

**To: All holders of a gas transporter licence**

**Gas Act 1986 Section 23(2)**

**Notice of statutory consultation on a proposal to modify the standard conditions of all gas transporter licences**

1. The Gas and Electricity Markets Authority ('the Authority')<sup>1</sup> proposes to modify the standard conditions of all gas transporter licences granted or treated as granted under section 7 of the Gas Act 1986 by amending standard licence condition 2 (SLC2).
2. We are proposing this modification because it would mean that SLC2 of the gas transporter licence would be compliant with the requirements of Article 39(4) of Directive 2009/73/EC (set out at Appendix 2 to this Notice), which requires that the Authority should make independent decisions and that its staff and members of the Authority do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks, as the Authority would be able to make decisions independent of the gas transporter licensee and without requiring the consent of the licensee on whether to switch certain licence conditions on or off. The proposed modifications would also ensure that SLC2 is compliant with Article 41(16) of Directive 2009/73/EC which provides that decisions of national regulatory authorities shall be subject to judicial review, as the licensee would retain its underlying right to seek judicial review of the Authority's decisions under SLC2.
3. The effect of this proposed modification will be that the Authority would no longer need the consent of the licensee to:
  - issue a notice ending the suspension of paragraphs 4 to 8 of SLC2;
  - issue or vary a Transportation Services Direction;
  - provide for Section C conditions to cease to have effect;and that all of the above will be subject to independent decisions of the Authority.
4. A copy of the proposed modification and other documents referred to in this Notice have been published on our website ([www.ofgem.gov.uk](http://www.ofgem.gov.uk)). Alternatively they are available from our Research and Information Centre, 9 Millbank, London, SW1P 3GE (020 7901 7003).
5. Any representations with respect to the proposed licence modification must be made on or before 4 July 2016 to: Ian Rowson, Office of Gas and Electricity Markets, 9 Millbank, London, SW1P 3GE or by email to [RegFinance@ofgem.gov.uk](mailto:RegFinance@ofgem.gov.uk).
6. We normally publish all responses on our website. However, if you do not wish your response to be made public then please clearly mark it as not for publication. We prefer to receive responses in an electronic form so they can be placed easily on our website.
7. If we decide to make the proposed modification it will take effect not less than 56 days after the decision is published.



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**Ian Rowson,**  
**Associate Partner RIIO Finance, Networks Division**  
**Duly authorised on behalf of the Gas and Electricity Markets Authority**  
**3 June 2016**

<sup>1</sup> The terms "the Authority", "we" and "us" are used interchangeably in this document.

## **Appendix 1 – Draft of proposed changes to Standard Licence Condition 2 (Application of Section C (Transportation Services Obligations)) of the Gas Transporters Licence**

The proposed modification is to delete the text shown crossed out below.

### **Condition 2: Application of Section C (Transportation Services Obligations)**

1. Where the Secretary of State has provided, by a scheme made under Schedule 7 to the Utilities Act 2000, for Section C (in whole or in part) to have effect within this licence:
  - (a) paragraphs 4 to 8 shall have effect in the licensee's licence; and
  - (b) the licensee shall be obliged to comply with the requirements of Section C (in whole or, as the case may be, in part) of this licence.

Such provision made by the Secretary of State in the said scheme shall be treated, for the purposes of paragraphs 5, 6, and 7 of this condition, as if it were a Transportation Services Direction made by the Authority.

2. Unless or until: -
  - (a) the Secretary of State has provided, by a scheme made under Schedule 7 to the Utilities Act 2000, for Section C (in whole or in part) to have effect within this licence; or
  - (b) the Authority has issued to the licensee a direction pursuant to paragraph 4the standard conditions in Section C (in whole or, as the case may be, in part) shall not have effect within this licence; and the licensee shall not be obliged to comply with any of the requirements of Section C (in whole or, as the case may be, in part) of this licence.

3. Except where paragraph 1 applies to the licensee, paragraphs 4 to 8 of this standard condition shall be suspended and shall have no effect in this licence until such time as the Authority, ~~with the consent of the licensee,~~ issues to the licensee a notice in writing ending the suspension and providing for those paragraphs to have effect in this licence with effect from the date specified in the notice.
4. The Authority may, ~~with the consent of the licensee,~~ issue a direction (a "Transportation Services Direction"). Where the Authority has issued to the licensee a Transportation Services Direction the standard conditions in Section C (in whole or, as the case may be, in part) shall have effect within this licence from the date specified in the direction; and the licensee shall be obliged to comply with

the requirements of Section C (in whole or, as the case may be, in part) to the extent and subject to the terms specified in such direction.

5. A Transportation Services Direction:

- (a) may specify that the standard conditions in Section C (in whole or in part) are to have effect in this licence; and
- (b) shall specify or describe an area (the “transportation Services area”) within which the licensee shall be obliged to comply with any of the requirements of Section C (in whole or, as the case may be, in part).

6. The Authority may, ~~with the consent of the licensee:~~

- (a) vary the terms (as set out in the Transportation Services Direction or elsewhere) under which Section C (or parts thereof) has effect in this licence; or
- (b) provide for Section C (or parts thereof) to cease to have effect in this licence.

7. The variation or cessation provided for in paragraph 6 shall take effect from the date specified in the variation or cessation notice given to the licensee by the Authority.

8. With effect from the date of cessation referred to in paragraph 7, paragraphs 4 to 7 of this condition shall be suspended and shall cease to have effect in this licence, but the Authority may at any time thereafter, with the consent of the licensee, give to the licensee a notice ending the suspension and providing for those paragraphs to have effect again in this licence with effect from the date specified in the notice.

## **Appendix 2 – Extracts of the Directive 2009/73/EC (Gas Directive) and of the Commission Working Paper on regulatory authorities**

### *Article 39(4)*

*"Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently. For this purpose, Member States shall ensure that, when carrying out the regulatory tasks conferred upon it by this Directive and related legislation, the regulatory authority:*

*(b) ensures that its staff and the persons responsible for its management:*

*(i) act independently from any market interest; and*

*(ii) do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks."*

The Commission Staff Working Paper dated January 2010 Interpretative note on regulatory authorities<sup>2</sup> explained that *"The new legislation also prohibits the NRA's staff and the persons responsible for its management from seeking or taking direct instructions from any government or other public or private entity. This provision aims to tackle the situation where someone working for the NRA is seeking or taking direct instructions. According to the Commission's services, this provision also implies that it is forbidden for anyone to give such instructions. An instruction in this context is any action calling for compliance and/or trying to improperly influence an NRA decision and thus includes the use of pressure of any kind on NRA's staff or on the persons responsible for its management."*

Article 41(4) of the Gas Directive also requires that the NRA should have the powers to issue binding decisions on gas undertakings, subject to the right for the decision to be judicially reviewed, in the broad sense of being subject to judicial scrutiny. This is provided in Article 41(16) of the Gas Directive.

Regulation 41 of the regulations amended the Gas Act 1986 to enable the Authority to make licence modifications, following consultation, independently of industry and government, subject to appeal provisions to comply with the requirements of the Gas Directive for the Authority to issue binding decisions independently of government or of industry. The previous licence modification procedure under the Gas Act 1986, which required consent from individual licensees or classes of licensees in order for the modification to be made was replaced by a modification procedure which allows the Authority to make the licence modification, but with a right for affected licence holders and other specified bodies to appeal licence modifications to the Competition and Markets Authority.

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<sup>2</sup> [https://ec.europa.eu/energy/sites/ener/files/documents/2010\\_01\\_21\\_the\\_regulatory\\_authorities.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/2010_01_21_the_regulatory_authorities.pdf)