

OFGEM CONSULTATION ON GAS DISTRIBUTION LICENCE REVIEW PHASE 1: PROPOSALS FOR RESTRUCTURING THE GAS TRANSPORTER LICENCE

A submission from Roger Barnard

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1. One of the hallmarks of a good utility regulator is a concern to ensure that the industry licences under its jurisdiction are properly maintained and broadly accessible and intelligible to licence users. Ofgem's decision to review the gas transporter licence with a view to both restructuring and redrafting this document in relation to gas distribution network activities is therefore particularly welcome because:
 - Licences for regulated utility companies determine both their right to run the business and the terms and conditions on which the business must be run. They are working documents for a wide range of industry users – not just lawyers, but accountants and auditors, economists and engineers. All of those users, along with the regulators themselves, have a strong interest in the construction and maintenance of accessible, sensibly organised, and intelligible licences, marked by drafting clarity and coherent and orderly presentation.
 - The gas transporter licence is the most difficult licence to navigate and use in the energy industry. The structure of the licence is technically complex and not easily understood even by the industry's own regulatory specialists. And the legal texts of the licence conditions themselves are mostly drafted in a manner that is stilted, archaic, and sometimes virtually impenetrable, with innumerable qualifications and provisos. This compares very poorly with the substantial improvements of recent years in statutory drafting techniques.
 2. Against that background, a review that aims to improve the clarity and ease of use of the gas transporter licence in relation to gas distribution activities is likely to be a challenging project requiring the full commitment of both Ofgem and the industry. However, the job cries out to be tackled, so as to reduce the burden of administering and complying with a licence that is so hard to understand that its meaning can only be found after disproportionate effort.
 3. Most of the problems on the structural side of the licence stem from the failure at the time of the gas DN sales to utilise the relevant provisions of the Gas Act 1986 to make gas distribution a new licensable activity distinct from gas transportation. It is not clear that Ofgem's current proposal for a two-stage review that would focus first on structural options is the most effective way to address those problems.

4. Looking at the four options set out in the consultation document, clearly none of them is ideal, and the first three are worryingly sub-optimal. Each of options 1, 2, and 3 would add further complexity to licensing arrangements that are already unduly complex and opaque, while also distracting from the principal objective of the review. That objective must surely be to produce (with a reasonable sense of urgency) a set of redrafted and re-organised standard licence conditions for the gas distribution activity that are lucid, clear, and free from ambiguity, and in which the legal drafting has been reduced to the simplest possible level consistent with legal robustness within a framework that is easily understood by all concerned.

5. On that basis, my own view is that option 4 – to proceed straight to the detailed drafting review without restructuring the licence beforehand – is likely to hold out the best prospect of successfully completing this project, in the round, in a timely manner. There are two reasons for this conclusion. The first is that the project is unlikely to be successful under any option without the full and direct engagement of NTS. Option 4 makes a virtue of necessity, in the sense that this is the only option that positively requires such engagement.

6. The second reason is that a strong initial momentum will be needed to get this project rolling along the track towards completion. This could best be supplied by an early start on the detailed work that will lie at its heart. This would include:

- Determining the portfolio of affected conditions and organising them into separate themed chapters.
- Consolidating some conditions where appropriate by bringing together similar requirements for different activities.
- Removing certain provisions as a result of such consolidation, or because of redundancy/obsolescence.
- Organising the issues within each individual condition under relevant cross-headings, and simplifying the texts to give greater clarity and certainty.
- Updating the overall drafting approach to make it more fit for purpose, and ensuring stylistic consistency across the drafting as a whole.

7. The sooner that those core jobs can be commenced and developed, with visible progress being made in that respect, the better it will be for the project overall.

8. Once a full replacement set of standard conditions for gas distribution has been completed, it will be easier to determine how these can best be applied to the existing relevant licensed operators via any necessary reconfigurations of licence structure. In principle, however, Ofgem's current powers to revoke gas licences, modify them by agreement, modify them by the statutory CLM and/or private CLM procedure, make modifications for incidental and consequential purposes, and suspend and/or re-activate licence conditions are, in combination, sufficiently wide and flexible to ensure a workable and legally robust outcome for the review process as a whole.