DETI Response to 2013 Consultation on Amendments to the Gas (Applications for Licences and Extensions) Regulations (Northern Ireland) 1996 and Published Criteria

November 2013
1. **INTRODUCTION**

1.1 On 5 July 2013, the Department of Enterprise, Trade and Investment (‘the Department’) launched a public consultation on proposed legislative amendments to the Gas (Applications for Licences and Extensions) Regulations (Northern Ireland) 1996 (‘the Gas Applications Regulations’) and the associated Published Criteria against which the Northern Ireland Authority for Utility Regulation (‘the Authority’) must judge any licence application.

1.2 By the close of the consultation period on 6 September 2013, the Department had received three substantive responses and two acknowledgements. The Department has considered the comments received and reached a decision on the way forward as outlined below.

2. **BACKGROUND**

2.1 The Gas Applications Regulations were established in 1996 to provide a structured and regulated system for companies wishing to apply for a licence, or for an extension to an existing licence, to convey, store or supply natural gas in Northern Ireland. The Regulations set out the process for applying for a gas licence; how such applications are to be published; and the fees which should accompany an application. As such, they do not impact directly upon natural gas customers but do contribute generally towards the effective regulation of the natural gas industry in Northern Ireland with the best interests of customers in mind.

2.2 The Gas Applications Regulations are periodically reviewed and were previously amended through:

- The Gas (Applications for Licences and Extensions) (Amendment) Regulations (Northern Ireland) 2010 which involved a minor amendment designed to ensure compliance with the EU Services Directive; and

- The Gas (Applications for Licences and Extensions) (Amendment) Regulations (Northern Ireland) 2013 which revised upwards the fees payable upon application for a gas licence or licence extension, and updated arrangements for lodging and publishing such applications by removing references to the Department in light of the recent removal of DETI’s consenting role following transposition of the EU Third Energy Package.

2.3 Following a review of current arrangements, the Department issued a public consultation in July 2013 on further proposed amendments to the Gas Applications Regulations and to the associated Published Criteria against which the Authority must assess gas licence applications. The proposed amendments are designed to make provision for applications for the newly created licence for operating a Liquefied Natural Gas (‘LNG’) facility in Northern Ireland, and to help facilitate competition for any new gas conveyance licences containing exclusive rights. In particular, these will be required to develop natural gas infrastructure to further towns in Northern Ireland, including in the West and North-West.
3. PROPOSED AMENDMENTS

3.1 The consultation paper outlined the following proposed amendments:

- An update of Schedule 1 of the Regulations which provides a “Form of Application” for all gas licences;

- An update of Schedule 2, Parts I to III of the Regulations which contains a list of documents which should accompany applications for a gas conveyance, gas storage or gas supply licence; and

- Incorporation in the Regulations, where appropriate, of references to the newly created licence to operate a Liquefied Natural Gas (LNG) facility.

3.2 The consultation paper also detailed proposals to revise the Published Criteria in order to:

- make the assessment criteria clearer and more succinct; and

- add a new section containing specific criteria which the Authority will use as a basis for awarding an exclusive gas conveyance licence(s) in a situation where more than one applicant applies for an exclusive licence over the same area at approximately the same time.

4. CONSULTATION

4.1 The consultation paper detailed the Department’s proposed amendments to the Gas Applications Regulations and Published Criteria. Stakeholders were asked to consider the following questions in particular:

Gas Applications Regulations

(a) Do you agree with the Department’s assessment of the action required to update the Gas Applications Regulations in order to reflect the new LNG licence?

(b) Do you agree with the Department’s assessment regarding the proposed changes to the Form of Application?

(c) Do you agree with the Department’s assessment regarding the documents and other particulars which should accompany applications for a gas conveyance, gas storage, gas supply, or LNG licence?

(d) Are there any other issues to consider that we have not anticipated?


Published Criteria

(a) Do you agree with the Department’s assessment of the selection and ‘Best Value’ assessment criteria with which the Authority would assess applications for an exclusive gas conveyance licence?

(b) Are there any particular issues concerning the Published Criteria that we have not anticipated?

4.2 The Department received three substantive responses and two acknowledgements to the consultation. The Department is grateful to all those who replied for taking the time and trouble to provide their views on the proposed changes to the Gas Applications Regulations and Published Criteria.

4.3 The three substantive responses received were broadly content with the proposed amendments to the Gas Applications Regulations and Published Criteria and agreed that gas network extension, including to further towns in the West and North West, should be delivered through a competitive process on an objective and non-discriminatory basis. Consultees did, however, raise a number of points of detail around the wording of the Gas Applications Regulations and Published Criteria and requested further clarification on certain issues.

4.4 Those comments made by consultees on a non-confidential basis are detailed on Table 1 below, together with the Department’s response. One of the substantive responses was submitted on a ‘confidential’ basis and is therefore not included in Table 1.
### TABLE 1

**Proposed Amendments to the Gas (Applications for Licences and Extensions) Regulations (NI) 1996 and the Published Criteria: Summary of Consultation Responses and Departmental Comments**

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<td><strong>Section 2</strong></td>
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<td>Proposed amendments to the Gas (Applications for Licences and Extensions) Regulations (NI) 1996</td>
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<td>(a) Do you agree with the Department's assessment of the action required to update the Gas Applications Regulations in order to reflect the new LNG licence?</td>
<td>No comments received.</td>
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<td>(b) Do you agree with the Department's assessment regarding the proposed changes to the Form of Application which is listed at Schedule 1 of the draft amending Regulations at Annex A?</td>
<td><strong>Phoenix Natural Gas Ltd (PNGL)</strong>&lt;br&gt;PNGL notes DETI's proposed amendments to Schedule 1, in particular the insertion of a 'confirmation of statements' section which should be completed and signed by an applicant for any category of gas licence. This seems a reasonable and prudent addition to better facilitate UR's assessment of the applicant.</td>
<td>Noted.</td>
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### Consultation Paper

Do you agree with the Department’s assessment regarding the documents and other particulars which should accompany applications for a gas conveyance, gas storage, gas supply or LNG licence as specified in Schedules 2-5 of the draft amending Regulations at Annex A?

### Summary of Comments

**PNGL**

PNGL notes DETI’s proposed amendments to Schedule 2, in particular the additional information required in the ‘constitutional documents’ section. PNGL believes that this insertion is duplication of the information required under paragraphs 8 and 9 of Schedule 1.

PNGL commented, in response to UR’s April 2013 consultation that it “considers that the qualification criteria set by UR must ensure genuinely and objectively sound technical ability and sound relevant experience. The criteria (and the weight to be accorded to particular criterion) should not be applied so as to exclude anyone who meets these tests as this may produce less than optimal results, in the context of UR’s stated duties and objectives [...]. Accordingly, PNGL does not expect that the criteria would be applied so as to exclude any applicant that has the requisite technical ability and experience to contribute to an efficient, economic and co-ordinated gas industry in NI.

For example:

- a potential new entrant in NI should not be excluded merely for lack of NI-specific experience, lack of directly relevant experience or inability to evidence five years of debt financing. What is relevant is an objective assessment of their capabilities to operate in this environment. PNGL notes that Ofgem awarded a number of licences to IGTs who had no previous experience of building or operating networks. In that case, the technical criteria were set high enough to ensure technical capability.

### Departmental Response

It is noted that there is a small degree of overlap but, generally, as Schedule 2 is looking for more detailed information than Schedule 1, the Department has decided that no amendment is necessary.
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<td>but low enough to encourage qualified new entrants;</td>
<td>• conversely, the mere experience of owning and operating a transmission or distribution network is not sufficient alone to meet the tests outlined above. Given the nature and scope of this project, the criteria should ensure that applicants demonstrate that they are able to deliver a greenfield infrastructure project and to run small and remote networks; and • any criteria that are arbitrary, rather than a full, objective and non-discriminatory test of competence and capabilities, should be avoided For example, the proposed 5 year cut-off risks excluding potential substantively qualified applicants (including – arguably – PNGL) which it would be in the interests of UR and the achievement of its public objectives to consider. UR should not for administrative convenience adopt an inflexible criterion that obliges it to close its mind to relevant material regarding the expertise of potential applicants where a proportionate, substantive assessment of such material is possible. Such an approach is particularly inappropriate in view of the potentially small pool of applicants that might compete for licences).”</td>
<td>After further consideration, the Department has removed the requirement which was outlined in paragraph 9 of Schedule 2 Part I of the draft amending Regulations in the consultation paper. This had requested a “statement providing full details of the applicant’s experience in owning, developing or operating any network for the conveyance of gas.” The Department felt that this requirement was unnecessary as applicants may detail relevant experience in the statement required under paragraph 8 which now reads: “A statement giving such particulars of the applicant, and of any sub-contractors or other persons on whose expertise or experience the applicant proposes to rely, as may indicate whether the applicant or that other person has or will acquire the necessary skills to undertake the activities to which the licence or, as the case may be, the extension, relates and any other activities which are incidental thereto.” Corresponding amendments have been made to the sections on ‘Expertise of Applicant’ in Schedule 2 Parts II and IV of the amending Regulations.</td>
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<td>PNGL notes DETI’s proposed amendments to the ‘expertise of applicant’ section of Schedule 2, in particular the insertion of paragraph 9 which requires full details of the applicant’s experience in owning, developing or operating any network for the conveyance of gas.</td>
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<td>This statement facilitates a full, objective and non-discriminatory test of competence and capabilities and ensures consideration of all relevant material regarding the expertise of potential applicants where a proportionate, substantive assessment of such material is possible. Furthermore the insertion of paragraph 10 ensures that a potential new entrant in NI is not excluded merely for lack of NI-specific experience. The proposed amendments seem a reasonable and prudent addition to better facilitate UR’s assessment of the applicant. PNGL notes DETI’s proposed insertion of a ‘fit and proper person’ section in Schedule 2. This seems a reasonable and prudent addition to clarify the information required to prove that an applicant is a ‘fit and proper person’ to hold a licence.</td>
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<td>No comments received.</td>
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<td>(d) Are there any other issues to consider that we have not anticipated in this Chapter?</td>
<td>Noted. The Department has made some amendments to the section on ‘fit and proper person’ in Schedule 2 in order to align this section with the ‘fit and proper person’ section in the Published Criteria.</td>
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| Proposed Amendments to the Published Criteria | (a) Do you agree with the Department’s assessment of the selection and ‘Best Value’ assessment criteria with which the authority would assess applications for an exclusive gas conveyance licence? | PNGL

Financial Resources and Standing

PNGL agrees with DETI that UR should undertake an appropriate evaluation to ensure that applicants have the necessary financial solvency and strength to deliver a network extension.

DETI is proposing to establish criteria that require applicants to firstly prove their financial resources and standing and that UR will only after this step is complete evaluate those applicants who demonstrate their financial resources and standing, on their operational ability and their commercial proposal. PNGL supports this two step approach, which at each step will require an assessment factually of the applicant’s position based on a proportionate and objective review by UR of the material submitted to it, and in conformity with its statutory duties and objectives.

On the basis that ‘financial resources and standing’ is being considered at the evaluation stage of the licence application process, PNGL believes that previous experience of being able to fund the capital value of the assets expected to be delivered by the applicant is an appropriate evaluation (referred to in the first bullet point in paragraph 3.5 of the consultation paper). |

Noted that PNGL supports the 2 step approach re assessment of financial standing followed by consideration of best value etc.
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<td>Most efficient businesses will only seek to raise capital when the investment is required. Given that most infrastructure investments are funded by debt finance, PNGL believes that the applicant’s ability to raise debt finance in proportion to the level of debt finance proposed would seem an adequate requirement (referred to in paragraph 3.6(b) of the consultation paper).</td>
<td></td>
<td>Paragraphs 3.4 to 3.6 of the consultation paper outlines the selection and assessment criteria which it is proposed the Northern Ireland Authority for Utility Regulation ('the Authority') should use in determining the grant of an exclusive gas conveyance licence. PNGL's understanding of these paragraphs would appear to be correct. It should be noted, however, that some amendments have been made to the related section of the final Published Criteria – primarily for clarification purposes.</td>
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<td>If PNGL's understanding of paragraphs 3.4 to 3.6 of the consultation paper is not correct, PNGL would welcome clarification of this.</td>
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<td><strong>Best Value</strong></td>
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<td>Having considered PNGL’s and other comments on the treatment of applications for related licences, the Department has decided to amend both the Regulations and Published Criteria such that an applicant may, if they wish, connect an application for one related licence to the application for another related licence. Connected applications will be considered together with either both applications being granted or neither application being granted.</td>
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<td>PNGL considers that the qualification criteria (and the weight to be accorded to particular criterion) set by DETI must ensure genuinely and objectively sound technical ability and sound relevant experience.</td>
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<td>If an applicant does not ask for an application to be connected to another particular application, his application will be considered in conjunction with any other available unconnected application as part of any scoring process.</td>
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<td>PNGL fully supports DETI's aim of finding the best solution to provide a transmission and distribution network relevant to applications for an exclusive conveyance licence. Achieving the optimal solution for each of transmission and distribution involves assessing each separately and awarding the winner in each case separately. There is no justification for selecting on the basis of aggregate scores, which implies a less satisfactory solution for consumers on one measure. If an applicant thinks it can score higher through cross-subsidy, it can always flex its application to reflect this.</td>
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<td>As discussed in PNGL’s response to UR’s April 2013 consultation, UR’s proposed Data Input Workbook currently precludes parties from competing on the most significant cost lines i.e. most elements of capex. PNGL commented that, if this remains the case, UR’s proposed 70% weighting on Applicant Determined Costs seemed excessive as it is an applicant’s ability to operate and manage a network that has an impact on its costs. PNGL suggested that a more appropriate weighting for transmission could be:</td>
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<td>• Applicant Determined Costs (60% of available marks)</td>
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<td>• Operational Business Plan (30% of available marks)</td>
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<td>• Innovation and Technology Transfer (10% of available marks)</td>
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<td>Similarly for distribution, PNGL commented that UR’s proposed 60% weighting on Applicant Determined Cost seemed excessive given the additional requirement on applicants to maximise connections. PNGL suggested a more appropriate weighting for distribution could be:</td>
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<td>• Applicant Determined Cost (40% of available marks)</td>
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<td>• Operational Business Plan (25% of available marks)</td>
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<td>• Maximising connections (25% of available marks)</td>
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<td>• Innovation and Technology Transfer (10% of available marks)</td>
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<td>PNGL notes DETI’s proposal is to distribute costs in the following proportions:</td>
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<td>Noted</td>
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<td>• Applicant Determined Cost (50% of available marks)</td>
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<td>• Operational Business Plan (40% of available marks) – with c.30% of the available</td>
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<td>marks awarded for maximising connections for distribution</td>
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<td>• Innovation and Technology Transfer (10% of available marks)</td>
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<td>This seems a reasonable weighting for transmission and distribution activities.</td>
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<td>PNGL suggested in its response to UR’s April 2013 consultation that parties are</td>
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<td>allowed to compete on the overall design split between transmission and distribution</td>
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<td>to secure the optimal outcome for consumers in any new licensed area.</td>
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<td>For example, PNGL considers that the current design to extend the natural gas</td>
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<td>network to towns in the West and North-West uses an excessive length of</td>
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<td>transmission network and that, in some instances distribution network could be</td>
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<td>used instead.</td>
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<td>The Department has noted that PNGL is content with the proposed marking scheme as</td>
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<td>outlined in paragraph 3.6 of the consultation paper (this had been revised from</td>
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<td>the proposals outlined in the Authority’s earlier consultation).</td>
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<td>For the purposes of any competition, the information provided by the Authority in</td>
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<td>the data work book will form the basis for assessment of applications. Successful</td>
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<td>applicants will be then required to produce detailed design proposals which will</td>
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<td>be considered by the Authority before the licensee seeks planning and other</td>
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<td>approvals.</td>
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<td>There was little discussion in UR’s April 2013 consultation on the development plan upon which the competition will be judged. A mandatory development plan, which was a key feature of PNGL’s original licence, has ensured that natural gas has been made available to the majority of households and businesses in PNGL’s Licensed Area. PNGL therefore welcomes DETI’s acknowledgment in section 4 of Annex 2 that an applicant must be able to demonstrate to the satisfaction of UR that its proposal is consistent with any development plan in accordance with a gas conveyance licence which authorises the transportation of gas in the area for which the consent is sought. This will focus the award of the licence on the applicant that can demonstrate their ability to deliver the business model and provide consumers within the new licensed area with a clear expectation of when natural gas will be made available to them.</td>
<td>Noted that PNGL supports the proposal that applications must be consistent with any development plan proposal.</td>
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| (a) Do you agree with the Department’s assessment of the selection and ‘Best Value’ assessment criteria with which the authority would assess applications for an exclusive gas conveyance licence? (CONT’D) | **BGE (NI) Ltd**  
*With reference to para 3.10 on ‘Applicant Determined Costs’ in Annex B (page 51 of the consultation document):*  
In our experiences of building and operating natural gas pipeline projects of this magnitude and technical complexity both within and outside Northern Ireland we have typically encountered criteria where the general weighting would be 40/60 in terms of cost/operational aspects (as opposed to the 50/50 weighting as proposed in this instance).  
In addition to this it is our opinion that the penalties associated with the percentage differences regarding the determined costs scoring might appear to be excessive and as such may impact on the competition by reducing the number of potential bidders – some such bidders could bring experiences and expertise to a major infrastructure delivery project such as this that could in our opinion de-risk project delivery and improve the likelihood of on time and successful build.  
*With reference to para 1.1 in Annex B (page 44 of the consultation document):*  
BGE would appreciate clarification with regard to where an exclusive gas conveyance licence is awarded by the Authority, that such an exclusive licence will allow the successful applicant to both build and operate the pipeline. | The Department has considered BGE’s comments but remains of the view that a 50:50 weighting would be optimal.  
The Department has decided to allow for more graduation in the marking system. This means that, rather than reducing marks by 5% for every 1% increase in determined costs, the Authority will reduce marks by a more graduated 1% for every 0.2% increase in determined costs.  
Yes, consent to construct and operate a pipeline will only be given to an applicant holding the appropriate gas conveyance licence. |
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<td>(b) Are there any particular issues concerning the Published Criteria that we have not anticipated in this Chapter?</td>
<td>No comments received.</td>
<td>Noted.</td>
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**General comments**

**PNGL**

PNGL welcomes DETI’s commitment to provide an objective and non-discriminatory basis on which UR may assess an application for the grant of a licence, extension or consent. PNGL provided a detailed response to UR’s April 2013 consultation paper on Gas Network Extensions in Northern Ireland and many of the comments raised therein remain relevant to DETI’s consultation.

PNGL has tried to provide a similarly detailed response to DETI’s consultation but is conscious that further debate and discussion may add additional value to the process and as such, would be very willing to enter into further discussion with DETI and indeed UR, if DETI were to consider this helpful.
5. **DECISION**

5.1 Having considered the consultation responses in some detail, and through close liaison with the Authority, the Department has made some adjustments to the drafting of the amending Regulations and revised Published Criteria. The key changes:

*Connected Applications*

(i) Amend the Form of Application in Schedule 1 of the Regulations and the Published Criteria so that an applicant may (if wished - this is not compulsory), ask the Authority to connect a particular application (e.g. in respect of high pressure pipelines) to another specific application (e.g. in respect of lower pressure pipelines) so that either both succeed or both fail. If an applicant does not ask for an application to be connected to another particular application, his application will be considered in conjunction with any other available unconnected application as part of the scoring process. It is therefore preferable for companies to clearly indicate that their respective licence applications should be connected, or are available for consideration with applications from other companies for specific licences.

*Expertise of Applicant*

(ii) Amend Schedule 2, Parts I, II and IV of the Regulations (Documents and other Particulars to accompany an Application) in order to remove the requirement under ‘Expertise of Applicant’ to provide a statement on the applicant’s experience in owning, developing or operating relevant gas infrastructure. It was felt that this requirement was unnecessary as there is already a requirement to provide a statement “giving such particulars of the applicant, and of any sub-contractors or other persons on whose expertise or experience the applicant proposes to rely, as may indicate whether the applicant or that other person has or will acquire the necessary skills to undertake the activities to which the licence or, as the case may be, the extension, relates”.

*Parent Group Resources*

(i) Amend Schedule 2, Parts I-IV of the Regulations and Sections 2 and 3 of the Published Criteria in order to make clear that an applicant can/should draw on resources within its parent group in order to demonstrate availability of appropriate levels of skill, experience and financial resources. And that, in these cases, the applicant should set out the nature of the arrangements or proposed arrangements.

*Fit and Proper Person*

(ii) Amend Schedule 2, Parts I-IV of the Regulations and Section 2 of the Published Criteria in order to ensure consistency between both documents in respect of the requirements listed under ‘fit and proper person’.
Gas Directive Requirements

(iii) Remove a number of references to Gas Directive (2009/73/EC) requirements from Schedules 1 and 2 of the Regulations and from the Published Criteria as such requirements already have a legal basis and do not need to be listed here.

Scoring of ‘Applicant Determined Costs’

(iv) Amend the method by which the Authority will score the Applicant Determined Costs for each application in order to allow more gradation in the marking.

Other amendments are not generally substantive in nature but are rather aimed at clarifying the wording within the amending Regulations and revised Published Criteria, particularly in response to queries raised during the consultation.

5.2 Final versions of the Gas (Applications for Licences and Extensions) (Amendment No 2) Regulations (Northern Ireland) 2013 and the Published Criteria are available at www.legislation.gov.uk and www.detini.gov.uk respectively.

Energy Division
Department of Enterprise, Trade and Investment
28 November 2013