

## Representation - Draft Modification Report UNC 0761

### Arrangements for Interconnectors with additional Storage capability

Responses invited by: **5pm on 21 March 2022**

To: [enquiries@gasgovernance.co.uk](mailto:enquiries@gasgovernance.co.uk)

*Please note submission of your representation confirms your consent for publication/circulation.*

<b>Representative:</b>	Phil Lucas
<b>Organisation:</b>	National Grid NTS
<b>Date of Representation:</b>	21 <sup>st</sup> March 2022
<b>Support or oppose implementation?</b>	Support
<b>Relevant Objective:</b>	<b>a)</b> Positive <b>b)</b> Positive <b>d)</b> Positive
<b>Relevant Charging Methodology Objective:</b>	<b>a)</b> None <b>b)</b> None <b>c)</b> None

*The consultation is aimed at establishing if the statement provided by BEIS would cause you to change a view that you previously expressed, or to take a view that you had not previously considered.*

*Please note previous representations received will be carried forward should parties not wish to change their original representation.*

**Modification Panel Members have requested that Modification is re-issued to Consultation with the aim of establishing if the statement provided by BEIS would cause you to change a view that you previously expressed, or to take a view that you had not previously considered.**

As the proposer, National Grid NTS ('National Grid') continues to support the implementation of this Modification Proposal.

**Reason for support/opposition: Please summarise (in one paragraph) the key reason(s)**

The key reasons for our support are as set out in our previous representation to this Proposal dated 19<sup>th</sup> November 2021.

Further, we note that the BEIS communication dated 16<sup>th</sup> February 2022 confirms the view we expressed in the January 2022 Workgroup<sup>1</sup> that the principle of supremacy of EU law over UK domestic law continues to apply to retained EU law. Therefore, if it is concluded that the definition of “*Storage Facility*” in the Gas Act 1986 is narrower in scope (in terms of the physical means of the storage of non-liquified gas i.e. in porous strata) and therefore arguably in conflict with the definition of “*Storage Facility*” incorporated into EU Regulation 715/2009 (now UK law post-Brexit), which merely refers to the stocking of natural gas, section 5(2) of the European Union (Withdrawal) Act 2018 directs that the EU derived law prevails over any domestic legislation that pre-dates exit day (from the EU) in terms of any question regarding interpretation.

We therefore conclude that the proposed storage of gas within Interconnector Pipelines is not precluded by (and is within the scope of) the applicable definition of “*Storage Facility*” incorporated into EU Regulation 715/2009.

### Implementation:

We have no additional comments to those set out in our previous representation to this Proposal dated 19th November 2022.

### Impacts and Costs:

In addition to those comments set out in our previous representation to this Proposal (dated 19<sup>th</sup> November 2021) we note the concerns expressed by some stakeholders regarding the question of whether the benefits of Storage services by qualifying Interconnectors will outweigh the estimated costs of implementation.

Whilst it is challenging to forecast commercial behaviours, and therefore utilisation of any relevant storage service (should qualifying Interconnector operators elect to offer such) it is relevant to note that in its representation dated 19<sup>th</sup> November 2021, Interconnector Ltd set out its assessment that the benefits of its proposed storage service alone would outweigh the costs of implementation. This is based upon a stakeholder consultation<sup>2</sup> it undertook in October 2021 which included an assessment of the potential benefits undertaken by Baringa Partners.

We also note the views expressed at Panel that the cost/benefit case to implement the solution into Gemini may be adversely impacted by National Grid’s plans to replace it. Whilst we are currently making plans for a Gemini replacement, no investment decision has yet been taken and it is not possible at this stage to determine what the incremental cost of including this change within the scope of the new system delivery would be. Therefore, we do not believe it is appropriate to delay industry changes at this stage pending the deployment of any replacement Gemini system.

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<sup>1</sup> See <https://www.gasgovernance.co.uk/sites/default/files/ggf/book/2022-01/7.3%20National%20Grid%20Response%20to%20Questions%20raised%20-%20Modification%200761.pdf>

<sup>2</sup> See <https://www.fluxys.com/en/products-services/empowering-you/customer-interactions/consultations-in-the-uk/2021---consultation-on-the-interconnector-storage-service>

## Legal Text:

We have no additional comments to those set out in our previous representation to this Proposal dated 19th November 2021.

## Are there any errors or omissions in this Modification Report that you think should be taken into account?

As set out in our view expressed in the January 2022 Workgroup regarding the BEIS statement replicated on page 17 of the Final Modification Report, we believe that it was not correct for the FMR to conclude that this BEIS statement conflicted, or disagreed, with the assessment that the principle of the supremacy of EU law continues to apply to retained EU law (specifically in the context of the definition of 'Storage Facility'), as stated on page 18 on the FMR:

*"The comments from BEIS noted that this definition is different from the term identified as 'gas storage facility' in the proposal which appears to have been used for a particular purpose in the Gas (Exemptions) Order 2011 and is more limited in scope as it does not include gas in natural porous strata, which is covered by the term 'storage facility' in the Gas Act."*

Rather, the BEIS statement set out in the Final Modification Report merely states as a matter of historic record that no revision to the definition of 'Interconnector' in the Gas Act was deemed as necessary by BEIS as a consequence of the transposition into UK law of EU Directive 2019/692 in order to align the respective definitions. This was on the basis that both definitions were consistent. In this statement, BEIS did not provide a view in respect of, nor refer to, the definition of 'Storage Facility'.

As set out above, BEIS has subsequently clarified its views regarding the principle of supremacy of EU law in the context of retained EU law.

## Governance Process Concerns

The conclusion reached by the Modification Panel on 17<sup>th</sup> February 2022 that the BEIS opinion constituted a new issue raised in consultation responses was based upon Modification Rule 9.3.1(d) which provides for the Code Administrator to highlight within the FMR any issues set out in representations. However, it is noteworthy that BEIS opinion was *not* provided within the formal consultation period *nor* in the form of a representation to this proposal such as to constitute an issue as described in 9.3.1(d).

Conversely, the differing interpretations of Storage definitions were made apparent during the Workgroup phase and thus documented in the Workgroup Report. The October 2021 Modification Panel directed that the Proposal be subject an extended initial consultation phase explicitly in order to "*allow all parties to acquire and consider legal opinion*". On this basis we would question the value of a further consultation, which itself was subject to a *further* extended period.

We believe that in this instance it was more appropriate that the BEIS clarity provided on 16<sup>th</sup> February 2022 to have been considered by the February 2022 Modification Panel as part of its consideration and discussions on the FMR and for the vote whether to recommend implementation to have subsequently been taken at that meeting

Recognising that other Modification Proposals may require interpretation of primary or secondary legislation, we have concerns regarding the precedent the approach taken in this Proposal potentially sets i.e. that Proposals are delayed pending expression of views by BEIS. BEIS itself has expressed that it does not ordinarily provide legal advice to industry and does not wish to create such a precedent. As a consequence, we would not expect future change Proposals to be delayed in an equivalent manner.

Even if the BEIS opinion expressed on 16<sup>th</sup> February 2022 is accepted as an issue raised in representation as contemplated by 9.3.1(d) then it is apparent that the only avenue open to the Modification Panel according to Rule 9.3.2 was to seek views from the Workgroup, there is certainly no explicit provision allowing the Modification Panel to determine that it is subject to re-consultation without Workgroup consideration. Given the extensive discussion of this Proposal within Workgroup, we recognise that a referral back to Workgroup is unlikely to have proved beneficial however the pragmatic decision to bypass that stage does not appear to be consistent with the Rules. Whilst 9.3.2(b) refers to representations, this relates to attachment of the representations submitted in respect of the original consultation and does not imply a capability for the Modification Panel to make a determination to reconsult.

The only circumstances allowing the Modification Panel to reconsult appears to be:

- as a consequence of variation of a Modification Proposal post consultation (rule 6.5.1(c)). In these circumstances the full suite of determinations (as set out in rule 7.2.3) is available to the Modification Panel, include to re-issue for consultation (rule 7.2.3(b)(i)).
- where a Final Modification Report has been with Ofgem for a specified period of time awaiting a decision or, where a Final Modification Report is with Ofgem awaiting a decision, the circumstances relating to the Modification have materially changed (rule 9.5.1)

**Please provide below any additional analysis or information to support your representation**

Not applicable.