

CODE MODIFICATION PROPOSAL No 0312
Introduction of Two-Thirds Majority Voting to the UNC Modification Panel
Version 1.0

Date: 26/05/2010

Proposed Implementation Date: 01/10/2010

Urgency: Non Urgent

1 The Modification Proposal

a) Nature and Purpose of this Proposal

Nature:

It is proposed that where a condition is introduced to a Transporter's Licence which requires that the Transporter bring forward a UNC Modification Proposal, a recommendation to implement that Proposal by the UNC Modification Panel must be based on gaining at least two-thirds of votes in favour of implementation cast by those Panel members present.

To illustrate this proposal using the current UNC Panel arrangements; assuming a Panel comprised of 5 Transporter representatives and 5 Shipper representatives and that all votes are cast, it would take at least 7 votes in favour for the Modification Panel to recommend implementation of a UNC Modification Proposal originating from a licence condition.

For clarity, it is intended that this proposal should only apply to Modification Proposals arising either directly from an obligation or condition to bring forward a proposal¹ (i.e. a Modification Proposal raised in response to a licence condition) or indirectly (i.e. a Modification Proposal arising from an industry review process which was initiated to meet a licence condition) from a Transporter's licence condition.

For all other Modification Proposals not included in the above definition, the current rules shall prevail; i.e. a simple majority is required for a recommendation to implement.

Purpose:

This proposed rule would replace the current arrangements, where a simple majority (i.e. over 50% of the votes cast) is required to recommend implementation. In practice, this means under the current voting arrangements that a Modification Proposal can be recommended for implementation provided all Transporter representatives recommend implementation, plus just one Shipper representative (or, all Shipper representatives plus one Transporter representative). Therefore, only a minority of Shipper (or Transporter) support is required for what may be a fundamental change to the terms of their contract under the UNC.

¹ This would also include proposals arising from a "Significant Code Review" (SCR) should such a concept be adopted under the UNC in future.

Furthermore, Modification Proposals originating from a licence condition tend, by definition, to be controversial, as they originate not from a signatory to the UNC, but from the Regulator. In many cases, such as “Exit Reform”, these proposals represent a fundamental change to the terms of the UNC. It is all the more important then, that materially affected parties have as full a voice as possible, but without creating an unreasonably high hurdle that might lead to filibustering by parties opposed to a change. Two-thirds majority voting ensures a greater proportion of minority views are considered when the Modification Panel decides whether to recommend implementation of a licence-originated Modification Proposal.

b) Justification for Urgency and recommendation on the procedure and timetable to be followed (if applicable)

This is a ‘Non Urgent’ Modification Proposal. We suggest the following timetable to achieve the proposer’s recommended 1 October 2010 implementation date.

3 June 2010 – Initial Discussion at Transmission Workstream

17 June – Further Discussion at Governance Workstream

15 July – Proceeds to Consultation

19 August - Modification Panel Vote

August, September – With Ofgem for a decision

1 October 2010 – Implementation date.

c) Recommendation on whether this Proposal should proceed to the review procedures, the Development Phase, the Consultation Phase or be referred to a Workstream for discussion.

Following discussion at the Transmission and Governance Workstreams and subject to comments received, the Proposer considers this proposal should proceed to consultation.

2 User Pays

a) Classification of the Proposal as User Pays or not and justification for classification

No UK Link impact has been identified by the Proposer and therefore this proposal is not classified as “User Pays”.

b) Identification of Users, proposed split of the recovery between Gas Transporters and Users for User Pays costs and justification

N/A.

c) Proposed charge(s) for application of Users Pays charges to Shippers

N/A.

d) Proposed charge for inclusion in ACS – to be completed upon receipt of cost estimate from xoserve

N/A.

3 Extent to which implementation of this Modification Proposal would better facilitate the achievement (for the purposes of each Transporter’s Licence) of the Relevant Objectives

In accordance with Standard Special Condition A11.2:

“In relation to a proposed modification of the network code modification procedures, a reference to the relevant objectives is a reference to the requirements in paragraphs 9 and 12 of this condition (to the extent that those requirements do not conflict with the objectives set out in paragraph 1)”:

In respect of A11.2 9 (f);

“the consideration of any representations relating to such a proposal made (and not withdrawn) by the licensee, any other relevant gas transporter, any relevant shipper, or any gas shipper or other person likely to be materially affected were the proposal to be implemented”

Two-thirds majority voting would ensure that those materially affected parties have a greater say (compared to the *status quo*) on whether a Modification Proposal originating from a licence condition should be recommended for implementation.

It is particularly important that affected parties’ rights to appeal (including the rights of consumers) are assured under the statutory Energy Codes Modification Appeals process. In the UNC116 appeal process the Competition Commission expressed concerns where Ofgem is closely involved in the origination of Code Modification Proposals:

“[I]t is less clear that the system of checks and balances established in the code modification procedures works if GEMA is, to use GEMA’s words, the ‘effective progenitor’ of a proposal (or at least if it is perceived as such). The existing system envisages that GEMA will express a firm view as to what (if any) reform ought to take place at the conclusion of the process, rather than at the start of the process. If GEMA is the effective progenitor of a proposal, there may be a perception that it cannot fulfil its intended role under the UNC modification procedures without having prejudged, or at least appeared to prejudge, the matter.”²

Transporter Panel members will necessarily feel obliged to vote for a proposal originating from a condition of their licence³, and it is this potential skewing of the Panel vote that this proposal seeks to address. As a result, the proposer considers that the opportunity to appeal would be better safeguarded if this Modification Proposal

² Para 6.192, ‘Decision and Order of the Competition Commission’, 10 July 2007.

³ It could be argued that it is difficult for a monopoly network business to genuinely express their views on such Modification Proposals, as to do so may potentially undermine their ongoing regulatory relationship with Ofgem. If there is little or no adverse impact on their business activities it is hard to believe that they would ever vote against a proposal that has effectively originated from Ofgem. However, such proposals may still have a material impact on Shippers and their customers.

were to be implemented.

In addition, there may be concerns about the scope for prejudgment and Ofgem acting as “judge, jury and executioner” should the SCR process outlined in Ofgem’s recent industry code governance review proposals be implemented. In particular, proposals to give consumer representatives voting rights and Ofgem the power to appoint one of these representatives might be seen to weaken statutory rights of appeal if such parties’ views were to be unduly influenced by those of Ofgem. There is a risk that a party could challenge the legitimacy of Modification Panel recommendations for proposals that originate from an Ofgem SCR, especially if changes to voting rights were to be implemented. The extra safeguard proposed here, of commanding a two-thirds majority, should also help protect Ofgem from potential accusations of prejudgement and any related legal actions.

The accountability and transparency of the industry code modification process is enhanced by an effective modification appeals process. By ensuring a slightly higher bar to recommend implementation of all Modification Proposals originating from Transporter licence conditions, this can be achieved. In turn, this will enhance the efficiency and effectiveness of the UNC Modification Procedures.

4 The implications of implementing this Modification Proposal on security of supply, operation of the Total System and industry fragmentation

No direct impacts identified.

5 The implications for Transporters and each Transporter of implementing this Modification Proposal, including:

a) The implications for operation of the System:

None identified.

b) The development and capital cost and operating cost implications:

None identified.

c) Whether it is appropriate to recover all or any of the costs and, if so, a proposal for the most appropriate way for these costs to be recovered:

No costs expected to be incurred.

d) The consequence (if any) on the level of contractual risk of each Transporter under the Uniform Network Code of the Individual Network Codes proposed to be modified by this Modification Proposal

May reduce the contractual risks arising from controversial Modification Proposals being implemented without the possibility of a Competition Commission Appeal.

- 6 The extent to which the implementation is required to enable each Transporter to facilitate compliance with a safety notice from the Health and Safety Executive pursuant to Standard Condition A11 (14) (Transporters Only)**
- Not applicable.
- 7 The development implications and other implications for the UK Link System of the Transporter, related computer systems of each Transporter and related computer systems of Users**
- No impacts identified.
- 8 The implications for Users of implementing the Modification Proposal, including:**
- a) The administrative and operational implications (including impact upon manual processes and procedures)**
None identified.
 - b) The development and capital cost and operating cost implications**
None identified.
 - c) The consequence (if any) on the level of contractual risk of Users under the Uniform Network Code of the Individual Network Codes proposed to be modified by this Modification Proposal**
May reduce the contractual risks arising from controversial Modification Proposals being implemented without the possibility of a Competition Commission Appeal.
- 9 The implications of the implementation for other relevant persons (including, but without limitation, Users, Connected System Operators, Consumers, Terminal Operators, Storage Operators, Suppliers and producers and, to the extent not so otherwise addressed, any Non-Code Party)**
- Code parties should feel more involved in the consultation and Panel recommendation stage as there is a greater likelihood of minority views being taken into account for what will often be fundamental changes to contractual terms of the UNC.
- 10 Consequences on the legislative and regulatory conditions and contractual relationships of the Transporters**
- A recommendation to implement by Panel will carry more weight, therefore giving a greater degree of legitimacy to proposed Code changes originating from a licence condition.

11 Analysis of any advantages or disadvantages of implementation of the Modification Proposal not otherwise identified in paragraphs 2 to 10 above

Advantages

- A two-thirds majority lends a greater sense of legitimacy to Code Proposals originating from a licence condition.
- Improved transparency and accountability of the code decision making process.

Disadvantages

- None identified.

12 Summary of representations received as a result of consultation by the Proposer (to the extent that the import of those representations are not reflected elsewhere in this Proposal)

Two-thirds majority voting as a concept has been discussed and debated in recent Governance Workstreams and support for the idea has been expressed by some Code parties.

13 Detail of all other representations received and considered by the Proposer

None received to date.

14 Any other matter the Proposer considers needs to be addressed

No.

15 Recommendations on the time scale for the implementation of the whole or any part of this Modification Proposal

By 1 October 2010

16 Comments on Suggested Text

To be provided.

17 Suggested Text

To be provided.

Code Concerned, sections and paragraphs

Uniform Network Code

Modification Rules

Section(s) TBC

Proposer's Representative

Richard Fairholme (E.ON UK)

Proposer

Richard Fairholme (E.ON UK)