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Commission for Energy Regulation  
The Exchange  
Belgard Square North  
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Dublin 24

3<sup>rd</sup> February 2012

**RE: Consultation Paper on Generator Financial Reporting, SEM-11-106 (the Consultation)**

Dear Fergus,

Bord Gáis Energy (BG Energy) has taken the opportunity to review the Consultation Paper on Generator Financial Reporting in the SEM (the Consultation) and has a number of observations to make which are enumerated hereinafter.

**1. Overview**

BG Energy believes that the level of information requested in the Consultation as well as the proposed publication of such by the Regulatory Authorities (RAs), is wholly inappropriate and disproportionate. BG Energy accepts that the RAs can request information but asserts that the extent of information that can legitimately be requested is limited by the purposes for which the information is sought, both under the generic generator licence conditions and functions pursuant to SEM legislation.<sup>1</sup> The right to information does not extend to the level of detail requested under the Consultation or to the publication of this information. Furthermore, the publication of this information would prejudice the commercial position of the generator licensee.

**2. The RAs' Objectives and Functions**

BG Energy accepts the RAs' objectives of fostering confidence and transparency in the market but argues that this already exists as has been recently recognised by the RAs and the SEM Committee (SEMC) in its Decision Paper on Market Power and Liquidity<sup>2</sup> and as illustrated by the investment that has been made in SEM since its establishment.

**2.1. Transparency**

BG Energy believes that the current degree of transparency in the SEM is more than adequate for consumers or investors who wish to make informed decisions. This view is supported by recent observations and

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<sup>1</sup> The performance of the RAs' functions in relation to SEM matters requires regulatory activities to be "transparent, accountable, proportionate, consistent and targeted only at cases where action is needed." (Section 9BD Electricity Act 1999 as amended (ROI), Section 9(7)(a) Electricity (Single Wholesale Market) (Northern Ireland) Order 2007)

<sup>2</sup> CER, NIAUR, SEM Market Power & Liquidity, A SEM Committee Decision Paper, 1<sup>st</sup> February 2012, SEM-12-002, p.15

publications from the SEMC. Market rules and transparency<sup>3</sup> are acknowledged by the RAs in this Consultation as having played an important part in encouraging investments in new generation capacity and that it is a “natural extension of this approach (to) ... publish a greater level of information on the profitability of generators” to deliver further information to potential new entrants and appropriate signals for market entry. However, the SEMC has recently stated that “the BCoP, MMU and DCs have helped ensure that generator bids are at competitive SRMC levels, resulting in SEM wholesale prices (SMP) that are efficient and providing the correct market signals.”<sup>4</sup>

With reference to SEM legislation,<sup>5</sup> BG Energy believes that as the RAs have not demonstrated a problem at which action should be targeted, it is inappropriate to present this Consultation on the basis of an unspecified potential / existing problem of which generators are unaware of. Furthermore, there is no cause or basis for requesting or indeed publishing the non-aggregated information under the Consultation and the proposals do not align with the RAs’ obligations in carrying out their activities.

## **2.2. Consumers’ and Other Interests**

While the principal function of the RAs is protection of the consumer, there are other principles which the RAs must consider in the execution of their functions such as the promotion of effective competition between persons engaged in, or in commercial activities connected with, the sale or purchase of electricity through the SEM.<sup>6</sup> Regard must also be had to the need to ensure that licensed electricity generators are able to finance activities and also to promote efficiency and economy on the part of generation licence holders.<sup>7</sup>

In light of these requirements on the RAs, the level of information both requested, and potentially to be published, pursuant to the Consultation implies revealing commercially sensitive information central to BG Energy’s modus operandi.<sup>8</sup> This will impact the efficient and economic operation and ultimately the competitiveness of the company. Furthermore, receipt of information such as that concerning Contracts for Differences (CFDs) and Power Purchase Agreements (PPAs) may impinge on current contracts and deter future non-licensed counterparties contracting with SEM participants and ultimately hinder companies’ capabilities of financing SEM activities.

Placing an emphasis on the principal objective of protecting consumer interests for the purposes of the Consultation without regard to the other considerations the RAs must adhere to, is contrary to the RAs’ obligations, disproportionate and potentially detrimental to the competitiveness of generator companies. Furthermore, BG Energy does not understand how the interests of consumers can be better met beyond the provision of strict market rules through the BCoP, Directed Contracts and ongoing market monitoring through the activities of the MMU and details of expected benefits would be helpful in this regard?

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<sup>3</sup> Underscored by SEM’s Bidding Code of Practice (BCoP), Market Monitoring Unit (MMU) and Directed Contracts (DCs)

<sup>4</sup> CER, NIAUR, SEM Market Power & Liquidity, A SEM Committee Decision Paper, 1<sup>st</sup> February 2012, SEM-12-002, p.15

<sup>5</sup> Regulatory activities are to be “transparent, accountable, proportionate, consistent and targeted only at cases where action is needed.” (Section 9BD Electricity Act 1999 as amended (1999 Act) (ROI), Section 9(7)(a) Electricity (Single Wholesale Market) (Northern Ireland) Order 2007)

<sup>6</sup> Section 9BC(1) 1999 Act (ROI), Section 9(1) Electricity (Single Wholesale Market) (Northern Ireland) Order 2007) (NI)

<sup>7</sup> Sections 9BC(2) and (4) 1999 Act (ROI), Sections 9(2)(b) and 9(4)(a) Electricity (Single Wholesale Market) (Northern Ireland) Order 2007) (NI)

<sup>8</sup> Please see section 4 below which deals further with the issue of commercial sensitivity

### **2.3. Policy Making**

Given the lack of basis for this Consultation as explained in section 2.1 above, BG Energy believes that the RAs receive sufficient information to effectively influence policy currently and there is absolutely no need to publish the requested non-aggregated information for the purposes of influencing policy. Moreover, a number of the line items specified in the Consultation's Section 6 template (e.g. SEM pool price; capacity payments; ancillary services), are already available in the public domain (from SEMO/ TSOs). It is respectfully suggested that such information can therefore be sought and obtained from these parties who hold all of the relevant information; otherwise this is 'double-reporting' - an undesirable standard under European law. Reporting obligations should be kept to a minimum, should not create unnecessary costs or administrative burdens for market participants, should avoid double reporting and "required information or parts therefore should be collected from other persons and existing sources where possible."<sup>9</sup>

### **2.4. Comparison of Generators' Financial Information within or outside SEM**

BG Energy asserts that the RAs' proposals go beyond that required of GB generators and inappropriate conclusions can be derived from comparative financial information when markets differ greatly and additional background to such information is unknown making meaningful comparisons extremely difficult.

Reference is made in the Consultation to the recent decision in GB to publish generator financial information. Importantly, Ofgem carried out an extensive consultation process with market participants and found there were transparency, competition and consumer engagement problems in BETTA and measures were adopted to deal with these problems. One such measure is an obligation on generators to publish a "Consolidated Segmental Statement". The Statement contains only aggregated information.<sup>10</sup> The RAs' proposals for the SEM are thus too onerous and unnecessary when, unlike GB, no specific problems are targeted and the information requested for submission and publication is non-aggregated.

Added to this, it appears that the RAs consider GB to be an appropriate market with which to compare SEM generators' financial information. Again, it is inappropriate to use BETTA as a comparison market when BETTA is a bi-lateral, highly concentrated market which has been found to have competition issues. Conversely, the SEM is a centrally dispatched pool market which has recently been reviewed and found to have efficient prices and market signals. BETTA allows for much more obscure wholesale prices as compared to the SEM's wholesale prices which are unambiguously visible to all SEM participants/ consumers/ interested stakeholders and based on a set of regulated market rules. Additional considerations also impact the interpretation of comparative financial information. This includes the portfolio of generators and the type of generation mix and its utilisation in a market, as well as the age of plants generators are operating with. The level of investment recovery required from a particular plant or portfolio of generation also varies from company to company and has a significant impact on the profitability of a businesses.

Thus, unlike GB, no specific problem exists in the SEM that warrants this regulatory action and the information requested in the Consultation is unnecessarily detailed. Inappropriate and incorrect

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<sup>9</sup> Regulation (EU) 1227/2011 on wholesale energy market integrity and transparency (REMIT), recital 19

<sup>10</sup> Examples of such information can be found on Ofgem's website at <http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=283&refer=Markets/RetMkts/ensuppro>

assumptions can be drawn from comparative results between generators either within or outside SEM which could result in unanticipated, undesirable outcomes for potential entrants and to the SEM itself.

### **3. Condition 2 of the Generator's Licence**

Despite the RAs' powers to request specific information, BG Energy believes that the RAs' basis for the right to both request and publish detailed information is limited.

The Consultation makes direct reference to the Generic Generation Licence AIP-SEM-07-333, as providing the power to the RAs to specify the format and content of financial reporting as well as providing the basis for publication of licensed generators' annual accounts.

In relation to the format and content of accounts, as well as the publication of such information, sections 2, 5, 6 and 7 of Condition 2 are relevant. The Purpose of Condition 2 is laid out in section 2, whose purpose is for "...ensuring that the Licensee... maintains accounting and reporting arrangements which enable separate accounts to be prepared for the Generation Business...". Section 6 allows for the preparation of accounting statements "in accordance with such guidelines as are reasonable and appropriate for the purposes of this Condition". Section 7 allows for the section 6 guidelines to "...specify the form and content of accounting statements..." Section 6 further stipulates that when the accounts are delivered to the Commission, "...shall (with the exception of the part of such statements which shows separately the amounts charged, apportioned or allocated and describes the basis of charge or apportionment or allocation respectively) publish the same...". Section 5 provides a further note that accounting statements "...unless otherwise approved by the Commission having regard to the purposes of this Condition..." again with the same exceptions as provided in section 6 above "...be published with the annual accounts of the Licensee."

Thus, while there is a right to specify the detail of the accounts, the level of non-aggregated information that can be requested is limited to how reasonable and appropriate it is for the purposes of this Condition (per sections 5 and 6). BG Energy asserts that the level of non-aggregated information requested goes beyond the purpose of Condition 2 of maintaining separate generation accounts. The amount of details requested are evidently neither reasonable nor appropriate guidelines to adopt for the purpose of maintaining separate generation accounts, and its publication is explicitly excluded by sections 5 and 6 which except the disclosure of granular information when it cannot be justified by reference to the purpose of Condition 2.

### **4. Usage and Publication of Information**

#### **4.1. Commercially Sensitive Information**

BG Energy acknowledges that there may be "genuine interest from stakeholders regarding financial performance of generators operating in the SEM"; however, BG Energy does not believe that this interest is a reasonable basis for requesting non-aggregated information as it goes far beyond that information which is provided for in published accounts. Accepting the principle that market confidence and integrity is a key component of competitive and effective markets, this cannot be achieved without recognition of the well-established EU principle of proportionality. With reference to REMIT, the principle objective of which is to ensure the functioning of the internal market in energy by ensuring "wholesale energy market transparency

and integrity”<sup>11</sup> the Regulation stipulates that any of its proposals should “not go beyond what is necessary...” in particular in its impact on those who trade in wholesale energy products “...in order to achieve that objective.”<sup>12</sup>

The level of information requested in the Consultation goes beyond that required of REMIT. Moreover, REMIT deems it important that the obligation of professional secrecy applies to those who receive confidential information and the confidentiality, integrity and protection of the information received should be ensured.<sup>13</sup> A number of other EU Regulations also acknowledge the requirement not to disclose information covered by the obligation of professional secrecy or confidential commercially sensitive information.<sup>14</sup> Furthermore, from an Irish legislative perspective,<sup>15</sup> when the RAs are publishing information they “shall” have regard to the need for excluding from publication any matter which relates to the affairs of a person where publication would or might adversely affect the person’s (including electricity licensees) interests.

BG Energy contends that information such as that relating to CFDs and PPAs is personal to the company’s affairs and mode of operation, to the extent that it distinguishes the company’s competitiveness in the SEM. Furthermore, information relating to fuel and non-fuel operating costs and certain “Other Revenue” are also considered personal to the company’s mode of operation. Should any such information be published, it will prejudice the company’s competitive position. This information must thus be protected and cannot be published. The RAs do not have the freedom to decide on publication once the information is commercially sensitive. This viewpoint is reinforced by the above cited legislative points as well as the discussion hereafter.

#### **4.2. Limitations on Freedom of Information and Commercially Sensitive Information**

In considering releasing any information the RAs must have due regard to their freedom to do so and the sensitivities exposed by the publication of this information. The Freedom of Information Act 1997, as amended (FOI Act) provides valuable guidance in this regard.

Section 27 of the FOI Act stipulates that commercially sensitive information is exempt from release if it contains trade secrets or financial or commercial information whose disclosure “could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation” or “could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates”.

Trade secrets may be confidential information of a commercial character such that it constitutes an economic asset of the business concerned. Furthermore, financial and commercial information includes: “...information in the nature of operating and financial information.”<sup>16</sup> A company has reasonable grounds to be concerned about the disclosure/ publication of confidential information if such disclosure will give a

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<sup>11</sup> Recital 32 REMIT Regulation

<sup>12</sup> Recital 32 REMIT Regulation

<sup>13</sup> Recital 30 REMIT Regulation

<sup>14</sup> E.g. Regulation (EC) 714/2009 on conditions for access to the network for cross- border exchanges in electricity Articles 3, 17 and 20

<sup>15</sup> Statutory Instrument 60/2005 EC (Internal Market in Electricity) Regulations 2005, Regulation 5 (ROI), The Energy (Northern Ireland) Order 2003, Article 7(2) (NI)

<sup>16</sup> Guidance is provided pursuant to the FOI Acts by the Irish government on what constitutes trade secrets. This guidance is made with reference to court decisions and is available at [http://foi.gov.ie/12-10-commercially-sensitive-information/#limitations\\_on\\_the\\_exemption](http://foi.gov.ie/12-10-commercially-sensitive-information/#limitations_on_the_exemption)

company's competitors an advantage in the market or could be used to prejudice a company's commercial standing or contractual negotiating position.

In deciding whether confidential information will truly affect generators' interests a number of questions can be asked of the information sought.<sup>17</sup> This has been considered widely under FOI provisions at home and abroad and general guidelines have been established aimed at assisting the determination of whether information is commercially sensitive or not.

There are a number of questions which can be asked of information to determine whether information has a right to protection from disclosure or publication. These include:<sup>18</sup>

1. Does the information relate to/ impact on a commercial activity?

Commercial activity relates to buying or selling of goods/ services. BG Energy believes that the non-aggregated information requested in the Consultation (CFDs/ PPAs/ fuel and non-fuel operating costs/ certain other revenues) has a direct relationship with the commercial activity of generating electricity and its disclosure would thus negatively impact BG Energy's commercial activity.

2. Is that commercial activity conducted in a competitive environment?

As the SEM is not a monopoly market and there are a number of generators competing in the SEM, it is more likely the publication will have a prejudicial impact on BG Energy's interests.

3. Would there be damage to reputation or business confidence?

Such damage can occur if information released has a significant impact on revenue or threatens the ability to obtain suppliers or to secure finance. BG Energy believes that the publication of the non-aggregated information in the Consultation may provide sensitive information which could jeopardise future negotiations or contractual agreements, and incidentally revenues earned and hedging/ financing opportunities.

4. Is the information commercially sensitive?

Companies compete by offering something different to their rivals. Any information which identifies how a company has developed its unique element / selling point such as contractual negotiation approaches/ outcomes/ prices, is likely to be commercially sensitive. This clearly applies to CFDs / PPAs / fuel and non fuel operating costs and certain other revenues under the Consultation.

5. What is the likelihood of prejudice?

BG Energy believes that the disclosure of this information presents more than a remote possibility of prejudice to the company's interests and is a substantial risk to competitiveness and profitability.

The answers above clearly illustrate that the information in CFDs/PPAs/fuel or non-fuel related operating costs/ certain other revenue can thus be considered trade secrets and commercially sensitive and as such BG

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<sup>17</sup> For example, in ROI, as above at [http://foi.gov.ie/12-10-commercially-sensitive-information/#limitations\\_on\\_the\\_exemption](http://foi.gov.ie/12-10-commercially-sensitive-information/#limitations_on_the_exemption) and in the UK in the Freedom of Information Act Awareness Guidance No. 5 UK, available at [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance\\_5\\_-\\_commercial\\_interests.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_5_-_commercial_interests.pdf)

<sup>18</sup> See above fn. 17, Freedom of Information Act Awareness Guidance No. 5 UK, pages 6-7

Energy believes that such information must be excluded from generators' reported accounts pursuant to the FOI Act, and certainly must not be published, to avoid prejudicing its competitive or commercial negotiating positions.

#### **4.3. Summary on the Limitation of the RAs on the Publication of Information**

On the basis of the above discussion in sections 4.1 – 4.2, aside from the fact that BG Energy believes the non-aggregated information cannot legitimately be requested, BG Energy considers that the non-aggregated information requested in the Consultation is commercially sensitive and cannot be published under any circumstances.

The Consultation's proposals go beyond that required of REMIT and are contrary to the EU principle of proportionality and the requirements to have respect for the confidentiality of commercially sensitive information under EU and Irish legislation (e.g. the FOI Act).

Sufficient information currently exists for genuinely interested stakeholders in the SEM. The provision of information beyond what is already available is not necessary for market confidence or integrity purposes. BG Energy has shown that the detail of the non-aggregated information requested in the Consultation can be deemed commercially sensitive and furthermore that its publication would severely prejudice the company's interests.

#### **5. Summary and Next Steps**

BG Energy accepts that the RAs have the power to request and publish certain information. However, the level of detail that can be requested is limited by virtue of the generic generation licence and the RAs' powers and obligations under relevant EU and national legislation. Notably, the RAs do not have a right to publish commercially sensitive information.

In summary BG Energy wishes to re-iterate the following points:

1. The SEM is a transparent market providing efficient prices and investment signals, as recognised in the SEMC Decision Paper on Market Power and Liquidity SEM-12-002;
2. Unlike Ofgem's review of the BETTA market, the RAs have not demonstrated that action is needed over and above the current provisions and obligations in any area of the SEM;
3. Although the RAs' primary duty is protection of consumers' interests, this is within the confines of ensuring that those parties competing in the market are in a position to continue commercial activities and economic operation;
4. Through generator accounts submitted annually and other sources of information, the RAs have access to sufficient information for informing policy and additional information certainly does not need to be published to further inform policy;
5. Condition 2 of the generator's generic licence allows for the form of accounts to be specified only when it is reasonable and proportionate to the purpose of enabling separate accounts to be prepared for generation. The non-aggregated information requested is unreasonable and disproportionate for this purpose, and the RAs are thus not permitted to either request or publish it;

6. Professional secrets and commercially sensitive information must be respected and protected from disclosure/ publication. The RAs are bound by EU and national legislation in terms of their right to disclose commercially sensitive information. Under generally accepted guidelines, the non-aggregated data requested in the Consultation (CFDs / PPAs / fuel and non fuel operating costs and certain other revenues) is commercially sensitive and cannot be published.

On the basis of the above key points, BG Energy does not support the implementation of the proposals outlined in the Consultation and believes that the current provisions are adequate for the purposes of identifying value chain opportunities, informing policy decisions and protecting consumer interests through market monitoring.

BG Energy however is a strong advocate of market transparency and integrity but believes that the RAs and SEM generator licensees must work within the confines of the REMIT regulation to ensure confidence and integrity in the SEM. If the RAs are seeking a more effective method of obtaining and portraying information, such as a standardised template of key aggregated financial indicators, BG Energy are willing and open to discussing the potential for such with the RAs.

I trust that you provide the above comments and suggestions helpful. If you wish to discuss any of the issues further, please do not hesitate to contact me.

Yours sincerely,

Julie-Anne Hannon  
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Bord Gáis Energy

{By email}