNG sees no basis in the Directive for provision for a 5 day response. This should therefore be removed from Condition F.

**[Amended] Condition 1.6: Restriction of Use of Certain Information**

PNG notes that protected information may now be disclosed to enable the person to whom such information is disclosed to enter into arrangements with PNG for the conveyance of gas, or in order to give effect to such arrangements or as necessary in order to enable any agent appointed by PNG to fulfil PNG's balancing obligations under the licence. The other minor adjustments to Condition 1.6 are not required.

**[Amended] Condition 2.7: Conduct of Transportation Business**

PNG has already demonstrated the role the business has played in facilitating competition in the gas supply market in NI.

Article 3(1) of the Directive states that Member States are to ensure that *"natural gas undertakings are operated in accordance with the principles of [the Gas] Directive with a view to achieving a competitive, secure and environmentally sustainable market in natural*

*gas, and shall not discriminate between those undertakings as regards their rights or obligations".*

Recital 25 of the Directive states that the activities of DSOs are monitored so they cannot take advantage of their vertical integration as regards their competitive position of the market. Yet there is no obligation on a DSO in the Directive to facilitate effective competition.

There is, however, an obligation on DSOs not to discriminate between system users or classes of system users, particularly in favour of their related undertakings (Article 25(2)).

However Condition 2.7.1(b) of PNG's Licence already provides that PNG must conduct its business activities so that it or any affiliated/ related entity or any other licence holder or exempt entity does not obtain any *"unfair commercial advantage in any business in the storage, supply or conveyance of gas including, in particular, any such advantage from a preferential or discriminatory arrangement"*. This already adequately reflects Article 25(2) of the Directive.

The modification to Condition 2.7.1(a) is therefore inappropriate. It is a broad, sweeping obligation that goes beyond the scope of the Directive and it is unclear how DSOs would discharge this obligation.

Condition 2.7.4 is not a requirement of the Directive and should not be implemented.

Any published statement by PNG on the arrangements for, or the level of, supply competition in NI will be based on factual information, which, as distribution operator, it has at its disposal. In fact it could be argued that PNG, as distribution operator, is best placed to comment on such activities and it seems absurd for UR to veto this along with comments made by PNG on the activities, position or status of any person competing or proposing to compete in the gas supply market.

The proposed licence Condition 2.7.4 seems to be disproportionate to the requirements of the Directive and seems an unwarranted infringement of PNG's rights in this regard. Licence Condition 2.7.4 should not be implemented for these reasons.

The same conclusion applies to licence Conditions 1.16.6(a) and (b).

#### **[Amended] Condition 1.16: Independence of the Licensed Business**

PNG notes the inclusion of Conditions 1.16.3, 1.16.4 and 1.16.6 and the additional requirement in 1.16.5(d)(v).

PNG accepts that maintaining the independence of DSOs is a fundamental and critical part of the Directive, given this is the underlying principles in Article 26(1), and that its licence will be amended to reflect this. However it is imperative that the licence amendments accurately reflect the requirements and indeed intentions of the Directive.

The purpose of Article 26(3) of the Directive is to ensure that companies such as PNG do not take advantage of their vertical integration *to distort competition*. Conditions 1.16.3 and 1.16.6(b) must therefore be amended to reflect that PNG shall use its best endeavours to ensure that its branding and communications do not create confusion as to the separate identities of PNG and Phoenix Supply Ltd (PSL) *in order to distort competition*.

Condition 1.16.5(d) has been extended and the new sub-clause (v) is wider than the requirements of the Gas Directive: it prohibits the persons engaged in management of the distribution business from providing services to other businesses. The Directive only prohibits the persons responsible for management of the DSO from "participating in the company structures" of other businesses. It does not prohibit them from providing services to an Associated Business such as the supply business.

The Directive states in Article 26(2)(b) that *'appropriate measures must be taken to ensure that the professional interests of persons responsible'* for the management of the DSO are taken into account in a manner which ensures that they are capable of acting independently. It is therefore imperative that 1.16.5(d) accurately reflects the requirements of the Directive and must be amended to reflect that Associated Businesses may not use or have access to 'the services of persons who are (whether or not as their principal occupation) engaged in the management or operation of [PNG] unless they are capable of acting independently.' In line with this principle, if members of the DSO's management can act independently, they should not be restricted from providing services to an Associated Business.

Conditions 1.16.6(a) and 1.16.6(b) duplicate the requirements within Condition 2.7.4 and Condition B respectively and should be removed. PNG has provided comment on Conditions 1.16.6(a) and 1.16.6(b) under the appropriate headings above.

Condition 1.16.6(c) appears to be consistent with Article 27(1) of the Directive. It goes without saying that commercially sensitive or confidential information relating to a licence holder and furnished to or otherwise acquired by PNG is not disclosed or accessible to any Associated Business without consent.

The other minor adjustments to Condition 1.16 are not required.

**[Amended] Condition 1.17: Business Separation Compliance Plan**

As already stated, PNG accepts that maintaining the independence of DSOs is a fundamental and critical part of the Directive and that its licence will be amended to reflect this. As in Conditions 1.16.3 and 1.16.6(b), Condition 1.17.5 must be amended to reflect the requirements of the Directive i.e. that PNG's branding does not create confusion as to the separate identities of PNG and PSL or any Associated Gas Supply Business *in order to distort competition*.

The proposed licence Condition 1.17.5 is of further concern as it does not give PNG an opportunity to rectify any possible confusion and does not specify the grounds on which UR may determine that there is confusion being caused.

By comparison, in standard special condition 33A of the GB transporter licence, the licensee must prepare a statement specifying, inter alia, how it will maintain the branding of the transportation business so that it is fully independent from the branding used for a supply business. Ofgem has the power to amend the statement where this is no compliance, but there is no specific right in the licence to require the licensee to amend the statement where Ofgem thinks the branding of the transportation business is not independent.

We note that UR will consider the branding of energy companies as part of its work programme for 2011/12 and we will be happy to engage with UR to discuss this further at that time.

Condition 1.17.10 reflects the provisions of Article 26(2)(d) which requires PNG's compliance officer to be fully independent. We note that in standard special condition 33A of the GB transporter licence, the only requirement is that the compliance officer be competent – there is no reference to him/ her being independent. PNG would therefore welcome clarification from UR on its interpretation regarding the meaning of "an independent person". PNG's current licence ensures that a senior member of its personnel engaged in the management and operation of PNG is appointed as its Compliance Manager. PNG's licence also ensures that the business maintains full managerial and operational independence from any of its associated businesses. Separation of PNG and PSL took place on 1<sup>st</sup> January 2007 in order to meet the unbundling requirements of Directive 2003/55/EC. PSL is established as a separate legal entity and has operated under its own supply licence for the last four years with separate management and Board of directors. The current structure of PNG's business therefore ensures that the Compliance Manager of PNG is fully independent from the management and operation of any of its associated businesses and no further changes are required under Article 26(2) of the Gas Directive.

The other minor adjustments to Condition 1.17 are not required.