

24 February 2014

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By email only: Jacob.Kane@ofgem.gov.uk

Dear Andrew

Re: Statutory Consultation on changes to Special Condition 1 of the Independent Gas Transporters' (IGTs) Licence

This letter is written for and on behalf of Brookfield Utilities UK's gas transporter licensees, Independent Pipelines Limited (IPL), Quadrant Pipelines Limited (QPL) and GTC Pipelines Limited.

As you will appreciate the drafting of Special Condition 1 is of particular importance to IGTs. In reviewing the proposed licence changes IGTs took external legal advice from Bond Dickinson on the proposed changes. Whilst we agree with the substance of the proposed changes, Bond Dickinson have suggested some amendments which we think improve the drafting.

Their suggestions are provided in the Appendix to this letter. Their suggestions are in two parts, Part one relates to the specific issues that were raised and covered by this consultation. Part two suggests an improvement to the drafting that you may consider to be out of scope of this consultation. Whilst we think the suggestions in Part 2 would improve clarity and remove ambiguity, we would have no serious objections if these suggested changes were not included at this time.

In respect of Bond Dickinson's comments in Part 2, we feel it is the guidance that needs to be consistent with the licence and not vice versa. Whilst guidance is useful to provide clarity and to remove ambiguity, it should not be used to change the intent or the meaning of the licence condition. We would be concerned if Ofgem guidance was used as vehicle for doing so¹. Following completion of this consultation, it may be appropriate to review the Ofgem guidance to ensure that it is consistent with Special Condition 1 and with other Ofgem policy documents.

Disapplication Requests

We acknowledge that paragraphs 12 and 13 of special condition 1 need amending following amendments to the Act. We understand that amendments to the Gas Act (and similar amendments to the Electricity Act) changed the modifications process to allow the Authority to make amendments to licences and to give licensees a right of appeal. However this does not cover disapplication requests which are made under and in accordance with the provisions of the licence (i.e. the licence is not modified under a disapplication request). Under the provisions of the licence it is the Authority (not the licensee) who has the option of referring the matter to the Competition Authority. Importantly these paragraphs set out the process steps that need to be followed where the Authority:

¹ Notwithstanding that Paragraph 2 of SC1 allows for the Authority to consent to charges being more than TC.

- has elected to not refer a disapplication request to the Competition Authority (within 12 months of such request); or,
- who has elected to make a reference to the Competition Authority, following a report by the Competition Authority.

We are concerned that Ofgem considered that these paragraphs should be revoked. To do so would leave a process vacuum. We would welcome further discussions in these areas in developing amendments to both gas transportation and electricity distribution licences.

If you require any further points of clarification to our response please let me know.

Yours sincerely

Mike Harding
Head of Regulation

Appendix 1 AiGT Draft Special Condition 1 – Suggested Amendments

This table sets out proposed drafting changes to Annex 1 (Draft of Special Licence Condition 1 with proposed changes) to Ofgem Statutory Consultation dated 31 January 2014 on changes to Special Condition 1 of the Independent Gas Transporters' (IGTs) Licence. In each case we:

- (1) illustrate the proposed change(s);
- (2) comment on consistency between RPC Guidance and the Special Condition drafting; and,
- (3) provide a justification for the proposed change.

In **Part 1** we set out proposed amendments to the clauses of Special Condition 1 which are expressly the subject of the statutory consultation.

In **Part 2** we set out proposed amendments to other clauses which we believe would help avoid ambiguity or address drafting errors in other clauses of Special Condition 1.

Note: Ofgem proposed amendments in consultation not shown redlined

Part 1 – Clauses expressly subject to consultation

Proposed amended drafting (shown underlined>	Consistency between RPC Guidance and Special Condition drafting	Justification/comment
<p><u>Paragraph 2</u></p> <p>2. For premises subject to paragraph 1 above or paragraph 3 (4) of this condition the licensee shall for <u>all</u>-each such premises, unless the Authority consents otherwise in writing, charge no more than TC_t:</p> <p>(1)</p> <p>(a) Where RC_t is less than C_t and greater than F_t, then</p> $TC_t = RC_t$ <p>(b) Where RC_t is greater than or equal to C_t, then</p> $TC_t = C_t$ <p>(c) Where RC_t is less than or equal to F_t, then</p> $TC_t = F_t$ <p>At Entry-point, then RC_t shall be calculated as follows:</p> $RC_t = SSP - CSEP$ <p>Where t is greater than 1, RC_t shall be calculated as follows:</p> $RC_t = RC_{t-1} \times \left(1 + \frac{wSSP_r}{100} \right)$	<p>The Guidance is clear that the RPC entry charge is specific to each premises (and varies between premises depending, amongst other things, on site location, date of entry into RPC, the property AQ the Connected System AQ and the property and site SOQ).</p>	<p>Without these amendments (and the corresponding amendments in the definitions in paragraph 2(6)) there is a risk of ambiguity because the original drafting implies that the charge is the same for all relevant premises, rather than being determined for each premises individually (as described in the Guidance).</p>

Proposed amended drafting (shown underlined)	Consistency between RPC Guidance and Special Condition drafting	Justification/comment
<p><u>Paragraph 2(2)</u></p> <p>(2) The licensee shall adjust charges on 1 January each year in accordance with this condition. Where the Entry-point is in the immediately preceding period of 1 October to 31 December, the licensee shall not adjust charges in accordance with <u>this paragraph 2 above but shall modify the charges in accordance with this condition each 1 January thereafter until 1 January following the first anniversary of the Entry-point.</u></p>	<p>The licensee is required to adjust the charges in accordance with paragraph 2 but not until 1 January first following the anniversary of the Entry-point and thereafter annually.</p>	<p>The original drafting stated that "the licensee shall not adjust charges in accordance with paragraph 2 above but shall modify charges in accordance with this condition each 1 January thereafter", which creates ambiguity about whether charges are to be adjusted in accordance with paragraph 2. The proposed amendments eliminate that ambiguity.</p>
<p><u>Paragraph 2(3)</u></p> <p>(3) To determine the level of charges the licensee shall apply Annual Quantity in relation to domestic premises in accordance with standard Annual Quantity as accepted by the Authority <u>at the Entry-point</u>, and for other premises as reasonably estimated and agreed between the licensee and any relevant shipper <u>from time to time</u>, unless the Authority directs otherwise for those other premises. In this paragraph 2 (3) domestic premises excludes any domestic premises where a surcharge <u>may be made</u> pursuant to paragraph 5 of this condition.</p>	<p>The Guidance (paragraph 2.18) states that a New Domestic Property's AQ is fixed and will not be revised due to any changes in the NEXA AQ table.</p>	<p>Paragraph 2(3) explains how the AQ is determined for particular premises (for the purposes of determining the level of charges (as opposed to unit rate of charge)).</p> <p>The different treatment of property AQs for RPC purposes (i.e. New Domestic = fixed whereas I&C and Domestic Infill = as revised from time to time) must be reflected in SC1 to avoid the risk of licence breach.</p> <p>The rule for domestic infill premises should apply irrespective of whether the licensee has, in fact, levied a surcharge in a particular case, so "is made" should be changed to "may be made".</p>

Proposed amended drafting (shown underlined)	Consistency between RPC Guidance and Special Condition drafting	Justification/comment
<p><u>Paragraph 2(6)</u></p> <p>Definitions:</p> <p>Annual Quantity means the annual quantity of gas off-taken, or which may be reasonably likely to be off-taken, by a single supply point or connected system exit point;</p> <p>Ct means the charge ceiling as determined in accordance with paragraph 2 (4) of this condition;</p> <p>CSEP means <u>for a premises</u> the relevant licenced gas transporter’s connected system exit point charges <u>for premises of that type/category</u> calculated at the prevailing charge in accordance with the prevailing methodology statement for Network Region r at Entry-point; excepting charges for metering arrangements, meter reading, CSEP administration charges, NTS entry capacity charges where determined by auction, or other charges determined in writing by the Authority;</p> <p>Entry-point means <u>for a premises</u> the date at which t=1 and, with the exception of premises subject to paragraph 3 (4) of this condition, shall be determined <u>unless the Authority otherwise directs the date of the Entry-point</u> as either the date of connection of a premises to the licensee’s pipe-line system <u>so that</u> gas has entered the premises’ service pipe, or <u>where the licensee elects within 60 days of the contract to connect</u> the date the licensee is contractually bound to provide a connection to the person requiring that connection;</p> <p>Ft means the charge floor as determined in accordance with paragraph 2 (4) of this condition;</p>	<p>Paragraphs 2.37 and 2.38 of the Guidance make clear that there are different unit rates for different types/categories of premises.</p>	<p>Whereas the formulas use annual percentage (wSSP_r and Δ_r) the tables (published by Ofgem and in the licence condition respectively) express the figure as percentage. The drafting is currently ambiguous as to whether the number to be entered as the numerator is the decimal figure in the table (e.g. 0.42) or the figure in the table expressed as a percentage (e.g. 0.0042).</p>

Proposed amended drafting (shown underlined)	Consistency between RPC Guidance and Special Condition drafting	Justification/comment
<p>RPI means the value published in October of each year by the Authority and calculated as the percentage change (whether of a positive or a negative value) in the arithmetic average of the retail price index determined in respect of April to September (both inclusive) of the current calendar year and the arithmetic average of the retail price index determined with respect to April to September of the previous calendar year;</p>		
<p>RCt means <u>for a premises</u> the relative charge in year 't' as determined in paragraph 2 of this condition.</p>		
<p>RCt-1 means <u>for a premises</u> the relative charge in the year preceding year 't' as determined in paragraph 2 of this condition.</p>		
<p>SSP means <u>for a premises</u> the relevant licenced gas transporter's single supply point charge for premises <u>of that type/category</u> calculated at the prevailing charge in accordance with the prevailing methodology statement for Network Region r at the Entry-point; excepting charges for metering arrangements, meter reading, CSEP administration charges, NTS entry capacity charges where determined by auction, or other charges determined in writing by the Authority;</p>		
<p>TCt means <u>for a premises</u> the maximum charge the licensee may charge subject to paragraph 2 of this condition in year 't';</p>		
<p>wSSPr means <u>for a type/category of premises and for each Network Region r</u>, the <u>percentage change from year t-1 to year t</u> in the <u>arithmetic</u> average of the relevant licenced gas transporter's single supply point charge . Networks Regions r comprise: r1 Scotland, comprising LDZ exit</p>		

Proposed amended drafting (shown underlined>	Consistency between RPC Guidance and Special Condition drafting	Justification/comment																		
<p>zones SC; r2 North and Yorkshire, comprising LDZ exit zones NO, NE; r3 North West, comprising LDZ exit zones NW; r4 East England, comprising LDZ exit zones EM, EA; r5 West Midlands, comprising LDZ exist zones WM; r6 Wales and South West, comprising LDZ exit zones WA, SW; r7 North London, comprising LDZ exit zones NT; and r8 South and South East, comprising LDZ exit zones SO, SE. The values for wSSPr in respect of each region shall be determined and published in October of each year by the Authority; and</p> <p>Δ_r means the annual percentage change in respect of the Network Region r in which the premises are located, and has a value according to the schedule below:</p> <table border="1" data-bbox="396 842 1055 1246"> <thead> <tr> <th>Region</th> <th>Annual percentage change</th> </tr> </thead> <tbody> <tr> <td>r₁ Scotland</td> <td>0.42</td> </tr> <tr> <td>r₂ North and Yorkshire</td> <td>1.13</td> </tr> <tr> <td>r₃ North West</td> <td>1.40</td> </tr> <tr> <td>r₄ East England</td> <td>1.64</td> </tr> <tr> <td>r₅ West Midlands</td> <td>1.57</td> </tr> <tr> <td>r₆ Wales and South West</td> <td>0.36</td> </tr> <tr> <td>r₇ North London</td> <td>1.23</td> </tr> <tr> <td>r₈ South and South East</td> <td>1.51</td> </tr> </tbody> </table>	Region	Annual percentage change	r ₁ Scotland	0.42	r ₂ North and Yorkshire	1.13	r ₃ North West	1.40	r ₄ East England	1.64	r ₅ West Midlands	1.57	r ₆ Wales and South West	0.36	r ₇ North London	1.23	r ₈ South and South East	1.51		
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<p><u>Paragraph 5</u></p> <p>5. Where, <u>in relation to a premises</u>, charges are made in accordance with paragraph 2, <u>they may include the licensee may also charge</u> a surcharge subject to the following</p>	<p>Paragraph 3.13 of the Guidance is clear that the Infill Surcharge is payable in addition to (and is not included in) the normal charge.</p>	<p>The conditions in paragraph 3(5) should permit a licensee to recover the infill surcharge in circumstances where the connection to the relevant premises was</p>																		

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<p>conditions,</p> <p>(a) a maximum surcharge of 0.3412 pence per kWh of gas transported adjusted on 1 January of each year by a factor of $\left(1 + \frac{RPI}{100}\right)$ starting from 1 January 2004. <u>equal to $S_{max,t}$ where:</u></p> $S_{max,t} = S_{max,t-1} \times \left(1 + \frac{RPI}{100}\right)$ <p><u>$S_{max,t} = 0.3412$ pence per kWh on 1 January 2003 and is adjusted on 1 January each year thereafter in accordance with the formula above.</u> RPI has the same meaning as given in paragraph 2 of this condition;</p> <p>(b) the surcharge has a maximum duration of 20 years from the <u>Entry point for the relevant premises;</u></p> <p>(c) the surcharge may only apply to existing domestic premises which were in existence for not less than 6 months prior to the provision of the gas main extended specifically for connection of those premises, and which have not previously received a supply of natural gas;</p> <p>(d) the licensee <u>(or a predecessor of the licensee)</u> has, on request to provide a connection by the owner or occupier of the premises, extended a gas main to specifically connect the premises;</p> <p>(e) the licensee must notify the Authority of the specified amount and specified duration as soon as reasonably practicable but in any event no later than 28 days prior to any such charge falling due; and</p>		<p>installed by a predecessor (e.g. where the licensee has acquired the relevant pipe-line system from someone else).</p>

Proposed amended drafting (shown underlined>	Consistency between RPC Guidance and Special Condition drafting	Justification/comment
(f) the Authority may direct the licensee not to make the surcharge within 28 days of the notification in (e) above.		

Part 2 – Suggested amendments to avoid ambiguity or correct drafting errors in other clauses

Proposed change	Consistency between RPC Guidance and Special Condition drafting	Justification/comment
<p><u>Paragraph 2(2)</u></p> <p>Note: <i>Special Licence Condition 1 does not currently reflect the Guidance document in relation to I&C properties in the following respects:</i></p> <ul style="list-style-type: none"> • <i>SC1 does not require the licensee to elect either Option 1 or Option 2 for I&C properties</i> • <i>the rules in the Guidance about choosing the same option for all I&C properties with an AQ less than 732,000 kWh and the same option for all I&C properties with an AQ greater than 732,000 kWh are not reflected; and</i> • <i>the rule in the Guidance (paragraph 1.15) that, for Option 2 I&C properties the charge is not subject to a floor and ceiling is not reflected.</i> 	<p>The Guidance explains (see paragraphs 3.7-3.12) that the rules in paragraph 2 do not apply to I&C Option 2 premises. For those premises the RPC Charge is recalculated on a continuous basis and is not subject to a floor or ceiling (see paragraph 1.15 of the Guidance).</p>	<p>The drafting in Special Licence Condition 1 (in contrast to the Guidance) does not distinguish between New Domestic, I&C and Domestic Infill property types. Currently, the charging provisions, including the provisions dealing with adjustments to iGT's RPC charges in paragraph 2(2) of SC1 apply to all property types. In order to reconcile the substance of the Guidance and the drafting in the licence condition, I&C properties to which Option 2 (<i>Continuous Tracking</i>) applies must be carved out of paragraph 2(2) and a new clause inserted to provide for continuous tracking. Similarly, the floor and ceiling provisions in paragraph 2(1) need to be made subject to a carve-out</p>

Proposed change	Consistency between RPC Guidance and Special Condition drafting	Justification/comment
		for Option 2 I&C properties. Without these changes, because the licence condition takes precedence, iGTs charging according to I&C Option 2 risk licence breach.

Bond Dickinson LLP
 CR3
 17 February 2014