



Ofgem's¹ final decision and analysis on Premier Transmission Limited's ("PTL's") application for certification

This document sets out Ofgem's final decision on PTL's compliance with the requirements of the Third Package² for transmission system operators ("TSOs") to be certified in accordance with implementing legislation in Great Britain ("GB").

1. Certification Decision

1.1. Having taken utmost account of the European Commission's (the "Commission's") opinion on our preliminary certification decision on PTL³ and its compatibility with Articles 9 and 10 of the Gas Directive, the Authority concludes that the first certification ground set out in section 8G(3) of the Gas Act 1986 (the "Gas Act") has been complied with and that PTL should therefore be certified (on the basis of ownership unbundling) and should be designated as a TSO⁴.

2. GB Legislation – Transposition of the Gas Directive

2.1. In GB the grounds for certification and the ownership unbundling requirements set out in the Gas Directive have been transposed through the Electricity and Gas (Internal Market) Regulations 2011 (the "Regulations") which insert new sections 8C to 8Q into the Gas Act. Section 8G of the Gas Act sets out the grounds on which the Authority may decide to certify an applicant. The first of these grounds⁵ is that the Authority may decide to certify an applicant if that applicant meets the ownership unbundling requirement in section 8H of the Gas Act. Section 8H of the Gas Act provides that the ownership unbundling requirement is met if the Authority thinks that each of the five tests set out in section 8H is passed.

3. The Applicant

3.1. PTL (the "Applicant") is the sole owner of the high pressure gas interconnector between Twynholm in Scotland and Ballylumford in Northern Ireland. This pipe is otherwise known as the Scottish Northern Ireland Pipeline (the "SNIP"). The SNIP is 24 inches in diameter and 135 kilometres in length.

3.2. In GB, PTL holds a Gas Interconnector Licence originally granted by the Department of Trade and Industry under section 7ZA of the Gas Act that came into force on 14 August 2006.

¹ The Gas and Electricity Markets Authority (the "Authority"). In this document the terms, "Authority", "Ofgem", "we" and "us" are used interchangeably.

² 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.

³ In accordance with Article 3(2) of the Gas Regulation.

⁴ Pursuant to section 8J(2) of the Gas Act, implementing Article 10(2) of the Gas Directive.

⁵ Set out in section 8G(3) of the Gas Act.

3.3. This document provides a summary of the analysis of the information submitted by PTL to the Authority and to the Commission for the purpose of assessing the Applicant's compliance with the unbundling requirements (the five tests) and its certification as independent under the GB legislation implementing the unbundling provisions of the Gas Directive.

4. Summary of Ofgem analysis

4.1. *First test: the applicant (a) does not control a relevant producer or supplier; (b) does not have a majority shareholding in a relevant producer or supplier; and (c) will not, on or after the relevant date, exercise shareholder rights in relation to a relevant producer or supplier.*

4.2. PTL has confirmed that it does not hold any shares, contractual or other rights in any other entity. Further, PTL has provided a signed undertaking that it will not, on or after the relevant date, exercise shareholder right in relation to a relevant producer or supplier. We therefore consider that PTL meets the requirements of the first test.

4.3. *Second Test: where the applicant is a company, partnership or other business, none of its senior officers has been, or may be, appointed by a person who (a) controls a gas undertaking which is a relevant producer or supplier; or (b) has a majority shareholding in a gas undertaking which is a relevant producer or supplier.*

4.4. PTL has provided details of the process for appointing these directors. PTL meets the requirements of the second test as none of its senior officers has been, or may be, appointed by a person who (a) controls a gas undertaking which is a relevant producer or supplier; or (b) has a majority shareholding in a gas undertaking which is a relevant producer or supplier.

4.5. *Third Test: where the applicant is a company, partnership or other business, none of its senior officers is also a senior officer of a gas undertaking which is a relevant producer or supplier.*

4.6. The information provided by PTL confirms that none of the directors or senior officers of PTL is also a senior officer of a gas undertaking which is a relevant producer or supplier.

4.7. *Fourth and Fifth Tests: the applicant is not controlled by a person who (a) controls a relevant producer or supplier; and, (b) has a majority shareholding in a relevant producer or supplier.*

4.8. PTL is a wholly owned subsidiary of Premier Transmission Financing plc ("PTFP"), which in turn is a wholly owned subsidiary of Premier Transmission Holdings Limited ("PTHL"), which in turn is a wholly owned subsidiary of NI Gas Transmission Holdings Limited ("NIGTHL"), which in turn is a wholly owned subsidiary of, and therefore controlled by, Mutual Energy Limited ("MEL"). Our analysis confirms that none of the companies controlled by MEL (as the ultimate parent company of the Applicant) is a relevant producer or supplier, and therefore the Applicant is not controlled by a person who either controls a relevant producer or supplier or has a majority shareholding in a relevant producer or supplier. The requirements of the fourth and fifth tests are therefore met.

5. European Commission Opinion

5.1. Pursuant to Article 3(2) of the Gas Regulation, Ofgem is required to take "utmost account" of the Commission's opinion in reaching its final certification decisions. We summarise below how we have taken "utmost account" of the Commission's opinion of

Ofgem's preliminary certification decision in relation to PTL. The Commission's opinion is published on the Commission's website and can be viewed at: http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/certification/2013_073_uk_en.pdf.

5.2. The Commission commented on three areas of PTL's arrangements: (i) Conflicted directors; (ii) European Renewable Energy Fund Limited Partnership; and (iii) Contracting out of TSO services. We look at each of these below.

5.3. Conflicted directors:

5.3.1. At the time of making the Authority's preliminary decision, one of both PTL and MEL's directors was also a non-executive director of two companies (established in the Republic of Ireland, with no activities in Northern Ireland) forming part of a corporate group with a minority non-operated interest in the Corrib gas field off the west coast of Ireland. The Corrib gas field is not yet operational.

5.3.2. In its opinion, the Commission noted that Northern Ireland and Ireland *"have been developing an all Island energy framework for almost a decade."* The Commission further noted that the commercial value of the Corrib gas field, which represents *"a potentially very significant contribution to the energy needs of Ireland, and indirectly also Northern Ireland,"* will be affected by *"the particular arrangement applying for trading between Ireland, Northern Ireland and Great Britain."*

5.3.3. The Commission therefore considers that *"a director or other senior officer of a transmission system operator who holds an interest in a gas field of the scale of the Corrib gas field, located in such proximity to the relevant gas transmission system, inevitably faces conflicts of interest and cannot be considered to meet the requirement of Article 9(1)(d) of the Gas Directive."*

5.3.4. The Commission invited Ofgem to *"ensure prior to its final certification decision that all directors of the transmission system operator meet the requirements of Article 9(1)(d) of the Gas Directive."* The Authority understands that in light of the Commission's opinion (given to the Authority and the Northern Ireland Authority for Utility Regulation ("Utility Regulator")) the director in question has stepped down from the board of PTL and is taking steps to be replaced on the board of MEL within 2013. The Authority will monitor the progress of the director's removal from the board of MEL and, if it considers it appropriate (for example, in the event of a delay in the director leaving MEL's board), may review this certification decision under section 8K of the Gas Act. We therefore consider these steps sufficient to address the Commission's concerns in this regard.

5.4. European Renewable Energy Fund Limited Partnership:

5.4.1. The Commission agreed with the Authority's view that MEL's (the Applicant's ultimate holding company's) investments (through a subsidiary company) in the European Renewable Energy Fund Limited Partnership *"do not constitute a barrier to certification"* as its interest was *"confined to a financial interest"* and that MEL did not directly or indirectly exercise *"rights or control in any of the renewable energy undertakings."*

5.4.2. The Commission invited the Authority *"to keep under review whether a financial incentive could exist that could influence MEL's decision-making powers and, if that is the case, to ensure that remedies are put in place that effectively remove this conflict of interest."* The Authority considers that this reassessment is possible under section 8K of the Gas Act. If Ofgem deems that the basis for certification has changed and an

applicant is no longer compliant with the ground on which it has been certified, the appropriate action can be taken.

5.5. Contracting out of TSO services:

5.5.1. In its opinion on PTL, the European Commission noted that under Article 9(1)(a) of the Gas Directive, each undertaking which owns a transmission system is required to act as a TSO, including carrying out of all the tasks of a TSO under Article 13 of the Gas Directive. The Commission states that decisions related to operation, maintenance and development must be made by the TSO. The Commission also noted the importance of TSOs having *"sufficient resources to oversee, control and provide instructions to the subcontractor"* and having *"enough resources at [their] disposal to carry out [their] tasks under Article 1[3] of the Gas Directive independently."*

5.5.2. We note that PTL is a single 'point-to-point' interconnector, owned and operated as such, and in that respect it differs from a national transmission system operator. PTL performs Article 13 tasks to the extent that they apply to a single 'point-to-point' interconnector such as the SNIP. PTL cooperates with National Grid Gas ("NGG") as GB TSO to facilitate the performance of other Article 13 tasks at the interconnection point in GB. NGG performs Article 13 tasks that are relevant to the GB transmission system and performs certain tasks to coordinate GB TSOs.

5.5.3. In our preliminary decision, we set out how Article 13 of the Gas Directive has been transposed in the GB legislation. To demonstrate that the TSO fulfils the requirements of Article 13 that pertain to it, we provided a table (which can be found in Annex 1) that lists the tasks that the TSO applicant, as a gas interconnector, fulfils in compliance with Article 13, with specific reference to where these provisions are found in GB legislation and licences. Specific duties, corresponding to the relevant requirements of Article 13, are imposed on PTL through its gas interconnector licence granted under the Gas Act.

5.5.4. Standard Licence Condition ("SLC") 19(1) (a) and (b) of the gas interconnector licence requires the licensee to *"at all times act in a manner calculated to ensure that it has available to it such resources, including (without limitation) management and financial resources, personnel, fixed and moveable assets, rights, licenses, consents and facilities, on such terms and with all such rights, as shall ensure that it is at all times able: (a) to properly and efficiently participate in the operation of the interconnector; and (b) to comply in all respects with its obligations under this licence, the Act, the Regulation and any other legislation as the Authority may direct from time to time for the purpose of this licence condition."* We consider that PTL's obligation to comply with SLC 19 to maintain its licence requires it to ensure that it has enough resources at its disposal to carry out its tasks under Article 13 of the Gas Directive independently. As set out below, the Authority may take enforcement action in the event of a breach of licence.

5.5.5. As all of the Article 13 tasks are set out in legislation and in licences, the Authority can carry out enforcement action if a TSO licensee does not comply with any of the relevant obligations. Therefore, these powers would be available to the Authority in connection with any of the conditions of PTL's licence which correspond to the duties imposed on TSOs by Article 13 of the Gas Directive. Licence holders have to comply with the conditions of their licences i.e. SLCs. Any failure to do so may constitute a breach of licence and the Authority may take such enforcement action as it considers

reasonable in the circumstances. The Authority may amend the SLCs if it considers it appropriate⁶.

- 5.5.6. The Authority's enforcement powers are set out in sections 28 to 30F of the Gas Act. These include an ability to order compliance⁷ or issue a penalty of up to ten percent of the licensee's annual turnover⁸. This corresponds with Article 41(4)(d) of the Gas Directive, which states that a penalty of up to ten percent of the TSO's turnover may be levied. The Authority can also issue directions in order to require the licensee to remedy any breach of licence. Any failure by a licensee to comply with an enforcement order made by the Authority may ultimately be a ground for revocation of its licence.
- 5.5.7. The Commission also referred to its opinion in Voralberger Übertragungsnetze GmbH that subcontracting core TSO tasks to a vertically integrated undertaking was not compatible with the full ownership unbundling model. The Commission noted that *"the contracting out of core transmission system operator functions can only be acceptable either if the transmission system is operated jointly as part of a wider transmission system or if a fully resourced transmission system operator makes an independent commercial decision to sub-contract services on efficiency grounds."*
- 5.5.8. In this regard, we note that the Applicant sub-contracts the physical operation of the SNIP to a third party, whilst retaining responsibility for decisions related to operation, maintenance and development. This sub-contracting is the result of an open-tender process.
- 5.5.9. In the Authority's opinion, taking utmost account of the European Commission's opinion, given that PTL (i) retains responsibility for the relevant tasks of the TSO as set out in Article 13 of the Gas Directive, and (ii) is subject to enforceable licence conditions in this regard, PTL's decision to meet certain of these obligations through a third party is compatible with the requirements of Article 13 of the Gas Directive.
- 5.5.10. PTL's application states that the current sub-contractor is BGE. BGE has not yet received a final certification decision and is, we understand, part of a vertically integrated undertaking (VIU) within the meaning of Article 2(20) of the Gas Directive. Given that a VIU (or part thereof), performs the role of physical operation of the SNIP, we note that it is possible for commercially sensitive information obtained when performing this role to be passed to other companies (or employees of such companies) with production or supply interests. We have therefore considered the issue of protection of commercially sensitive information in line with the principles of ownership unbundling.
- 5.5.11. In our preliminary decision, we proposed including in our final decision a specific condition relating to information sharing between PTL and its subcontractor. We note that PTL is already subject to the confidentiality requirements of standard licence condition 21 of its gas interconnector licence. Having considered further, we now believe that standard licence condition 21 is sufficient to address any possible concerns about passing of information to relevant producers or suppliers within the subcontractor's group; therefore introducing an additional condition is unnecessary in this instance.
- 5.5.12. We would nevertheless encourage PTL to keep under consideration whether it has put in place appropriate arrangements to ensure that it continues to comply with standard licence condition 21, just as it would if we had imposed an additional

⁶ The Regulations have amended the licence modification process from requiring a certain level of consent to being imposed subject to an ex-post right of appeal. The licence modification procedure is set out in sections 23 to 23G of the Gas Act.

⁷ Section 28 of the Gas Act

⁸ Section 30A of the Gas Act

condition. It would be for the Applicant to determine that its arrangements (such as contractual arrangements) with the current or any future subcontractor were sufficient to ensure that standard licence condition 21 was met. Breach of this condition would be a ground for withdrawing the certification. Withdrawal of certification may ultimately lead to the Authority taking enforcement action (which may result in it imposing a financial penalty, in line with paragraph 5.5.6 above) as it is a requirement for the Applicant to be certified under section 8C(2) of the Gas Act.

5.5.13. We conclude that in order to maintain its gas interconnector licence, the Applicant must demonstrate compliance with the requirements of Article 13. We consider that PTL does so by (i) meeting the unbundling requirements, and (ii) being in a position to ensure that its subcontractor also complies as an enforceable requirement to maintain its licence. It is therefore sufficient for us to certify the Applicant on the basis that, through itself and its subcontractor(s), it satisfies each of the five tests required for ownership unbundling certification, without the need for the Authority to impose additional conditions relating to Article 13.

5.5.14. The Commission invited Ofgem (and Utility Regulator in its opinion on Utility Regulator’s preliminary certification decision in relation to PTL) to ensure that “each tender to provide transmission system operator services has been fully evaluated against the potential of carrying out those functions in-house and that the transmission system operator has all necessary resources to effectively oversee, control and provide instructions to the subcontractor.” We consider that it is for the applicant to ensure that it complies with the requirements of Article 13 of the Gas Directive (including these matters) as implemented in GB law. Failure to ensure compliance may result in enforcement action by the Authority as per paragraph 5.5.6 above.

6. Annex 1: Requirements of Article 13 of the Gas Directive as Transposed to GB Legislation

Article 13, Gas Directive		Interconnector compliance in GB as applicable to PTL
13(1)	Each transmission ... system operator shall:	
13(1)(a)	operate, maintain and develop under economic conditions secure, reliable and efficient transmission ... facilities to secure an open market, with due regard to the environment, ensure adequate means to meet service obligations	<p>SLC 19(2) of the Gas Interconnector Licence: <i>“The licensee shall operate, maintain and develop and economic, efficient, secure and reliable interconnector”.</i></p> <p>SLC 19(3) of the Gas Interconnector Licence: <i>“The licensee shall promote security of supply by taking into account all economically reasonable and technically feasible demands for capacity on the licensee’s interconnector.”</i></p> <p>SLC 19(1)(a) and (b) of the Gas Interconnector Licence:</p>

		<p><i>"1. The licensee shall at all times act in a manner calculated to secure that it has available to it such resources, including (without limitation) management and financial resources, personnel, fixed and moveable assets, rights, licenses, consents and facilities, on such terms and with all such rights, as shall ensure that it is at all times able:</i></p> <p><i>(a) to properly and efficiently participate in the operation of the interconnector; and</i></p> <p><i>(b) to comply in all respects with its obligations under this licence, the Act, the Regulation and any other legislation as the Authority may direct from time to time for the purpose of this licence condition."</i></p>
13(1)(b)	Refrain from discriminating between system users or classes of system users, particularly in favour of its related undertakings;	<p>SLC 20(1) of the Gas Interconnector Licence requires that <i>"The licensee shall not discriminate between users or classes of users particularly in favour of a related undertaking."</i></p> <p>Under SLC 11A of the Gas Interconnector Licence, licensees are required to submit their access rules for Authority approval.</p> <p>SLC 11A(4) requires that the licensee's access rules comply with the Gas Regulation.</p> <p>SLC 11A(5) requires that the licensee's access rules are transparent, objective, non-discriminatory and compliant with the Gas Regulation and any relevant legally binding decision of the Commission and/or the Agency for the Co-operation of Energy Regulators (ACER).</p>
13(1)(c)	providing any other transmission system operator ... sufficient information to ensure that the transport and storage of natural gas may take place in a manner compatible with the secure and efficient operation of the interconnected system	<p>SLC 5 of the Gas Interconnector Licence requires the licensee to furnish any relevant gas transporter or operator of an interconnected system information concerning the operation and technical specifications of the licensee's interconnector in such manner and at such times as may reasonably be required by the operator of an interconnected system for the purposes of ensuring the secure and efficient operation of the interconnected system.</p>
13(1)(d)	provide system users with the information they need for efficient access	<p>Under SLC 11A of the Gas Interconnector Licence, licensees are required to submit their access rules for Authority approval.</p>

	to the system	<p>SLC 11A(4) of the Gas Interconnector Licence requires that the licensee's access rules comply with the Gas Regulation, including containing arrangements for users to obtain interconnector capacity at appropriate timescales, including where relevant, the auction rules and procedures for nominating gas flows against the capacity.</p> <p>SLC 11A(15) of the Gas Interconnector Licence requires the licensee to publish its access rules (as soon as practicable after Authority approval/after modification/28 days prior to coming into effect).</p> <p>SLC 11A(16) of the Gas Interconnector Licence requires the licensee to send a copy of its access rules (or any proposed modification to them) to anyone who requests them.</p>
13(2)	Each transmission system operator shall build sufficient cross-border capacity to integrate European transmission infrastructure accommodating all economically reasonable and technically feasible demands for capacity and taking into account security of supply.	<p>SLC 19(2) of the Gas Interconnector Licence: <i>"The licensee shall operate, maintain and develop and economic, efficient, secure and reliable interconnector"</i>.</p> <p>SLC 19(3) of the Gas Interconnector Licence: <i>"The licensee shall promote security of supply by taking into account all economically reasonable and technically feasible demands for capacity on the licensee's interconnector."</i></p> <p>SLC 19(1)(a) and (b) of the Gas Interconnector Licence:</p> <p><i>"1. The licensee shall at all times act in a manner calculated to secure that it has available to it such resources, including (without limitation) management and financial resources, personnel, fixed and moveable assets, rights, licenses, consents and facilities, on such terms and with all such rights, as shall ensure that it is at all times able:</i></p> <p><i>(a) to properly and efficiently participate in the operation of the interconnector; and</i></p> <p><i>(b) to comply in all respects with its obligations under this licence, the Act, the Regulation and any other legislation as the Authority may direct from time to time for the purpose of this licence condition."</i></p>
13(3)	Rules adopted by transmission system operators for balancing the gas transmission system shall be objective,	<p>Under SLC 11A of the Gas Interconnector Licence, licensees are required to submit their access rules for Authority approval.</p> <p>SLC 11A(4) of the Gas Interconnector Licence</p>

	<p>transparent and non-discriminatory, including rules for the charging of system users of their networks for energy imbalance. Terms and conditions, including rules and tariffs, for the provision of such services by transmission system operators shall be established pursuant to a methodology compatible with Article 41(6) in a non-discriminatory and cost reflective way and shall be published.</p>	<p>requires that the licensee's access rules comply with the Gas Regulation.</p> <p>SLC 11A(5) of the Gas Interconnector Licence requires that the licensee's access rules "<i>be transparent, objective, non-discriminatory and compliant with the [Gas] Regulation ...</i>"</p> <p>SLC11A(15) of the Gas Interconnector Licence requires the licensee to publish its access rules (as soon as practicable after Authority approval/after modification/28 days prior to coming into effect).</p> <p>SLC 11A(16) of the Gas Interconnector Licence requires the licensee to send a copy of its access rules (or any proposed modification to them) to anyone who requests them.</p>
<p>13(4)</p>	<p>The regulatory authorities where Member States have so provided ... may require transmission system operators to comply with minimum standards for the maintenance and development of the transmission system, including interconnection capacity.</p>	<p>SLC 19(2) of the Gas Interconnector Licence: "<i>The licensee shall operate, maintain and develop and economic, efficient, secure and reliable interconnector</i>".</p>
<p>13(5)</p>	<p>Transmission system operators shall procure the energy they use for the carrying out of their functions according to transparent, non-discriminatory and market based procedures.</p>	<p>SLC 19(4) of the Gas Interconnector Licence requires the licensee to "<i>procure the energy used for participating in the operation of the interconnector according to transparent, non-discriminatory and market based procedures.</i>"</p>