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Dear Mark

Codes Governance Review: Final Proposals Licence Drafting Consultation (ref: 44/10)

Thank you for the opportunity to respond to Ofgem's licence drafting consultation for Code Governance Review Final Proposals. This response is provided on behalf of National Grid Electricity Transmission plc (NGET) and National Grid Gas plc (NGG). NGET owns the electricity transmission system in England and Wales and is the National Electricity Transmission System Operator. It is responsible for administering the electricity Connection and Use of System Code (CUSC), the Grid Code and the System Operator – Transmission Owner Code (STC). NGG owns and operates the Gas Transmission System and also owns and operates four of the gas Distribution Networks. In association with the three other gas Distribution Network Operators it also jointly provides for the administration of the Uniform Network Code (UNC) Governance arrangements through the Joint Office of Gas Transporters.

National Grid attended Ofgem's licence drafting workshop on 23rd April 2010; our detailed response in the appendix to this letter is based mainly on the licence drafting which accompanied the consultation document published on 31st March 2010, but it also refers in places to the revised indicative drafting circulated by Ofgem on 6th May 2010, after the licence drafting workshop, which sought to address issues raised by attendees at that workshop. We are also sending you an annotated copy of the licence drafting published on 31st March 2010 for your consideration.

I would like to highlight that our response to the question regarding the proposed implementation date of 1st November 2010 suggests that for certain codes this would be extremely challenging, given the standard code modification processes that may apply for such changes. For example, a panel decision to send a code modification to a working group for further development could add several months to the overall implementation process. We would welcome the opportunity to discuss our response with you in greater detail, including potential timetables that these modifications could follow dependent on panel choices and any working group development.

Our other main point is that, following the change in status for the Code Administration Code of Practice, we have a concern that it is not sufficiently clear from the licence drafting whether the Code of Practice or the relevant code takes precedence. We feel it is essential that the licence drafting clarifies this issue given the consequences for breach for licensees. Please see our separate response on the Code Administration Code of Practice consultation (ref: 45/10) for a full explanation.

If you wish to discuss this further, or have any queries regarding this response, please contact me, Mark Ripley on 01926 654928 (mark.g.ripley@uk.ngrid.com) or Richard Court on 01926 656146 (Richard.court@uk.ngrid.com).

Yours sincerely

[By e-mail]

Paul Whittaker
UK Director of Regulation

Enc: electronic version of annotated licence drafting

Appendix: Responses to questions in Ofgem consultation

Question 1: Is the amending nature of the proposed changes appropriate?

We have commented on the proposed approach for modifications to the gas NTS versus the gas DN licences in question 12 below.

Question 2: Where the licence drafting differs between different licence conditions, because of intrinsic differences as between those licence conditions, but where the underlying policy position is identical, do you agree that the substantive effect is materially the same?

We are not aware of any material differences between the effects of the drafting, we do however have comments on the detailed wording of the drafting and these are set out in the annotated licence drafting which accompanies this letter.

Question 3: Do you agree with our preservation of existing condition provision numbering?

We suggest that it would be more appropriate to renumber certain provisions; please see our annotated version of the licence drafting. We note that Ofgem's revised indicative licence drafting, circulated on 6th May 2010, incorporated our suggestions.

Question 4: Do you agree with our approach to existing "house style"?

We do suggest some stylistic changes for consistency of drafting with other licence provisions. Please see the annotated version of the licence drafting for our detailed comments on "house style".

Question 5: Do you agree with the order and placement of the new provisions?

We do not have any comments on these other than in relation to the manner in which the changes are implemented. Please see the comments below in relation to question 13.

Question 6: Do you agree with the references to panel consultation on the availability of the self-governance route?

We raised concerns at the licence drafting workshop over what we perceived to be an unintended consequence of the drafting regarding the self-governance process, namely that it could result in an increase to the overall code modification process of at least one month. This point was echoed by a number of other attendees and Ofgem has acknowledged this in the revised drafting it provided on 6th May 2010.

Question 7: What are your views on the appropriateness of replicating the provisions relating to the UNC in SSLC A11(6)(d)(ii) for the CUSC and BSC?

We note that the CUSC currently provides for the National Consumer Council (NCC) to appoint one representative to the Amendments Panel as a Panel Member with voting rights; therefore replicating the UNC provisions in the CUSC licence drafting would seem unnecessary. However, we accept that for consistency purposes, having the requirement in the licence means that should a CUSC Amendment Proposal be raised in future to revise the Panel constitution, it would not be possible to remove the NCC representative or his right to vote without a licence modification.

Question 8: Do you agree with the appropriateness of the proposed deletions of provisions superseded by the code modification rules (as amended) and have you identified any potential unintended or unforeseen consequences?

We would prefer that the text proposed for deletion of text within SSC A4 of the Gas Transporters' licences remain in that condition.

Question 9: What are your views on the interaction of the charging-specific timing restrictions and obligations?

We note that there is a conflict between the existing licence conditions within the National Grid NTS licence which impose a restriction on the licensee only to change prices on 1st October (and 1st April other than for capacity prices) and an obligation only to change the methodology on the same dates. The conflict arises due to the licence obligation to give at least a month's notice (and the UNC requirement to give two months' notice) of price changes. The current approach to this conflict is to make changes to the methodology "in regard to the setting of capacity prices for capacity released from 1st October" and then updating the charging methodology statement on 1st October. The charging methodology has always been treated as being the prevailing statement plus any non-vetoed

charging change proposals. However, it may not be possible to continue with this interpretation once the charging methodologies are included within the UNC and subject to the UNC change processes.

If the proposed licence drafting were implemented, it would require all UNC charging methodology changes to be implemented at least two months before the date the charges were required to be changed. This would add a further level of complexity to the charging methodology arrangements and could be avoided if the licence obligation, set out in SSC A5 2A b, relating to the dates for changing the charging methodologies were removed.

Question 10: Do you agree with the wording of the licensee obligation to provide information/assistance to affected parties?

We note the additional obligation on the licensee(s) to provide information and assistance to materially affected parties with regard to the preparation of charging methodology change proposals. We welcome the inclusion within the text of the caveats "insofar as reasonably practicable" and "may reasonably request" as we consider these are necessary safeguards until it becomes clear over time what level of assistance a licensee is expected to provide and what additional resource requirement this may create.

Question 11: Do you agree with the proposed deletion of the word 'financial' and the phrase 'on society' in respect of the proposed drafting for Environmental Assessment and Code Objectives?

In line with our response to the earlier consultation in this area, we agree that the phrase "on society" should be deleted from the proposed licence drafting. We note that the replacement of the term "financial" with "quantifiable" could lead to ambiguity over whether the "quantifiable impact" relates to the financial or the physical. However, during discussions on this matter at Ofgem's licence drafting workshop, Ofgem referred back to the Authority's published guidance in this area which would make it clear what the "quantifiable impact" was. We do, however, still consider that this clarificatory amendment is appropriate.

Question 12: Do you agree with the treatment of connection charging methodologies in the gas transporter licences?

We agree that the gas distribution connection charging methodologies should not be included within the proposed licence modifications at this time.

Question 13: Do you agree that the modification of Standard Special Condition A11 will not affect the application of the Special Conditions pertaining to the NTS operator licence?

We note that the drafting published on 31st March 2010 contained separate conditions for "NTS" and "DN" licences, on account of the differences in the proposed treatment of connection charging between NTS and DN licensees. If the proposed changes are implemented, we would like to point out that the changes implemented at Network Sales were designed to ensure that Standard Special Conditions in Part A were to be in the same form for all NTS and DN licensees. As a result, any changes applicable to one class or other of licensee (NTS or DN) should be implemented through either a Special Condition in Part C (to implement any NTS-specific provisions) or a Standard Special Condition in Part D (to implement any DN-specific provisions) and the procedures in the Private Collective Licence Modification Procedures set out in the licence and section 23 of the Gas Act 1986 used accordingly. This approach is the same as that currently taken, for example, by Special Conditions C1, C1A and C1B of NGG's gas transporter licence in respect of the NTS in order to keep the "baseline" text of Standard Special Conditions in Part A the same for all licensees. This approach should be adopted again here for any relevant changes.

Furthermore, in relation to the changes relating to Standard Condition 4b (Connection Charging Methodology), because this is a standard condition currently applicable to all licensees, the proposed changes, in order to be implemented for the NTS licensee only, will need to be implemented through "turning off" that condition in NGG's licence in respect of the NTS, and replacing it with a Special Condition in part C applicable only to the NTS, in each case using the procedure set out in s23 of the Gas Act 1986.

Question 14: Are the lead-in times and implementation timescales proposed appropriate?

We recognise that as the modification processes set out in each code currently differ, so the implementation requirements for each code will also differ slightly, in terms of the scope of code

modifications required to implement the Code Governance Review Final Proposals and the consultation approach adopted. We have set out our initial thoughts for each of the codes below, including any factors that we feel may prevent the proposed implementation date of 1st November being achieved. In all cases, we have assumed a 10 working day implementation period for code changes and a 25 working day period for an Authority decision to be made, in line with existing custom and practice. We recognise that these timescales could be shorter, however given the potential volume of code changes to consider and implement across the BSC, CUSC and UNC, we felt it prudent to allow these timings. We would also note that, as licensee (and code administrator for the CUSC), there are certain decisions relating to implementation over which we do not have full control and which will ultimately be in the hands of the relevant code panel.

Having considered the most likely implementation process for the CUSC, we consider that an implementation date of 1st November 2010 would be unlikely to be achievable. This conclusion is based on a number of considerations, including the likelihood that the more significant code changes (for example implementing the Significant Code Review or Self-Governance proposals) would be directed by the Amendments Panel to a CUSC Working Group for consideration of the detailed processes to be included within the CUSC. The current timescales for the Working Group process and subsequent wider industry consultation process, coupled with the relevant Panel processes do not facilitate achieving a 1st November implementation date. This is in contrast to similar processes for the UNC, which do not require that any workgroup established hold an industry consultation. We would also note that the implementation period covers the summer months, when it can be anticipated that many industry participants will be taking annual leave. We are happy to discuss this with Ofgem in far greater detail in order to agree an implementation date that enable swift and efficient implementation, while recognising those elements of the process over which the Amendments Panel has control.

The UNC Governance Workstream (Review Proposal 0267 - Review of UNC Governance Arrangements) has for sometime been considering the changes needed to the Modification Rules in order to comply with Ofgem's Final Proposals, including the Code of Practice. Although further work is still required to clarify what changes are required, it would appear that the 1st November implementation date is achievable, however this is dependent on the required modification proposals not being directed to a Review Group, which would be likely to add several months onto the process. Other than that, we consider that the main factor in achieving the proposed implementation date is the implementation approach to include the charging methodologies within the UNC. We note that there has been discussion among the industry as to the interpretation of the indicative licence drafting and whether it requires each charging methodology to be fully codified, that is for each to be rewritten in the same legal style language as the existing UNC. Our view is that the licence drafting does not require this and that a "lift and shift" approach, whereby the existing charging methodologies could be added to the UNC as a new section, could be followed. We would appreciate Ofgem's confirmation that full codification is not required – were this to be the case, the implementation timescales would be considerably longer than currently envisaged due to the redrafting and industry consultation processes required. We also believe that there is a risk that, in respect of the Distribution Charging Methodologies, the requirement to transpose the respective methodologies from individual consultation reports into a network code document would require coordination across Distribution Network Operators which may impact the ability to achieve a November implementation date.

We understand that the BSC is likely to be in a position similar to the CUSC. Where modification proposals are raised and sent directly to industry consultation, an implementation date of 1st November should be achievable. However, where the BSC Panel considers that a proposal warrants further development and directs a proposal to a modification group, those processes set out in the BSC are such that a 1st November 2010 date would not be achievable.

Question 15: Are any transitional measures required?

We consider that it would be useful to include transitional measures for the inclusion of the charging methodologies within the relevant code, such that it is clear to the industry which governance regime is applicable for the duration of any charging methodology change proposal which is already progressing through the existing processes or is raised prior to implementation of the new governance arrangements. We note that the existing arrangements, particularly in the area of Authority decisions on change proposals, are very different to the proposed arrangements and clarity would be beneficial to all industry participants affected by potential charging changes.

Furthermore, for code modification proposals which are not related to charging methodologies, we consider that it should be clear that the new governance arrangements relating to Final Proposals will not be applied retrospectively, in order to provide clarity to the industry of the process which existing code modification proposals will follow. We suggest that the standard industry approach in this area is adopted, such that any code modification proposal raised prior to the implementation date for any code modification proposal raised to implement the Code Governance Review Final Proposals continues along the existing code modification process. Any new code modification proposal raised after the implementation date for any code modification proposal raised to implement the Code Governance Review Final Proposals would follow the newly established code governance processes.

We note that Ofgem has included some transitional measures in its revised indicative licence drafting circulated on 6th May 2010.

Question 16: Have you identified any other or consequential changes not highlighted in this chapter that we should make to the licence conditions to reflect our Final Proposals?

We have not identified any other changes.

Question 17: Are there any definitions in the standard licence conditions that are now redundant or need updating?

We do not see a need to make any changes in this area; this has not been done previously when standard conditions have been "switched off" in the past. In addition, this would require involvement of independent Gas Transporters if a change were proposed.

Question 18: Do you consider it appropriate to repeat the condition-specific definitions in the global definition conditions?

We do not consider there is a need to repeat condition-specific definitions in the global definition conditions; the definition should be contained in the relevant condition.

Question 19: Do you consider the new defined terms are appropriate?

We have a number of comments on the defined terms as included within the licence drafting published on 31st March, noting that some of the terms were revised by the revised indicative licence drafting circulated on 6th May 2010.

"Affected Party". The definition of "affected party" includes "any person or class of persons designated by the Authority for this purpose". We note that the Final Proposals document does not set out the designation process to be followed, although we understand from discussions at Ofgem's licence drafting workshop that such designation could be temporary. We appreciate that this is not strictly a licence issue, however we would like to highlight it as a policy area that may benefit from further consideration and where the industry may appreciate greater clarity. We also note that the revised indicative drafting provided by Ofgem on 6th May 2010 amends the definition to "materially affected party: any person or class of person designated by the Authority for this purpose."

"Charging methodology forum". With regard to the definition in SSC A11 only, we consider that the definition of "charging methodology forum" should refer to "UNC charging methodologies" instead of "applicable charging methodologies". This is to provide clarity, by reference to a defined term, that the connection charging methodologies for Distribution are excluded from this requirement.

"Charging methodology window". We note that the revised indicative licence drafting, circulated on 6th May 2010, proposes to remove the definition of "charging methodology window". It is proposed that any risk mitigation measures such as this could be included within the relevant code.

"Code of Practice". We raised a concern at Ofgem's licence drafting workshop over the definition of "Code of Practice" as it was not clear what status the "signatories" to the Code of Practice would have as they are not the same parties as the licensees. We note that Ofgem's revised indicative licence drafting, circulated on 6th May 2010, amends the definition of "Code of Practice" to remove the reference to "signatories".

"Industry code". We consider that the definition of "industry code" could be expanded to list all of the relevant codes, rather than referencing the relevant sections of the relevant Acts; please see our comments on the annotated licence drafting.

Question 20: Do you agree with the proposed house-keeping amendments? Do you propose any additional house-keeping amendment?

We agree with the proposed house-keeping amendments.

Question 21: Have you identified any unintended consequences of the licence drafting?

We raised concerns at the licence drafting workshop over what we perceived to be an unintended consequence of the drafting regarding the self-governance process, namely that the process as described in the licence drafting could result in an increase to the length of the overall code modification process of at least one month. Ofgem acknowledged this concern and confirmed that this was not the intention of the policy or the licence drafting and has made changes to the licence drafting in the revised indicative version it circulated on 6th May 2010.

Question 22: Do you agree with the proposed approach and detail of the potential alignment, accuracy and clarification amendments?

We note that comments were raised on the "reference to time periods as specified in the relevant codes only being extended with Authority approval" during the Ofgem licence drafting workshop and that the revised indicative drafting, circulated on 6th May 2010, has changed this element from an Authority approval, to a veto approach, which is more in line with existing practice and would appear to be more appropriate.

Question 23: Do you have any other (non-policy related) comments on the proposed licence drafting?

Please see the annotated licence drafting provided with this consultation response. In addition, please see our response to the Code Administration Code of Practice consultation (ref: 45/10) which raises a concern over a lack of clarity within the licence drafting and the proposed Code of Practice as to whether the Code of Practice or the relevant code would take precedence. We consider this to be an issue for us, as licensee, given the proposed change in status of the Code of Practice from voluntary to mandatory and our wish to ensure that we are able to demonstrate that we have fulfilled our licence obligations in this area.

Question 24: Are there any aspects of the drafting that you do not understand or that you consider inappropriate?

Where we were uncertain of the meaning of the drafting, we raised questions at Ofgem's licence drafting workshop. Should the drafting be amended again prior to statutory consultation, which would appear likely given the circulation of the revised indicative drafting on 6th May 2010, we will seek clarification from Ofgem where we are uncertain as to the interpretation of the drafting.

Question 25: Are our substantive proposed changes appropriate in order to give effect to the underlying policy of the Final Proposals?

We consider that the underlying policy of the Final Proposals is reflected in the licence drafting.

Chapter Three

Question 1: Are there any comments that are still valid but you consider have not been addressed by us, either in our reply or in the revised licence drafting?

We are not aware of any outstanding comments.

Question 2: Are there any aspects of this chapter regarding which you seek additional clarification or to which you would like to respond?

We raised points of clarification during the Ofgem licence drafting workshop held on 23rd April 2010, the majority of which were addressed and any outstanding we have included within this response.