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Inquiry Secretary
Competition Commission
Victoria House
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Dear David

Domestic Bulk Liquefied Petroleum Gas Market Investigation Order

I write on behalf of Shell Gas Limited (“Shell”) in response to the Competition Commission’s notice date 31 July 2007 inviting comments on the draft Domestic Bulk Liquefied Petroleum Gas Market Investigation Order (the “Order”).

Although some of Shell’s previous concerns have been addressed in the revised draft of the Order, Shell considers that the Order continues to fall short in a number of material respects which are described below. There are a number of ambiguities and drafting issues and these are also identified below. The making of an Order in the form of that consulted on would give rise to significant regulatory burden and uncertainty which could have a significant adverse impact on the markets in question.

1. Substantive issues arising

1.1 Metered estates

Part II of the Order dealing with metered estates has been inserted since Shell was last asked to comment on a draft in February. It gives rise to substantial issues and is probably unworkable. Shell sets out what it considers are the most significant issues here, dealing with the remaining issues towards the end of this letter.

Although Part II of the Order deals with metered estates, Part I of the Order has not been amended to exclude metered estate customers. Without such an exclusion, it would appear that a metered estate customer is able to take advantage of the provisions of Part I of the Order as well as Part II.

Article 24.1 of the Order introduces the concept of a metered estate customer having “*the necessary authorisation to change supplier*”. However, the Order does not define what is meant by this. This concept is central to the operation of the Order to metered estates since a request by a metered estate customer with the necessary authorisation triggers a tank transfer or a tank uplift. Shell therefore considers that the Order needs to make clear exactly what a customer needs to show to demonstrate that they have the necessary authorisation. It is essential that the Commission provides clarity on this issue since any ambiguity risks allowing an entire metered

estate to be switched without a majority of customers having agreed to the switch. It is not sufficient for this to be incompletely addressed in the explanatory notes.

On a related point, Article 26.3 refers to the existing metered estate supplier "*being satisfied*" that the metered estate customer has the authorisation to switch. Again it is not clear what standard will suffice here. The existing supplier will want to set this at a high standard while the new supplier will want a low standard. Again this might be addressed by inserting a definition of what constitutes "*necessary authorisation*".

Shell also considers that the section of the Order on metered estates fails to deal with the additional complexities relating to property rights and the provision of meters. In some circumstances the tank(s) on a metered estate is situated on land which is leased to the existing metered estate supplier. The lessor is often, but not inevitably, the developer of the estate. The supplier on a metered estate must provide for each individual customer a meter. These meters form part of the metered estate infrastructure and have a non negligible capital value. The Order does not provide for the transfer of these meters nor for a value to be attributed to them on transfer. The absence of any provisions relating to interests in land and the transfer of meters will make obligatory tank transfer of tanks on metered estates impractical.

More generally, by definition a metered estate is an area with more than one customer supplied through common infrastructure. Shell is concerned that the Order appears to put the interests of one customer who wishes to switch ahead of all others. This is unsatisfactory.

1.2 Vires

As Shell indicated in its comments on previous drafts, some provisions of the Order may fall outside what is permitted by Schedule 8 of the Enterprise Act 2002. In particular, Article 3 of the Order continues to create free standing rights for both LPG customers and new suppliers. Schedule 8 allows the Commission to impose obligations but not create rights and that those obligations can only be imposed on a person supplying goods and services. Therefore, it is Shell's view that, to the extent that it has any legal consequence, Article 3.1 may be outside the scope of the Commission's statutory powers.

Further, it is still not clear to Shell what new legal rights or obligations are created by Article 3.1. A right to "*request*" seems to Shell to fall short of creating any obligation on the outgoing supplier to sell a tank and that obligation does not appear elsewhere in the Order. As Shell has suggested before, a better approach would be for the draft Order simply to impose obligations on the existing supplier and the new supplier to take certain actions where the customer took certain steps (i.e. made a request). Shell would therefore question whether Article 3.1 has any legal effect and therefore suggests that it is removed from the Order. Shell believes that it is not appropriate to include provisions in secondary legislation which are not intended to make any change to existing rights and obligations.

1.3 More than one new supplier

Because of the way the Commission has defined 'new supplier' it is possible for an existing supplier to receive communications from more than one person claiming to be a new supplier and claiming to be entitled to buy a tank. The obligations of an existing supplier in these circumstances must be clearly defined. In the draft Order they are not.

1.4 LPG remaining in the tank on transfer

A significant issue that Shell has raised before, but which remains unaddressed by the Order, is what happens where a tank is transferred to a new supplier containing LPG supplied by the

existing supplier which has not been paid for by the switching customer. Shell refers the Commission to its previous comments on this issue. [CONFIDENTIAL]

1.5 Warranties

Another point made by Shell before is in relation to warranties. As with previous drafts, the Order does not make it a term of a tank transfer that the existing supplier and the new supplier agree to exclude the warranties as to satisfactory quality and fitness for purpose implied by operation of the Sale of Goods Act 1979. This appears to go against the Commission's stated intention at paragraph 135 of Appendix L to the Commission's report where it states that "*the provision of warranties as to the condition of the tank and/or pipework would be of limited value so that outgoing suppliers should not be obliged to provide them.*" Shell considers that the Order should make it a term of a tank transfer that the existing supplier and the new supplier agree to exclude such warranties (subject to the application of the Unfair Contract Terms Act 1977), as is permitted by Section 55 of the Sale of Goods Act 1979 (as amended by the Sale and Supply of Goods Act 1994).

Although an existing supplier must provide a statement of tank ownership, the Order does not provide for an existing supplier to provide a warranty as to title on a tank transfer. The Order therefore, continues to fail to reflect the Commission's intention as set out at paragraph 135 of Appendix L to its report.

1.6 Cooling-off periods

The timescales in the Order still do not take account of the 7 day cooling-off period required by law during which the customer may cancel the contract without penalty. Shell refer the Commission to its previous comments on this issue.

2. Other drafting points

2.1 Definitions

The definition of "*date of purchase*" in the Order provides that the date of purchase is the date on which payment for the tank is received by the seller. However, Shell envisages circumstances in which confusion and/or disagreement might arise as to when payment is received. To ensure that there is no confusion as between the new supplier and the existing supplier, Shell suggests that the Order should provide that any payments made in relation to tank transfer are to be made by electronic transfer.

"*eligible to switch*": Shell suggests that this definition is amended to refer to a customer "*who is not prevented from switching under a contract for the supply of LPG*" rather than referring to a customer that is "*able*" to switch. This removes the ambiguity and uncertainty that might arise here.

The definition of "*exclusivity period*" refers to a fixed period during which "*the customer is not able unilaterally to terminate the contract for the sole purpose of switching supplier*". Under Shell's standard terms and conditions, the customer may unilaterally terminate where the customer moves house. Shell suggests that the Order is amended to make clear that a right to unilaterally terminate in these circumstances will not make an otherwise exclusive contract non-exclusive for the purposes of the Order.

"*existing supplier*": Shell notes that the Commission has changed this definition so that it refers to the customer "*proposing*" to switch supplier rather than the customer "*deciding*" to switch supplier. However, Shell is not convinced that this change removes the original ambiguity. Shell considers

that it would be better to define “*existing supplier*” by reference to an objective act, such as the supplier to whom notice has been given, rather than a subjective state.

“*industry trade association*”: Shell welcomes the clarification at paragraph 30 of the Explanatory Memorandum that it is envisaged that an industry trade association for the purposes of the Order will be an association of suppliers in their capacity as LPG suppliers and not in any other capacity (eg. road hauliers). However, it is unclear why the Commission feels unable to make this explicit on the face of the Order.

“*metered estate*”: it is not clear why this term is defined in Part I of the Order since it is not used until Part II of the Order where it is defined again. Further, paragraph 38 of the Explanatory Memorandum indicates that this definition is intended to exclude metered estates that include commercial customers. We are not clear that this definition achieves this.

Shell considers that the definition should be amended so as to finish “and where the consumption of each customer is measured by a meter”.

“*new supplier*”: Shell notes that the reference in this definition to a customer who “*wishes*” to switch has been changed to a customer who “*proposes*” to switch. However, again Shell considers that this does not remove the original ambiguity and, as with the definition of “*existing supplier*” it is better to refer to an objective act.

“*RPI*”; this definition should refer to the Office for National Statistics.

2.2 Article 3

The right under Article 3 arises where a customer ‘*proposes*’ to change supplier. It is unclear how the existing supplier is able to verify that this state exists. Shell therefore suggests that Article 3 should instead make reference to notice having been given to the existing supplier, either by the customer or the new supplier on behalf of the customer. To the extent that Article 3.1 has any legal effect, it should be limited to those customers who are eligible to switch. Similarly, the reference to the customer in Article 3.3 should also be limited to those eligible to switch.

2.3 Article 4

Shell considers that Article 4.1(c) should refer to “*current applicable safety requirements*” (addition underlined). The Commission should also clarify in the Explanatory Memorandum that this refers to the safety requirements current at the time of uplift and not at the date of the Order.

The reference in Article 4.2 to “*a supplier*” should be to “*the new supplier and the existing supplier*” and the reference to “*the tank transfer and the tank uplift*” should be to “*any tank transfer and any tank uplift*”. The Order as drafted appears to place the obligation on any person who supplies domestic bulk LPG rather than the specific suppliers involved in a particular tank transfer or uplift.

2.4 Article 5

Articles 5.1 and 5.2 impose separate obligations on the new supplier to communicate contractual notice and a tank transfer request to the existing supplier on behalf of the customer. This creates scope for contractual notice and a tank transfer request to be given to an existing supplier at different times. Therefore, we suggest making provision in the Order for a tank transfer request and, where relevant, contractual notice, to be communicated to the existing supplier at the same time. Shell considers that the potential for confusion here may well create real commercial difficulties. Shell also requests that the Commission clarify in the Explanatory Memorandum the

time at which notice given under the Order is effective. Is it the time at which notice is given by the existing supplier or time at which notice is received by the new supplier?

2.5 Article 6

The Order allows for the possibility of a “*customer proposing to switch*” to approach more than one new supplier at or about the same time. It is therefore possible to conceive of circumstances where two (or more) new suppliers consider that they have a right to buy the tank at the same time. Shell suggests that this possibility is addressed by providing that the existing supplier is only required to sell the tank to the supplier that first gave notice that a customer of the existing supplier requested a tank transfer.

Article 6.1 refers to a supplier receiving notice pursuant to Article 5. However, it goes on to refer specifically to only one of the two possible forms of notice that can be given pursuant to Article 5. This drafting creates ambiguity and appears to suggest notice of a tank transfer request if not accompanied by contractual notice has no effect. This cannot be the Commission’s intention. This Article appears to have the effect that a customer may only have a tank transfer where either it gives notice of termination to the new supplier or where it makes a tank transfer request to a new supplier. There is no mechanism for a customer himself requesting a tank transfer from the existing supplier.

Article 6.2: Shell notes that the obligation to provide technical and safety documentation now applies to such documentation that is in the “*control of the existing supplier*”. However, no such qualification is applied to the obligation to provide information in relation to the service pipework. Therefore, Shell suggests limiting this obligation to provide only such information as is within the control of the existing supplier. This also appears more consistent with Article 6.3. Article 6.2 also provides for the existing supplier to provide information where the customer does not own the tank. This drafting appears to be wide enough to require information to be provided where the tank or service pipework is owned by a third party. Shell considers that it is inappropriate for there to be an obligation to provide all this information in these circumstances.

Article 6.2 does not require the existing supplier to prove ownership of the service pipework before it is transferred. In Shell’s case it does not own the underground pipework and therefore cannot transfer title to it.

Article 6.3: this Article requires the existing supplier to notify the new supplier of all documentation and information mentioned in Article 6.2 not within the existing supplier’s control. Since Shell cannot be absolutely certain that in any given case all of the possible information and documentation is within its control, this obligation should be limited by amending the Article to read, “*Where the existing supplier is aware that any information or documentation mentioned in Article 6.2 is not in its control, the existing supplier shall notify the new supplier accordingly*”.

Article 6.5: the Order continues to provide that the new supplier determines whether or not the existing supplier has complied with its obligations. Shell considers that it is inappropriate for the new supplier, who has an interest in the customer switching away from the existing supplier, to be in a position to determine whether the existing supplier has complied with its obligations.

Article 6.5 (deemed eligibility to switch) has also been extended to include the circumstances where an existing supplier is unable to provide the customer with a copy of its contract. Shell queries the legal basis for this provision since it is not referred to explicitly in the Commission’s report. Assuming the Commission does have the necessary vires, since there is no deadline by which to provide the contract to the customer (Article 6.4 refers to as soon as reasonably practicable), it is unclear at what point Article 6.5 has effect in these circumstances.
[CONFIDENTIAL]

Paragraph 14 of the Explanatory Memorandum to the Order explains that where a customer owns a tank, the existing supplier is required to send the customer documentary evidence of this to the customer. However, there does not appear to be a corresponding obligation in the Order.

2.6 Article 7

Article 7.2: there is still no backstop date for when the Tank Valuation Formula will apply where the new supplier makes an offer for the tank, but this is not acceptable to the existing supplier. The Commission's report states that in these circumstances any period of negotiation should be no more than two working days. Shell considers that the Order should be amended to reflect this.

Article 7.4: Shell considers that the words "*Unless the tank has already been sold by the existing supplier to a new supplier or another new supplier has already given notice under Article 7.3*" should be inserted at the beginning of this article. Otherwise there will be an obligation to uplift the tank where another new supplier serves notice under Article 7.4 in relation to the same customer.

Articles 7.5, 8.1 and 9.1: the language used to refer to time periods in these Articles is still inconsistent.

2.7 Article 9

Article 9: It is possible that telemetry equipment might be damaged when it is removed from the tank by the new supplier pursuant to Article 9, notwithstanding that it is removed with due care and attention. Shell considers that the Order should make clear that the new supplier is not obliged to pay compensation in the event that such accidental damage occurs.

Furthermore telemetry equipment incorporates a contents gauge, which is needed for the operation of the tank. When this equipment is removed a substitute gauge is required as otherwise it is impossible to identify the volume of LPG in the tank, giving rise to health and safety issues. The Order, therefore, should require the existing supplier to supply a substitute gauge when removing its telemetry equipment. Shell considers that, where telemetry equipment incorporating a contents gauge is installed and has not been removed when title to the tank passes, the new supplier should be entitled to deduct the cost of the new contents gauge and the installation of a replacement gauge from the consideration paid for the tank. The practical consequence of this approach is that a new supplier should be entitled to withhold some of the purchase price at the time that title to the tank passes. This will require some amendment to the definition of "*date of purchase*".

Unless this issue is addressed in the Order, there is likely to be a disincentive on a new supplier to engage in a tank transfer when a tank has telemetry attached to it.

2.8 Article 10

Article 10.2: the Commission has not addressed Shell's request that the existing supplier be notified where the time limits are suspended by operation of this Article. This comment also applies to Article 13.2.

2.9 Article 11

Article 11.2: if a copy of the customer's contract is not sent to the customer within 5 working days, the customer is deemed eligible to switch. This is to be contrasted with Article 6.4 where such a contract must only be provided as soon as reasonably practicable. This obligation appears odd as Article 11.3 does not set a time limit for the contract to be provided to the customer.

2.10 Article 12

The draft Order continues to allow for a customer switching to be without an LPG supply for up to six working days. Shell considers that this is undesirable from a customer service perspective, and that Article 4.2 does not remedy this issue.

2.11 Article 15

The obligation requiring the switching process to be completed within 42 days still falls only on the new supplier notwithstanding the scope for the existing supplier to delay the switching process. Shell remains of the view that this obligations should be imposed on both parties.

2.12 Article 16

Article 16.3: this Article provides for the exclusivity period to begin on the date of the contract, subject to one exception. However, it is not clear what this date will be when the date on which the contract is entered into and the commencement date of the supply under the contract are different. Shell requests that the Commission clarify which is the appropriate date for determining the start of the exclusivity period in these circumstances.

2.13 Article 18

We suggest that Article 18.1(b) is amended to read "*a statement of the volume of LPG delivered to the customer in litres and the price charged to the customer for that LPG in pence per litre*". We consider that this better reflects the Commission's intention.

2.14 Article 23

The explanatory memorandum indicates that the definitions in Article 2 of Part I of the Order do not apply to Part II. However, Article 23 does not contain all the definitions necessary for Part II of the Order. For example, definitions required for Part II include, "*date of purchase*", "*emergency cover*", "*new tank*", "*PSSR*", "*signage*", "*statement of eligibility to switch*", "*statement of eligibility to switch*", "*switching*", "*telemetry equipment*", "*working day*" and "*WSOE*". Shell suggests that these should be inserted into Part II of the Order.

2.15 Article 25

Although Article 25 provides for a metered estate supplier to use all reasonable endeavours to ensure continuity of supply to a metered estate customer, there is no corresponding obligation in relation to a customer on the same estate and supplied from the same tank who is unwilling or unable to switch.

2.16 Article 26

Article 26.4: this Article is rather odd since it refers to a metered estate customer being prohibited from switching by its contract. It is more likely that a customer is contractually free to switch but that a switch cannot take place because the customer does not have the necessary authorisation (i.e. permission of the other LPG customers on the metered estate). Also, a metered estate supplier will have separate contracts with each of the residents on a metered estate. Often some of these customers will be within periods of exclusivity while others will not. Therefore, Shell cannot see the benefit of sending the customer a copy of its contract; if anything, this is likely just to cause confusion. Shell therefore suggests that Article 26.4 is deleted.

2.17 Article 27

Article 27.1: this Article does not refer to a metered estate customer having the necessary authorisation to switch or to the existing metered estate supplier informing the new metered estate supplier that the customer does not have this authorisation. Shell considers that this can be addressed by adding a definition of eligible to switch to Part II of the Order to include details of whether the customer has the necessary authorisation to change supplier.

Article 27.2: this Article should be qualified to apply only where a metered estate customer is eligible to switch. Also, from a safety perspective it is essential for an incoming metered estate supplier to understand the layout of the metered estate service pipework. As currently drafted, the Order does not provide for such information to be exchanged between the existing metered estate supplier and the new metered estate supplier. Shell suggests that this important safety point is addressed by inserting a new sub-clause (b) equivalent to that at Article 6.2(b).

2.18 Article 32

Shell already provides the information specified in Article 32.1(b) on its invoices. On metered estates, however, because Shell only measures the LPG used by each customer in cubic metres (of gas), this has to be converted to pence per litre using a standard conversion rate. We would be grateful if the Commission would confirm that such an approach complies with the Order or amend the Order to allow for this approach.

2.19 Schedule 1

The Tank Valuation Formula still does not provide for a value to be attributed to the service pipework and paragraph 16 the Explanatory Memorandum states that the service pipework is not included in this formula and there should be no additional charge made by the existing supplier for service pipework on transfer. However, Shell is unclear as to the basis for this as the Commission's report does not explicitly provide for this.

The Formula Price formula appears to have a bracket missing (see the formula in the Explanatory Memorandum which includes the extra bracket). The formula should read " $FP = (a - 0.05 * x * (a - b)) + (c * (1 - 0.05 * y)) + (d * (1 - 0.1 * z)) + (e * (1 - 1/15 * w))$ " (addition underlined). Also, Shell considers that the fraction 1/15 in the last set of brackets should be expressed as a decimal. There also appears to be an error in the worked example in the Explanatory Memorandum for an above ground tank where the bracketed sum " $(£80 * 0.95)$ " should read " $(£80 * 0.90)$ ".

Shell considers that the definitions of "c" and "d" in Schedule 1 (20 and 10 year test respectively) contain some ambiguity. To address this Shell suggests that the two definitions are amended as set out below so that they conform more closely to the LPG COP1, part 3:

"c" is the 20-year test price where 20 Year Test means a thorough examination (which takes place 20 years after either the date of manufacture or the last thorough examination and the results of which are recorded) where all the tank fittings are replaced with new fittings and the tank out of service is subject to careful and critical scrutiny using suitable techniques including testing (where appropriate) to assess: (a) the tank's actual condition; and (b) whether, for the period up to the next examination, it will not cause danger when properly used if normal maintenance is carried out. For this purpose "normal maintenance" means such maintenance as it is reasonable to expect the user or owner to ensure is carried out independently of any advice from the competent person making the examination.

"d" is the 10-year test price where 10 year test means an examination of a tank (which takes place 10 years after either the date of manufacture or last thorough examination and the results of which are recorded) that is carried out which subjects the tank in or out of service (as appropriate)

to careful and critical scrutiny using suitable techniques including testing (where appropriate) to assess - (a) the tank's actual condition; and (b) whether, for the period up to the next examination, it will not cause danger when properly used if normal maintenance is carried out. For this purpose "normal maintenance" means such maintenance as it is reasonable to expect the user or owner to ensure is carried out independently of any advice from the competent person making the examination.

Shell considers that the Formula Price is not valid for written schemes which have different intervals for the in-service and thorough examination. Shell is aware that Calor have a 10 year test, then an enhanced 10 year test (after 20 years in service) followed by a thorough examination at 30 years. The new written scheme that Shell is proposing to adopt will also include reviews at these intervals.

3. Schedule 4

The obligation in paragraph 2 of Schedule 4.2 provides for certain information to be provided to the OFT for the year 1 July 2007 to 31 May 2008. Depending on when the Order enters into force, there is a possibility that this provision will require information to be provided for a period during which the Order did not apply. Shell suggests that the Order should be amended so that this information is not required to be provided for the period during which the Order is not in force.

4. Conclusion

Shell considers that the draft Order published by the Commission raises significant practical and legal issues and should not be implemented in its current form. On each occasion over the last 15 months since the report was published that Shell has been consulted in respect of a draft Order it has tried to make helpful and constructive comments so as to assist the Commission to produce practical and sensible provisions. It is becoming increasingly concerned that the Commission is going to make an Order which will impose a disproportionate regulatory burden and significant commercial uncertainty on a relatively small sector of the economy. Shell urges the Commission to give serious consideration to the comments made in this letter, which are made with the intention of assisting the Commission to produce a workable Order, and would willingly attend a meeting to discuss them further if that would be helpful.

Yours sincerely

Charles Bankes
Partner