

## **Information provided by Ofgem (by email) in response to concerns raised at the Workgroup 0448 meeting held on 02 May 2013**

“Dear Joint Office,

During the workgroup discussions on modification proposal UNC0448 on 2 May 2013, those present expressed concern that: (i) the Regulations making the changes to the Gas Transporter licence allowing the Authority to raise modifications had passed everyone by; and, (ii) this change goes further than the EU legislation. Please distribute this response to those present at the workgroup meeting.

I've set out below some further information on these concerns and some other questions raised during the workgroup.

### **1. How are the conditions and therefore the modification derived from EU legislation? This relates to the concerns about the changes passing everyone one by and going further than the EU legislation.**

European Member States have the legal duty of implementing EU legislation into the domestic legal and regulatory framework. The Department for Energy and Climate Change (DECC) has been responsible for ensuring that the Third Package of energy legislation is implemented in GB. Generally speaking, EU Directives may need to be transposed into domestic legislation whereas the provisions of EU Regulations – such as Regulation (EC) No. 715/2009 (“the Gas Regulation”) - are automatically directly applicable and do not need to be transposed through domestic law. Ofgem, as the National Regulatory Authority for GB, provided advice and assistance to DECC in relation to Ofgem’s statutory functions as part of the implementation of the Third Package but was not itself responsible for implementation. DECC’s consultations, impact assessments and published responses in relation to the Third Package of energy legislation can be found on its website here: <https://www.gov.uk/government/consultations/implementing-the-eu-third-internal-energy-package>. The impact assessment on articles of the EU legislation concerning the National Regulatory Authority (NRA) refers to this new power. We understand that workgroup members felt that this aspect of transposition had passed them by, whereas other aspects of Third Package transposition had come to their attention.

DECC implemented the Third Package under section 2(2) Regulations made under the European Communities Act 1972 - The Electricity and Gas (Internal Markets) Regulations 2011 <http://www.legislation.gov.uk/ukdsi/2011/9780111513965>. These section 2(2) Regulations made changes to primary and secondary legislation and to standard licence conditions including provisions in licences relating to codes, such the Balancing and Settlement Code and the Connection and Use of System Code in electricity. However, the changes to the standard special conditions of the Gas Transporter licence (and therefore the arrangements for the UNC) were made

by a second set of Regulations, called The Gas Transporter (Modification of Licence Conditions) Regulations 2011. These can be found online here:<http://www.legislation.gov.uk/ukxi/2011?title=gas%20transporter>. Standard special conditions are a type of special condition. We understand that the particular nature of special conditions prompted DECC to consider these separately from modifications to standard licence conditions.

The Electricity and Gas (Internal Markets) Regulations 2011 and Gas Transporter (Modification of Licence Conditions) Regulations 2011 were made by the Secretary of State under powers set out in section 2(2) European Communities Act 1972. Section 2(2) and associated provisions require such regulations to be laid in Parliament.

As the GB NRA, the Authority has duties imposed on it by virtue of the Gas Directive. One of these relates to complying with and implementing any relevant legally binding decisions of the Agency for the Co-operation of Energy Regulators (ACER) and the European Commission. We note that one such decision was to amend Annex I of the Gas Regulation to include rules on congestion management. The Gas Directive also requires Member States to ensure NRAs are granted powers enabling them to carry out such duties. Given that legally binding decisions could relate to matters that are contained in GB industry codes and could require compliance or implementation by a set deadline, it was necessary to ensure the Authority had the powers to fulfil this duty in relation to industry codes and to be able to demonstrate this to the European Commission.

So far the Authority has not exercised this new power; the modification proposal UNC0449 relating to congestion management procedures was raised by National Grid without a direction from the Authority. The Authority is likely only to exercise this new power in the future if it considers it necessary.

**2. Are the UNC Panel going to be required to raise modification proposals?**

No. The modification raising power is that the Authority can either raise a modification proposal, or direct that the gas transporter licensee (e.g. National Grid) raise a modification proposal where the Authority considers it is necessary to comply with or implement the Gas Regulation and/or any relevant legally binding decisions of the European Commission and/or ACER. Standard Special Condition A11.9(j) of the Gas Transporters Licence, requires the UNC to have modification rules in place that oblige the UNC Panel to accept such a modification into the UNC modification procedures and to comply with any direction setting and/or amending a timetable.

**3. What are the appeal rights in relation to an Authority raised modification proposal?**

If the Authority raises a modification proposal under this new power, the same appeal rights apply as any other UNC modification

proposal (i.e. if the Authority's decision is different to the recommendation of the UNC Panel then a right of appeal lies).

**4. Will Ofgem raised modifications follow the regular UNC modification procedures?**

Yes, but subject to any direction that the Authority may issue in relation to the timetable and completion of the relevant procedural steps.

I hope that the above information is helpful.

Kind regards

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