

**Application by BBL Company for an  
interconnector licence to participate in the  
operation of the Balgzand Bacton Line**

**Ofgem final views**

April 2005 114/05

## Summary

The new EU Gas and Electricity Directives<sup>1</sup> and Electricity Regulation<sup>2</sup> introduce, amongst other things, a regulated third party access (RTPA) regime for interconnectors, as well as other infrastructure facilities. The Directives and Regulation allow exemption from RTPA for new interconnectors to be given by the relevant regulatory authorities, subject to veto by the European Commission. The Directives and Regulation set down criteria that have to be met in order to justify exemptions from the RTPA requirements being granted.

These requirements for RTPA in relation to interconnectors have been implemented in Great Britain via the Energy Act 2004. The Energy Act 2004 introduces a licensing regime for all gas and electricity interconnectors and it is through these licences that the requirements concerning third party access and, where appropriate, exemptions from these requirements via the suspension of the operation of certain licence conditions will be given effect.

On 10 December 2004, BBL Company submitted to Ofgem<sup>3</sup> a formal application under the provisions of the Gas Act 1986 and in accordance with the provisions of the Gas (Applications for Licences and Extensions and Restrictions of Licences) (No.2) Regulations 2004 (the Application Regulations 2004) for an interconnector licence that would authorise the participation of BBL Company in the operation of the Balgzand Bacton Line (BBL). As part of its application BBL Company requested that the licence conditions relating to the matters referred to in sub-paragraphs (a) and (b) of paragraph 2 of Part 4 of Schedule 2 of the Application Regulations 2004, not to have effect in any licence granted to BBL Company in respect of the BBL interconnector until 1 December 2022.

In its application, BBL Company explained that its application demonstrated that the BBL interconnector satisfies the criteria for exemption set out in Article 22(1) of the Gas Directive. The Authority may grant an exemption order contemporaneously with a licence, such exemption order providing that standard licence conditions 10 and 11

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<sup>1</sup> Directive 2003/54/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity and repealing Directive 96/92/EC; and Directive 2003/55/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC.

<sup>2</sup> Regulation No.1228/2003 of the European Parliament and of the Council on Conditions for Access to the Network for Cross-Border Exchanges in Electricity.

<sup>3</sup> Ofgem is the office of the Authority. The terms Ofgem and the Authority are used interchangeably in this document.

shall not have effect or will be suspended from operation in that licence, where the criteria for exemption are met.

On 14 December 2004, Ofgem issued a consultation<sup>4</sup> on BBL Company's formal application for an interconnector licence that would authorise the participation of BBL Company in the operation of the BBL. Ofgem's preliminary view was that all the relevant criteria for the giving of an exemption were likely to be met. Therefore Ofgem expressed the view that it considered it would therefore be appropriate to grant BBL a gas interconnector licence authorising it to participate in the operation of the BBL interconnector, and to issue a direction<sup>5</sup> contemporaneously with such a licence providing that standard licence conditions 10 and 11 are not in effect or are suspended from operation in that licence for the initial capacity of the BBL interconnector, which equates to approximately 1.8 mcm/hr. Ofgem also considered that standard licence conditions 10 and 11 should not be in effect or should be suspended from operation with respect to any contractual reverse flow of the BBL interconnector.

Ofgem has considered the responses received to the consultation on BBL Company's formal application in making a decision on whether to grant an interconnector licence with standard licence conditions 10 and 11 not in effect or suspended from operation. Ofgem remains of the view that all the licence application and exemption criteria are met and therefore the Authority has granted BBL Company a gas interconnector licence with standard licence conditions 10 and 11 not in effect in respect of the initial capacity of the BBL interconnector (in the direction from the Netherlands to the UK) and any non-physical reverse flow of the BBL interconnector. This licence is set out in Appendix 1 of this document and the exemption order suspending the operation of standard licence conditions 10 and 11 is set out in Appendix 2 of this document.

The European Commission has two months in which it can veto a decision by the relevant authority of a Member State to grant an exemption, or request that the regulatory authority amend its decision.<sup>6</sup>

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<sup>4</sup> *Application by BBL Company for an interconnector licence to participate in the operation of the Balgzand Bacton Line: Ofgem Initial views, December 2004.*

<sup>5</sup> Sections 1.7 - 1.9 explain the reasons for the change from the issuing of a direction to the issuing of an exemption order.

<sup>6</sup> This two month period may be extended by one additional month where additional information is sought by the Commission.

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# 1. Introduction

## ***Background***

### ***The EU Gas and Electricity Directives***

- 1.1. The new EU Gas and Electricity Directives and Electricity Regulation introduce, amongst other things, the requirement for an RTPA regime for interconnectors. The Directives and Regulation allow exemption from RTPA by the relevant regulatory authorities, subject to veto by the European Commission. With respect to interconnectors, the Directives and Regulation were implemented in Great Britain via the Energy Act 2004.
- 1.2. The Energy Act 2004 introduces a licensing regime for all gas and electricity interconnectors, through which the requirements of the EU legislation concerning third party access and, where appropriate, exemptions from these requirements via the suspension of the operation of certain licence conditions, will be given effect.
- 1.3. On 13 July 2004, the Department of Trade and Industry (DTI) published a consultation document<sup>7</sup> on the licensing of interconnectors which invited views on proposals for the licensing of existing and new interconnectors. On 15 November 2004, the DTI published a further consultation document<sup>8</sup> which set out the DTI's conclusions from the first round of consultation and sought final views on a revised version of the standard licence conditions. On 1 March 2005, the DTI published its decision document<sup>9</sup> on the final standard licence conditions to be determined by the Secretary of State. On 18 March 2005, the Secretary of State determined the standard conditions for gas interconnector licences to be given under section 7ZA of the Gas Act 1986.<sup>10</sup> Under the Energy Act 2004 (Commencement Order No. 3) Order 2004, made on 30 September 2004, section 149(6) of the Energy Act 2004 came into force on 1 December 2004. Under section 149(6) the Authority may grant a licence authorising any person to participate in the operation of a gas interconnector. Under

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<sup>7</sup> *Interconnector licences: determination of standard licence conditions and proposed exemption regime: DTI, 13 July 2004.*

<sup>8</sup> *Interconnector licences: determination of standard licence conditions and proposed exemption regime: DTI, 15 November 2004.*

<sup>9</sup> *Interconnector licences: determination of standard conditions: DTI, 1 March 2005.*

the Energy Act 2004 (Commencement Order No. 5) Order 2005, made 21 March 2005, section 150(6) of the Energy Act 2004 came into force on 1 April 2005, under which the standard licence conditions were incorporated into gas interconnector licences.

- 1.4. The requirements of the EU Gas Directive in relation to RTPA are reflected in standard licence conditions 10 and 11 of the gas interconnector licence. Standard licence condition 10 relates to the charging methodology to apply to third party access to the licensee's interconnector and standard licence condition 11 relates to the requirement to offer terms for access to the licensee's interconnector.
- 1.5. Any exemption given in respect of an interconnector from the requirements of the EU Gas Directive will be implemented by granting an interconnector licence with standard licence conditions 10 and 11 not having effect or being suspended from operation, such conditions not being in effect or suspended from operation under certain conditions and for a specified period of time.
- 1.6. The criteria for the granting of an exemption from the requirements of the EU Gas Directive in relation to RTPA (such requirements reflected in standard licence conditions 10 and 11 of the licence) are:<sup>11</sup>
  - a) the investment in the licensee's interconnector enhances competition in gas supply and enhances security of supply;
  - b) the level of risk attached to the investment is such that the investment would not take place unless an exemption was granted;
  - c) the interconnector will be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose system that infrastructure will be built;
  - d) charges will be levied on users of the interconnector; and
  - e) the exemption is not detrimental to competition or the effective functioning of the internal gas market, or the efficient functioning of the regulated system to which the interconnector is connected.

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<sup>10</sup> *Determination of Standard Licence Conditions for Gas Interconnector Licences: DTI, 18 March 2005.*

- 1.7. The process for granting such an exemption has been amended since Ofgem published its initial views document. This is as a result of the Authority considering that it would be more appropriate for it to grant exemptions from standard licence conditions 10 and 11 via an exemption order issued by the Authority rather than via a direction.
- 1.8. This change has resulted from the Authority's experience with the European Commission in relation to the giving of exemptions from RTPA for LNG terminals. The procedure for the giving of exemptions in respect of interconnectors allows for (as is required by the Gas Directive) a mechanism through which effect may be given to any Commission request that the Authority amend or withdraw its decision to issue an exemption without the need for Ofgem to go through a licence modification procedure.
- 1.9. As a result of this the conditions under which standard licence conditions 10 and 11 may be switched on in an interconnector licence are now set out in the exemption order and not in standard licence condition 12.

### ***DTI/Ofgem exemption policy***

- 1.10. In June 2003, the DTI and Ofgem issued a joint consultation document concerning new regulations to apply to LNG facilities and interconnectors.<sup>12</sup> This document set out Ofgem's initial views regarding the regulatory regime for interconnectors and LNG facilities. In addition to a quantitative competition analysis, DTI and Ofgem identified three areas that would be minimum requirements for an exempt regime:
  - ◆ effective capacity allocation in terms of an initial offer of capacity to market (though under specific circumstances this condition might be loosened);
  - ◆ effective mechanisms to ensure that capacity is not hoarded i.e. Use It or Lose It (UIOLI) arrangements; and
  - ◆ information provision requirements relating both to the regulator and potentially also to the market.

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<sup>11</sup> These criteria for granting an exemption are included within standard licence condition 12 of the licence.

<sup>12</sup> *LNG facilities and interconnectors, EU legislation and regulatory regime: DTI/Ofgem initial views, June 2003.*

1.11. In November 2003, the DTI and Ofgem issued final views in relation to the EU Directives and the resulting regulatory regime.<sup>13</sup> By and large, the final views document confirmed, and clarified, the position set out in the initial views document. DTI and Ofgem expanded upon grounds for withdrawal of an exemption:

- ◆ breach of exemption criteria;
- ◆ breach of competition law;
- ◆ bankruptcy; or
- ◆ mergers / acquisition activity.

1.12. At the time, there were several potential projects that were moving to financial close prior to the EU Directives becoming transposed into GB law. As a result, project developers requested early guidance as to whether they could expect their particular project to be exempt from RTPA. Ofgem said that while it would be prepared to give such guidance, any guidance would need to be informed by consultation on a case-by-case basis, with any such consultation being on the basis of a draft application prepared by the relevant infrastructure developer. Ofgem indicated that while it would aim to ensure, as far as possible, that any potential guidance that was issued gave comfort as to the likely regulatory treatment of particular infrastructure, any such guidance would also be constrained to a significant extent by necessary legal caveats.

1.13. Ofgem received draft applications for exemption in respect of three projects.<sup>14</sup> In each case, Ofgem consulted upon, and issued regulatory guidance to, each project. The first application was from Gastransport Services (GtS) for the proposed Balgzand Bacton pipeline project (BBL).<sup>15</sup> The second application was received from Qatar Petroleum and ExxonMobil for the proposed South Hook LNG import terminal at Milford Haven in Wales.<sup>16</sup> The third application was received from Dragon for the proposed LNG import terminal, also at Milford Haven.<sup>17</sup>

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<sup>13</sup> *LNG facilities and interconnectors, EU legislation and regulatory regime: DTI/Ofgem final views*, November 2003.

<sup>14</sup> As the EU legislation had yet to be transposed into GB law all the draft applications received were for exemption from the RTPA requirements of the EU Gas Directive.

<sup>15</sup> *Gastransport Services, Draft application for an exemption for the Balgzand Bacton Pipeline project (BBL)*, Final views: Ofgem, December 2003.

<sup>16</sup> *Qatar Petroleum and ExxonMobil, Draft Gas Directive Exemption Application for an LNG Terminal at Milford Haven*, Final views: Ofgem, February 2004.

<sup>17</sup> *Dragon LNG Ltd, Draft application for an exemption for the Milford Haven LNG import terminal*, Final views:



- 1.14. In each case, Ofgem expressed the view that the application for exemption would be likely to meet each of the exemption criteria set out in the relevant EU legislation. In these documents, Ofgem stated that once legislative authority was granted to Ofgem in respect of the licensing and exemption of interconnectors and LNG facilities, Ofgem would expect to undertake a formal consultation process in respect of formal applications it received for exemption. In addition, in the case of the GtS application, Ofgem also consulted the Dutch regulatory authorities.
- 1.15. In each case, Ofgem's views were submitted to the European Commission, and the Commission indicated general support for Ofgem's position in respect of each of the applications mentioned.

### ***Formal application by BBL Company***

- 1.16. On 10 December 2004, BBL Company<sup>18,19</sup> submitted to Ofgem a formal application under the provisions of the Gas Act 1986 and in accordance with the provisions of the Gas (Applications for Licences and Extensions and Restrictions of Licences) (No.2) Regulations 2004 (the Application Regulations 2004) for an interconnector licence that would authorise it to participate in the operation of the Balgzand Bacton Line (BBL). As part of its application BBL Company requested that the licence conditions relating to the matters referred to in sub-paragraphs (a) and (b) of paragraph 2 of Part 4 of Schedule 2 of the Application Regulations 2004 not to have effect until 1 December 2022.
- 1.17. In its application, BBL Company explained that its application demonstrated that the BBL interconnector satisfies the criteria set out in Article 22(1) of the Gas Directive, for standard licence conditions 10 and 11 of the gas interconnector licence not to have effect or be suspended from operation in any licence granted to BBL Company in respect of the BBL interconnector.

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*Ofgem*, June 2004.

<sup>18</sup> Details of the change in ownership were discussed in Ofgem's initial views document: *Application by BBL Company for an interconnector licence to participate in the operation of the Balgzand Bacton Line: Ofgem Initial views*, December 2004.

<sup>19</sup> BBL Company also applied for an exemption from the requirements of the EU Gas Directive in relation to third party access under the new article 18h of the Dutch Gas Act.

- 1.18. The public version of BBL Company's application for a gas interconnector licence can be found on the Ofgem website.<sup>20</sup>

### ***Ofgem's initial views***

- 1.19. On 14 December 2004, Ofgem issued a consultation on BBL Company's formal application for an interconnector licence with standard licence conditions 10 and 11 not in effect or suspended from operation.<sup>21</sup> Ofgem's preliminary view was that the application and exemption criteria were likely to be met. Therefore, Ofgem considered that it would be appropriate to grant BBL a gas interconnector licence authorising it to participate in the operation of the BBL interconnector, and to issue a direction contemporaneously with this licence providing that standard licence conditions 10 and 11 are not in effect or are suspended from operation in that licence for the initial capacity of the BBL interconnector, which equates to approximately 1.8 mcm/hr. Ofgem also considered that standard licence conditions 10 and 11 should not be in effect or be suspended from operation with respect to any contractual reverse flow of the BBL interconnector. Ofgem invited responses on Ofgem's initial views, and on the draft licence and direction, to be received by close of business on 21 January 2005. Since receiving BBL's formal application, Ofgem has again been in discussions with the Dutch regulatory authorities, regarding the granting of an exemption from RTPA to BBL.

### ***Respondents' views***

- 1.20. Ofgem received two responses to the consultation and these responses can be found in full on the Ofgem website. Both respondents supported Ofgem's initial views that all the exemption criteria had been met and that it would therefore be appropriate to grant BBL Company a gas interconnector licence with standard licence conditions 10 and 11 not in effect or suspended from operation. Respondents' views are discussed further in Chapter 2.

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<sup>20</sup> [www.ofgem.gov.uk](http://www.ofgem.gov.uk), under "Europe" area of work.

<sup>21</sup> *Application by BBL Company for an interconnector licence to participate in the operation of the Balgzand Bacton Line: Ofgem Initial views*, December 2004.

## ***Ofgem's final views***

- 1.21. Ofgem has considered the respondents' views in making a decision on whether to grant BBL Company a gas interconnector licence that would authorise it to participate in the operation of the Balgzand Bacton Line, with standard licence conditions 10 and 11 not in effect or suspended from operation in this licence. Ofgem's final views are discussed in more detail in Chapter 2.
- 1.22. Since it is Ofgem's view that the application and exemption criteria are met, the Authority has granted BBL Company a gas interconnector licence under Section 7ZA of the Gas Act 1986 and has issued an exemption order with this licence providing that standard licence conditions 10 and 11 are not in effect or are suspended from operation in that licence for the initial capacity of the BBL interconnector, which equates to approximately 1.8 mcm/hr and with respect to any non-physical reverse flow of the BBL interconnector. The licence is set out in Appendix 1 of this document and the exemption order is set out in Appendix 2.

## ***Way forward***

- 1.23. This final views document and all supporting documents will be submitted to the European Commission. The European Commission has two months in which it can veto a decision by the relevant authority in a Member State to grant an exemption, or request that the regulatory authority amend its decision.<sup>22</sup>
- 1.24. If you wish to discuss any matters in this document, please contact Matthew Buffey on 020 7901 7088.

## ***Consultation code of practice***

- 1.25. If respondents have comments or complaints about the way this consultation has been conducted these should be sent to:

Michael Fews

Head of Licensing

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<sup>22</sup> This two month period may be extended by one additional month where additional information is sought by the Commission.

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## 2. Ofgem's decision

- 2.1. Ofgem's consultation on Gastransport Services' (GtS) draft application set out the arguments presented by GtS as to why it considered that the BBL interconnector met the various requirements of the Gas Directive and therefore should be granted an exemption. This document also explained that the formal powers for the giving of an exemption would only be available to Ofgem once the EU Directives had been enacted into GB law. However, Ofgem's final view on the draft application was that it considered that the BBL project would be likely to meet the criteria set out in Article 22(1) of the Gas Directive and therefore that it would be likely that the project would be eligible for an exemption from certain aspects of the EU Gas Directive for the capacity of the underlying contracts that would be negotiated by GtS for the BBL.
- 2.2. In the consultation on BBL Company's formal application, Ofgem outlined the updated information provided in BBL Company's formal application. Ofgem's preliminary view was that the five relevant criteria as specified in the EU Gas Directive appeared to have been met in respect of the BBL interconnector and, as such, this project could be expected to have an overall positive impact on competition and security and diversity of supply for the UK. Therefore, Ofgem's initial view was that it would be appropriate to grant BBL Company a gas interconnector licence authorising it to participate in the operation of the BBL interconnector. It was also Ofgem's initial view that it would be appropriate to issue contemporaneously with the licence, a direction to provide that standard licence conditions 10 and 11 shall not have effect, or are suspended from operation, in that licence until 1 December 2022. It was Ofgem's preliminary view that it would be appropriate for the exemption to be given in respect of the initial forward-flow capacity of the BBL (that is, flow from the Netherlands to the UK), which equates to approximately 1.8 mcm/hr and any contractual reverse flow.
- 2.3. Ofgem received two responses to the consultation. This chapter provides a summary of respondents' views and provides Ofgem's final views on the formal application.

## ***Ofgem's analysis of whether the exemption criteria are met***

### **(a) the investment in the licensee's interconnector enhances competition in gas supply and enhances security of supply**

#### **Ofgem's initial view on the formal application**

- 2.4. On the basis of the competition analysis presented by BBL Company in its application and Ofgem's own competition assessment, Ofgem continued to consider that the project should, in principle, enhance competition in gas supply to the UK as well as enhancing security of supply and therefore that the condition relating to the investment in the licensee's interconnector enhancing competition in gas supply and security of supply would be met.
- 2.5. In particular, it was noted that Ofgem's own competition analysis had shown that Ofgem is not aware of evidence to suggest that new entrants and current market participants would not be able to compete within the retail market because of a lack of access to future gas supplies; and further, that the GB market is currently dynamic enough to respond to changes in demand and supply.
- 2.6. Ofgem also considered that its existing powers under UK and European competition legislation would provide protection against any future abuse of any dominant position in the GB gas market. For example, Ofgem has concurrent powers with the Office of Fair Trading (OFT) to investigate and take enforcement action under the Competition Act 1998 if abuse of a dominant position is found to occur. Further, if BBL Company were to be in breach of the Competition Act 1998, under standard licence condition 12, the Authority could direct the relevant standard licence conditions to have effect.
- 2.7. Ofgem also considered that the contractual provisions put in place to make unused capacity available to the market should prevent any anti-competitive hoarding of capacity. Further, condition 13 (which it is proposed will be in effect in BBL Company's licence) requires the entire capacity of the interconnector to be made available to the market.

### **Respondents' views**

- 2.8. One respondent supported the development of additional infrastructure to promote security of supply and competitive choice in the source of gas for the GB market.
- 2.9. One respondent welcomed the establishment of a direct link between the UK gas market and flexible Dutch gas resources.
- 2.10. A respondent also noted that the rules that allow optimisation of the use of capacity in infrastructure are a key element in the contribution of that capacity to the GB security of supply and would therefore welcome further details on BBL's proposals for UIOLI capacity to reach the market.

### **Ofgem's final view on the formal application**

- 2.11. Ofgem continues to consider that the BBL interconnector should enhance competition in gas supply in the UK as well as enhancing security of supply and therefore it is Ofgem's view that this requirement has been met.
- 2.12. Ofgem agrees that the UIOLI rules are a key element in relation to security of supply. Ofgem considers that the requirements of standard licence condition 13 will ensure that the maximum capacity of the licensee's interconnector is made available to the market.
- 2.13. As a result of the change of procedure under standard licence condition 12, if BBL Company were found to be in breach of the Competition Act 1998, the process is no longer that the Authority would be able to direct under standard licence condition 12 that the relevant standard licence conditions have effect. The process now is that a breach of any national or European competition laws by BBL Company would give rise to the ability of the Authority to revoke the exemption order issued to BBL Company. Where the exemption order was so revoked the relevant licence conditions would have effect in BBL Company's licence. That is, while the form of the process has changed, the substance is the same – the licence conditions could be brought into effect if BBL Company were found to be in breach of competition laws.
- 2.14. More widely, Ofgem considers that both European and domestic competition laws should provide a disincentive to engage in any anti-competitive conduct within the gas market, as well as a mechanism through which any anti-competitive conduct,

should it eventuate, could be addressed. Further, where the exemption gave rise to a breach in European or domestic competition law then it is possible that a remedy could include revocation of the exemption.

- 2.15. In relation to competition in the gas supply market and, in particular, to the possibility of anti-competitive behaviour in the retail gas market, Ofgem monitors the retail gas market on a continuing basis and will investigate market structures and conduct that may give rise to competition concerns. Ofgem also notes that any decision it may make in relation to BBL Company's exemption does not preclude or impact in anyway on the operation of the Competition Act 1998 or the Enterprise Act 2002. Any review of the retail market in response to any concerns of abuse of market power is therefore freely able to take account of the impact of any contractual arrangements.

**(b) the level of risk attached to the investment is such that the investment would not take place unless an exemption was granted**

#### **Ofgem's initial view on the formal application**

- 2.16. On the basis of the analysis provided by BBL Company, and its financial advisors KPMG and ABN AMRO, and Ofgem's preferred approach to entrepreneurial projects presented in the joint consultation with the DTI, Ofgem continued to consider that it appears appropriate to conclude that the level of risk attached to the BBL interconnector would merit exemption.

#### **Respondents' views**

- 2.17. No respondents commented on this condition.

#### **Ofgem's final view on the formal application**

- 2.18. Ofgem considers that the requirement that the investment would not take place unless an exemption was granted has been met.



**(c) the interconnector will be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose system that infrastructure will be built<sup>23</sup>**

#### **Ofgem's initial view on the formal application**

- 2.19. Ofgem welcomed the establishment of the BBL Company between the three legally separate subsidiaries: Gasunie BBL B.V., E.ON Ruhrgas BBL B.V. and Fluxys BBL B.V.
- 2.20. As a result of the establishment of the BBL Company, Ofgem considered that it is clear that BBL Company will be separate from National Grid Transco (the system operator in the UK) and GTS (the system operator in the Netherlands) and therefore it appeared appropriate to conclude that the level of legal separation with respect to this investment means that the BBL interconnector will be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose system that infrastructure will be built.

#### **Respondents' views**

- 2.21. No respondents commented on this condition.

#### **Ofgem's final view on the formal application**

- 2.22. Ofgem considers that the requirement that the interconnector will be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose system that infrastructure will be built has been met.

#### **(d) charges will be levied on users of the interconnector**

#### **Ofgem's initial view on the formal application**

- 2.23. Based on the information provided by BBL Company in its application, Ofgem maintained its view that it is likely that the criterion that charges will be levied on users of the interconnector would be met.

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<sup>23</sup> This criterion has been slightly amended in the interconnector licence to reflect the fact that an interconnector is connected to two systems. The criterion set out in the interconnector licence is "the interconnector will be owned by a natural or legal person which is separate at least in terms of its legal form from the relevant system operators to whose systems that infrastructure will be connected".

### **Respondents' views**

- 2.24. One respondent stated that its particular concern is that no discrimination should occur between possible future regulated BBL tariffs and non-regulated BBL tariffs of the initial shippers. However, this respondent noted that the proposed licence includes elements which can prevent development of such a discriminatory regime.

### **Ofgem's final view on the formal application**

- 2.25. Ofgem acknowledges the view of one respondent that no discrimination should occur between possible future regulated BBL tariffs and the non-regulated tariffs of the initial shippers. With this in mind, Ofgem notes that standard licence condition 10 requires that the charges and the application of the underlying charging methodology shall be objective, transparent and non-discriminatory.
- 2.26. Ofgem considers that the requirement that charges will be levied on users of the interconnector has been met.

**(e) having any or all of the relevant conditions under consideration not in effect, or suspended from operation, is not detrimental to competition or the effective functioning of the internal gas market, or the efficient functioning of the regulated system to which the interconnector is connected**

### **Ofgem's initial view on the formal application**

- 2.27. Ofgem continued to consider that the connection of the BBL Interconnector to the UK system would not be detrimental to the effective functioning of the internal gas market.
- 2.28. Ofgem considered that any concerns that might be raised with respect to gas quality issues should be resolved by BBL Company and National Grid Transco via the system operator to system operator agreement that BBL Company will be required to have in place under condition 3 of the draft gas interconnector licence.

### **Respondents' views**

- 2.29. One respondent noted the reference in Ofgem's initial views document to additional investment being carried out by GTS in the Netherlands as a consequence of the proposed investment by BBL Company and requested whether any information was

available in relation to any additional investment by Transco that may be necessary as a consequence of the BBL development.

- 2.30. The other respondent pointed out that it considered that the Transco quality requirements should be in line with the recommended EASEE gas values for high calorific gas at cross border points in order to allow maximum utilisation of the BBL and connected infrastructure.

### **Ofgem's final view on the formal application**

- 2.31. Ofgem understands that the only investment required on Transco's system as a result of the BBL project is the actual connection to the Transco national transmission system, this will be paid for directly by BBL Company.
- 2.32. As noted in the initial views consultation document, Ofgem considers that any concerns that might exist with respect to gas quality issues should be resolved by BBL Company and National Grid Transco via the bilateral agreement that BBL Company is required to have in place under standard licence condition 3 of its gas interconnector licence.
- 2.33. Ofgem therefore considers that the condition that having any or all of the relevant conditions under consideration not in effect, or suspended from operation, is not detrimental to competition or the effective functioning of the internal gas market, or the efficient functioning of the regulated system to which the interconnector is connected has been met.

## ***Duration and scope of an exemption***

### **Ofgem's initial view on the formal application**

- 2.34. Based on the additional information provided by BBL Company in its formal application, Ofgem's initial view was that the relevant conditions<sup>24</sup> in BBL Company's gas interconnector licence should not have effect or should be suspended from operation until 1 December 2022 for the initial forward capacity (that is, flow in the direction from the Netherlands to the United Kingdom), which equates to approximately 1.8 mcm/hr. Ofgem also considered that these licence conditions

should not have effect or should be suspended from operation in respect of any contractual reverse flow. In reaching this initial view Ofgem took account of BBL Company's comments on making any additional capacity available to the market and also took account of the avenues within standard licence condition 12, through which the Authority could direct that the relevant conditions can have effect.

- 2.35. Ofgem did not consider that a decision should be taken now on whether this view should extend to cover any future physical capacity (for either flow to the UK or reverse flow) that the BBL Company makes available in the BBL interconnector as a result of additional investment.

### **Respondents' views**

- 2.36. No respondent commented on this issue.

### **Ofgem's final view on formal application**

- 2.37. Ofgem continues to consider that the relevant conditions in BBL Company's gas interconnector licence should not have effect or should be suspended from operation until 1 December 2022 for the initial forward capacity, which equates to approximately 1.8 mcm/hr.
- 2.38. As noted above, Ofgem also considered that these licence conditions should not have effect or should be suspended from operation in respect of any contractual reverse flow. However, Ofgem has reconsidered how such capacity would be made available to the market and now considers it appropriate that these licence conditions should not have effect or should be suspended from operation in respect of any non-physical reverse flow. Ofgem considers that this is appropriate as it will capture both contractual reverse flow capacity that is offered by shippers on the secondary market who hold firm forward flow capacity and interruptible reverse flow capacity offered by BBL Company on the primary market.
- 2.39. In reaching this final view Ofgem took account of BBL Company's comments on making any additional capacity available to the market and also took account of the avenues within the exemption order through which the Authority could direct that the relevant conditions can have effect.

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<sup>24</sup>Standard licence conditions 10 and 11 of the gas interconnector licence.

- 2.40. Ofgem does not consider that a decision should be taken now on whether this view should extend to cover any future physical capacity (for either forward flow to the UK or reverse flow) that the BBL Company makes available in the BBL interconnector as a result of additional investment.

## ***Withdrawal of an exemption***

### **Ofgem's initial view**

- 2.41. Ofgem noted the grounds to bring those licence conditions relating to RTPA into operation in a licence where they were not in effect or were suspended from operation and that these were included in paragraph 5 of standard licence condition 12 of the interconnector licence.
- 2.42. Ofgem noted that the relevant conditions would not automatically be brought into effect should there be material changes in the nature of the BBL interconnector project. Rather, that it would be open to Ofgem to review the appropriateness of having standard licence conditions 10 and 11 not in effect in any particular licence in the event that any of the specified circumstances arise. Further, that in the event that any of the circumstances occur which allow for the relevant conditions to be brought back into effect Ofgem would likely undertake a consultation explaining why it considered that to be the case and on whether standard licence conditions 10 and 11 should be in effect in that particular licence.

### **Respondents' views**

- 2.43. No respondent commented on this issue.

### **Ofgem's final view on formal application**

- 2.44. As noted above, the grounds upon which the relevant conditions may be brought back into effect now reside within the exemption order itself.
- 2.45. The relevant conditions will not automatically be brought into effect should any of the grounds for revocation stated in the exemption order arise. Rather, it would be open to Ofgem to review the appropriateness of continuing to have standard licence conditions 10 and 11 not in effect in BBL's licence in the event that any of the specified circumstances arise. Further, that in the event that any of the circumstances

occur which allow for the relevant conditions to be brought back into effect it is likely that Ofgem would undertake a consultation explaining why it considered that to be the case and on whether standard licence conditions 10 and 11 should be in effect in BBL's licence.

## ***Summary***

### **Respondents' views**

- 2.46. Both respondents agreed with Ofgem's initial views and supported the proposal to grant BBL Company an interconnector licence with standard licence conditions 10 and 11 not in effect. One respondent also noted that this project appears to meet the Commission's stated wish in respect of the "integration of national energy supply into a wider European market" as outlined in the latest Benchmarking study and should be supported in that forum.

### **Ofgem's final views**

- 2.47. In summary, Ofgem's final view is that the five relevant criteria as specified in the EU Gas Directive have been met in respect of the BBL interconnector and, as such, this project could be expected to have an overall positive impact on competition and security and diversity of supply for the UK. Therefore, it is Ofgem's final view that it is appropriate to grant BBL Company a gas interconnector licence authorising it to participate in the operation of the BBL interconnector. Further, that it is appropriate to contemporaneously with the issue of this licence, issue an exemption order that standard licence conditions 10 and 11 shall not have effect, or are suspended from operation, in that licence until 1 December 2022 for the initial forward capacity (that is, flow in the direction from the Netherlands to the United Kingdom), which equates to approximately 1.8 mcm/hr. Ofgem also considers that any non-physical reverse flow should also not be subject to the operation of standard licence conditions 10 and 11 for this period. However, at this time Ofgem does not consider that this view can be extended to cover any future physical capacity (for either forward flow to the UK or reverse flow) that the BBL Company makes available through the BBL pipeline as a result of additional investment. An assessment of any such investment will be made if and when the BBL Company were to develop plans for such investment.

2.48. For the avoidance of doubt, Ofgem's analysis has been carried out against the criteria for the relevant conditions not to have effect and is specific to the application for the interconnector licence that Ofgem is considering. Any decision that Ofgem may make in relation to this application for an interconnector licence does not preclude or impact in any way on the operation of the Competition Act 1998 or the Enterprise Act 2002. Further, as the analysis contained in this document is in relation to a specific situation, the analysis may or may not necessarily be relevant to a consideration of any related issues that may arise, for example under the Gas Act 1986, the Competition Act 1998 or the Enterprise Act 2002.

### 3. Way forward

- 3.1. This final views document and all supporting documents will be submitted to the European Commission.
- 3.2. As mentioned previously, the European Commission has two months in which it can veto a decision by the relevant authority in a Member State to grant an exemption, or request that the regulatory authority amend its decision.<sup>25</sup>

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<sup>25</sup> This two month period may be extended by one additional month where additional information is sought by the Commission.



# **Appendix 1 Licence**

**GAS ACT 1986**

**SECTION 7ZA**

**GAS INTERCONNECTOR LICENCE**

**FOR**

**BBL Company**

## **PART I. TERMS OF THE LICENCE**

1. This licence, granted under section 7ZA of the Gas Act 1986 (“the Act”), authorises BBL Company (a partnership registered in the Netherlands under company number 02085020) (“the licensee”) whose registered office is situated at PO Box 225, 9700 AE Groningen, the Netherlands, to participate in the operation of the gas interconnector specified in Schedule 1 during the period specified in paragraph 3 below, subject to -
  - (a) the standard conditions of gas interconnector licences referred to in –
    - (i) paragraph 1 of Part II below, which shall have effect in the licence; and
    - (ii) paragraph 2 of Part II below which shall only have effect in the licence if brought into effect in accordance with the provisions of standard condition 12,  
  
subject to such amendments to those conditions, if any, as are set out in Part III below (together “the conditions”);
  - (b) the special conditions, if any, set out in Part IV below (“the special conditions”); and
  - (c) such Schedules hereto as may be referenced in the conditions, the special conditions or the terms of the licence.
2. This licence is subject to transfer, modification or amendment in accordance with the provisions of the Act, the special conditions or the conditions.
3. This licence shall come into force on 8 April 2005 and unless revoked in accordance with the provisions of Schedule 2 shall continue until determined by not less than 25 years’ notice in writing given by the Authority to the licensee. Such notice must not be served earlier than a date being ten years after the licence comes into force.
4. The provisions of section 46(1) of the Act (service of notices etc.) shall have effect as if set out herein and as if for the words “this Part or regulations made under this Part” there were substituted the words “this licence”.
5. Without prejudice to sections 11 and 23(1) of the Interpretation Act 1978, Parts I to IV inclusive of, and the Schedules to this licence shall be interpreted and construed in like manner as an Act of Parliament passed after the commencement of the Interpretation Act 1978.

6. References in this licence to a provision of any enactment, where after the date of this licence -
- (a) the enactment has been replaced or supplemented by another enactment, and
  - (b) such enactment incorporates a corresponding provision in relation to fundamentally the same subject matter,

shall be construed, so far as the context permits, as including a reference to the corresponding provision of that other enactment.

The Official Seal of the Gas and  
Electricity Markets Authority  
hereunto affixed is authenticated  
by:-

.....

**STEVE SMITH**

**Authorised in that behalf by the  
Gas and Electricity Markets Authority**

**8 April 2005**

## PART II. THE STANDARD CONDITIONS

### 1. Standard conditions in effect in this licence

Section A	Section B	Section C	Section D
Standard condition 1	Standard condition 3	Standard condition 9	Standard condition 12
Standard condition 2	Standard condition 4		Standard condition 13
	Standard condition 5		Standard condition 14
	Standard condition 6		
	Standard condition 7		
	Standard condition 8		

### 2. Standard conditions not in effect or suspended from operation in this licence

<b>Section D</b>
Standard condition 10
Standard condition 11

These standard conditions are not in effect or suspended from operation in this licence in accordance with the terms of standard condition 12 and any exemption order issued by the Authority. These standard conditions may be brought into, or back into, operation in accordance with the terms of standard condition 12 and the provisions of any exemption order issued by the Authority.

Note: A copy of the standard conditions of gas interconnector licences as determined by the Secretary of State together with subsequent modifications can be inspected at the principal office of the Authority. The above lists are correct at the date of this licence but may be changed by subsequent modifications to the licence.

**PART III. AMENDED STANDARD CONDITIONS PARTICULAR TO THIS LICENCE**

There are no amendments to the standard conditions.

#### **PART IV. SPECIAL CONDITIONS**

There are no special conditions.

## **SCHEDULE 1**

This licence authorises the participation of BBL COMPANY in the operation of the BALGZAND BACTON LINE, a gas interconnector between Juliandorp near Balgzand in the Netherlands and Bacton in the United Kingdom.

## **SCHEDULE 2**

### **REVOCAATION**

1. The Authority may at any time revoke the licence by giving no less than 30 days' notice (24 hours' notice, in the case of a revocation under sub-paragraph 1(f)) in writing to the licensee:
  - (a) if the licensee agrees in writing with the Authority that the licence should be revoked;
  - (b) if any amount payable under standard condition 2 (Payments by the Licensee to the Authority) is unpaid 30 days after it has become due and remains unpaid for a period of 14 days after the Authority has given the licensee notice that the payment is overdue - provided that no such notice shall be given earlier than the sixteenth day after the day on which the amount payable became due;
  - (c) if the licensee fails:
    - (i) to comply with a final order (within the meaning of section 28 of the Act) or with a provisional order (within the meaning of that section) which has been confirmed under that section and (in either case) such failure is not rectified to the satisfaction of the Authority within three months after the Authority has given notice in writing of such failure to the licensee - provided that no such notice shall be given by the Authority before the expiration of the period within which an application under section 30 of the Act could be made questioning the validity of the final or provisional order or before the proceedings relating to any such application are finally determined; or
    - (ii) to pay any financial penalty (within the meaning of section 30A of the Act) by the due date for such payment and such payment is not made to the Authority within three months after the Authority has given notice in writing of such failure to the licensee - provided that no such notice shall be given by the Authority before the expiration of the period within which an application under section 30E of the Act could be made questioning the validity or effect of the financial penalty or before the proceedings relating to any such application are finally determined;
  - (d) if the licensee fails to comply with:
    - (i) an order made by the court under section 34 of the Competition Act 1998;



- (ii) an order made by the Authority under sections 158 or 160 of the Enterprise Act 2002;
  - (iii) an order made by the Competition Commission under sections 76, 81, 83, 84 and 161 of the Enterprise Act 2002;
  - (iv) an order made by the Secretary of State under sections 66, 147, 160 or 161 of the Enterprise Act 2002;
- (e) if the licensee:
- (i) has not commenced participation in the operation of the interconnector to which this licence relates within five years of the date on which the licence comes into force;
  - (ii) has ceased to participate in the operation of the interconnector to which this licence relates;
- (f) if the licensee:
- (i) is unable to pay its debts (within the meaning of section 123(1) or (2) of the Insolvency Act 1986, but subject to paragraphs 2 and 3 of this schedule) or has any voluntary arrangement proposed in relation to it under section 1 of that Act or enters into any scheme of arrangement (other than for the purpose of reconstruction or amalgamation upon terms and within such period as may previously have been approved in writing by the Authority);
  - (ii) has a receiver (which expression shall include an administrative receiver within the meaning of section 251 of the Insolvency Act 1986) of the whole or any material part of its assets or undertaking appointed;
  - (iii) has an administration order under section 8 of the Insolvency Act 1986 made in relation to it;
  - (iv) passes any resolution for winding-up other than a resolution previously approved in writing by the Authority; or
  - (v) becomes subject to an order for winding-up by a court of competent jurisdiction; or
- (g) if the licensee is convicted of having committed an offence under section 43 of the Act in making its application for the licence.
2. For the purposes of sub-paragraph 1(f)(i), section 123(1)(a) of the Insolvency Act 1986 shall have effect as if for “£750” there was substituted “£100,000” or such higher figure as the Authority may from time to time determine by notice in writing to the licensee.
3. The licensee shall not be deemed to be unable to pay its debts for the purposes of sub-paragraph 1(f)(i) if any such demand as is mentioned in section

123(1)(a) of the Insolvency Act 1986 is being contested in good faith by the licensee with recourse to all appropriate measures and procedures or if any such demand is satisfied before the expiration of such period as may be stated in any notice given by the Authority under paragraph 1.

# Appendix 2 Exemption order

## GAS INTERCONNECTOR LICENCE

### STANDARD LICENCE CONDITION 12

#### EXEMPTION

Pursuant to paragraph 2 of standard licence condition 12 of the gas interconnector licence granted to BBL Company<sup>26</sup> under section 7ZA of the Gas Act 1986 (as amended from time to time), such licence authorising BBL Company to participate in the operation of the Balgzand Bacton Line between Juliandorp near Balgzand in the Netherlands and Bacton in the United Kingdom, the Gas and Electricity Markets Authority hereby issues to BBL Company an exemption providing that standard licence conditions 10 and 11 of that licence are suspended from operation, subject to the attached schedule.

**Steve Smith**

Authorised in that behalf by the

Gas and Electricity Markets Authority

8 April 2005

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<sup>26</sup> Registered in the Netherlands No 02085020; Registered Office: PO Box 225, 9700 AE Groningen, the Netherlands.

## **SCHEDULE**

### **PERIOD, CONDITIONS, AND REVOCATION OF EXEMPTION**

#### **A. Interpretation and Definitions**

In this exemption:

“non-physical reverse flow”	means a reduction in physical forward flow in substitution for physical reverse flow
“physical forward flow”	means the physical flow of the facility in the direction from Juliandorp near Balgzand in the Netherlands to Bacton in the United Kingdom of the Balgzand Bacton Line
“physical reverse flow”	means the physical flow of the facility in the direction from Bacton in the United Kingdom to Juliandorp near Balgzand in the Netherlands of the Balgzand Bacton Line
“the Authority”	means the Gas and Electricity Markets Authority established by section 1(1) of the Utilities Act 2000, as amended from time to time
“the Act”	means the Gas Act 1986 as amended from time to time
“the facility”	means the Balgzand Bacton Line, a gas interconnector between Juliandorp near Balgzand in the Netherlands and Bacton in the United Kingdom
“the licensee”	means the BBL Company, authorised by licence to participate in the operation of the Balgzand Bacton Line

## **B. Full description of the interconnector to which this exemption relates**

This exemption relates to the Balgzand Bacton Line, a gas interconnector between Juliandorp near Balgzand in the Netherlands and Bacton in the United Kingdom, with respect to the following services:

- (a) physical forward flow; and
- (b) non-physical reverse flow.

## **C. Period**

Subject to section E below, and pursuant to sub-paragraph (a) of paragraph 4 of standard licence condition 12, this exemption will cease to have effect on 2 December 2022.

## **D. Conditions**

Pursuant to sub-paragraph 4(b) of standard licence condition 12, this exemption is made subject to the following conditions:

1. That the material provided by the licensee to the Authority in respect of this exemption is accurate in all material respects.
2. Should any of the grounds for revocation arise under section E of this exemption, the Authority may amend this exemption rather than revoke the exemption.
3. The Authority may amend this exemption where the Authority has been requested to amend the decision to grant this exemption by the European Commission (such request being made in accordance with Article 22(4) of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003).
4. This exemption is transferable where the Authority has given its written consent to such a transfer. For the avoidance of doubt, all of the conditions contained in this exemption order continue unaffected in respect of any person to whom this exemption order may be transferred.

## **E. Revocation**

Pursuant to paragraph 5 of standard licence condition 12, this exemption may be revoked in the following circumstances:

1. The Authority may revoke this exemption where the European Commission has requested (in accordance with Article 22(4) of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003) that the Authority withdraw the decision to grant this exemption.
2. The Authority may revoke this exemption where the European Commission has requested (in accordance with Article 22(4) of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003) the Authority amend the decision to grant this exemption and the licensee does not agree (under paragraph D3 above) for this exemption to be amended in the manner so requested by the European Commission.
3. This exemption may be revoked by the Authority by giving a notice of revocation to the licensee not less than four months before the coming into force of the revocation in any of the following circumstances:
  - (a) where:
    - i. in the Authority's reasonable opinion there is a material change in the degree to which the requirements of sub-paragraphs 6(a), (c), (d) or (e) of standard licence condition 12 are met with respect to the facility as the result of an action or omission of the licensee;
    - ii. the licensee has a receiver (which expression shall include an administrative receiver within the meaning of section 251 of the Insolvency Act 1986 and/or an administrative receiver within the meaning of Article 215 literate 2 of the Bankruptcy Act of the Netherlands, as amended from time to time) of the whole or any material part of its assets or undertaking appointed;
    - iii. the licensee has an administration order under section 8 of the Insolvency Act 1986 and/or an administration order under Article 218

literate 2 of the Bankruptcy Act of the Netherlands, as amended from time to time, made in relation to it;

- iv. the licensee is found to be in breach of any national or European competition laws, such breach relating to the licensee's interconnector;  
or
- v. there is merger or acquisition activity in relation to, or by the licensee, that is detrimental to competition.