



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

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value to customers*

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Dear Colleague,

Information release under Gas Transporters Licence Standard Special Condition A7: Guidance Document

In June 2005, following consultation with interested parties, the Gas and Electricity Markets Authority (the Authority)¹ decided not to change the existing onshore regulatory arrangements to facilitate the release of information to third parties.² At the same time the Authority removed the temporary informal derogation in respect of Standard Special Condition A7 (SSC A7) of Transco NTS's Gas Transporters (GT) licence.^{3,4} In making that decision, Ofgem emphasised that it did not relate to any particular modification proposal for release of information or enhanced transparency in the wholesale gas market. Rather, the decision was in respect of setting the regulatory framework regarding the release of information to the market going forward.

Concurrent with the publication of its decision letter, Ofgem also published guidance on how the Authority intends to consider any future modification proposals that seek to release information to the market.⁵ In publishing this document, Ofgem welcomed responses from interested parties on how the guidance could be amended to provide further clarity regarding the way in which modification proposals that seek to release information would be treated by the Authority.

This letter provides a summary of the responses that were submitted to Ofgem in relation to the guidance document. Following consideration of comments made by respondents, Ofgem has revised sections of the guidance. This letter details the reasons behind those amendments and also explains why Ofgem has not, in some cases, amended the guidance in line with respondents' comments.

¹ Ofgem is the office of the Authority. The terms Ofgem and the Authority are used interchangeably in this document.

² 'Offshore gas production information disclosure: Decision letter' Ofgem, 27 June 2005.

³ Transco plc was rebranded to National Grid Gas plc, as of 10 October 2005. Therefore, as of this date, references to Transco NTS have become references to National Grid Gas NTS.

⁴ Further information on the background to this decision can be found in the 27 June 2005 decision letter.

⁵ 'Information release under Gas Transporters Licence Standard Special Condition A7 - Guidance Document', 27 June 2005.

Ofgem has also today published an updated version of the guidance “Information release under Gas Transporters Licence Standard Special Condition A7 – Guidance Document: Version 2.0”.⁶

Respondents’ views

There were five responses to the guidance document, two parties with offshore production interests, one gas transporter, one shipper/supplier and UKOOA.⁷ Two of the responses were marked as confidential. One respondent commented that it believed that the guidelines represent a fair and reasonable interpretation of the considerations that the Authority could be expected to give to any UNC modification proposal related to the publication of information. Three respondents did not consider that the guidance was sufficient to provide the clarity and certainty required by affected parties in respect of the release of information, and one respondent did not express an opinion regarding the guidance. The main issues detailed in the responses are outlined below.

Regulatory uncertainty

Three respondents supported the principle of the guidelines providing regulatory certainty, but did not consider that they actually provided the level of certainty they were looking for. Further, that the guidelines in their present form do not achieve Ofgem’s intent of providing certainty to industry. One respondent considered that it was preferable for Ofgem to introduce greater stability into the guidance and reduce uncertainty. However, one respondent recognised that Ofgem is unable to fetter its discretion, which makes it difficult for Ofgem to provide the assurance which it sets out to provide, and which owners of data would welcome. One respondent suggested that Ofgem should work with UKOOA and the DTI to revise and update the guidelines into a more workable solution.

Another respondent commented that the guidance was not legally binding and that they needed complete assurance that certain information, such as TBE data, will not be released. Whilst a further respondent considered that it was unreasonable for a company to rely on non-binding guidance and the unfettered discretion of the Authority to prevent information release under a modification proposal to the network code. One respondent commented that it expected the Authority to follow the guidelines in all foreseen circumstances.

Liability

A number of respondents noted that the issue of a party’s liability in respect of releasing confidential information in breach of a confidentiality provision in an agreement is important and did not consider that the guidelines addressed this issue as fully as they considered appropriate. One respondent considered that it would be beneficial for the guidelines to expand on the issue of liability, whilst another noted that there is nothing in the guidelines regarding the way in which the issue of liability will be dealt with and that this required more attention. Whilst one respondent considered that if Ofgem discounts any prejudicial effects by a company they will support release of the information even if the company genuinely believes there is a liability risk.

One respondent considered that there was nothing in the guidelines to indicate how any liabilities would be managed in the event of a claim from an aggrieved party who had used published information and suffered a loss.

⁶ Copies are available from the Ofgem website: www.ofgem.gov.uk.

⁷ Copies of the non confidential responses are available on Ofgem’s website.

Detail of information that would not be released

Two respondents considered that the guidance document does not provide sufficient clarity regarding the information that would not be released. One respondent noted that there was no definition with respect to the confidential information that warrants protection. Whilst another respondent commented that the guidance document would benefit from further definitional work to clarify material which warrants protection. Another respondent noted that there were a number of statements suggesting that anything falling short of ex ante, company specific information will not be considered confidential. However, one respondent considered that it did not have any general confidentiality concerns with the information contained in Appendix 9 being released.

Several respondents also raised concerns that the guidance did not rule out the possibility of information being released that was considered confidential. These included concerns that the level of detail and the format of the information to be released could cause the respondent to be in breach of confidentiality provisions or injunctions or that the information had been provided to the transporter on a confidential basis. It was also noted that if an injunction was brought against the release of information the release of that information should not be required.

Demonstration of requirement to release information

Three respondents noted that the onus was being placed on the offshore operator to demonstrate that the information it is trying to protect is confidential and commercially sensitive. One respondent further commented that companies entering into commercial arrangements should not be required to expend effort assessing the commercial impact of a modification proposal and justifying this to Ofgem – it should be for Ofgem to justify the need for the data, further, that from the guidance it appeared that parties will automatically be required to provide information unless they can prove that this information is private. One respondent had concerns regarding the extent to which confidential information will need to be released to Ofgem to demonstrate it should not be released to the market.

One respondent considered that Ofgem should set out a compelling case outlining why confidential offshore information is required. Another respondent considered that Ofgem has previously accessed confidential information from Transco regarding offshore operators and the threshold for obtaining this information lacks clarity.

One respondent was concerned that decisions on the release of information were to be reached at the discretion of the Authority whilst another commented that even where Ofgem accepts that information is commercially sensitive, it would have to be satisfied that its release would have a prejudicial effect. Another respondent considered that the process Ofgem suggests provides a lower test for information to be provided to it than we would expect under formal investigation and that this places a considerable burden on the industry, and is not proportionate to the issues being discussed.

One respondent commented that information should only be released if it could be demonstrated that in doing so it would better facilitate the achievement of the UNC relevant objectives, and that this would be unlikely to be the case if approval of the proposal threatened the continued provision of such information.

Other comments

Respondents also made a number of other related comments, which are summarised below. One respondent expressed disappointment that Ofgem did not consult with affected parties prior to the publication of the guidelines. Another respondent did not consider that the process for parties to negotiate waivers regarding confidentiality provisions was practical. One respondent considered that there should be an industry review of all new confidentiality clauses in UNC documents, particularly ancillary documents that Ofgem needs to approve.

One respondent raised concerns over the appeals process that has been introduced, noting that decisions can only be appealed where the majority of the panel were not in favour, therefore if a modification proposal is approved following recommendation from the panel there will be no scope for appeal. The respondent therefore highlighted that if the appeals mechanism is to provide comfort, Ofgem should approach the DTI to amend the procedures to allow for affected parties, such as upstream interests, to appeal outside the Panel recommendation process.

Ofgem's views

Ofgem welcomes the responses that it has received in respect of its SSC A7 guidance document. As noted, following consideration of comments received Ofgem has amended the guidance and has today published an updated version of the document. Further clarification in respect of the amendments made to the guidance is provided below.

Regulatory uncertainty

Whilst Ofgem has sought to provide more clarity to its decision making process regarding modification proposals seeking to release information, Ofgem recognises the concerns raised by some respondents that the guidance does not provide the regulatory certainty that they consider to be necessary. However, as detailed in the guidance document, the guidance cannot be legally binding on the Authority as Ofgem cannot fetter the Authority's discretion as to any decision it may take in relation to a particular modification proposal. As noted in the guidance, for this reason Ofgem cannot provide interested parties with a definitive or exhaustive list of the types of information that would not be approved for release by the Authority, if modifications of this nature were to be proposed. In this regard, Ofgem considers that decisions regarding the release of information would need to be taken on a case-by-case basis and that such decisions would be dependent upon the particular circumstances in which the modification was raised. Therefore, while Ofgem has sought to provide further clarity regarding the process it will follow when considering proposals to release information; Ofgem does not consider it is able to provide regulatory certainty to the extent that some respondents are seeking.

With respect to the comment that it was expected that Ofgem would follow the guidelines in all foreseen circumstances, Ofgem has sought to amend the guidance such that it provides additional certainty to market participants that this would be the case.

Liability

Ofgem notes that several respondents did not consider that the guidance addressed the issue of liability to the extent that they considered to be appropriate. Ofgem recognises that there may be issues of liability for different parties in respect of proposals seeking to release information. However, while Ofgem has sought to provide clarity in the guidance that these issues will be considered by Ofgem as part of its decision making process in respect of such proposals; Ofgem does not consider that it is able to provide any further comfort to market participants in respect

of this issue. Ofgem considers that if there were potential liability issues, associated with the release of information under a proposed modification, these would need to be made clear to Ofgem, by affected parties, as part of the consultation process. However, Ofgem would highlight that any such liability issues would be considered on a case by case basis and would not necessarily prohibit the Authority's approval of a modification requiring the release of this information.

Detail of information that would not be released

Ofgem notes that a number of respondents did not consider that the guidance document provided sufficient clarity regarding the information that would not be released. Ofgem is not able to provide a definitive list of information that would not be released to third parties for two main reasons. Firstly, as noted above and in the guidance, while Ofgem has provided further clarity as to the process for how the Authority will consider such proposals, Ofgem cannot fetter the discretion of the Authority in respect of whether it would be likely to direct the implementation of any modification proposal requiring the release of particular information. Further, as any decision would be in respect of the specific modification proposal being considered, and as Ofgem cannot know with foresight what information future modification proposals may seek to release, it is not possible to detail all such information, given that the Authority will need to consider each modification proposal on a case by case basis at the time that it is asked to consider whether or not to approve the modification proposal.

Ofgem has amended the guidance to provide further detail as to why such a list cannot be made available and has also provided additional clarification in respect of Appendix 9, which lists types of information that may be released.

Demonstration of requirement to release information

In respect of the requirement to demonstrate that information was confidential and/or commercially sensitive, several respondents considered that the onus should be placed on Ofgem to set out why such information was required.

Ofgem does not consider that it would be appropriate or practicable for the onus to be placed upon it to demonstrate that information is confidential and therefore should not be published. Rather, consistent with legal practice, it is for the affected parties to prove that the information is confidential or commercially sensitive and therefore should not be released as part of the proposed modification.

However, as detailed in the guidance, and as noted by one respondent, the Authority would only approve a modification proposal if it could be demonstrated that it better facilitated the achievement of the relevant network code objectives and was consistent with the Authority's wider statutory duties.

Other comments

With respect to the comment that Ofgem did not consult with affected parties prior to the publication of the guidance, Ofgem considers that it was appropriate to publish the guidance at the same time as the temporary informal derogation was removed. Ofgem notes that had it sought to publish the guidance for a period of consultation before it became effective, market participants would not have had comfort as to the process for how such proposals would be considered by the Authority over the period of consultation. Ofgem considers that by making the guidance effective at the same time as the temporary informal derogation was removed and

by formally seeking respondents views as to how the guidance could be enhanced, this has provided both certainty as to the process for how such proposals will be considered and also an opportunity for affected parties to provide views in respect of how the guidance could be enhanced.

Ofgem notes the comment that a respondent did not consider that the process for parties to negotiate waivers regarding confidentiality provisions was practical. However, Ofgem maintains the view that it would expect the relevant parties to consider the ways in which their concerns about liability for the release of information may be mitigated. In some circumstances waivers may be an appropriate tool to achieve this.

With respect to the comment made by one respondent that there is a need for review of all confidentiality clauses in UNC documents, Ofgem considers that it is for industry parties to determine whether the contracts that they enter into are consistent with the process outlined within the guidance. In this respect, where parties do not consider that such contracts are appropriate or consistent with the regulatory decision making framework, it is for those parties to consider options including renegotiating those contracts in order that such issues can be addressed.

Finally, in respect of the comment made regarding the appeals process, Ofgem considers that if parties are of the opinion that the appeals process does not provide the necessary comfort, it would be appropriate for the respondent to discuss this issue directly with the DTI. Ofgem considers that the appeals process is a useful tool in cases where interested parties consider that the Authority has reached the wrong decision with respect to a proposed modification. Ofgem recognises that this process is not appropriate in the case outlined by this respondent but would highlight that, under paragraph 10.4 of the UNC modification rules, where an urgent modification proposal has been implemented, the modification panel may determine that the subject matter of the modification shall be reviewed. If such a determination is made, a review proposal in respect of the modification shall be referred to the relevant workstream. This provision therefore provides an alternative route for review of Authority decisions in cases where modification proposals have been progressed to urgent timeframes.

Should you wish to discuss the contents of this letter or the revised guidance, Jo Witters (020 7901 7159) or Hannah Cook (020 7901 7444) would be pleased to help.

Yours sincerely



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