



*Promoting choice and value for
all gas and electricity customers*

To:
Current and future electricity
transmission; gas transportation;
electricity interconnector; and
gas interconnector licensees and
all other interested stakeholders

Our Ref: Certification of Unbundling

Email: unbundlingc@ofgem.gov.uk

Cc:
European Commission; DECC

Date: 21 May 2013

Dear Colleague,

**Certification of transmission system operators ('TSOs') under the ownership unbundling requirements of the Third Package¹
Decision of the Gas and Electricity Markets Authority ('the Authority')**

The Electricity and Gas (Internal Markets) Regulations 2011 ('the GB Regulations') require TSOs to be certified as complying with the ownership unbundling requirements of the Third Package.

Current and future transmission and interconnector licensees² are required to apply for certification under the ownership unbundling requirements of the Third Package pursuant to the GB Regulations. The certification procedures are set out in the Electricity Act 1989 ('the Electricity Act') and in the Gas Act 1986 ('the Gas Act') as amended by the GB Regulations.

On 11 November 2011 Ofgem³ published an open letter setting out information on our intended procedure for processing applications for certification under the ownership unbundling requirements of the Third Package.

¹ The term 'Third Package' refers to Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC ('Electricity Directive'); Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 ('Electricity Regulation'); Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC ('Gas Directive'); Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 ('Gas Regulation'); and Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.

² Electricity transmission, gas transportation, electricity interconnector and gas interconnector licensees.

³ Ofgem is the Office of the Gas and Electricity Markets Authority, which supports the Gas and Electricity Markets Authority, the regulator of the gas and electricity industries in Great Britain. The terms 'Ofgem' and 'the Authority' are used interchangeably in this document.

On 30 November 2012⁴ Interconnector (UK) Limited⁵ ('I(UK)' or 'the Applicant') submitted an application under section 8D(2) of the Gas Act requesting to be certified pursuant to two grounds set out section 8G(8) and section 8G(3) of the Gas Act.

This letter sets out Ofgem's final decision on the Applicant's application for certification under section 8F of the Gas Act.

Background

The Third Package is a suite of legally binding European Union legislation. The Third Package imposes new obligations on certain industry participants.

The GB Regulations have amended relevant domestic legislation, including the Gas Act, the Electricity Act and the Utilities Act 2000.

The GB Regulations have designated the Authority as the National Regulatory Authority for GB and have given it the responsibility for administering the certification process for current and future GB electricity transmission, gas transportation and electricity and gas interconnector licensees.

Application for certification

The Applicant holds a gas interconnector licence granted under section 7ZA of the Gas Act and is a person required to be certified as independent under section 8C(1) of the Gas Act.

The Authority received an application for certification from the Applicant under section 8D(2) of the Gas Act on 30 November 2012. The application requested that the Applicant be certified on two grounds:

- (i) First, for a transitional period until 2 March 2015, under the sixth certification ground set out in section 8G(8) of the Gas Act (on the basis that it complies with section 8G(8)(b)(ii) of the Gas Act) (the "Substantially Similar Ground"); and,
- (ii) secondly, for the period from 3 March 2015 under the first certification ground set out in section 8G(3) of the Gas Act; namely, that the Applicant meets the ownership unbundling requirement set out in section 8H of the Gas Act (the "Ownership Unbundling Ground").

⁴ I(UK)'s application of 30 November 2012 replaced the previous application for certification submitted on 11 November 2011, which was withdrawn.

⁵ A company registered in England and Wales under company number 02989838.

The Substantially Similar Ground, which is set out in section 8G(8) of the Gas Act has two limbs:

First, the applicant must hold a licence (gas interconnector licence) to participate in the operation of a gas interconnector granted under section 7ZA of the Gas Act (section 8G(8)(a) of the Gas Act).

Second, the applicant must meet one of the two alternative conditions for the second limb of the test as set out in section 8G(8)(b) of the Gas Act. I(UK)'s application refers to the second of these conditions: that "*another person benefits from such an exemption [in accordance with the conditions of that [other person's licence and granted] in accordance with Article 22 of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 on common rules for the internal market in natural gas (new infrastructure) (the "Second Gas Directive")], and the applicant is in a position which is substantially similar to the position of that person*" (section 8G(b)(ii) of the Gas Act). In other words, the Applicant must be in a substantially similar position to that of someone who has been granted an exemption in accordance with its licence and the Second Gas Directive (from certain requirements relating to third party access and approval of charging methodologies) and remains entitled to the benefit of it⁶.

On the basis of the information contained in the application dated 30 November 2012 and the further information provided by the Applicant, the Authority considered that the two limb test set out in section 8G(8) of the Gas Act was met by the Applicant.

The Ownership Unbundling Ground, set out in section 8G(3) of the Gas Act is that the applicant meets the ownership unbundling requirement in section 8H of the Gas Act.

On the basis of the information contained in the application and the further information provided by the Applicant, the Authority considers that certification should continue from 3 March 2015 on the Ownership Unbundling Ground set out in section 8G(3) of the Gas Act subject to conditions relating to the appointment of directors and other senior officers and voting/access to information, which are set out in the Schedule of the Authority's final decision and subject to the Authority being satisfied that as at 3 March 2015, the Applicant meets the ownership unbundling requirement set out in section 8H of the Gas Act. These conditions are set out in section C of the Schedule to the Authority's final decision, a copy of which is attached to this letter. Failure to comply with any of these conditions is a ground

⁶ The second, alternative condition, as set out in section 8G(8)(b)(i) is "*the applicant has, in accordance with the conditions of that licence, been granted an exemption in accordance with Article 22 of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 on common rules for the internal market in natural gas (new infrastructure) and remains entitled to the benefit of it ...*"

on which the Authority may withdraw I(UK)'s certification. Further information on this aspect of the Authority's final decision can be found in section 4 of the final decision analysis, which accompanies this letter.

The Authority made its preliminary decision under section 8F(1) of the Gas Act on 30 January 2013 and decided that the Applicant should be certified as independent as set out above. The Authority's preliminary decision was notified to the European Commission ('the Commission') in accordance with section 8F(4) of the Gas Act.

The Authority received the Commission's opinion on the preliminary decision and as to its compatibility with Articles 9 and 10 of the Gas Directive on 2 April 2013. The Authority understands from the Commission that its opinion was published on the Commission website and can be viewed at:

http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/certification/certifications_decisions.pdf. In accordance with Article 3(2) of the Gas Regulation, the Authority has taken utmost account of that opinion in reaching its final decision which is set out below.

The Authority's final decision is that as of and from the date of this decision until 11:59pm on 2 March 2015, the Applicant should be certified as independent on the Substantially Similar Ground set out in section 8G(8) of the Gas Act, with certification continuing from 3 March 2015 on the Ownership Unbundling Ground set out in section 8G(3) of the Gas Act subject to conditions relating to the appointment of directors and other senior officers and voting/access to information, which are set out in the Schedule of the Authority's final decision and subject to the Authority being satisfied that as at 3 March 2015, the Applicant meets the ownership unbundling requirement set out in section 8H of the Gas Act.

In accordance with section 8J(2) of the Gas Act, the Applicant, being a person who holds a licence specified in section 8J(1) of the Gas Act and who is certified on the sixth certification ground, is designated as a gas TSO for the purposes of Article 10(2) of the Gas Directive⁷.

In accordance with sections 8F(7) and 8J(4) of the Gas Act, the Authority hereby notifies the certification and designation of the Applicant to the Applicant, to the Commission and to the Secretary of State.

⁷ Having been designated as a TSO, the Applicant must comply with the obligations imposed on TSOs by the Gas Regulation, the Gas Directive (for example under Article 13) and the relevant European network codes adopted pursuant to the Gas Regulation as they enter into force.

In accordance with section 8K of the Gas Act, the Authority will monitor whether the basis on which it decided to certify the Applicant continues to apply following the Authority's final decision and if appropriate will review its certification decision.

Attached to this letter is a copy of the certification decision made by the Authority.

Yours sincerely,

Pamela Taylor

Associate Partner, European Wholesale

GAS ACT 1986
SECTION 8F
CERTIFICATION

Pursuant to section 8F of the Gas Act 1986 ('the Act') the Gas and Electricity Markets Authority hereby gives to Interconnector (UK) Limited (a company registered in England and Wales under company number 02989838) as a person who is required to be certified as independent, certification as independent, subject to the attached Schedule, under the ground set out in section:

- (i) 8G(8) of the Act (on the basis that it complies with section 8G(8)(b)(ii) of the Act), from the date hereof until 11.59pm on 2 March 2015; or until it is withdrawn (whichever is earlier) and
- (ii) 8G(3) of the Act, from 12am on 3 March 2015 if not withdrawn prior to that date.

Pamela Taylor

Authorised in that behalf by the Gas and Electricity Markets Authority
21 May 2013

SCHEDULE

PERIOD, CONDITIONS AND WITHDRAWAL OF CERTIFICATION

A. Interpretation and Definitions

In this certification

'the Authority'	means the Gas and Electricity Markets Authority established by section 1(1) of the Utilities Act 2000, as amended from time to time
'the Act'	means the Gas Act 1986, as amended from time to time
'the Agency'	has the same meaning as in section 48 of the Act
'the certified person'	Interconnector (UK) Limited (company number 02989838) in its capacity as a person certified as independent under section 8F of the Act
'the Commission'	means the European Commission
'conflicted shareholder(s)'	means any shareholder(s) of the certified person which: (a) is a relevant producer or supplier; and/or (b) directly or indirectly controls or has a majority shareholding in a relevant producer or supplier; and/or (c) is directly or indirectly controlled by a person who: (i) is a relevant producer or supplier; and/or (ii) directly or indirectly controls a person who is a relevant producer or supplier; and/or (iii) is directly or indirectly controlled by a person who is a relevant producer or supplier
'control'	has the same meaning as in section 8Q of the Act
'the interconnector'	means the gas pipeline between Zeebrugge in Belgium and Bacton in the United Kingdom
'person from a third country'	has the same meaning as in section 8Q of the Act
'relevant producer or supplier'	has the same meaning as in section 8Q of the Act

'senior officer'	has the same meaning as in section 48 of the Act
------------------	--

B. Period and grounds

Subject to sections C and D below, and pursuant to section 8F of the Act, this certification shall come into effect on the date that it is issued and shall:

1. Be made under the ground set out in sections 8G(8)(a) and (b)(ii) of the Act and continue until 11.59pm on 2 March 2015 or until it is withdrawn in accordance with section D, whichever is earlier; and
2. If not withdrawn prior to that date, continue from 12am on 3 March 2015 on the ground set out in section 8G(3) of the Act unless and until it is withdrawn in accordance with section D.

C. Conditions

This certification is made subject to the following conditions:

1. The material provided by the certified person to the Authority in respect of its application for certification is true and complete.
2. Prior to 3 March 2015, the certified person shall demonstrate to the Authority's reasonable satisfaction that from 3 March 2015 the certified person passes the five tests set out in section 8H of the Act, as demonstrated by the report referred to in paragraph C3. The steps referred to in this paragraph shall include, but not be limited to, taking all necessary steps to ensure that:
 - a. any director(s), or other senior officer(s), appointed by any conflicted shareholder(s) shall be removed from the certified person's board of directors and any board committee(s) or any other administrative body of the certified person; and,
 - b. any director(s), or other senior officer(s), of the certified person who participates in the appointment of directors, or other senior officers, of the certified person shall not be a senior officer of a relevant producer or supplier.
3. The certified person shall provide a written report to the Authority every three months (starting three months from the date of this certification) setting out the steps it has taken and is taking under paragraph C2 and the date by which each step has been or will be completed.

4. Prior to 3 March 2015, the certified person shall take all steps to ensure that from 3 March 2015 any conflicted shareholder(s) and any proxy(s) of any conflicted shareholder(s) shall not:
- i. be entitled to appoint, or participate in the appointment process of, any directors, or other senior officers of, or members of a board committee of the certified person;
 - ii. attend any meeting of the certified person's shareholders, or any part of the shareholders' meeting, unless the meeting, or any part of such meeting, will receive information on, or discuss, any matter(s) which the certified person's board of directors has determined (at the previous board meeting) would lead to a material adverse impact on the certified person's dividends;
 - iii. vote at any meeting of the certified person's shareholders unless, without prejudice to sections 8O and 8P of the Act, the matter being voted upon has been determined by the certified person's board of directors (at the previous board meeting) would lead to a material adverse impact on the certified person's dividends; and
 - iv. without prejudice to sections 8O and 8P of the Act, be provided with information and/or documentation, or access to information and/or documentation, in any format by any other shareholder, director or employee of the certified person, or any representative (including, but not limited to legal advisors and accountants) of the certified person unless the information and/or documentation relates to:
 1. decisions taken by the certified person's board of directors and/or shareholders; financial reports, forecasts and accounts; and, audit reports; or
 2. a matter which the certified person's board of directors has determined would lead to a material adverse impact on the certified person's dividends.
5. At the first meeting of the certified person's board of directors after the date of this certification, and subsequently after any change in shareholdings of the certified person, it shall be determined whether there are any conflicted shareholder(s) and the registered identity of that conflicted shareholder. This decision together with reasons shall be recorded in writing and a copy sent to the Authority within 7 working days of the meeting.

6. The certified person shall establish and maintain a compliance programme to monitor, review and report quarterly (commencing three calendar months from the date of this certification) to the Authority on its adherence to the conditions set out in paragraphs C2 to C5.
7. The compliance programme required by paragraph C6 shall include but not be limited to:
 - a. maintaining copies of the information and/or documentation:
 - i. withheld from any conflicted shareholder(s); and
 - ii. provided (pursuant to paragraph C4(d)) to any conflicted shareholder(s) (including any proxy, employee and/or representative thereof);
 - b. a register recording:
 - i. details of the meeting(s) and/or part(s) of such meetings (including date(s)) and decision(s) from which the conflicted shareholder(s) have been excluded;
 - ii. each occasion where paragraph C4(d)(1) or (2) has been applied. The register shall include but not be limited to the following information in respect of each instance when paragraph C4(d)(1) or (2) has been applied:
 1. the name(s) of the conflicted shareholder(s) in respect of which paragraph C4(d)(1) or (2) has been applied;
 2. the date on which the certified person's board of directors determined that a matter would lead to a material adverse impact on the certified person's dividends and the reasons for the decision;
 3. the date on which the conflicted shareholder(s) attended and/or participated in the relevant meeting(s) and/or received or was given access to information and/or documentation;
 4. details of the relevant meeting(s) and/or information and/or documentation received or given.
8. If at any time the certified person knows or reasonably should know of any event or circumstance that has occurred or is likely to occur that may affect its eligibility for certification, the certified person shall as soon as reasonably practicable notify the Authority in writing of the event or circumstance and the reasons it considers that the event or circumstance may affect its eligibility for certification.
9. The certified person shall notify the Authority in writing within 7 working days of any change in the shareholdings of the certified person. Such notification shall include but shall not be limited to the registered name(s) and company numbers of any new shareholder(s);

the number and type of share(s) allotted or transferred; the percentage of the total shareholding in the certified person that each new shareholder(s) holds; and any reduction or increase in shareholding by any current shareholder(s) (including the number of shares allotted or transferred and the new percentage of the total shareholding in the certified person held by the relevant shareholder(s)).

10. If at any time the Authority provisionally considers that a condition contained in paragraphs C1 to C9 is not met (the “provisional breach”), the certified person shall furnish the Authority in such manner and at such times as the Authority may reasonably require the reasons for the provisional breach and the details of any steps being taken to rectify the provisional breach (including the timescales for any such steps) together with any supporting documentation.
11. If at any time from 3 March 2013 the certified person knows or reasonably should know that any event or circumstance has occurred, or is likely to occur, that may cause the Authority to think that the certified person is or may become a person from a third country, or that a person from a third country has or may take control of the certified person, the certified person shall as soon as reasonably practicable notify the Authority in writing.
12. If at any time from the relevant date the certified person exercises or is likely to exercise any shareholder right or right of appointment in the circumstances described in section 80 of the Act, the certified person shall as soon as is reasonably practicable notify the Authority in writing of the right that has been or is likely to be exercised and the effect of exercising that right.
13. By 31 July of each year the certified person shall provide the Authority with a written declaration, approved by a resolution of the board of directors of the certified person and signed by a director of the certified person pursuant to that resolution, setting out:
 - a. Whether any event or circumstance has occurred in the previous 12 month period, or such part of that 12 month period since the certified person was certified, that may affect the certified person’s eligibility for certification, and if so, the reasons it considers that the event or circumstance may affect its eligibility for certification; and
 - b. Whether any event or circumstance has occurred, or is likely to occur, that may cause the Authority to think that the certified person has become a person from a third country, or that a person from a third country has taken control of the certified person, in the previous 12 month period or such part of that 12 month period since the certified person was certified, providing that the certified person is

only required to provide a written declaration under this paragraph (b) in relation to a period that occurs after 3 March 2013.

14. The certified person shall furnish the Authority in such manner and at such times as the Authority may reasonably require, with such information as the Authority may reasonably require, or as may be necessary, for the purpose of:

- (a) performing the functions assigned to it by or under the Act, the Electricity Act 1989, the Utilities Act 2000, the Energy Act 2004, the Energy Act 2008, or the Energy Act 2011, each as may be amended from time to time; or
- (b) monitoring and review of the certification under section 8K of the Act (which, for the avoidance of doubt, shall include but not be limited to any information and/or documentation required to be maintained pursuant to paragraph C7);
- (c) considering the information and reports provided under paragraphs C3 and C7; or
- (d) reporting by the Authority as to any connection of the licensee with a country outside the European Economic Area under section 8M of the Act.

15. Should any of the grounds for withdrawal arise under section D of this certification, the Authority may amend this certification rather than withdraw the certification.

D. Withdrawal

Pursuant to section 8N of the Act, this certification may be withdrawn in the following circumstances:

1. This certification may be withdrawn by the Authority by giving a notice of withdrawal to the certified person not less than four months before the coming into force of the withdrawal in any of the following circumstances:

- (a) where:
 - (i) the Authority considers that a condition contained in paragraphs C1 to C14 above is not met;
 - (ii) the Authority considers that the basis on which the Authority decided to certify the certified person does not continue to apply and has made a final decision that the certification should be withdrawn;
 - (iii) the certified person has a receiver (which expression shall include an administrative receiver within the meaning of section 251 of the Insolvency Act 1986, as amended from time to time) of the whole or any material part of its assets or undertaking appointed;

- (iv) the certified person has entered into administration under section 8 of Schedule B1 to the Insolvency Act 1986;
 - (v) the certified person is found to be in breach of any national or European competition laws, such breach relating to the licensed activity of the certified person;
 - (vi) the certified person has failed to provide a declaration to the Authority pursuant to paragraph C13 above and the Authority has written to the certified person stating that the declaration has not been provided and giving the certified person notice that if the declaration remains outstanding past the period specified in the notice the certification may be withdrawn;
 - (vii) the certified person has failed to comply with a request for information issued by the Authority under paragraph C14 above and the Authority has written to certified person stating that the request has not been complied with and giving the certified person notice that if the request for information remains outstanding past the period specified in the notice the certification may be withdrawn; or
 - (viii) to ensure compliance with any legally binding decision of the Agency or of the Commission.
2. This certification may be withdrawn if the certified person notifies the Authority that it does not require to be certified and the Authority considers that the certified person is not a person who is required to be certified.