

Customers, Shippers, Gas
Transporters, Terminal Operators,
UKOOA and other interested
parties

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Dear Colleague,

Offshore gas production information disclosure: Decision letter

In February 2005, Ofgem consulted on a number of options in respect of the regulatory arrangements to facilitate offshore gas production information disclosure (the February document).¹ Following careful consideration of the issues and of responses received to that consultation, the Gas and Electricity Markets Authority (the Authority)² has decided not to change the existing onshore regulatory arrangements; i.e. it has approved Option One outlined in the February document. As set out in the February document, this decision also means that the temporary informal derogation in respect of Standard Special Condition A7 (SSC A7) of Transco NTS's Gas Transporters (GT) licence is removed with immediate effect as of today's date.³ This letter explains the reasons for this decision and constitutes the Authority's formal notice in accordance with the provisions of section 38A of the Gas Act 1986.

Ofgem has also published today guidance on how the Authority intends to consider any modification proposals that seek to release further information to the market.⁴

¹ "Offshore gas production information disclosure: initial consultation and draft impact assessment", Ofgem, February 2005.

² Ofgem is the office of the Authority. The terms Ofgem and the Authority are used interchangeably in this document.

³ The temporary informal derogation was initially issued in respect of Standard Condition 4E (amended) of Transco's Gas Transporters (GT) licence. Following 'hive-down' on 1 May 2005, the relevant licence condition is now Standard Special Condition A7 of all Transco NTS, Transco RDN and IDN licences (the relevant GT licences). The February document made reference to Standard Condition 4E (amended) of Transco's Gas Transporters Licence. While in this document the Authority is not proposing any licence amendments, any amendment in respect of Standard Special Condition A7 of the relevant GT licences would apply across all six licences (i.e. not just to Transco NTS GT licence). For the purpose of this document, Transco is referred to as Transco NTS and this licence condition is referred to as Standard Special Condition A7 (SSCA7) and should be considered as a reference to Standard Condition 4E where appropriate.

⁴ 'Information release under Gas Transporters Licence Standard Special Condition A7 - Guidance Document', 27 June 2005

Background

In February 2005 Ofgem issued its initial consultation and draft impact assessment (the February document), which sought views regarding whether changes need to be made to the current onshore regulatory arrangements that relate to the release of information. This consultation followed a lengthy period of discussion between Ofgem, DTI, Transco NTS, offshore producers and market participants more widely in respect of the level and quality of offshore information that is released to the market.

Standard Special Condition A7

As discussed in the February document, paragraph 5 of SS7A was introduced in April 2002 and requires Transco NTS to comply with any obligation in its Network Code⁵ to disclose information relating to the operation of Transco NTS's pipeline system or any market relating to the licensee's pipeline system.⁶ The explanatory notes that accompanied the introduction of paragraph 5 of SS7A envisaged that information from offshore companies could fall within the scope of the licence condition.

When the condition was introduced, the importance of information release was recognised, as was the importance of the Network Code governance arrangements in providing an appropriate means for market participants to raise and consider in detail what information is necessary for efficient market operation. However, it was noted that section 105 of the Utilities Act 2000 may have prevented Transco NTS from disclosing such information. Section 105 is a general prohibition on the disclosure of information except through certain "gateways" which was capable of applying to Transco NTS. One of the "gateways" is where a licensee is required by its licence to disclose the relevant information. It was therefore considered necessary to introduce paragraph 5 of SS7A into the licence so that the Network Code could be used as the basis for considering information disclosure and so that section 105 could not potentially prevent Transco NTS from releasing certain information.

DTI Information Initiative

Following the supply interruptions in summer 2003,⁷ Ofgem has been liaising closely with the DTI, Transco NTS and offshore producers in an attempt to secure greater information release regarding offshore gas production in order to provide enhanced information transparency to the wholesale gas market. Ofgem expressed its preference for a legislative route to require offshore companies to provide this information, but supported the voluntary scheme proposed.

As part of this scheme, all parties have worked to secure a 'voluntary' agreement for the release of information (the DTI Information Initiative) from offshore producers to Transco NTS. This initiative has facilitated the introduction of greater information flows to Transco NTS in its role as

⁵ Following 'hive-down' on 1 May 2005, paragraph 5 of SS7A relates to both the short form network code and the Uniform Network Code.

⁶ 'Transco price control and NTS incentives 2002-7. Explanatory notes to accompany the section 23 notice of proposed modifications to Transco's gas transporter licence', Ofgem, April 2002. See also Ofgem's letter of 27 September 2002 to shippers, Transco and other interested parties regarding modifications to Transco's GT licence.

⁷ 'Summer Interruptions 17 and 18 June 2003: Conclusions', Ofgem, August 2003

system operator, and has provided a means for some information flows to be released to the wider market in a 'sufficiently aggregated' form.

Confidentiality issues

Given the requirements of SS CA7, offshore parties had concerns during the onset of phase two of the voluntary scheme that information provided to Transco NTS would be released to the wider market. In order to facilitate the disclosure of phase two information, UKOOA proposed that Transco NTS sign an agreement with offshore participants to address issues of confidentiality and liability. The proposed confidentiality agreement contained a provision that should a modification be proposed to the network code which required the disclosure of information covered by the agreement, such information could be recalled by the producers or destroyed by Transco NTS on request of the producers.

While Ofgem supported the process of disclosing offshore information and welcomed the progress that had been made, it considered that the confidentiality agreement proposed between Transco NTS and the producers could result in a situation where Transco NTS was subject to conflicting obligations; on the one hand being required by its licence to disclose information whilst on the other, being prevented from doing so by the confidentiality agreement. Given Ofgem's views, Transco NTS made it clear that it could not sign such an agreement if the agreement could potentially place it in breach of its GT licence (e.g. when a modification proposal to its network code was raised and approved by Ofgem). Transco NTS also highlighted concerns regarding the continued security of supply if producers perceived a risk in continuing to provide information to Transco NTS and therefore withheld such information going forward.

Ofgem responded to these concerns in its open letter of 23 October 2003.⁸ However, UKOOA sought unequivocal commitment from Ofgem that it would not approve a network code modification proposal to disclose field specific information that producers had agreed to pass to Transco NTS under phase two of the DTI Information Initiative. Ofgem could not provide such a commitment as it cannot fetter the discretion of the Authority in respect of future decisions. UKOOA was therefore of the view that it would be unable to agree to the voluntary disclosure of certain information under phase two.

Informal temporary derogation

To facilitate the release of information under phase two of the DTI Information Initiative, Transco NTS and UKOOA sought a 'derogation' from the requirements of SS CA7 of Transco NTS's GT licence to address their concerns surrounding the release of information to the market.

Ofgem first 'issued' this derogation in April 2004,⁹ making clear that the derogation was 'informal' in nature and had no formal legal basis.^{10,11}

⁸ 'The disclosure of offshore information', Ofgem, 23 October 2003.

⁹ This derogation was subsequently extended until a decision was taken by the Authority in respect of the options in the February document.

¹⁰ See 'Access to offshore information: Consultation on a possible derogation to Standard Condition 4E of Transco's Gas Transporters Licence', Ofgem, 23 March 2004; and 'Access to offshore information: Derogation to Paragraph 5 of Amended Standard Condition 4E of Transco's Gas Transporters Licence', Ofgem, 15 April 2004.

In issuing the temporary informal derogation, Ofgem indicated that it was intended to be an interim measure only and that it would seek to consult on options to formally address the derogation and seek views in respect of a more enduring solution. The February document therefore represented Ofgem's open consultation in respect of these issues.

Uniform Network Code Modification Proposal 006 – related consultation

On 3 November 2004, energywatch raised network code modification proposal 727 "Publication of near real time data at UK sub-terminals" (now renumbered as UNC modification proposal 006).¹² This modification proposal is currently with Ofgem for decision. Ofgem has recently published an Impact Assessment (IA) in respect of the potential costs and benefits of its implementation.¹³ Ofgem notes that modification proposal 006 seeks to release information to the market that is not covered by the DTI Information Initiative and does not seek to release any information relating to the temporary informal derogation of SS CA7 in Transco NTS's GT licence.

February document

In its February document Ofgem sought views on three options in respect of SS CA7. These options are as follows:

- **Option 1: No change** - retain the current requirements of SS CA7. The temporary informal derogation would also be withdrawn. This would be supplemented with guidance on the treatment of potentially commercially sensitive information.
- **Option 2: Introduce a formal "derogation" power** - introduce a power in SS CA7 for the Authority to be able to grant the relevant GT licensee a derogation from having to comply with some or all of the information disclosure requirements. The temporary informal derogation would therefore also be withdrawn under this option. However, this option would provide the Authority with the ability to formalise the content of the temporary informal derogation if it considered this to be appropriate.
- **Option 3: Licence modification** - modify SS CA7 to prescribe the information that the relevant GT licensee would be obliged to release to the market if required to do so by the network code. The temporary informal derogation would therefore also be withdrawn under this option.

Ofgem did not provide a recommendation in respect of these options in its February document.

¹¹ If a network code modification were to be implemented requiring the release of information covered by the informal derogation, the status of the informal derogation would need to be scrutinised.

¹² This modification proposal was originally raised as modification proposal 0727 to Transco's network code. Under the Unified Network Code (UNC) Transitional Rules, this proposal is deemed to be made in respect of the UNC in accordance with the modification rules and has been renumbered as UNC modification proposal 006.

¹³ '3rd Party Proposal: Publication of Near Real Time Data at UK sub-terminals Modification Reference Number UNC 006 (0727), Impact assessment', Ofgem, May 2005.

Respondents Views

There were 27 responses to the February document, 11 parties with offshore production interests, 7 shippers/suppliers, 7 customers, DTI and NGT.¹⁴ Only one response was marked confidential. A summary of the views raised in response to the February document is provided below, with each key issue discussed in turn. A detailed statement of respondents' views is provided at Appendix 1.

Scope of consultation

A number of respondents queried why the consultation was considering wider issues and options surrounding the potential release of information rather than the information covered by the temporary informal derogation. Respondents indicated that, in their view this was inconsistent with previous statements made by Ofgem. Respondents also noted that the discussions which concluded with a Joint Industry Agreement (JIA) in March 2004 were premised on the understanding that formal consultation was required for modification of Standard Condition 4E (now SSCA7) to prevent release of phase two information.

Another respondent expressed the view that a true "no change" option should be considered, namely a continuation of the current arrangements and the temporary informal derogation. A fourth option, a hybrid of Options 2 and 3, was also suggested, whereby information would be specified in Transco NTS's GT licence as being exempt from disclosure requirements.

One respondent noted that an omission to the legal framework set out in the consultation was in relation to the Financial Services and Markets Act and the Competition Act, which includes important provisions that act to prevent market participants taking advantage of information or collusion in the upstream market. The respondent also noted that detailed information release (effectively implying exchange with competitors of information which would normally be considered confidential) could be contrary to Article 81(1) and the Chapter 1 prohibition.

Market transparency issues

Most respondents supported the overall principle of market transparency on the basis that disaggregated information on expected supply and demand was important for the market, and that lack of information in relation to offshore information was causing unnecessary volatility in gas prices. It was noted that this volatility often resulted in suppliers withdrawing customer quotes shortly after having issued them, meaning customers were unable to close contracts until the markets peaked. Respondents also cited the more transparent arrangements in the electricity market, which were seen to be working well.

Other respondents, predominantly representing those with production interests, highlighted a number of possible issues related to greater transparency. They stated that it was not unusual for market participants to have differing levels of information and that, once fully implemented, the present arrangements would provide participants with adequate information. It was also noted that comparisons to the electricity market were not valid, since the markets had different characteristics.

¹⁴ Copies of the non confidential responses are available on Ofgem's website.

Finally, one respondent stated that one of the cheapest and simplest ways of improving current information would be the requirement on Transco NTS to provide all data on one simple web based platform rather than the current proliferation of arcane and complicated systems.

DTI Information Initiative

A number of respondents raised concerns regarding the voluntary arrangements, with some expressing the view that these did not go far enough in releasing information to the market and expressing a preference for a legislative approach over the current voluntary arrangements.

The views of such respondents, predominantly those representing downstream or customer interests, included that information fundamental to the efficiency of the market (e.g. which was critical to understand price movements and make appropriate commercial decisions) should not be provided on a voluntary basis where it could be withdrawn at short notice. Respondents also noted that risk of withdrawal of information critical to system operation was a *prima facie* case for imposing provisions to regularise and underwrite the provision of information to Transco NTS (independent of consideration of whether or not that data should be subsequently released to the market).

Some respondents stated that it would be important to ensure that the decision taken with respect to arrangements regarding the provision of information to Transco NTS would not limit the potential development of these requirements in the future.

In addition, a number of respondents highlighted the benefits that have accrued to Transco NTS as a result of phases one and two of the voluntary scheme, and the need to avoid this information being withdrawn.

Some respondents, particularly those with production interests, indicated that they believed the benefits of the voluntary scheme needed to be fully assessed before further changes were considered, and that any information disclosure over and above the voluntary scheme should be subject to a proper impact assessment.

Confidentiality and commercial sensitivity

A number of respondents, predominantly representing production interests, indicated concern in relation to the potential release of confidential information. Concerns included the commercial sensitivity of TBE information relating to future plans and projects, and the shorter term risks of becoming a “distressed buyer” if the market were to become aware of specific supply problems. Respondents expressed doubts that these issues could be addressed through contract renegotiation, given the continued risk of physical delivery.

In contrast, other respondents, largely representing downstream or customer interests, indicated that they did not believe any of the options would jeopardise producers’ interests or their continuing participation in the voluntary scheme. They noted that Ofgem had indicated that it would be unlikely to approve any modification if acceptance would threaten the provision of information or involve breach of confidentiality obligations. They also noted that if any company believed a proposed modification would create commercial risks, they would be free to explain the full details of their commercial position to Ofgem, and allow it to judge whether

the information should be released. Respondents also indicated a belief that production risks could be hedged to some extent by moving the point of sale to the NBP rather than the beach.

One respondent considered that in taking account of commercial confidentiality concerns there needs to be some objective basis for considering these concerns and striking an appropriate balance between the interests of producers, consumers and other market participants. This respondent considered that simply accepting claims relating to commercial sensitivity at face value would set a dangerous precedent, whereby a bilateral deal between Transco NTS and producers could be used to “veto” beneficial changes to industry rules agreed under network code governance.

Draft impact assessment

Some respondents welcomed the demonstration of benefits by the draft IA and considered that the Barclay’s impact analysis was an underestimate of the benefits of greater information release, given that prices had significantly increased since the publication of this report.

A number of other respondents questioned the basis for the costs and benefits presented in the draft impact assessment. Respondents argued that the benefits of information release were overstated for a range of reasons, that there was no differentiation in the impact assessment between the costs and benefits associated with the three options, and that it was not clear that the release of disaggregated information would improve market signals, reduce balancing costs and improve security of supply, not least as the market structure, not just the information released, would primarily deliver security of supply.

Respondents also argued that the impact assessment did not present a sufficient empirical case, and represented opinion rather than evidence.

Option One

Eight respondents, in particular those supporting greater market transparency over and above that provided under the voluntary scheme, supported Option One (two of these respondents offered qualified support for Option One). The reasons cited by respondents for supporting Option One included that:

- it was the most efficient and least complicated route forward;
- it would provide protection in relation to commercially sensitive information while retaining flexibility to address future market developments; and
- it would ensure that market participants, under a consultative governance process with appropriate routes of appeal, retain the right to propose changes to key aspects of market rules.

Some respondents expressed a number of concerns in relation to the adoption of Option One – these centred on the clarity of the guidance on the treatment of commercially sensitive information in relation to modifications, and on the extent to which Ofgem could provide comfort to producers in relation to confidential information.

Option Two

Two respondents supported Option Two. The reasons given included that this option could recognise the benefits of retaining the current level of upstream information release and allow for the possibility of additional release in the future

A number of further respondents stated that they considered that it was difficult to comment on this option without further information regarding the way in which the derogation power would be applied. While some respondents stated that they could in principle support this option, many of these actually expressed a preference for Option Three, as it provided more certainty. A large proportion of these respondents cited a number of potential benefits of option two, including the certainty that this option would provide, but also noted that only phase three information was mentioned in discussions of Option Two.

A number of respondents expressed concern in relation to Option Two. Some respondents argued that rationale used by Ofgem in support of Options Two and Three (that it would give producers comfort over the confidentiality of data passed to Transco NTS) were not valid, as Ofgem could take into account commercial confidentiality concerns when it considered a specific proposal under Option One. Respondents also commented that Options Two and Three could unwittingly block the publication of data that may, at some time in future, be necessary for the fulfilment of Transco's relevant objectives.

Respondents also noted that application for a derogation in relation to every modification proposal would be time consuming, and that it could be inconsistent for Ofgem to approve a Network Code modification and then subsequently issue a derogation against it.

Option Three

Ten respondents specifically expressed support for Option Three, including a number of producers who indicated that Option Three provided the most certainty with respect to the potential publication of commercially sensitive information because the information that Transco NTS would possibly publish would be clearly set out and subsequent extensions to the requirements to publish data would require the standard licence modification consultation process.

A number of those parties that expressed support for Option Three also noted that further information would be required before they could offer their full support. Parties noted in particular the lack of specification of the information that would be covered and detail on the duration that could be associated with the licence change options.

A number of respondents expressed concerns in relation to the flexibility of Option Three. These concerns related principally to the fact that the practicalities of this option seemed to make it more difficult to fully specify the information that could be released, and could constrain future innovative proposals for further information provision. It was noted that the information being provided may not be able to respond as easily to changes in the overall distribution of supply sources which could justify information being presented at a lower level of disaggregation or on a different basis.

One respondent also suggested a fourth option, a hybrid of Options 2 and 3, whereby information would be specified in Transco NTS's GT licence as being exempt from disclosure requirements.

Ofgem's views

Having carefully considered responses received to the February document, and having had regard to its principal objective and wider statutory duties under section 4AA of the Gas Act, the Authority has decided not to make any changes to SS CA7 in any of the relevant GT licences, and has therefore approved Option One as outlined in the February document. In taking this decision, and as highlighted in the February document, the temporary informal derogation in respect of SS CA7 is withdrawn with immediate effect as of today's date. Ofgem has also today published guidance with respect to the way in which the Authority intends to consider any current or future modification proposals that seek to release further information to the market.

It is important to note that this decision does not relate to any particular proposal for release of information or enhanced transparency in the wholesale gas market. Rather, it relates purely to the regulatory framework to be applied to issues of information release and transparency going forward.

In taking its decision, the Authority carefully considered the options outlined in the February document and took the view that Option One would have clear and distinct benefits above all other options outlined in the February document. In particular, the Authority considered that Option One provided the most appropriate overall framework for the Authority to consider any future modification proposals. In taking this decision the Authority noted the differing views from consumers and downstream participants, and also from producers. However, on balance the Authority considered, having regard to its principal objective and statutory duties, that this decision best serves the interests of consumers. The information below is provided to further explain this decision and is presented as a summary of each of the key issues raised in responses to the February document.

Scope of consultation

In its letter of 14 October 2004 which extended the temporary informal derogation, Ofgem noted that it would seek to consult on options to create an enduring regulatory framework relating to the release of information provided to Transco NTS under the current regulatory agreement. Ofgem welcomes the views raised by respondents in respect of the range of options identified in the February document, which aided and informed its decision making process.

Ofgem considers that it was appropriate to look at the range of options identified in the February document, particularly given that nearly one year had passed since the temporary informal derogation had first been issued. Ofgem further considers that it was appropriate to ensure that all options identified in the February document were available to market participants for their consideration, to ensure that options that may provide benefits to consumers were not limited or foreclosed.

Ofgem does not consider that it would have been appropriate, as suggested by one respondent, to have considered an option whereby the temporary informal derogation was extended for a longer period. Ofgem notes that the temporary informal derogation was put in place as an interim measure, with the intent from the outset being to consult on enduring regulatory arrangements. Further, while Ofgem recognises that parties have taken some comfort from the existence of the temporary informal derogation, as noted in the February document and in

earlier letters, the derogation is not suitable on a more enduring basis as there is no statutory basis or provisions in the relevant GT licences to enable it to be granted or directed.

Market Transparency Issues

Ofgem continues to support the principle of greater market transparency. Ofgem notes that there was general support across all respondents to the February document for information transparency, and an overall view that information can provide benefits in respect of aiding and informing the market.

Ofgem considers that where the market has equivalent access to transparent information this will enable market participants to make better informed trading and investment decisions and that this will likely lead to improved market confidence and increased competition. Ofgem notes that large industrial customers have highlighted at different times (including during the recent gas price rises in February and March 2005) that a better understanding of price movements could improve their ability to take informed decisions; for example, whether to opt for fixed price contracts or contracts linked to spot prices.

Ofgem notes concerns raised by respondents with respect to asymmetric access to information and also in relation to the coordination of production outages. In situations where parties have asymmetric access to information, Ofgem notes that those with production interests do not necessarily have access to a collective data set of all offshore information, but may have access to information relating to their own fields and to some extent the relevant upstream facilities and terminals they are contractually associated with. Further, Ofgem notes that the requirements of the FSMA 2000 and Competition Act 1998 provide certain protection against market manipulation and anti-competitive behaviour.

Ofgem also notes the views of a number of respondents in relation to the information that is made available in the electricity market and whether or not the same information should be made available in the gas market. However, Ofgem considers that while there are some good examples of effective information release in the GB electricity market, the rationale for information to be made available in the gas market is not necessarily determined by the extent to which information is currently available in the electricity market. Ofgem considers that it is appropriate for proposals to release information to either the gas or electricity markets to be considered on a case by case basis, as with all other modification proposals.

Ofgem also notes the comments made by a respondent with respect to the improvements that could be made to the provision of the current information made available by Transco NTS. Ofgem would welcome any developments that Transco NTS may make to its information systems that would improve the clarity of information provision.

DTI Information Initiative

Whilst being supportive of the voluntary DTI Information Initiative, Ofgem remains of the view that it would be preferable to put in place legislative obligations on offshore producers requiring them to provide relevant information to Transco NTS and an appropriate level of transparency for all market participants. Ofgem agrees with a number of respondents that consider that information essential to Transco NTS's market operation should not continue to be made available purely on a voluntary basis and further that customers' interests would be best

protected by a legislative approach. Indeed, Ofgem considers that the fact that the current arrangements are not mandatory, and that there is therefore a possibility that the provision of this information could be withdrawn, highlights a key weakness in the current voluntary arrangements for the provision of information.

Ofgem also notes that a number of market participants expressed some dissatisfaction with the levels of information being released under the DTI Information Initiative. In addition, Ofgem notes views raised that the DTI Information initiative is arguably under-delivering in certain respects; e.g. with respect to Transco NTS's publication of some of this data and in particular with respect to the timeliness of the provision of this information to the market and the way in which it is published, compared to the original specification. Whilst Ofgem recognises that there are often delays in the progress of large scale projects (particularly from an IT perspective), Ofgem considers that these issues may also indicate some of the weaknesses of the voluntary arrangements.

Ofgem also notes the views raised by one respondent that information released under the voluntary scheme represents information that producers agreed to release and not necessarily what may be required by the market. Ofgem agrees that this is a potential further shortcoming of the voluntary arrangement and further considers that the levels of information that producers are likely to settle upon for release is likely to be at a higher level of aggregation than may strictly be necessary to protect their commercially sensitive data.

Ofgem recognises there is a risk that producers may seek to withdraw from providing information to Transco NTS under the DTI Information Initiative. Ofgem notes that some producers have indicated that they may have to reconsider their arrangements for providing TBE data to Transco NTS should the temporary informal derogation be removed. Ofgem would be concerned if the benefits of the improved levels of market transparency achieved under the voluntary scheme, and also the benefits achieved in respect of improving Transco NTS's TBE process, were to be lost.

Ofgem welcomes the support expressed by respondents overall (including a number of producers) for the improved information provision in Transco NTS's TBE process and for transparency more generally, and considers that this is likely to be indicative of the wider support for ongoing provision of information.

However, in respect of the potential implementation of a mandatory arrangement, Ofgem notes that the DTI could implement such an arrangement via legislative or licensing routes. Ofgem would welcome further consideration of this issue by the DTI and would be happy to continue to work with the DTI and market participants to further progress this issue.

Finally, Ofgem notes that although Option One would remove the current temporary informal derogation, there are currently no UNC modification proposals either in assessment phase or under consideration by Ofgem regarding the release of information relating to that derogation.¹⁵ Ofgem notes that parties providing information to the relevant licensee would be able to continue to assess the materiality of this risk on a case by case basis as the Authority takes decisions on any new relevant modification proposals going forward.

¹⁵ It should be noted that modification proposal 006 does not seek to release information currently subject to the temporary informal derogation.

In this respect, Ofgem has today issued guidance with respect to the process the Authority would undertake when making such decisions. It should also be noted that decisions taken by the Authority to modify the UNC are soon to be appealable to the Competition Commission under the Energy Act. Ofgem considers that this new appeal process will represent a further layer of accountability to the Authority's decision making process.

Confidentiality and commercial sensitivity

Ofgem has carefully considered the issues raised by respondents and Transco NTS with respect to the potential risk of liability to Transco NTS resulting from breach of contracts or confidentiality agreements. Ofgem notes and agrees with the views of one respondent that if a company believed that the exact nature of its commercial position could be identified by the information being released and that the company was unable to mitigate that risk, the onus would be on those parties to explain the full details of their position to Ofgem for it to assess whether such a situation had arisen. Ofgem is of the view that the parties who considered that particular information is commercially sensitive or is confidential are best placed to explain and provide evidence as to how their commercial positions would be exposed from the release of wider information and the prejudice they would suffer, and also that there were no steps that could be taken to mitigate this situation.

Ofgem recognises that a number of parties have concerns in respect of the extent to which Ofgem will account for commercial sensitivities and issues of confidentiality as part of its decision making process. As noted previously, the Authority intends to consider any future modification proposal, seeking to release information to the wider market, on a case by case basis and has today published guidance regarding the way in which it intends to factor these considerations into its decision making process. As noted in the guidance, the Authority would be unlikely to accept any modification proposal where it had been demonstrated that the implementation of that proposal was likely to "seriously and prejudicially affect the interests" of the individual or body concerned.

Further, whilst Ofgem considers there are benefits to the market of greater information transparency, it does not consider that requiring relevant GTs to disclose confidential information would necessarily better facilitate the achievement of the relevant objectives of the UNC or a relevant network code. As the guidance notes, this may include account being taken of the extent to which the implementation of a UNC or network code modification may threaten the continued provision of information to Transco NTS (either, for example, withdrawal of participants from the voluntary scheme or the operation of any "return or destroy" provisions in relevant contracts). Ofgem considers that these guidance notes should go a long way in providing comfort and clarity to market participants that all relevant and important factors will be taken into consideration by the Authority as part of its decision making process.

As an example of the process that Ofgem could undertake in considering modification proposals that seek to release information to the market, as part of its assessment of UNC modification proposal 006, Ofgem requested and received copies of a number of relevant contractual agreements from Transco NTS. Ofgem notes that Transco NTS has indicated to Ofgem that it has not undertaken its own detailed contract by contract analysis of its agreements with producers in order to judge the likely level of its liability risk. Ofgem undertook a preliminary assessment of these agreements, particularly in respect of the issue of confidentiality and the

potential liability risk to Transco NTS if it had to release information that the agreements covered.

Draft Impact Assessment

Whilst Ofgem notes that there was considerable support from respondents for this assessment and the overall benefits it demonstrated, Ofgem recognises that a number of concerns were raised in respect of the methodology and baseline used for the draft impact assessment in the February document.

Ofgem notes that having considered views relating to the draft impact assessment (which drew heavily on analysis carried out by Barclays Capital)¹⁶, and also having considered views raised in relation to UNC Modification Proposal 006 (where supporting analysis also made reference to the same analysis carried out by Barclays Capital), Ofgem has undertaken further analysis with respect to the likely costs and benefits of the increased provision of information; both in respect of information provision in general and that specific to UNC Modification Proposal 006.¹⁷ A draft form of this analysis was provided to the Authority as background reference material only, when taking its decision with respect to the potential amendment to SSC A7 of the relevant GT licences. It should be noted that the Authority was also made aware that respondents' views were yet to be considered in respect of that analysis.

Comparison of the three options

Having carefully considered the issues identified in respect of each option, the Authority considers that Option One has clear and distinct benefits over and above Options Two and Three.

The Authority considers that Option One provides the best solution to achieve the greatest potential benefits through improved market transparency while balancing the legitimate interests of market participants in relation to commercially sensitive or confidential information, and providing a regulatory framework that will allow for the greatest flexibility for modification proposals seeking to release information to be raised and considered on a case by case basis.

Having considered Options Two and Three, while recognising there are also potential benefits of each of these, the Authority is mindful that both of these options could limit the achievement of benefits from modification proposals that sought to release information to the market, in that these options could act to block the publication of current or future information that may provide overall benefits to the market and to consumers.

In particular, Ofgem notes that Option One provides the Authority with the flexibility to consider any modification proposal on its merits, against the relevant objectives of the UNC and its wider statutory duties, without any limitations in respect of what information can or cannot be released under the terms of the relevant GT licence. Whilst Ofgem recognises concerns that this could lead to proposals being raised that seek to release potentially confidential information,

¹⁶ "Benefits of greater information release in the UK gas market" Barclays Capital, December 2003

¹⁷ Ofgem published this additional analysis in its consultation document "3rd Party Proposal: Publication of Near Real Time Data at UK sub-terminals Modification Reference Number UNC 006 (0727): Impact assessment" on 27 May 2005.

Ofgem considers that the guidance published today will provide increased comfort and clarity to market participants in respect of how the Authority intends to treat these issues as part of its decision making process. As noted in the guidance, the Authority intends to make an assessment of any commercial sensitivity and confidentiality concerns raised by parties (and specifically by the providers of that information to the relevant GT licensee) and factor this into its overall decision on modification proposals seeking to release information to the market. Ofgem considers that this guidance affords producers with the desired degree of protection and outlines the objective basis on which the Authority will seek to consider any future proposals to release information to the market.

In respect of the DTI Information Initiative, Ofgem notes comments made by some respondents that Option One may have an adverse impact on information made available to the market in that its implementation may lead to producers' withdrawal from the voluntary scheme. However, Ofgem also notes the comments made by the large majority of respondents to the February document in respect of the benefits of information transparency more generally. Having carefully considered these views, given that there are currently no modification proposals either in assessment or with Ofgem for decision that seek to require Transco NTS to publish data from third parties relating to "the affairs of any individual or any particular business", and given the significant investment in goodwill involved in the voluntary scheme to date, Ofgem does not consider it likely that the implementation of Option One would necessarily lead to the withdrawal of information from the DTI Information Initiative.

In respect of the flexibility of the governance arrangements, Ofgem notes the comments made by a number of respondents that the network code governance arrangements provide all parties with the ability to make representations to modification proposals. Ofgem agrees that this is important to ensure that proposals seeking to release information can be proposed by all relevant code signatories and not solely by relevant GT licensees or the Authority.

Further, Ofgem also notes the imminent implementation of the Energy Act requirement for a right of appeal to the Authority's decisions in respect of the UNC. Ofgem considers the appeals process will provide further accountability to its decision making process and considers that this will likely provide increased comfort to parties that continue to have concerns about the risk of decisions in respect of the release of potentially confidential or commercially sensitive information to the market.

Having considered the potential benefits of Option Two, Ofgem does not consider that Option Two would be as flexible as Option One and would therefore not be likely to facilitate the optimal achievement of the potential benefits associated with information transparency. Whilst Option Two would provide some flexibility and a degree of certainty in that it would be possible to issue formal derogations when appropriate in relation to certain specific information flows, Option Two would still potentially limit the achievement of benefits to the market by exempting the release of specific information flows. Further, Ofgem holds some concerns that under Option Two, while modification proposals may be raised and considered by market participants and subsequently directed by the Authority if such an approval were to be considered appropriate, elements of that proposal may be subject to a derogation and therefore not released to the market by the relevant GT licensee.

Ofgem notes the comments made by a number of respondents that it was difficult to comment on Option Two without further information regarding the way in which the derogation power

would be applied. In particular, Ofgem notes the comment made by one respondent that it would be difficult to issue a derogation in respect of information for which there was no obligation to publish. Ofgem does not consider that details of the information which may or may not be derogated under Option Two is necessary in order to take a view on the option itself – the key issue relates to the governance process and not about any particular derogation.

With respect to the views raised regarding Option Three, Ofgem notes that this option would provide the most certainty to those parties with production interests. However, Ofgem also agrees with the concerns of some respondents that this option would narrow the Authority's ability to consider each modification proposal seeking to release information on a case by case basis by 'hard-wiring' into the licence the information that the relevant GT licensee would not be required to release. Ofgem also agrees with the view of a number of respondents, that it is not possible to anticipate all potential future UNC modification proposals or alternatively to anticipate any relevant future information flows. Ofgem is of the view that this issue of practicality is therefore a key disadvantage of Option Three.

Ofgem also notes that Option Three could also reduce the ability to realise potential benefits that could flow to customers from enhanced gas market transparency as any future modification to SS7 to specify further information flows for exclusion would require further consultation and the consent of relevant licensees.¹⁸ Further, Ofgem does not consider that Option Three would provide the most efficient outcome as, going forward, this may result in multiple amendments being proposed to the relevant GT licensees as new modification proposals are raised or new information flows become available.

Finally, in relation to the additional hybrid option suggested by one respondent, Ofgem considers that has very similar characteristics to Option Three, and therefore shares broadly the same advantages and disadvantages.

Therefore, on balance, Ofgem agrees with a number of respondents mainly reflecting customer and downstream interests that Option One provides clarity and a degree of regulatory certainty to market participants (via the guidance notes published today) that all modification proposals would be judged by the Authority on their own merits and on a case-by-case basis, consistent with current practice. Ofgem does note however, that the implementation of Option One does not foreclose the future implementation of Options Two or Three (or any other changes that may be appropriate) going forward if this were considered appropriate at some future time.

Authority's Decision

Therefore, following careful consideration of the issues and of responses received to the February document, the Authority has decided not to change the existing regulatory arrangements – i.e. the Authority has approved Option One outlined in the February document. As set out in the February document, this decision means that the temporary informal derogation in respect of Standard Special Condition A7 of Transco NTS's Gas Transporters (GT) licence has been removed with immediate effect as of today's date. Further, as noted previously in the February document, Ofgem has also today published guidance regarding the way in which the Authority intends to consider any current or future modification proposals that seek to release further information to the market. A copy of this guidance is available on the Ofgem website.

¹⁸ In accordance with the private collective licence modification process.

Please feel free to contact me if you have any further questions. Alternatively, Jo Witters on 020 7901 7159 would be happy to help.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Sonia Brown', enclosed within a light grey rectangular border.

Sonia Brown
Director, Wholesale Markets
Authorised on behalf of the Authority for that purpose

Appendix 1 : Detailed summary of respondents' views

Scope of consultation

A number of respondents queried why the consultation was considering wider issues and options surrounding the potential release of information rather than the information covered by the temporary informal derogation. Respondents indicated that, in their view:

- This was inconsistent with previous statements made by Ofgem;
- Ofgem had made a unilateral decision to expand the scope of any formal licence modification proposal;
- The discussions led by the DTI with UKOOA, Transco NTS and including Ofgem concluded with a Joint Industry Agreement (JIA) in March 2004 to provide information to Transco NTS and the wider market – this agreement was reached on the understanding that formal consultation was required for modification of Standard Condition 4E (now SSCA7) to prevent release of phase two information;
- In various statements, Ofgem had seemed to disregard the significant amount of time and resource that was expended by the DTI, Transco NTS, UKOOA and Ofgem in reaching the JIA.

Another respondent expressed the view that a true “no change” option should be considered, namely a continuation of the current arrangements and the temporary informal derogation. One respondent also suggested a fourth option, a hybrid of Options 2 and 3, whereby information would be specified in Transco NTS’s GT licence as being exempt from disclosure requirements.

One respondent noted that an omission to the legal framework set out in the consultation was in relation to the Financial Services and Markets Act and the Competition Act, which includes important provisions that act to prevent market participants taking advantage of information or collusion in the upstream market. The respondent also noted that detailed information release (effectively implying exchange with competitors of information which would normally be considered confidential) could be contrary to Article 81(1) and the Chapter 1 prohibition.

Market transparency issues

Most respondents supported the overall principle of market transparency. Many of the responses raised differing views as to whether the level of information release under the voluntary scheme was sufficient. Respondents highlighted a range of issues in relation to the need for transparency, including that, in their view:

- The market needs to know what the total expected supply was on any day, and when there had been a deviation from the expected position that might affect part of the system. The historic separation of onshore and offshore regulation should not prevent such disclosure;
- Lack of information release, resulting in information asymmetries could facilitate insider trading;
- Without sufficiently disaggregated information, it was difficult to be sure that the market was not being manipulated;

- Lack of information in relation to offshore information was causing unnecessary volatility in gas prices – and that this volatility often resulted in suppliers withdrawing customer quotes shortly after having issued them, meaning customers were unable to close contracts until the markets peaked. The point was also made that supplier margins have increased in recent years, and this could be due to higher risk premia being added to take account of increased wholesale volatility;
- The relatively transparent arrangements in the electricity market work well, and differences in information provision between the electricity and gas markets are inequitable – although the difference between single user and multi-user entry points in the gas system may mean that information release disadvantages some users;

Other respondents, predominantly representing those with production interests, highlighted a number of possible issues related to greater transparency. Their views included that:

- It was not unusual for market participants to have different levels of information, not least because every market participant has access to unique information regarding its own commercial position – it is through the price mechanism that information is aggregated and released;
- As trading is primarily at NBP, the present arrangements (once fully implemented) would provide market participants with adequate information, as the key data relates to NBP deliveries, and not to where the gas supply shortage or length may physically be;
- Any locational information required is already provided to the market via the OCM;
- Providing information to parties who cannot always understand the basis or relevance of the information they are receiving is likely to increase the incidence of inappropriate actions in the market;
- Increased information flows could result in an improved ability to co-ordinate system outages in an anti-competitive manner;
- Comparisons to the electricity market were not relevant, since market features (e.g. balancing periods, gate closure) were different.

A number of respondents also noted that the benefits of transparency should relate both to supply and demand, and that therefore requirements could also be placed on the demand side.

Finally, one respondent stated that one of the cheapest and simplest ways of improving current information would be the requirement on Transco NTS to provide all data on one simple web based platform rather than the current proliferation of arcane and complicated systems.

One respondent considered that the appropriate comparison between gas and electricity is information provided at D + 1 in gas and at gate closure in electricity. Some respondents highlighted that the comparison with electricity in relation to information provided under the voluntary scheme in gas could have included additional detail on other information provided by Transco NTS, such as linepack.

Another respondent questioned the comparisons between electricity and gas for some of the categories of phase three information release against the equivalent electricity data flow. This respondent identified that category one equivalent in electricity was NGC and Elexon publishing “near to real time data” on the users intended requirements to flow (nominations) rather than from physical metering arrangements. For category two, this respondent highlighted that the comparator used in the consultation may be incorrect as category two relates to NTS gas entry flows, whereas the document highlighted that the electricity equivalent was forecasts of

electricity demand. This respondent also noted that LDZ demand forecast information was published to all market participants in gas, both ahead and within day. Further, this respondent considered that in terms of competition measures the gas market compared favourably on various market concentration and vertical integration measures.

DTI Information Initiative

A number of respondents raised concerns with the voluntary arrangements, with some expressing the view that these did not go far enough in releasing information to the market and expressing a preference for a legislative approach over the current voluntary arrangements. The views of such respondents, predominantly representing downstream or customer interests included that:

- the limited consultation by the DTI in relation to the voluntary scheme resulted in the scheme focusing on data that producers were happy to share rather than information that was of most value to the market;
- the data to be provided under phase 3 was insufficient, and further dis-aggregation was required to understand locational constraints and interruptions witnessed in recent years;
- the key issue was ensuring that producers continue to supply the information required by the industry. Information fundamental to the efficiency of the market (e.g. which was critical to understand price movements and make appropriate commercial decisions) should not be provided on a voluntary basis where it could be withdrawn at short notice, and therefore a legislative approach would better protect customer interests;
- the risk of withdrawal of information critical to system operation was a *prima facie* case for imposing provisions to regularise and underwrite the provision of information to Transco NTS (independent of consideration of whether or not that data should be subsequently released to the market); and
- under the voluntary scheme, there have been a number of instances where data is not in an ideal form or has not been provided promptly – for example, physical flow data is reported with a two day lag and interconnector flows are not reported as physical flows but as import nominations.

Some respondents stated that it would be important to ensure that the decision taken, with respect to arrangements regarding the provision of information to Transco, would not limit the potential development of these requirements in the future.

A number of respondents highlighted the benefits that have accrued to Transco NTS as a result of phases one and two of the voluntary scheme, and the need to avoid this information being withdrawn. Respondents indicated that the information currently provided has improved participants' understanding of peak deliverability in the winter and allowed more accurate modelling of future supply scenarios, and hence it would be unwelcome for this information to be withdrawn particularly given the tight supply situation for the next few winters.

Some respondents, particularly those with production interests, indicated that they believed the benefits of the voluntary scheme needed to be fully assessed before further changes were considered, and that information disclosure over and above the voluntary scheme should be subject to a proper impact assessment.

Transco NTS committed to undertake a full and detailed impact analysis to confirm the systems development effort, costs and timescales involved.

One respondent indicated that it thought that it was odd that Ofgem expressed support for a legislative approach but then supported the voluntary scheme so strongly.

Another respondent considered that the method by which the provision of offshore information was assured was not of great importance but that it was simply important that the type of information, necessary for the market to function efficiently, was made available.

Confidentiality and commercial sensitivity

A number of respondents (predominantly representing production interests) indicated concern in relation to the potential release of confidential information – for example, respondents indicated that:

- to encourage future UKCS investments and safeguard future gas supplies, it was vital to protect the integrity of the TBE process, and that future plans and projects, some of which can be very sensitive, were only shared with Transco NTS on the basis that they will not become public knowledge under any circumstances;
- detailed information release could reveal that a shipper was short and put that party in the position of being a “distressed buyer” of gas. In the longer term, this would increase the commercial risks associated with supplying gas to the UK market. Respondents also expressed doubts that such issues could be addressed through contract re-negotiation, indicating that this ignores the costs of contract re-negotiations and misses the point that residual physical delivery risk will always exist;
- the terms of confidentiality agreements with Transco NTS would need to be reconsidered. Some stated that if information were released that could result in commercial disadvantage to parties operating on the NTS, they would stop providing such information until an acceptable solution could be found;
- the unrestricted disclosure of ‘real-time’ flow data at smaller single user entry points could inadvertently favour sellers under certain circumstances; and
- the understanding between DTI, UKOOA, Transco NTS and Ofgem was that the balance between additional information to the market and protection of confidential information was achieved by aggregation at a National, North or South zonal basis. If there was any economic redress identifiable from the publication of disaggregated information then the affected party(ies) is (are) likely to seek financial recompense.

Transco NTS highlighted that the information it receives from third parties such as hourly sub-terminal delivery forecast nominations (DFNs), planned and unplanned maintenance, availability of beach supplies and, in some circumstances, access to certain metering equipment, is provided largely on a bilateral, non-contractual basis. Transco NTS further indicated that where confidential information is provided on a contractual basis, for example, under Network Entry Agreements, there are confidentiality clauses inserted that prevent Transco NTS from disclosing commercially sensitive information except in certain limited circumstances. Transco NTS noted that although this information was largely received on a “grace and favour” basis, it is deemed to be an integral part of the information that is required to undertake the efficient balancing of the NTS pipeline; but for operational rather than commercial purposes.

Some respondents, predominantly representing downstream or customer interests, indicated that they did not believe any of the options would jeopardise producers’ continuing participation in the voluntary scheme. Their views included that:

- since Ofgem had previously indicated that it would be unlikely to approve any modification if such an acceptance would threaten the continued provision of information or would place them in breach of pre-existing confidentiality obligations, withdrawal from the scheme should be unlikely;
- the current arrangements, under which the information published by Transco NTS can be modified using provisions of the Network Code, seemed entirely appropriate as it allowed Ofgem to take a broad view of the arguments presented (including in relation to confidentiality of information) whilst also having regard to its underlying statutory objectives
- there are not currently any modifications seeking to require Transco NTS to publish any data it receives from third parties that specifically relates to “the affairs of any individual or any particular business”, except Transco NTS, and if any company believed that the nature of their commercial position could be identified via flow data and they were unable to mitigate this risk they should explain the full details of their commercial position to Ofgem and allow it to judge if the information should be released; and
- while release of gas flow data does not automatically expose the producer to commercial risks, if a party feels that they have a “risk” from flow data they can hedge the risk by moving the point of sale to the NBP rather than the beach. In any case, where there are production risks, producers are best placed to manage them.

One respondent commented that because the arrangements which provide information to Transco are outside the network code the legislative chain needs to be considered, particularly with the proposed move from the network code to the UNC.

One respondent considered that in taking account of commercial confidentiality concerns there needs to be some objective basis for considering these concerns and striking an appropriate balance between the interests of producers, consumers and other market participants. This respondent considered that taking these claims at face value would set a dangerous precedent, whereby a bilateral deal between Transco NTS and producers can be used to “veto” beneficial changes to industry rules agreed under network code governance.

Another respondent noted that, in responding to the original temporary informal derogation consultation, they had noted that Transco NTS would have time prior to the implementation of a change to the Network Code for the return or destroy provisions in the confidentiality agreements for the phase two information to be activated and that therefore the risk of disclosure was limited.

Finally, some respondents, although understanding producers’ reluctance to provide detailed information, felt that revealing information was unlikely to damage them commercially in the same way or indeed to the same extent that all consumers are punished when the price of gas takes an unexpected hike.

Draft impact assessment

Some respondents welcomed the demonstration of benefits by the draft IA and considered that the Barclay’s impact analysis was an underestimate of the benefits of greater information release, given that prices had significantly increased since the publication of this report.

A number of respondents questioned the basis for the costs and benefits provided in the draft impact assessment. Their views included that:

- the benefits of information release were overestimated, and Barclays' assessment:
 - adopted the wrong baseline (i.e. no information provision)
 - drew on an invalid comparison between the gas and electricity markets;
 - was unclear in relation to the basis for the £20 million benefit associated with improved coordination of gas field outages (as there was a belief that planned outages are already largely coordinated, and indeed further co-ordination could be viewed as anti-competitive);
 - misrepresented the likely impact on the bid-offer spread, as the spread reflects market fundamentals, and would not be affected by greater information release
- there was no differentiation in the impact assessment between the costs and benefits associated with the three options presented in the consultation, and no differentiation between costs and benefits of different categories of information;
- it was not clear that the release of disaggregated information would improve market signals, reduce balancing costs and improve security of supply, and the argument that security of supply would be improved was misplaced as the market structure, not just the information released, would primarily deliver security of supply
- the impact analysis had not drawn a proper distinction between the economic benefit and economic transfers associated with information release;
- the impact assessment did not provide a sufficient empirical case, and represented opinion without evidence;
- the £135,000 setting up cost for phase three information is a cost associated with the DTI and should not be included in Ofgem's options; and
- the impact assessment focused on the costs and benefits of the release of upstream and not downstream information.

Option One

Eight respondents, in particular those supporting greater market transparency over and above that provided under the voluntary scheme, supported Option One (two of these respondents offered qualified support for Option One). The reasons cited for supporting Option One included that:

- it was the most efficient and least complicated route forward because the other options would take longer to implement and introduce more complex regulatory arrangements;
- it provided sufficient protection in relation to commercially sensitive information through the proposed guidance;
- it would ensure that market participants, under a consultative governance process with appropriate routes of appeal, retain the right to propose changes to key aspects of market rules, rather than placing them in other documents;
- it would remove the risk under Options Two or Three that publication of data perceived to be necessary for the fulfilment of Transco NTS's relevant objectives could be blocked at some time in the future

Some respondents expressed a number of concerns in relation to the adoption of Option One – these concerns included that:

- they would need to see the precise wording of the guidance before being in a position to support the option – guidance would need to be clear, unambiguous and have well-defined criteria;
- guidance on the treatment of disclosed information would be unlikely to provide adequate protection for that information, and that in any event it would have significant concerns about continued information disclosure in circumstances where the derogation had expired and the licence remained unamended;
- even though there is no way to know if a Network Code modification proposal would be raised or approved:
 - the risk would still exist;
 - there was little confidence that Ofgem could provide sufficient comfort through the guidance;
 - the route of appeal to the Competition Commission could be restricted;
- the voluntary agreement had progressed on the understanding that the temporary informal derogation would be introduced to Standard Condition 4E (SSCA7), and, based on DTI discussions, there was little confidence that Option One would give producers any assurance and would therefore lead to their withdrawal from the scheme;
- in presenting Option One, Ofgem had not taken into account the discussions with UKOOA on the ability of Ofgem to provide sufficient comfort to producers without fettering the discretion of the Authority;
- the potential test under the guidance that a party was “seriously and prejudicially affected” could mean that even if there is an impact on one player, this may affect the whole market and as such may not facilitate information release; and
- it would be more appropriate for Ofgem to demonstrate that information is not commercially sensitive rather than the other way round.

Another respondent considered that any guidance under option one should be drafted widely to cover any modification proposal regarding commercially sensitive information that could seriously and prejudicially affect the interests of a particular party, not just those relating to offshore information.

One respondent expressed concern that Option One did not achieve anything other than creating a framework for detailed modifications to be brought forward. In these circumstances, even if Ofgem issued guidance on what could be disclosed, and then accepted a modification following guidance, the producers could still choose to stop providing information. The modification would then become irrelevant. Nevertheless, this respondent considered Option One to be most flexible to react to network code changes as they arose.

One respondent considered that the easier the mechanism for change to the information regime, the more likely it will be that the existing arrangements may need to be altered to take account of regulatory uncertainty.

Option Two

Two respondents supported Option Two. The reasons given included that this option could recognise the benefits of retaining the current level of upstream information release and allow for the possibility of additional release in the future

A number of further respondents stated that they considered that it was difficult to comment on this option without further information on how the derogation power would be applied. While some respondents stated that they could in principle support this option, many of these actually expressed a preference for Option Three, as it provided more certainty. A large proportion of these respondents cited a number of potential benefits of option two, including the certainty that this option would provide, but also noted that only phase three information was mentioned in discussions of Option Two. One respondent suggested that should sufficient confidence be given to upstream participants that certain information would be protected, then there might be opportunity to publish additional, albeit potentially aggregated, upstream information to the market.

A number of respondents expressed concern in relation to Option Two – the views expressed include that:

- the arguments used by Ofgem in support of Options Two and Three (that it would give producers comfort over the confidentiality of data passed to Transco NTS) were not valid, as Ofgem could take into account commercial confidentiality concerns when it considered a specific proposal under Option One;
- Options Two and Three could unwittingly block the publication of data that may at some time in future be necessary for the fulfilment of Transco's relevant objectives. In turn, this may conflict with Ofgem's own statutory obligations in respect of the protection of customers' interests;
- Each time a modification proposal was raised, this would require a new application for a derogation, which would be a time consuming process;
- If the derogations were time bounded, this would increase the regulatory uncertainty faced by the industry;
- it would be difficult to issue a derogation in respect of information for which no obligation to publish exists; and
- it could be inconsistent for Ofgem to approve a network code modification and then subsequently issue a derogation against it.

Option Three

Ten respondents specifically expressed support for Option Three, including a number of producers who indicated that Option Three provided the most certainty with respect to the potential publication of commercially sensitive information because the information that Transco NTS would possibly publish would be clearly set out and subsequent extensions to the requirements to publish data would require the standard licence modification consultation process.

A number of those parties that expressed support for Option Three also noted that further information would be required before they could offer their full support. Parties noted in particular the lack of specification of the information that would be covered and, for example, the duration that could be associated with the licence change options.

A number of respondents expressed concerns in relation to the flexibility of Option Three. These concerns included that:

- the practicalities of this option seemed to make it more difficult to fully specify the information that could be released and could constrain future innovative proposals for further information provision – for example, the information being provided may not be

able to respond as easily to changes in the overall distribution of supply sources which could justify information being presented at a lower level of dis-aggregation or on a different basis;

- the exclusions from publication would be too prescriptive and would potentially take too long to implement; and
- the problem of individual producers disagreeing and unilaterally withdrawing from the provision of information would not be resolved.