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Sent by email: mick.watson@ofgem.gov.uk

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Dear Mick

Consultation on Ofgem's minded-to position for the determination of re-opener applications in respect of additional income associated with the Traffic Management Act (and Transport (Scotland) Act) under the first gas distribution price control review

I am writing on behalf of the National Joint Utilities Group Ltd. (NJUG), the UK's only trade association representing utilities and their contractors across all utility sectors, but solely on street works matters.

As you know, our focus is on promoting best practice, self-regulation and constructive two-way relationship with Government and other relevant stakeholders, seeking to ensure that any regulations are fair, workable, robust and are at least cost to utilities and their customers. We are also the utility arm of the national Highway Authorities and Utilities Committee (HAUC(UK)), which brings together local authorities and utilities from across the UK, together with the UK Government and Devolved Administrations, to raise standards of roads and street works.

We are therefore very pleased to have the opportunity to comment on this further consultation, having responded to the original consultation undertaken earlier in the year, and focusing on Ofgem's approach to assessing such applications, which NJUG generally supported. Our response comprises this covering letter, NJUG's commentary on the Consultation Document, and NJUG's response to the specific Consultation Questions.

We hope that the attached response is useful to Ofgem. NJUG remains committed to working with you and would welcome the opportunity to discuss our response further with you. In the meantime, if you have any specific queries regarding the attached, please do not hesitate to contact me, or in my absence Jane Smith on 020 7340 8737.

Yours sincerely

Les Guest
CEO, National Joint Utilities Group Ltd

Consultation on Ofgem's minded-to position for the determination of re-opener applications in respect of additional income associated with the Traffic Management Act (and Transport (Scotland) Act) under the first gas distribution price control review

NJUG Detailed Commentary on Ofgem's Consultation Document

1.0 Introduction

NJUG welcomes the opportunity to comment on Ofgem's minded-to position for the determination of re-opener applications in respect of additional income associated with the Traffic Management Act and Transport (Scotland) Act 2005 under the first gas distribution price control review.

For ease of reference we have followed the format of the Ofgem Consultation document, and each comment made in respect of a particular point, is referenced by the section and paragraph number to which it applies. We hope this is helpful.

2.0 Executive Summary

2.1 *Overview*

NJUG welcomes Ofgem recognising that productivity, operational efficiency and administrations costs have all been dramatically affected by the TMA, and therefore Ofgem's approach of allowing all permit fees. NJUG also particularly welcomes Ofgem's commitment to look at the impacts of increased costs arising from the New Road and Street Works Act 1991, which have risen considerably since the last price review, and will continue to do so.

However, NJUG does have some concerns that Ofgem's approach of automatically setting the allowance for the various increases incurred at the very lowest (or in some cases below the lowest) level of costs incurred, will unfairly penalise those GDNs who incur additional costs for reasons outside their control, and which vary significantly from local authority to local authority.

2.2 *Productivity*

NJUG welcomes Ofgem's recognition that there has been a big impact on productivity arising from the TMA. However, the estimated range of productivity impact is between £18 per metre to £44 per metre, based on the evidence received from GDNs, yet there is an incorrect assumption that those GDNs who have confirmed higher costs, can reduce them down to the lowest cost levels of £18 per metre, with yet further efficiencies expected for 2011/12 and 2012/13. This assumption is incorrect for a number of reasons:

- **Differences in Approach by Highway Authorities**

Each Authority has a package of regulatory and voluntary measures which they can use to manage street works. The way in which an authority chooses to manage their network can have a big impact on the costs incurred by, and operational efficiency of utility works. For instance:

- The London Permit Scheme applies to all works on all streets, with a strong emphasis on applying conditions which increase costs more than schemes outside London. However, the Kent County Council Scheme just applies to works on the busiest streets – leading to a significant differential in costs.
 - Certain authorities focus heavily on the use of FPNs and / or S74 charges, whereas other authorities, such as Staffordshire County Council, focus on co-ordinating works through a voluntary approach working closely with utilities and their own highway teams, with far less costs incurred.
- **Political / Financial Influences**

Coupled with the above differences, the level of rigour with which authorities pursue various financial sanctions or impose conditions which impact on productivity / operational costs and efficiency is influenced directly by the:

- **Level of congestion within their area, and the level of disruption that road and street works cause** e.g. in London TfL's London Code of Conduct Report indicates that 36% of major disruption on TfL's network is caused by road and street works – 19% utilities and 17% TfL's own works. Whereas elsewhere the figure is much lower, typically around 10%, half of which is utility work and half is highway authority work.
 - This affects the focus of the politicians / councillors – and therefore the level of financial sanctions / conditions that are applied.
 - **Volume of works** – Whilst major gas and water mains programmes, roll-out of high-speed broadband, and the renewal of the electricity networks are required across the UK, the volume of work in any particular area has a direct effect on the number of complaints that local politicians (MPs and councillors) receive, and therefore the approach a council takes to the differing mechanisms available to them.
- **The ability to dramatically reduce costs**

Whilst clearly over time there may be the ability to improve efficiency through innovations in technology or working practices, NJUG questions the assumption that GDNs would deliver such significant improvements in efficiency so as to be able to reduce costs from £44 per metre to £18 per metre.

This is particularly true in the case of permit schemes, where there is:

- An increase in the number of permit schemes.
- A requirement to pay a fee every time works take place or are varied.
- Increasingly stringent application of permit conditions, particularly in London and other large urban conurbations, which leads to increased out-of-hours working, and restrictions on times when works can take place etc.

Therefore GDNs will still incur considerable additional costs, regardless of any productivity improvements.

2.3 Increased Administration Costs

NJUG welcomes Ofgem's recognition that there are considerable additional administrative costs resulting from the implementation of the TMA, recognising a range of £8.7k to

£10.8k per project. Whilst we recognise that Ofgem will always want to incentivise utilities to be ever more efficient, setting the amount to £8k per project, below the level substantiated by data provided by GDNs is unreasonable as:

- **Factors affecting administration costs** - As outlined above, the ability to manage administration costs are affected by a) the approach of authorities e.g. in imposing conditions or requiring traffic management plans for all works, b) the complexity of permit schemes, c) the approach in applying FPNs / S74 charges, which directly impacts on the level of administration, and the amount of dialogue to clarify or challenge imposed charges / penalties.
- **Increased Levels of Spurious FPNs / S74 Overstay Charges** - With the reduction in highway authority budgets, we are already seeing increased levying of FPNs / S74 overstay charges, although we are not seeing an increase in their payments (i.e. There is not an increase in works overrunning, but an increase in charges being incorrectly levied, disputed and then withdrawn). This is only likely to increase as pressure on authority budgets rises over the coming years, and so utilities will have no option but to challenge charges and fees incorrectly levied, which is likely to lead to an increase, not decrease, in administration costs.
- **The devolvement of approval powers for permit schemes** - will lead to the development of numerous differing schemes, which will increase inconsistency - and therefore inefficiency and inadvertent non-compliance.
- Additionally it will be much more difficult to ensure, without DfT scrutiny and oversight to ensure that the Government's commitment (given during the debate on permit regulations in Parliament) that all costs incurred in the running of a permit scheme must be real, accurate and efficiently incurred.

2.4 Fixed Penalty Notices (FPNs)

NJUG is concerned that the efficiency test with respect to FPNs does not fully reflect the total impact of FPNs – for the following reasons:

- FPNs apply to both permits but also NRSWA 1991 notices, and this is not recognised / reflected.
- The value Ofgem is proposing to apply is the minimum £80 FPN. However, £80 is the absolute minimum FPN a utility can pay, assuming payment within 29 days, whereas in practice FPNs can be as high as £500 for not submitting a permit, or £300 if paid quickly. **Therefore, NJUG suggests some form of weighted average might be more appropriate.**
- **NJUG would also welcome clarity on how the 6% efficiency factor has been developed and on what basis Ofgem believes it is achievable.**

2.5 Permits

NJUG welcomes the allowance of all permit fees, however our comments in Sections 2.2 and 2.3 apply, regarding the need for a more sophisticated approach to allowing different levels of costs depending on all the factors identified above.

2.6 Principles

Improved Working with Local Authorities

As Ofgem is aware, NJUG has for some time encouraged greater co-ordination, co-operation, communication and compliance, with local authorities and utilities working better together to reduce disruption.

The introduction of NJUG's Vision for Street Works acted as a catalyst for change, when introduced back in 2007, and has delivered numerous improvements across the country in terms of advance planning of works, increased joint occupation of the carriageway, increased use of minimum-dig techniques and innovative methods of working.

Equally, the London, NJUG and now HAUC(UK) Codes of Conduct have done much to improve working with highway authorities.

We therefore support the principle of improved working with local authorities, however, three factors are already having a big effect on this principle:

- **The reduction in local authority budgets** – leading to:
 - A reduced level of resources to work with utilities to plan and co-ordinate works.
 - A more aggressive approach to revenue generation, which in turn affects the ability to work more closely with authorities in a co-operative partnership.
- **The outsourcing of the application of local authority management of street works to contractors** - who are in some cases incentivised on the number of FPNs, S74 charges or reinstatement failures they levy.

Reduction in Fixed Penalties

The introduction of FPNs has led to a dramatic improvement in the timeliness and quality of notices with the majority of utilities now recognised as delivering 97%+ notices / permits on time, coupled with a much reduced rate of inaccurate notices / permits.

However, as, above, all utilities are seeing a ramp up in the number of FPNs being levied, due to the focus on any potential sources of additional revenue arising from pressures on local authority budgets, and the outsourcing of FPN levying to incentivised third parties.

Equally, with the increase in the number of permit conditions and the number of schemes themselves, utilities expect this will lead to a further increased exposure to FPNs, just because of the complexity of operating within so many differing regimes. The possibility of one street crossing two local authority boundaries, needing two completely different permit applications or notices will definitely increase the risk of getting small details wrong.

More Efficient Administrative Support

NJUG firmly believes that with the advent of numerous different permit schemes, all with different requirements and conditions, and the devolvement of approval powers to local authorities, the complexity and level of dispute / challenge is only likely to increase. We therefore do not believe that further efficiencies in administrative support are achievable, rather the opposite will be true.

Innovation in Productivity for Street Works

Whilst NJUG / utilities constantly strive to find ways of improving productivity and to undertake works more efficiently, the imposition of conditions by local authorities, and the increasing bureaucracy / complexity of operating across different regimes (Notices and increasing numbers of permit schemes) means that productivity is reducing, not increasing.

Equally, with the widespread use of minimum-dig techniques with GDNs using these techniques for over 90% of their gas mains replacement programmes, largescale productivity improvements are unlikely in the short to medium term.

Additionally, the introduction of lane rental schemes will, in those areas where it is in place, dramatically impact on productivity in a number of ways (in addition to cost of the lane rental charges themselves):

- The current proposals for lane rental are about incentivising utilities to not work during traffic-sensitive times on targeted streets.
- In doing so, utilities will incur additional costs – including:
 - A premium in labour rates for out-of-hours working.
 - Additional costs of providing and running lighting (to enable the works to be undertaken safely).
 - Additional costs of securing reinstatement materials (currently most materials providers do not supply out-of-hours and utilities will need to either renegotiate new contracts at additional costs or use hot-boxes to enable reinstatements to be undertaken.
 - Additionally, this could lead to the need to reinstate on a temporary basis, and return to undertake a permanent reinstatement at a later date (again reducing productivity.)
- The TfL lane rental consultation makes an assumption that working before 8pm on targeted roads will generally incur a lane rental charge, yet also states that for environmental health reasons it is possible that working after 11pm may be precluded. In these instances, utilities would have just 3 hours per night to undertake work, which would have a significant impact on operational efficiency, extending durations and increasing costs.

For all these reasons we believe that the challenges to productivity will continue to increase, and therefore decreasing them by any substantial amount will be extremely difficult. We therefore strongly suggest that no major assumptions in this respect should be made.

3.0 Detailed Points

3.1 *Introduction*

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Paragraph 3 - We note that three of the eight gas distribution networks (GDNs) – those in Scotland, Southern and London – have given notice to Ofgem confirming that they have

started to incur significant additional costs following the implementation of the TMA. With permit schemes now being planned in many more local authority areas, further notifications from other GDNs should be expected. In addition to Permit Schemes already in operation in London (tranches 1 & 2), Kent and Northamptonshire, NJUG is aware that schemes are also currently being developed / planned in:

London Tranche 3 – commencing date tba - another 2 boroughs – all works on all streets.

St Helens (part of the Merseyside common permit scheme) – with the Secretary of State for approval – planned commencement date March 2012 - all works on all streets

Greater Manchester – planned commencement date July / August 2012 – but this could slip – all works on all streets.

East of England Scheme – likely April 2012 – all works on all streets.

Yorkshire – likely April 2012 – all works on traffic-sensitive streets.

Leicestershire, Nottingham and Derby – planned for commencement in 2012 – pre-consultation commenced for Derby based on all works on traffic-sensitive streets .

Liverpool – (breaking away from Merseyside Scheme) – planned commencement late 2012 or early 2013 – all works on all streets.

Lancashire – planned commencement 2013 – possibly limited to all works on 0,1,2 and traffic-sensitive streets.

Paragraph 4 – We note Ofgem’s analysis of efficiently incurred costs for the TMA for the three GDNs for the price control period is £40.47 million. Clearly it is for each GDN to provide the detailed figures to demonstrate the additional costs associated with the impact of the TMA.

However, as a general principle it is clear that costs have been incurred for a variety of reasons including:

- The direct payment of fees (such as permit fees) or charges.
- Additional indirect costs incurred through:
 - The imposition of conditions on the way in which utilities work, and
 - Increases in administration through utilities having to challenge increasing numbers of penalties or charges, as local authorities focus more acutely on ways of generating revenue in the face of cuts in their highway maintenance budgets.

NJUG suggests that Ofgem should also consider the differing ways in which each Highway Authority chooses to fulfil its Network Management Duty. Depending on the emphasis each authority places on the various regulatory and voluntary measures, and which ones each authority chooses to best manage its network, there is a real impact on the level of costs and operational impact.

Consultation on Ofgem's minded-to position for the determination of re-opener applications in respect of additional income associated with the Traffic Management Act (and Transport (Scotland) Act 2005) under the first gas distribution price control review

NJUG Response to the Consultation Questions

Q1 Do you agree with the proposed adjustments to the revenues associated with the TMA for three GDNs, North London, Southern and Scotland?

NJUG is concerned that Ofgem's general approach is to opt for the lowest (or in some cases below the lowest) level of costs identified by GDNs. NJUG recognises the role of Ofgem is to protect the consumer and therefore to impose a level of expectation of efficiency improvements, however, for a variety of reasons outlined in our Summary Document above, the scale of expected efficiencies / productivity is highly unlikely to be achieved.

This is particularly true for those GDNs and other utilities operating in areas with a number of different permit schemes; in areas where the impact of congestion is particularly politically important (e.g. London); and where the impact of different approaches has a significant impact on costs incurred.

Q2 Do you agree with the proposed principles that have been set and that these should be applied to future TMA re-openers and price controls?

NJUG and its members already support the proposed principles that Ofgem has identified – improved working with local authorities; reducing fixed penalties by timelier and more accurate noticing / permit applications; more efficient administration; and greater productivity in street works activities. All of these form the core of *NJUG's Vision for Street Works* and the London, NJUG and HAUC(UK) Codes of Conduct. However, for a number of reasons the outlook that we collectively face over the coming years is likely to have a real impact on utilities' ability to continue to drive improvements:

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Equally, the London, NJUG and now HAUC(UK) Codes of Conduct have done much to improve working with highway authorities.

We therefore support the principle of improved working with local authorities, however, three factors are already having a big effect on this principle:

- **The reduction in local authority budgets** – leading to:

- A reduced level of resources to work with utilities to plan and co-ordinate works.
- A more aggressive approach to revenue generation, which in turn affects the ability to work more closely with authorities in a co-operative partnership.
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However, as, above, utilities are seeing an increase in the number of spurious FPNs being levied, due to the focus on potential sources of additional revenue arising from pressures on local authority budgets, and the outsourcing of FPN levying to incentivised third parties.

Equally, with the increase in the number of permit conditions and the number of schemes themselves, utilities expect this will lead to an increased exposure to FPNs, just because of the complexity of operating within so many differing regimes. The possibility of one street crossing two local authority boundaries, needing two completely different permit applications or notices will definitely increase the risk of getting small details wrong.

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Equally, with the widespread use of minimum-dig techniques, with GDNs using these techniques for over 90% of their gas mains replacement programmes, largescale productivity improvements are unlikely in the short to medium term.

Additionally, the introduction of lane rental schemes will, in those areas where it is implemented, dramatically impact on productivity in a number of ways (in addition to the lane rental charges themselves):

- The current proposals for lane rental are about incentivising utilities to not work during traffic-sensitive times on targeted streets.

- In doing so, utilities will incur additional costs – including a premium in labour rates for out-of-hours working; additional costs of providing and running lighting (to enable the works to be undertaken safely); additional costs of securing reinstatement materials (currently most materials providers do not supply out-of-hours and utilities will need to either renegotiate new contracts at additional costs or use hot-boxes to enable reinstatements to be undertaken. Additionally, this could lead to the need to reinstate on a temporary basis, and return to undertake a permanent reinstatement at a later date (again reducing productivity.)
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For all these reasons we believe that the challenges to productivity will continue to increase and decreasing them by any substantial amount will be extremely difficult, and therefore no major assumptions in this respect should be made.

Q3 Do you agree with the timeframe within which it is proposed that additional revenues will be recovered?

Clearly, it is up to individual GDNs to comment on the timing of allowable costs for each network. However, NJUG would like to make two overarching points:

- The costs of the TMA across the whole utility sector have been considerable, sustained and are increasing with the tightening of local authority budgets and the increasing focus on street works and their contribution to disruption, particularly in the UK's capital London.
- NJUG welcomes Ofgem's agreement to look at the additional costs associated with changes to / further implementation of NRSWA 1991. **However, these costs are being incurred already (as per our previous response to the first GDN TMA Re-opener Consultation), and NJUG strongly believes that these costs should be the subject of an early separate re-opener during this regulatory period. This is particularly important, given that costs will further increase:**
 - **With the advent of the lane rental pilots from likely October 2012, particularly for those GDNs working in London and Kent.**
 - **If further S74 increases are brought forward by DfT.**