

## NOTICE UNDER SECTION 23(3) OF THE GAS ACT 1986

The Gas and Electricity Authority (“the Authority”) hereby gives notice pursuant to section 23(3) of the Gas Act 1986 (“the Act”) as follows:

- 1 The Authority proposes to modify the gas transporter licence held by Transco plc in respect of its National Transmission System (“the Licence”) treated as granted under section 7 of the Gas Act 1986 by amending Special Condition C8B(14)(5)(f)(ii)(a) of the Licence as follows:
  - (a) inserting the words “except where, and to the extent that, the Authority has otherwise consented in writing.” after the words “at the end of day d of month m”; and
  - (b) deleting “for” and inserting “For” such that the phrase “for the avoidance of doubt” is the start of a new sentence.
- 2 The Authority is proposing to make these licence modifications in response to Modification Proposal 0043 under the Uniform Network Code which was submitted by Transco plc on 10 August 2005. As such the Authority does not propose to direct these licence modifications unless Modification Proposal 0043 is approved by the Authority. For the avoidance of doubt, nothing in this Notice shall be regarded as fettering the Authority’s discretion in relation to the approval of Modification Proposal 0043.
- 3 The reasons why the Authority proposes to make these licence modifications are summarised in Appendix 1 of this Notice and the following documents:
  - (a) 201/05 - Modification proposals 0036 and 0043 - way forward, Ofgem, 13 September 2005;

- (b) 193/05 - Ofgem Initial Views Letter on Uniform Network Code modification proposal 0043, Ofgem, 25 August 2005;
- (c) Addendum to Ofgem Initial Views letter on modification proposal 0043, Ofgem, 26 August 2005; and
- (d) Modification Proposal 030: 'Extension of the QSEC auction timetable for 2005', Ofgem, 18 August 2005.

4 In summary, the effect of these licence modifications is to allow for the licensee to be exempted from its obligation to use all reasonable endeavours to offer for sale obligated entry capacity under Special Condition C8B(14)(5)(f)(ii)(a) of the Licence. The exemption will only take effect where, and to the extent that, the Authority has provided its written consent.

5 The proposed licence modifications are detailed in Appendix 2 of this Notice. Copies of the documents referred to in paragraph 3 of this Notice are available on request from Ofgem or are on the Ofgem website at [www.ofgem.gov.uk](http://www.ofgem.gov.uk).

6 Any representations or objections with respect to the proposed modifications may be made on or before 12 October 2005 and should be addressed to Mark Feather, Ofgem, 9 Millbank, London SW1P 3GE or [mark.feather@ofgem.gov.uk](mailto:mark.feather@ofgem.gov.uk).



**Robert Hull**

**Director, Transmission**

**Duly authorised on behalf of the Authority**

**14 September 2005**

## Appendix 1: Reasons for the Proposed Licence Modifications

### Background

#### *Modification Proposal 0043*

1. On 10 August 2005, Transco NTS submitted Modification Proposal 0043 under the Uniform Network Code (“UNC”). This modification proposal provides Transco NTS with the discretion not to offer baseline and obligated incremental capacity for sale (through the long, short and medium term auctions) at any system entry point in the following circumstances:
  - (a) where Transco NTS assesses it may be unable to physically deliver the capacity for any reason, including for example, due to the length of time required to obtain consents or construction challenges; and
  - (b) where Transco NTS assesses there is an expectation that previously allocated capacity at the ASEP would need to be bought back.
2. In Modification Proposal 0043, Transco NTS stated that, in making its assessment as to whether to release unsold capacity in any auction, it would still need to ensure that it was able to meet Special Condition C8B Part 2 paragraph 14(5)(f)(ii)(a) of its Licence to “use all reasonable endeavours to offer for sale” all obligated entry capacity. Transco NTS therefore believed that the criteria proposed to be included within the UNC when considered in combination with its Licence obligations would result in unsold capacity not being released through auctions conducted in this formula period only in exceptional circumstances.
3. In its proposal, Transco NTS envisaged that it would be required to seek written permission from the Authority to not release unsold capacity and considered that this should mitigate industry concerns regarding the amount of discretion that Transco NTS may be perceived to be granted in not releasing unsold capacity, were Modification Proposal 0043 to be implemented.

#### *Ofgem Initial Views Letter*

4. On 25 August 2005 Ofgem issued a letter for consultation providing its initial views on Modification Proposal 0043 (the “**Initial Views Letter**”). On 26 August 2005, Ofgem issued an addendum to the Initial Views Letter.
5. In the Initial Views Letter Ofgem expressed concern regarding the degree of flexibility that the proposal could afford to Transco NTS and stated its view that there would be merit in introducing formal Authority

consent processes such that Authority consent is required for Transco to use its discretion to withhold capacity for sale.

6. In the Initial Views Letter Ofgem stated that it had carefully considered the views raised by all parties in relation to this proposal and that without fettering the Authority's discretion with respect to the proposal, and having considered the proposal against the relevant objectives of the UNC as well as the Authority's principal objective and statutory duties, Ofgem's initial view was that Modification Proposal 0043 was finely balanced but should be approved subject to certain amendments to the legal text.
7. Taking account of concerns raised through the consultation process, Ofgem stated that it considered that there were some shortcomings with the proposal in terms of the degree of discretion that the proposal provided Transco NTS, with respect to limiting the amount of capacity that is made available for sale. Ofgem noted in this respect that although Transco NTS had stated that it envisaged seeking the written permission of the Authority not to release unsold capacity, this was not stated within the legal text of the proposal.
8. As such, Ofgem's initial view was that there would be merit in introducing a formal process through which Transco NTS would apply to the Authority for consent to limit the volumes of capacity it may wish to make available for sale. Ofgem noted that a formal process of this nature could be established through modifications to Transco NTS's GT licence and potentially through the text of the UNC. Ofgem's initial view was that any such consent process would need to be completed prior to the holding of this year's Long Term System Entry Capacity (LTSEC) auctions.
9. Ofgem noted the views of some respondents that this proposal was seeking to limit the effect of Transco NTS's "all reasonable endeavours" licence obligation with respect to the release of obligated entry capacity. Ofgem stated that it shared these concerns and considered that the legal text of the proposal should make clear that any exercise of discretion on the part of Transco NTS to limit the amount of obligated entry capacity it offers for sale does not in any way limit the operation of the "all reasonable endeavours" licence obligation. Indeed, Ofgem stated that it would not expect to issue any approval to this proposal until the legal text was modified to address these concerns. Ofgem further noted that it would not expect to grant such approval until such time as the formal consent process referred to above was established.

*Responses to Initial Views Letter on Modification proposal 0043*

10. In response to the Initial Views Letter Transco NTS noted Ofgem's suggestion to amend the legal text for this proposal in two areas:

- (a) to include clarification that Transco NTS is required to obtain written permission to not release capacity: Transco NTS stated that this was appropriate and could be undertaken without further UNC Modification Proposals; and
- (b) to include clarification within the legal text that any exercise of discretion does not limit the operation of the “reasonable endeavours” obligation within Special Condition C8B paragraph 14(5)(f)(ii)(a) of Transco NTS’s GT Licence: Transco NTS stated that they did not consider that this can be satisfied by a change to the existing legal text because the Authority is not a party to the UNC and therefore could not enforce the provision. However, Transco NTS stated that this requirement can be satisfied by the formal mechanism of applying to the Authority to adjust investment lead times and at the time of submission the Authority can consider and either accept or reject the request with consideration to the “reasonable endeavours” obligation. In any event, Transco NTS stated that the “reasonable endeavours” obligation still applies even if it is not specifically stated in the UNC.

#### *Ofgem Way Forward Letter*

- 11. Following the completion of the consultation with respect to the Initial Views Letters on 7 September, and having considered the responses that had been submitted, Ofgem issued an open letter setting out its current views on the proposal and a way forward (the “**Way Forward Letter**”).
- 12. In the Way Forward Letter, Ofgem stated, in respect of Modification Proposal 0043 that, without fettering the discretion of the Authority with respect to this proposal and having considered the proposal against the relevant objectives of the UNC as well as the Authority’s principal objective and statutory duties, it remained of the view that Modification Proposal 0043 should be approved. However, Ofgem also stated that it remained of the view that any such approval should not be granted until such time as a formal consent process is established by which Transco, as owner and operator of the NTS, would be required to obtain the Authority’s consent before it is able to limit the volumes of entry capacity made available in the long term entry capacity allocations.
- 13. In the Way Forward Letter, Ofgem noted the concerns that had been raised by respondents regarding the interaction between Modification Proposal 0043 and Transco’s licence obligations as set out in Special Condition C8B(14)(5)(f)(ii)(a) of the Licence. With a view to clarifying this interaction, Ofgem noted the following:
  - (a) Firstly, that Ofgem was of the view that the terms and conditions of the UNC can not fetter the Authority with respect to the enforcement of Transco's licence obligations in Special Condition

C8B(14)(5)(f)(ii)(a), or indeed any other licence obligation - Transco's licence obligations exist independently of the provisions of the UNC, and the UNC can not be relied upon to interpret compliance or otherwise with Transco's licence obligations. Ofgem stated that it was therefore of the view that it would not be appropriate for Transco's licence obligations to be referenced in the UNC in these circumstances; and

- (b) Secondly, that Ofgem was of the view that, in the event that Modification Proposal 0043 is implemented, the most appropriate way to clarify how the licence obligations in Special Condition C8B(14)(5)(f)(ii)(a) will operate in the circumstance that the Authority decides to approve an application for consent to withhold unsold NTS entry capacity for sale under the UNC is within the text of Special Condition C8B. Therefore, in the event that Modification Proposal 0043 is implemented, Ofgem stated that it would amend Special Condition C8B(14)(5)(f)(ii)(a) to provide that the licensee must comply with the obligations stated within Special Condition C8B(14)(5)(f)(ii)(a) except where the Authority otherwise consents. As a result, Ofgem noted that there would be parallel consent processes under the UNC and the relevant licence condition.

- 14. In the Way Forward Letter, Ofgem emphasised that this proposed approach was aimed at preserving the licence obligations within Special Condition C8B(14)(5)(f)(ii)(a) in the generality of cases, whilst providing clarity that the obligations should not, as a matter of practicality, apply to Transco offering for sale unsold NTS entry capacity at a specified date where the Authority has consented to Transco NTS not doing so under the UNC.

#### **Reasons for proposing the Licence Modifications**

- 15. Further to, and for the reasons set out in the Way Forward letter, Ofgem is proposing a modification to Special Condition C8B(14)(5)(f)(ii)(a) of the Licence.
- 16. The licence modifications proposed in this Notice are intended to allow the Authority to provide explicit clarification of the applicability of the licensee's obligation to use all reasonable endeavours to offer for sale obligated entry capacity under Special Condition C8B(14)(5)(f)(ii)(a) of the Licence in the circumstances that consent to withhold capacity for sale is granted under the UNC pursuant to Modification Proposal 0043, should it proceed.
- 17. In proposing these licence modifications, it is Ofgem's aim to preserve the obligation under Special Condition C8B(14)(5)(f)(ii)(a) of the Licence in the generality of cases, whilst providing clarity that there may be very specific circumstances under which it may not be appropriate for the

licence obligation to apply. That is, where the Authority has consented under the UNC to the licensee not offering particular obligated entry capacity for sale during a particular period.

18. It is envisaged that any consent which may be granted by the Authority under the modified provisions of Special Condition C8B(14)(5)(f)(ii)(a) of the Licence would be very specific with regards to the capacity, period and circumstances to which it applies. The licensee's obligation to use all reasonable endeavours to offer obligated entry capacity for sale will continue to apply in all other circumstances that do not fall within the very specific terms of the consent.
19. As the proposed licence modifications are linked to the implementation of Modification Proposal 0043, the Authority only proposes to direct these licence modifications if Modification Proposal 0043 is implemented.

**Appendix 2: Proposed Amendment to Special Condition C8B(14)(5)(f)(ii)(a)**

**(ii) Obligation to offer for sale obligated entry capacity**

- (a) In respect of any terminal  $j$  the licensee has an obligation to offer for sale obligated entry capacity at the commencement of the day to which it relates (that is,  $O_{SELL}^j_{m,d,d} > 0$  at 06:00 on day  $d$ ) the licensee shall use all reasonable endeavours to offer for sale all such capacity to gas shippers such that  $O_{SELL}^j_{m,d,d} = 0$  at the end of day  $d$  of month  $m$  except where, and to the extent that, the Authority has otherwise consented in writing. For the avoidance of doubt, where such an allocation would contravene the provisions of Standard Special Condition A4 (Charging– General) the licensee shall allocate such capacity in accordance with the provisions of Standard Special Condition A5(5)(aa)(ii) (Obligations as Regard Charging Methodology);

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