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14th April 2015

Deirdre Bell
Ofgem
9 Millbank
London
SW1P 3GE

By E-mail

Dear Deirdre,

Consultation on amending the disapplication conditions of the Independent Gas Transporter (IGT) and Independent Distribution Network Operator (IDNO) licences

I write on behalf of AIGT¹ and CNA² members in response to the above consultation.

Summary

Subject to the comments on the proposed drafting below, in the view of AIGT and CNA members:

1. The proposed changes achieve Ofgem's stated aim of implementing a modification procedure which is as close as practicable to the modification procedure which applied prior to the changes to legislation introduced by the Electricity and Gas (Internal Markets) Regulations 2011.

And

2. Do not adversely affect IGTs' and IDNOs' ability to seek disapplication of the requirements of SLC 1 of the IGT licence and Standard Condition BA2 of the IDNO licence.

Legal advice from Bond Dickinson

In reviewing Ofgem's proposed changes, the two Associations took legal advice from a law firm, Bond Dickinson. Bond Dickinson's comments are summarised in Appendix 1. They include some fundamental issues relating to the proposed drafting which Bond Dickinson has advised should be addressed to ensure that the licence condition works as intended. These are discussed in rows 3 to 4 of the table.

Other Drafting Comments

Specific comments on the proposed changes to Special Condition 1 of the IGT Licence and to Standard Condition BA2 of the IDNO Licence are discussed in Appendix 2.

AIGT and CNA members would be happy to discuss the comments in Appendix 1 and 2 of this response should Ofgem require further any further clarification.

Yours sincerely,



John Barrett

Secretary, Association of Independent Gas Transporters (AIGT)
& Competitive Networks Association (CNA)

¹ **AIGT Members are:** GTC Pipelines Ltd; Independent Pipelines Ltd; ES Pipelines Ltd; Indigo Pipelines Ltd, Energetics Gas Ltd; and Fulcrum Pipelines Ltd.

² **CNA Members are:** The Electricity Network Company Ltd, Independent Power Networks; ESP Electricity Ltd; Energetics Electricity Ltd and Harlaxton Energy Networks Ltd.

Appendix 1 – Legal Advice from Bond Dickinson

No.	Issue	Original position	Proposed position	Comment
1.	Scope of disapplication mechanism in IGT licence	Paragraph 9 applied to any provision in SLC1	Paragraph 10 applies to paragraphs 2 and 5 only	<p>Not commercially significant.</p> <p>However, we note that the effect of dis-applying only paragraphs 2 and 5 of SLC1 is that paragraph 1 of SLC1 continues to dis-apply paragraph 5 of standard condition 4 (<i>Charging of Gas Shippers – General</i>). As a result, neither the obligation to charge on the basis of relative price control nor the obligation to charge on the basis of an agreed methodology applies. This is a point for Ofgem.</p>
2.	Referral to CMA.	Ofgem had the ability, if it considered that the disapplication was not necessary and that the licence conditions did not require modification, to refer the licensee's disapplication request to the CMA.	Under the Third Package Regulations Ofgem no longer has this ability, so the proposed drafting in SLC1/SCBA2 relies on Ofgem's power to modify a licence unilaterally under s.23B of the Gas Act/s.11A of the Electricity Act by removing the licensee's right to serve a Disapplication Notice in respect of the relevant Disapplication Request (or to modify a provision referred to in it). The licensee then has the right to appeal to the CMA against that proposed modification.	<p>Not commercially significant, subject to the drafting issues set out in rows 4 and 5 below.</p> <p>Both mechanisms effectively allow the licensee a right of appeal to CMA. Although the matter referred to the CMA is now Ofgem's licence modification rather than the licensee's Disapplication Request, in our view, the CMA has the power to address the underlying issue of whether the licensee Disapplication Request could operate against the interest of consumers in substantially the same way as previously.</p>
3.	Duty to provide further information	No equivalent provision	If the Authority gives notice to the licensee that further information is required in relation	<p>Potentially significant.</p> <p>Until the licensee provides all of the information that Ofgem requires, the</p>

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			<p>to a Disapplication Request, paragraph 13 (iGT) /paragraph 11 (iDNO) deems the Disapplication Request not to have been delivered.</p>	<p>Disapplication Request is deemed not to have been delivered. Although Ofgem's right to require further information is potentially qualified (the word 'reasonableness' appears in the paragraph 13(a)/11(a), but not in paragraph 13(b)/11(b)) of the proposed licence condition), a disagreement between Ofgem and the licensee as to what information should be provided could result in the licensee being left with no right to serve a Disapplication Notice and no right of appeal to the CMA.</p> <p>In our view this clause should be amended so that, if there is a disagreement between the licensee and Ofgem as to whether the required information has been provided, Ofgem should be required exercise its powers under s.23B of the Gas Act/s.11A of the Electricity Act to remove the licensee's right to serve a Disapplication Notice in respect of the relevant Disapplication Request (or to modify a provision referred to in it). That would then allow the licensee to appeal to the CMA.</p>
4.	Disapplication following involvement of the CMA	Following a report of the CMA, paragraph 13 permitted the licences to disapply the conditions (or part of the conditions) in the Disapplication Request unless the CMA had concluded that they operated against the public interest.	<p>New paragraph 19/paragraph 17 permits the licensee to serve a Disapplication Notice if both of the following preconditions are met (amongst other things):</p> <p>the CMA has <i>quashed</i> Ofgem's decision; and</p> <p>the CMA has directed the licensee to service a Disapplication Notice on Ofgem.</p>	<p>Potentially significant.</p> <p>Under the new regime, the licensee can appeal to the CMA against Ofgem's decision to modify the licensee's right to serve a Disapplication Notice (or the licence condition in question).</p> <p>However, there are fundamental differences between the CMA's wide statutory powers on allowing an appeal under s.23E of the Gas Act/s.11F of the Electricity Act and the very narrow right that the licensee has under the proposed paragraph 19/paragraph 17 to serve a Disapplication Notice only where the pre-conditions described in the 'Proposed Condition' column are met. These issues are discussed below in relation to each pre-condition.</p> <p><u>Pre-condition 1 – That the CMA has quashed Ofgem's decision</u></p>

No.	Issue	Original position	Proposed position	Comment
				<p>Under s.23E(2) of the Gas Act/ s.11F(2) of the Electricity Act (which applies where the appeal is in relation to a price control decision), the CMA has the power to either (a) quash the decision (to the extent that the appeal is allowed) (b) remit the matter back to Ofgem for reconsideration and determination in accordance with the CMA's directions or (c) substitute its decision for Ofgem's decision and give directions to Ofgem or the licensee.</p> <p>Under the proposed paragraph 19/paragraph 17, the licensee may only serve a notice if the CMA has <u>quashed</u> Ofgem's decision. This means that, if the CMA opted to exercise its powers in s.23E(2)(b) or (c)/s.11F(2)(b) or (c) of the Electricity Act (described above), the precondition would not be met and the licensee would be forced to re-start the process by issuing a new Disapplication Request.</p> <p>In relation to the power in 23E(2)(a) of the Gas Act/ s.11F(2)(a) of the Electricity Act (described above), the drafting in new paragraph 19/paragraph 17 only provides for a binary outcome (i.e. quashed/not quashed). This fails to cater for the outcome provided for in the Gas Act/Electricity Act by the words "<i>to the extent that the appeal is allowed</i>" that the CMA allows an appeal in relation to a part of Ofgem's proposed modification. As currently drafted, if the CMA allowed a part of the appeal, the licensee's only option would be to re-start the process by submitting a revised Disapplication Request in respect of those parts of the previous Disapplication Request which has been 'approved' by the CMA.</p> <p>In our view, paragraph 19/paragraph 17 should be re-drafted to cater for all of the possible outcomes on appeal as set out in s.23E of the Gas Act/s.11F of the Electricity Act.</p>

No.	Issue	Original position	Proposed position	Comment
				<p><u>Pre-condition 2 – that the CMA must direct the licensee to serve a Disapplication Notice</u></p> <p>If the CMA exercises its power under s.23E(2)(a) of the Gas Act/s.11F(2)(a) of the Electricity Act to quash the Ofgem's decision, the licensee may only submit a Disapplication Notice under the proposed paragraph 19/paragraph 17 if the CMA has directed it to do so. There are two issues with this:</p> <ol style="list-style-type: none"> 1) the CMA's power under s.23E(2)(a)/s.11F(2)(a) does not include a power to give directions to the licensee (it is only given this power under s.23E(2)(c)/ s.11F(2)(c)); and 2) if the CMA quashes Ofgem's decision, the licensee will automatically have a right, but not an obligation, to submit a Disapplication Notice under the licence. In those circumstances, the licensee remains free to choose whether or not to serve Disapplication Notice and so there is no reason why the CMA should direct it to do so. <p>In our view, all references to the licensee "being, or having been directed to" serve a Disapplication Notice should be removed from the proposed paragraph 19(b) and (c)/paragraph 17(b) and (c).</p>

Appendix 2 - Other Drafting Comments

1. Gas Specific

- 1.1 We would query under paragraph 9 whether the drafting should read “Except ~~with~~ **where** the Authority consents.....”
- 1.2 After paragraph 11 (e), add closing bracket at end of definition (the “Disapplication Date”);
- 1.3 Para 10 anticipates the disapplication of paragraphs 2 and 5 (in whole or in part). Para 11(b) requires licensee to specify the “paragraphs” Para 11(e) should therefore state “specified **paragraphs**”
- 1.4 Paragraph 11(b) states “any part”, whereas 11(e) only states “part”
- 1.5 Paragraph 14: Replace “Notice” with “**notice**”.

2. Electricity Specific

- 2.1 At the end of paragraph 6(b), there is a full stop missing.
- 2.2 Paragraph 8(d) replace “Licensee” with “**licensee**”.
- 2.3 To be consistent with the revised drafting under paragraph 8(b) (which is also the proposed approach in the IGT Special Condition 1 licence drafting), in paragraph 8(e) replace “paragraph or paragraphs” with “paragraph (**or parts thereof**)”. We would also suggest “**paragraphs**” as in gas above.
- 2.4 It is queried whether paragraph 8(b) should be “**paragraphs**”? Paragraph 7 refers to the disapplication of this condition (and thus must mean the possibility of disapplying more than one paragraph);
- 2.5 Paragraph 8(e): Replace “Disapplication Date” in first line and replace with “**date**”.
- 2.6 Replace “disapplication date” with “**Disapplication Date**” in the brackets at end of paragraph.
- 2.7 Paragraph 9 in the Gas drafting is awkward, but is consistent in that in both instances it refers to “service” of the Disapplication Request. The Electricity drafting on the other hand refers to “receipt of” the Disapplication Request and then to “delivery of” the Disapplication Request. It is questioned whether these are the same date?
- 2.8 Para 12: Replace “proposal” at end of paragraph with “**Disapplication Request**”.

3. General

Clarification is requested on why the Authority requires within 10 working days to request further analysis in the case of a gas Disapplication Request, and within 28 working days to request further analysis in the case of an electricity Disapplication Request. For consistency across the licences, it is suggested that the timeframes are aligned using the 10 working day timeframe.