

2004 No. 2043

**GAS
PETROLEUM**

The Gas (Third Party Access) Regulations 2004

<i>Made</i> - - - - -	<i>29th July 2004</i>
<i>Laid before Parliament</i>	<i>2nd August 2004</i>
<i>Coming into force</i> - -	<i>26th August 2004</i>

The Secretary of State, being a Minister designated^(a) for the purposes of section 2(2) of the European Communities Act 1972^(b) in relation to measures relating to natural gas and oil, in exercise of the powers conferred on her by that section, hereby makes the following Regulations:—

Citation and commencement

1. These Regulations may be cited as the Gas (Third Party Access) Regulations 2004 and shall come into force on 26th August 2004.

Amendment of the Gas Act 1965, the Gas Act 1986 and the Petroleum Act 1998

- 2.—(1) The Gas Act 1965^(c) is amended as set out in Schedule 1 to these Regulations.
(2) The Gas Act 1986^(d) is amended as set out in Schedule 2 to these Regulations.
(3) The Petroleum Act 1998^(e) is amended as set out in Schedule 3 to these Regulations.

Transitional Provisions

3. An exemption given under section 19C^(f) of the Gas Act 1986 before 26th August 2004 shall be treated after 25th August 2004 as having been given under section 19A^(g) of that Act.

29th July 2004	<i>Stephen Timms,</i> Minister for Energy, E-Commerce and Postal Services, Department of Trade and Industry
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(a) S.I. 2000/738.
(b) 1972 c. 68.
(c) 1965 c. 36.
(d) 1986 c. 44.
(e) 1998 c. 17.
(f) inserted by S.I. 2000/1937.
(g) inserted by S.I. 2000/1937.

SCHEDULE 1

Regulation 2(1)

AMENDMENTS TO GAS ACT 1965

1. In section 12 (the right to store gas underground and related rights)—
 - (a) in subsection (2) for “or any other purpose” substitute “or any other purpose, but that exclusive right does not prevent the acquisition by another person of a right to store gas in the underground gas storage (whether in accordance with section 19B of the principal Act or otherwise)”;
 - (b) in subsection (6) for “any gas transporter” substitute “any gas transporter, but nothing in this subsection prevents the grant to another person of a right to store gas in the underground gas storage (whether in accordance with section 19B of the principal Act or otherwise)”.

SCHEDULE 2

Regulation 2(2)

AMENDMENTS TO GAS ACT 1986

1. In section 19A (application of section 19B to storage facilities)—
 - (a) in subsection (1) for “storage facilities other than exempt storage facilities” substitute “a storage facility unless, or except to the extent that, its capacity is exempt under this section”;
 - (b) in subsection (2) for “An owner” substitute “A person who is or expects to be an owner”;
 - (c) in subsection (2) for “for the facility or for facilities of a particular description” substitute “with respect to the facility”;
 - (d) after subsection (3)(b) insert—
 - (c) so as to have effect—
 - (i) in the case of a facility other than a new facility, in relation to the whole of the capacity of the facility; or
 - (ii) in the case of a new facility, in relation to the whole of the capacity of the facility or any significant increase in the capacity of the facility.”;
 - (e) in subsection (4) omit “or facilities”; and
 - (f) for subsection (5) substitute—

“(5) The Authority shall give an exemption with respect to a facility (other than a new facility) where it is satisfied that use of the facility by other persons is not necessary for the operation of an economically efficient gas market.

(6) The Authority shall give an exemption with respect to a new facility where it is satisfied that either—

 - (a) use of the facility by other persons is not necessary for the operation of an economically efficient gas market; or
 - (b) the requirements of subsection (8) are met.

(7) In respect of a facility which is or is to be modified to provide for a significant increase in its capacity, an exemption by virtue of subsection (6)(b) may only be given in relation to that increase in its capacity.

(8) The requirements of this subsection are that—

 - (a) the facility or (as the case may be) the significant increase in its capacity will promote security of supply;
 - (b) the level of risk is such that the investment to construct the facility or (as the case may be) to modify the facility to provide for a significant increase in its capacity would not be or would not have been made without the exemption;
 - (c) the facility is or is to be owned by a person other than the gas transporter who operates or will operate the pipeline system connected or to be connected to the facility;
 - (d) charges will be levied on users of the facility or (as the case may) the increase in its capacity;
 - (e) the exemption will not be detrimental to competition, the operation of an economically efficient gas market or the efficient functioning of the pipeline system connected or to be connected to the facility; and
 - (f) the Commission of the European Communities is or will be content with the exemption.

(9) Subject to subsection (10), an exemption may not be given by virtue of subsection (6)(b) more than once in respect of the same facility.

(10) Subsection (9) does not prevent a further exemption being given by virtue of subsection (6)(b) in respect of a facility if—

- the facility is or is to be modified to provide for a significant increase in its capacity;
- the exemption has effect only in relation to that increase in its capacity; and
- no previous exemption has been given by virtue of subsection (6)(b) in relation to that increase in its capacity.

(11) The Authority shall publish its decision to give or refuse to give an exemption together with the reasons for its decision in such manner as it considers appropriate.”.

2. In section 19B (acquisition of rights to use storage facilities) after “gas”, in each place where it occurs, insert “or liquid gas”.

3. In section 19C (application of section 19D to LNG facilities)—

- (a) in subsection (1) for “LNG facilities other than exempt LNG facilities” substitute “an LNG import facility unless, or except to the extent that, its capacity is exempt under this section”;
- (b) in subsection (2) for “An owner of an LNG facility” substitute “A person who is or expects to be an owner of an LNG import facility”;
- (c) in subsection (2) for “for the facility or for facilities of a particular description” substitute “with respect to the facility”;
- (d) after subsection (3)(b) insert—

“(c) so as to have effect in relation to the whole of the capacity of the facility or any significant increase in the capacity of the facility.”;
- (e) in subsection (4) omit the words “or facilities”; and
- (f) for subsection (5) substitute—

“(5) The Authority shall give an exemption with respect to a facility where it is satisfied that the requirements of subsection (7) are met.

(6) In respect of a facility which is or is to be modified to provide for a significant increase in its capacity, an exemption by virtue of subsection (5) may only be given in relation to that increase in its capacity.

(7) The requirements of this subsection are that—

- (a) the facility or (as the case may be) the significant increase in its capacity will promote security of supply;
- (b) the level of risk is such that the investment to construct the facility or (as the case may be) to modify the facility to provide for a significant increase in its capacity would not be or would not have been made without the exemption;
- (c) the facility is or is to be owned by a person other than the gas transporter who operates or will operate the pipeline system connected or to be connected to the facility;
- (d) charges will be levied on users of the facility or (as the case may be) the increase in its capacity;
- (e) the exemption will not be detrimental to competition, the operation of an economically efficient gas market or the efficient functioning of the pipeline system connected or to be connected to the facility; and
- (f) the Commission of the European Communities is or will be content with the exemption.”

(8) Subject to subsection (9), an exemption may not be given by virtue of subsection (5) more than once in respect of the same facility.

(9) Subsection (8) does not prevent a further exemption being given by virtue of subsection (5) in respect of a facility if—

- the facility is or is to be modified to provide for a significant increase in its capacity;
- the exemption has effect only in relation to that increase in its capacity; and
- no previous exemption has been given by virtue of subsection (5) in relation to that increase in its capacity.

(10) The Authority shall publish its decision to give or refuse to give an exemption together with the reasons for its decision in such manner as it considers appropriate.”.

4. In section 19D (acquisition of rights to use LNG facilities)—

- (a) in subsection (1) for “The owner of an LNG facility” substitute “Subject to subsection (2A), the owner of an LNG import facility”;
- (b) in subsection (1)(a) for “at least once in every year” substitute “prior to their entry into force”, and for “LNG” substitute “liquid gas”;
- (c) subsection (2) shall cease to have effect;

(d) after subsection (2) insert—

“(2A) The cost or the method of determining the cost of acquiring the right to have liquid gas treated in a relevant facility and any changes thereto must be approved by the Authority prior to their publication; and such approval may be given on condition that certain modifications are made to the cost or methodology.

(2B) Before the owner of a relevant facility seeks approval under subsection (2A) he must carry out such consultation as the Authority may require.”;

(e) in subsections (3) and (4) for “LNG” substitute “liquid gas”;

(f) in subsection (6) paragraph (a) shall cease to have effect;

(g) in subsection (6)(b) and (c) for “LNG” substitute “liquid gas”;

(h) for subsection (7) substitute—

“(7) The owner shall notify the applicant of his decision giving reasons for any refusal.”;

(i) in subsection (8) for the words “and the applicant do not reach any such agreement” substitute “refuses the application”;

(j) subsection (9) shall cease to have effect;

(k) in subsection (10) for the words from “Where” to “shall—” substitute “Where a person applies to the Authority under subsection (8), the Authority shall—”;

(l) for subsection (10)(a) substitute—

“(a) decide whether to give directions under subsection (11), to consider the application further or to reject the application”;

(m) for subsection (10)(c) substitute—

“(c) in the case of a decision that the application is to be considered further—

(i) give to the owner of the facility, the Health and Safety Executive and any person who has a right to have liquid gas treated in the facility notice that the application is to be so considered and an opportunity of being heard about the matter; and

(ii) after so considering the matter, decide whether to give directions under subsection (11) or to reject the application and give notice of its decision to the applicant.”

(n) in subsection (11) for “LNG”, in each place where it occurs, substitute “liquid gas”;

(o) in subsection (12)(a)(i)—

(i) omit the words “for the period specified in the directions”; and

(ii) for “LNG” substitute “liquid gas”;

(p) in subsection (12)(a)(iii) for “LNG” substitute “liquid gas”; and

(q) in subsection (12)(a)(iv) omit the words from “(which” to the end.

5. After section 19D insert—

“Provision of information

19DA A person who is or expects to be the owner of an LNG import facility shall provide the Authority with such information in such manner and at such times as the Authority may reasonably require to facilitate the performance of its functions under this Act.”.

6. In section 19E (provisions supplemental to sections 19A to 19D)—

(a) in subsection (1) for “sections 19A to 19D” substitute “sections 19A to 19DA”;

(b) in subsection (1) omit the definition of “LNG”;

(c) in subsection (1) for the definition of “LNG facility” substitute—

““LNG import facility” means a facility for the following—

(a) the importation of liquid gas;

(b) the regasification of liquid gas following its importation and prior to its conveyance to a pipeline system operated by a gas transporter; and

(c) any temporary storage of liquid gas which is necessary for the operation of the facility;”;

(d) in subsection (1) in the definition of “main commercial conditions” for paragraph (a) substitute—

“(a) in the case of a storage facility, such information as would enable a potential applicant for a right to have gas or liquid gas stored in the facility to make a reasonable assessment of the cost of, or the method of calculating the cost of, acquiring that right;

(aa) in the case of an LNG import facility, the terms setting out the cost or the method of determining the cost of acquiring the right to have liquid gas treated in the facility;”;

(e) in subsection (1) in paragraph (b) of the definition of “main commercial conditions” after “such a right” insert “as is mentioned in paragraph (a) or (aa)”;

- (f) in subsection (1) after the definition of “main commercial conditions” insert—
 ““new facility” means—
 - (a) a storage facility the construction of which is or is to be completed after 3rd August 2003; or
 - (b) a storage facility the modification of which to provide for a significant increase in capacity is or is to be completed after 3rd August 2003.”;
- (g) in subsection (1) in the definition of “owner” for “LNG facility” substitute “LNG import facility”;
- (h) in subsection (1) in the definition of “significant transaction”—
 - (i) for “gas stored in a gas storage facility” substitute “gas or liquid gas stored in a storage facility”;
 - (ii) for “treated in an LNG facility” substitute “liquid gas treated in an LNG import facility”;
- (i) in subsection (1) after the definition of “significant transaction” insert—
 ““storage”, in relation to liquid gas in a storage facility, includes any liquefaction of gas or regasification of liquid gas ancillary to the storage of liquid gas, and “stored”, in relation to liquid gas in a storage facility, shall be construed accordingly;”
- (j) in subsection (1) for the definition of “storage facility” substitute—
 ““storage facility” means a facility in Great Britain (excluding the territorial sea adjacent to the United Kingdom) for either or both of the following—
 - (a) the storage of gas in cavities in strata or in porous strata, provided that the facility is or will be used for the storage of gas which has previously been conveyed in a pipeline system operated by a gas transporter;
 - (b) the storage of liquid gas;
 but the reference in paragraph (b) to the storage of liquid gas does not include such temporary storage as is mentioned in paragraph (c) of the definition of “LNG import facility”;
- (k) in subsection (1) for the definition of “treatment” substitute—
 ““treatment”, in relation to liquid gas in an LNG import facility, includes importation, temporary storage and regasification, and “treat” shall be construed accordingly.”;
- (l) in subsection (5)—
 - (i) for “any kind” substitute “any kind, or liquid gas or liquid gas of any kind,”;
 - (ii) for “that kind” insert “that kind, or liquid gas or liquid gas of that kind,”; and
- (m) subsection (6) shall cease to have effect.

SCHEDULE 3

Regulation 2(3)

AMENDMENTS TO PETROLEUM ACT 1998

1. In section 17C (application of section 17D to certain offshore gas storage facilities)—
 - (a) in subsection (1) for “offshore gas storage facilities other than exempt offshore gas storage facilities” substitute “an offshore gas storage facility unless, or except to the extent that, its capacity is exempt under this section”;
 - (b) in subsection (2) for “An owner” substitute “A person who is or expects to be an owner”;
 - (c) in subsection (2) for “for the facility” substitute “with respect to the facility”;
 - (d) after subsection (3)(b) insert—
 ““(c) so as to have effect—
 - (i) in the case of a facility other than a new facility, in relation to the whole of the capacity of the facility; or
 - (ii) in the case of a new facility, in relation to the whole of the capacity of the facility or any significant increase in the capacity of the facility.”;
 - (e) for subsection (5) substitute—
 “(5) The Authority shall give an exemption with respect to a facility (other than a new facility) where it is satisfied that use of the facility by other persons is not necessary for the operation of an economically efficient gas market.
 (5A) The Authority shall give an exemption with respect to a new facility where it is satisfied that either—
 - (a) use of the facility by other persons is not necessary for the operation of an economically efficient gas market; or
 - (b) the requirements of subsection (5C) are met.

(5B) In respect of a facility which is or is to be modified to provide for a significant increase in its capacity, an exemption by virtue of subsection (5A)(b) may only be given in relation to that increase in its capacity.

(5C) The requirements of this subsection are that—

- (a) the facility or (as the case may be) the significant increase in its capacity will promote security of supply;
- (b) the level of risk is such that the investment to construct the facility or (as the case may be) to modify the facility to provide for a significant increase in its capacity would not be or would not have been made without the exemption;
- (c) the facility is or is to be owned by a person other than the gas transporter who operates or will operate the pipeline system connected or to be connected to the facility;
- (d) charges will be levied on users of the facility or (as the case may be) the increase in its capacity;
- (e) the exemption will not be detrimental to competition, the operation of an economically efficient gas market or the efficient functioning of the pipeline system connected or to be connected to the facility; and
- (f) the Commission of the European Communities is or will be content with the exemption.

(5D) Subject to subsection (5E), an exemption may not be given by virtue of subsection (5A)(b) more than once in respect of the same facility.

(5E) Subsection (5D) does not prevent a further exemption being given by virtue of subsection (5A)(b) in respect of a facility if—

- (a) the facility is or is to be modified to provide for a significant increase in its capacity
- (b) the exemption has effect only in relation to that increase in its capacity; and
- (c) no previous exemption has been given by virtue of subsection (5A)(b) in relation to that increase in its capacity.

(5F) The Authority shall publish its decision to give or refuse to give an exemption together with the reasons for its decision in such manner as it considers appropriate.”; and

(f) for subsection (6) substitute—

“(7) In this section and sections 17D and 17E—

- (a) “the Authority” means the Gas and Electricity Markets Authority;
- (b) “owner”, in relation to an offshore gas storage facility, includes any person occupying or having control of the facility.”

2. In section 17H(1) for “The duties in section 17B(6) and section 17D(7)” substitute “The obligation to comply with any notice under section 17D(11) and the obligation to comply with any duty in section 17B(6) or section 17D(7)”.

3. In section 28(1)—

(a) after the definition of “holder” insert—

““new facility” means—

- (a) an offshore gas storage facility the construction of which is or is to be completed after 3rd August 2003; or
- (b) an offshore gas storage facility the modification of which to provide for a significant increase in capacity is or is to be completed after 3rd August 2003”; and

(b) for the definition of “offshore gas storage facility” substitute—

““offshore gas storage facility” means a facility for the storage of gas in controlled waters other than the territorial sea of the United Kingdom adjacent to Northern Ireland;”.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations partially implement in respect of Great Britain Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas (O.J. L176, 15.7.2003, p 57) (“the Directive”). The Directive amended and repealed Directive 98/30/EC.

Provisions in the Directive concerning interconnectors are implemented in the Energy Act 2004, which amends the Gas Act 1986 and introduces a licensing regime for interconnectors.

Directive 98/30/EC was implemented by the Gas (Third Party Access and Accounts) Regulations 2000 (S.I.2000/1937). Those Regulations made amendments to the Pipe-lines Act 1962, the Gas Act 1986, the Gas Act 1995 and the Petroleum Act 1998. The Regulations inserted sections 19B and 19D into the Gas Act 1986 to provide a way for applicants to gain access to gas storage facilities and liquid natural gas (“LNG”) facilities respectively. Sections 19A and 19C provided the possibility of exemption from the requirements of sections 19B and 19D in certain circumstances. The Regulations also inserted section 17D into the Petroleum Act 1998 to provide a way for applicants to gain access to offshore gas storage facilities. Section 17C provided the possibility of exemption from the requirements of section 17D in certain circumstances.

The remainder of Directive 98/30/EC was largely already implemented in Great Britain by pre-existing legislation, notably the Gas Act 1986, and by conditions in licences issued under sections 7 and 7A of that Act. As regards market opening, in article 23 all final customers on distribution systems of licensed gas transporters may choose their supplier. Access to the majority of the pipeline system in Great Britain may be obtained in accordance with article 18 of the Directive by any person who holds a shipper’s licence under section 7A of the Gas Act 1986 and who contracts with a licensed gas transporter on the terms set out in the network code which such transporters are obliged by the licence conditions to publish.

These Regulations amend the Gas Act 1986 to implement Articles 2 9) and 11), 18.1, 22 and 25 of the Directive in respect of storage and LNG import facilities. Article 2 9) amends the definition of storage facility, which now includes facilities for the storage of liquid gas. Article 2 11) amends the definition of LNG facility, which now includes a terminal used for importation and temporary storage of LNG. (These facilities are now called LNG import facilities in the Regulations.) Articles 18.1 and 25 impose an obligation on Member States to ensure third party access to LNG facilities based on regulated published tariffs or the methodologies underlying their calculation. Article 22 provides that major new LNG and storage facilities or modifications to existing facilities, which increase capacity significantly or enable the development of new sources of gas supply, may be exempted from some requirements of the Directive under certain conditions.

Schedule 1—amendments to the Gas Act 1965

This Schedule makes consequential amendments to section 12 of the Gas Act 1965 so that where a licensed gas transporter has acquired compulsorily a right to store gas in natural porous strata underground another person is not prevented from acquiring a right to store gas there whether in accordance with section 19B of the Gas Act 1986 or otherwise.

Schedule 2—amendments to the Gas Act 1986

This Schedule amends sections 19A to 19E of the Gas Act 1986. Paragraphs 1 and 3 amend the requirements in sections 19A and 19C for exemption from the provisions of sections 19B and 19D dealing with third party access to storage and LNG import facilities and implement Article 22 on major new infrastructure exemptions. Section 19A(5) now sets out the requirements for the giving of an exemption in respect of a storage facility which is not a new facility. Section 19A(6) to (10) sets out the requirements for the giving of an exemption in respect of a storage facility which is a new facility. In the case of an exemption in respect of a new facility, which has been modified to provide for a significant increase in capacity, the exemption will only be given in relation to the amount of the increase of the capacity. Section 19C as amended by these Regulations sets out the requirements for an exemption in respect of LNG import terminals. Again where an application is made in respect of a facility, which has been modified to provide for a significant increase in capacity, the exemption will only be given in relation to the amount of the increase of the capacity.

Paragraph 2 inserts references to liquid gas in section 19B as a person may now acquire a right under that section to store gas or liquid gas in a storage facility.

Paragraph 4 amends section 19D so that tariffs or methodologies underlying tariffs for the right to have liquid gas treated in an LNG import facility and any changes thereto are approved by the regulator, the Gas and Electricity Markets Authority, prior to publication. Before seeking such approval the owner of the facility must carry out such consultation as the regulator may require. Consequential amendments are also made to the dispute settlement procedure to reflect the fact that access is now regulated access.

Paragraph 5 inserts section 19DA, which imposes an obligation on an owner of an LNG import facility to provide information to the regulator to enable the regulator to meet the requirements of Article 25.

Paragraph 6 inserts a definition of new facility, amends the definition of storage facility, substitutes a definition of LNG import facility for the definition of LNG facility and makes consequential amendments to various other definitions.

Schedule 3—amendments to the Petroleum Act 1998

This Schedule amends sections 17C, 17D, 17H and 28 of the Petroleum Act 1998. Paragraph 1 amends the requirements in section 17C for exemption from the provisions of section 17D dealing with third party access to offshore gas storage facilities, in the same way as the requirements in section 19A of the Gas Act 1986 have been amended, and implements Article 22 on major new infrastructure exemptions. Paragraph 3 inserts a definition of new facility and substitutes a new definition of offshore gas storage facility.

Paragraph 2 amends section 17 H(1) so that an obligation to comply with a notice from the Gas and Electricity Markets Authority under section 17D(11) containing provisions dealing with the right of a third party applicant to have gas stored in an offshore gas storage facility becomes a duty owed to a person affected by a failure to comply with the notice. Section 17H(2) provides that a breach of such a duty which causes a person to sustain loss or damage shall be actionable at the suit or instance of that person.

A Transposition Note has been placed in the libraries of the Houses of Parliament and is also available from the Energy Markets Unit, 1 Victoria Street, London SW1H 0ET.

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