

To gas transporter licensees, gas  
shipper licensees, gas  
interconnector licensees and  
other interested parties

Our Ref: Gas Day  
Email: [gasday@ofgem.gov.uk](mailto:gasday@ofgem.gov.uk)

Date: 28 March 2014

Dear Colleague,

## **Notice under section 5A Utilities Act 2000 - Statement of reasons for not carrying out an impact assessment**

### **Background**

On 21 February 2014 the Authority received the Final Modification Report for Uniform Network Code (UNC) Modification 461 (UNC461) which seeks to implement changes to the definition of the gas day within the UNC and its associated documents to facilitate compliance with European (EU) legislative changes with effect from 1 October 2015.

The relevant EU legislation is contained in two European Network Codes:

1. Capacity Allocation Mechanisms in Gas Transmission Systems (CAM)<sup>1</sup>, which was published in the Official Journal of the European Union (OJEU) on 15 October 2013 and applies from 1 November 2015. This EU legislation applies to interconnection points<sup>2</sup> and defines the 'gas day' as "*the period from 5:00 to 5:00 UTC<sup>3</sup> the following day for winter time and from 4:00 to 4:00 UTC the following day when daylight saving is applied*"<sup>4</sup>.
2. The Gas Balancing of Transmission Networks Network Code<sup>5</sup> (BAL), which was published in the OJEU on 27 March 2014 and applies from 1 October 2015. BAL also defines the gas day as from 5:00 to 5:00 UTC in winter and 4:00 to 4:00 UTC during daylight saving time by applying the definitions contained in Article 3 of CAM. BAL applies to balancing zones, which includes the downstream sector<sup>6</sup>.

These EU legislative requirements take priority over GB domestic legislation and associated regulations and codes, including the UNC.

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<sup>1</sup> Commission Regulation (EU) No 984/2013 establishing a Network Code on Capacity Allocation Mechanisms in Gas Transmission Systems and supplementing Regulation (EC) No 715/2009 of the European Parliament and of the Council: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:273:0005:0017:EN:PDF>.

<sup>2</sup> For example, Bacton.

<sup>3</sup> Coordinated Universal Time.

<sup>4</sup> CAM Article 3(7).

<sup>5</sup> Commission Regulation (EU) No 312/2014 of 26 March 2014 establishing a Network Code on Gas Balancing of Transmission Networks: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL\\_2014\\_091\\_R\\_0015\\_01&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2014_091_R_0015_01&from=EN).

<sup>6</sup> In other words, across the onshore gas industry.

The current gas day in Great Britain (GB), as set out in the Gas (Calculation of Thermal Energy) Regulations 1996<sup>7</sup>, is "a period beginning at 6am on one day and ending immediately before 6am on the following day"; this definition is used as the basis for various times specified in the UNC. Therefore, in order to comply with CAM and BAL, GB's gas day at interconnection points and downstream must change to that defined in CAM.

### **Statement of reasons for not carrying out an IA**

Section 5A of the Utilities Act 2000 requires that before implementing an important proposal we are required to either carry out and publish an assessment of the likely impact of implementing the proposal or publish a statement setting out our reasons for thinking that it is unnecessary for us to carry out such an assessment. We considered that the decision on UNC461 could meet the technical definition of an important proposal as set out in Section 5A. Therefore on 3 March we indicated on our website and on 4 March indicated in an email that we had decided to carry out an impact assessment (IA) in respect of UNC461. As noted in our Impact Assessment Guidance<sup>8</sup> we may decide to undertake an IA to consider the impact of accepting or rejecting a proposed modification to the UNC and for the IA to inform the decision as to whether to accept or reject a modification.

While our initial view was to carry out an IA, on further reflection we have determined that while UNC461 may meet the technical definition of being an important proposal, in accordance with Section 5A of the Utilities Act 2000, we consider that it is not necessary to carry out an IA, for the following reasons:

1. UNC461 is implementing a change required by the EU Network Codes<sup>9</sup>. The European Network Codes are pieces of EU legislation which should have effect automatically. However, Member States may have to take some action to ensure the national law and other arrangements reflect the EU legislation. Some such changes are being implemented in GB via modifications to industry codes with the ultimate decisions on approving or rejecting proposed modifications, which are raised by industry, being made by Ofgem.
2. Ofgem must act compatibly with EU law. In relation to UNC461 Ofgem will in effect have no discretion when it makes its decision about the proposed modification if it considers that the modification better facilitates compliance with the EU legislation.
3. Such decisions, as with any other code modification decisions, involve consideration of the proposed changes against relevant code objectives and whether they facilitate the achievement of such objectives and also consideration of our principal objective and statutory duties.
4. In respect of UNC461, the relevant code objectives are as provided in Standard Special Condition A11 of the Gas Transporter licence with the objective that this modification impacts on being that set out in Standard Special Condition A11(1)(g). For a proposed modification to be made, the provisions of Standard Special Condition A11 require that it better facilitates compliance with the relevant objectives, in this case compliance with the Regulation<sup>10</sup> and any relevant legally binding decisions of the European Commission (the "Commission") and/or the Agency for the Co-operation of Energy Regulators (ACER).
5. Accordingly, if UNC461 does better facilitate compliance with the European obligations then Ofgem is bound to approve the modification. This is because Ofgem must act compatibly with EU law when exercising its functions.

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<sup>7</sup> Regulation 2(1) of SI No. 439/1996 (<http://www.legislation.gov.uk/uksi/1996/439/contents/made>) (as amended).

<sup>8</sup> <https://www.ofgem.gov.uk/publications-and-updates/impact-assessment-guidance>

<sup>9</sup> CAM and BAL – see further details in background section above.

<sup>10</sup> The Regulation means Regulation 2009/715/EC on conditions for access to the national gas transmission networks and which is also known as the Gas Regulation.

6. Section 4C of the Gas Act 1986 specifically requires us to carry out our functions in the manner that we consider is best calculated to implement, or to ensure compliance with, any binding decision of ACER or the Commission made under the Gas Directive, the Gas Regulation or the ACER Regulation in relation to gas. CAM and BAL are European Regulations that supplement the Gas Regulation. Therefore so long as we consider that UNC461 appropriately reflects relevant legal EU obligations, bearing in mind our governing framework, Ofgem would be acting unlawfully if it failed to approve the modification.
7. While the proposed modification may meet the technical definition of an important proposal in terms of Section 5A of the Utilities Act 2000, there is a good reason why an IA is not necessary in this instance, namely that any impacts revealed by an IA cannot change the decision that has to be taken by the Authority in relation to UNC461 in light of its statutory obligations.
8. There have been numerous workshops<sup>11</sup> and a consultation<sup>12</sup> on the proposed change to the gas day as part of the UNC461 development process and stakeholders have had many opportunities to comment on UNC461. However, no alternatives to UNC461 were raised by industry. Therefore, there are no alternative proposals as to how the UNC can be made to be compliant with the EU legislative definition of gas day. Had there been alternative modifications proposed it may have been appropriate for Ofgem to have completed an IA in order to assess which was the most proportionate approach to implementing the EU network code.

For the reasons set out above, we do not consider it necessary, appropriate or practicable to carry out and publish an IA or that such publication would be in the best interests of stakeholders and consumers.

Yours faithfully,

**Rachel Fletcher**

**Interim Senior Partner, Wholesale Markets**

Signed on behalf of the Authority and authorised for that purpose

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<sup>11</sup> 3 July 2013, 11 September 2013, 18 September 2013 and 12 February 2014.

<sup>12</sup> By the Joint Office which closed on 27 January 2014.