

0484S:

Guidance for the production of legal text



By introducing a Legal Text Guidance Document, this modification seeks to clarify responsibilities with respect to the production of legal text in support of modification proposals. This will create a more transparent and consistent approach, helping to address concerns about the production of legal text.



Panel consideration is due on 19 June 2014



High Impact:



Medium Impact:



Low Impact:
UNC Modification Rules

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About this document:

This Final Modification Report will be presented to the Panel on 19 June 2014.

The Panel will consider the views presented and decide whether or not this self-governance change should be made.


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1 Summary

Is this a Self-Governance Modification?

The Modification Panel determined that this is a self-governance modification. Whilst implementation would have an impact on the Uniform Network Code (UNC) governance procedures and modification procedures, the impact would not be material.

Why Change?

The UNC is largely silent regarding the expectations on all parties for ensuring appropriate legal text is produced in support of proposed modifications. This lack of transparency creates uncertainty, and potentially leads to inconsistency that can impair the quality of text that is provided as well as adversely impacting the efficiency with which it is produced.

Solution

It is proposed that the modification rules be amended to require the creation of a legal text guidance document and that Parties are to have regard to that guidance document when producing text in support of a UNC Modification.

Relevant Objectives

Implementation would further Relevant Objective f) Promote efficiency in the implementation and administration of the Code.

Implementation

No implementation timescale are proposed.

There is no evidence that the costs of providing legal text would alter materially (either upwards or downwards) as a result of implementing the modification and subsequent compliance with the proposed guidance document.

2 Why Change?

The UNC Modification Rules are largely silent on the requirements of parties for ensuring that appropriate legal text is produced in support of proposed modifications. This creates ambiguity, and the potential for inconsistency and a lack of agreement regarding responsibilities. In turn this may create difficulties for those responsible for the drafting of legal text, and can create concerns that the quality and timeliness of legal text provided is not of the standard that might reasonably be expected for a contract such as the UNC.

A number of concerns regarding legal text have been expressed in recent months:

- Transporters have argued that the cost of producing legal text may be unduly high because of inefficiencies in the present process;
- Shippers have expressed concerns about the quality, consistency, impartiality and timeliness of text production; and
- Ofgem has quoted legal text concerns when exercising the Authority's power to send two recent Final Modification Reports back to the Modification Panel for amendment (Modification 0425V and 0451(A)).

The range of concerns expressed, and parties expressing them, suggests that the existing UNC provisions are not working economically and efficiently.

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3 Solution

To begin to address the range of concerns that have been identified, it is proposed that the Modification Rules are modified to introduce a new guidance document, the “Legal Text Guidance Document”. This does not represent a comprehensive change to the current process, but seeks to codify expectations and document the approach which parties are expected to take to ensure that consistent, high quality text is produced in a timely and efficient fashion. Creating a guidance document that can be modified allows for the industry to learn from experience and to develop and improve the guidance over time if and when concerns arise in future, or when alternative approaches are identified that are expected to lead to a more economic and efficient process for the production of legal text – the proposed document specifically provides for an annual review in order to encourage continual improvement.

UNC modification proposals vary. While a consistent basic framework can be followed, the effort and resources involved in legal text production also vary greatly from modification to modification. A guidance document rather than specific rules has been proposed in recognition of this variance, providing clear expectations but also flexibility. A light governance process for amending the document is proposed, under the control of the Modification Panel, enabling change to be made efficiently.

It is proposed that:

1. The Transporters be required to publish a Legal Text Guidance Document.
2. The initial content of the Legal Text Guidance Document be that which is provided as an Appendix to this modification proposal.
3. Parties have regard to the Legal Text Guidance Document when text is produced in support of modification proposals.
4. The Legal Text Guidance Document may be modified if the Modification Panel votes in favour of a proposed change and that the Modification Panel be given any necessary vires to undertake this.

User Pays

Classification of the modification as User Pays, or not, and the justification for such classification.

No User Pays service would be created or amended by implementation of this modification and it is not, therefore, classified as a User Pays Modification.

Identification of Users of the service, the proposed split of the recovery between Gas Transporters and Users for User Pays costs and the justification for such view.

Not applicable

Proposed charge(s) for application of User Pays charges to Shippers.

Not applicable

Proposed charge for inclusion in the Agency Charging Statement (ACS) – to be completed upon receipt of a cost estimate from Xoserve.

Not applicable

4 Relevant Objectives

Impact of the modification on the Relevant Objectives:	
Relevant Objective	Identified impact
a) Efficient and economic operation of the pipe-line system.	None
b) Coordinated, efficient and economic operation of (i) the combined pipe-line system, and/ or (ii) the pipe-line system of one or more other relevant gas transporters.	None
c) Efficient discharge of the licensee's obligations.	None
d) Securing of effective competition: (i) between relevant shippers; (ii) between relevant suppliers; and/or (iii) between DN operators (who have entered into transportation arrangements with other relevant gas transporters) and relevant shippers.	None
e) Provision of reasonable economic incentives for relevant suppliers to secure that the domestic customer supply security standards... are satisfied as respects the availability of gas to their domestic customers.	None
f) Promotion of efficiency in the implementation and administration of the Code.	Positive
g) Compliance with the Regulation and any relevant legally binding decisions of the European Commission and/or the Agency for the Co-operation of Energy Regulators.	None

Implementation would facilitate relevant objective f, promotion of efficiency in the implementation and administration of the Code by codifying a consistent process that all parties are expected to follow in order to support the production of UNC modification legal text. Responsibilities will be clarified and transparency will be introduced to the existing process. An opportunity will also be created for the process to be modified if and when desirable improvements are identified. Implementation would therefore be expected to increase certainty regarding the approach taken to the provision of legal text, and support changes which increase the efficiency with which text is produced.

5 Implementation

No systems changes are required to support implementation. Applying the guidance to modifications that are progressing through the modifications process is not expected to cause any difficulties since: the guidance largely encapsulates existing best practice; those responsible for the provision of text can seek to ensure the guidance is adopted informally prior to implementation; and because the status of the document is to provide guidance rather than formal contractual obligations.

As self-governance procedures are proposed, implementation could be sixteen business days after a Modification Panel decision to implement.

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6 Legal Text

Text has been prepared by Scotia Gas Networks as requested by the UNC Modification Panel at the February meeting and is published alongside this report.

The Workgroup is satisfied that this Text achieves the intent of this Modification.

7 Consultation Responses

Of the 9 representations received 8 supported implementation and 1 offered qualified support.

Representations are published alongside the Final Modification Report.

Representations were received from the following parties:

Organisation	Response	Relevant Objectives	Key Points
British Gas	Support	f - positive	<ul style="list-style-type: none">the Legal Text Guidance Document should clarify the production of Legal Text and improve these provisions for all parties.
DONG Energy	Support	f - positive	<ul style="list-style-type: none">introduces a process for the production of legal text will provide clarity and consistency which is currently absent in the UNC.
E.ON	Support	f - positive	<ul style="list-style-type: none">the guidelines will give greater confidence to code parties about the process and expectations for the production and delivery of legal text and ensure a more consistent approach.
Gazprom	Support	f - positive	<ul style="list-style-type: none">the introduction of guidance will have a positive effect by creating a more transparent and consistent approach for producing legal text.
National Grid Distribution	Support	f - positive	<ul style="list-style-type: none">acknowledge that there are benefits in producing industry guidance concerning the production of legal text for UNC changes
National Grid NTS	Support	f - positive	<ul style="list-style-type: none">the efficient and timely production of legal text is a key facilitator of an effective UNC Modification process.clarifying the process for legal text preparation will be advantageous.
RWE npower	Support	f - positive	<ul style="list-style-type: none">will provide greater transparency when producing legal text.give re-assurance to the industry by defining responsibilities that will ensure quality, consistency, impartiality and timeliness of text production

Scotia Gas Networks	Qualified Support	f - positive	<ul style="list-style-type: none"> • supports this modification as it sets out further guidance to all parties in relation to legal text production. • is concerned the guidelines could be abused in certain circumstances.
Winchester Gas	Support	f - positive	<ul style="list-style-type: none"> • there is a sense in the Transporters sharing the responsibility for legal text, it may help with consistency if there was only one body responsible.

Additional Issues Identified in Responses

British Gas whilst supportive of the creation of a guidance document, observe that the UNC Modification Rules will not be amended. They highlight that as the guidance document has less authority than the UNC, they consider this change is reliant on the good will of the Transporters rather than obligating them. They were therefore concerned that this will add complexity to the current process and potentially not deliver the expected improvements.

Both National Grid Distribution and National Grid NTS consider that the legal status of the proposed guidelines has not been made expressly clear in the guidelines themselves. It is their understanding that the guidelines are not intended to be legally binding and are for guidance only; compliance with the guidelines is not mandatory under UNC or otherwise. They also have some concerns that changes might be made to the guidelines through a Modification Panel decision, which might then place them in conflict with the UNC Modification Rules.

National Grid NTS notes that the intention of the proposal is that the guidelines are not intended to be legally binding, are for guidance only and compliance with the guidelines is not mandatory under UNC or otherwise. It is also not clear about the consequences of material cases of non-compliance. Would such cases be expected to be brought to the Modification Panel for further discussion for example?

Both National Grid Distribution and National Grid NTS suggest a number of amendments to the legal text.

Scotia Gas Networks explains the reasons for providing qualified support for this modification is that the guidelines set out in the Guidance Document could be abused in certain circumstances, for example in requiring legal representation at workgroup meeting, and that the industry needs to ensure that this does not become commonplace practice where it is not necessary. The industry must ensure that legal text is only requested when the modification is fully developed to not waste legal resources. These issues should be reviewed after the first 12 months should the modification be implemented.

8 Panel Discussions

9 Recommendation

Panel Recommendation

Having considered the Modification Report, the Panel determined:

- that proposed self-governance Modification 0484S [should/should not] be made.

10 Appendix – Legal Text Guidance Document

Introduction

This document is the Legal Text Guidance Document referenced in the Uniform Network Code (UNC) Modification Rules. It may be modified by Panel Majority, as provided for in paragraph 9.6.6 of the Modification Rules.

Background

UNC modifications are ultimately defined by the legal text that supports them. The development of the legal text is therefore critical to any modification and this guidance document provides a framework for the preparation of legal text. This framework seeks to set out best practice, providing transparency to the existing process, clarity to parties involved in the process and consistent expectations. The Guidance has been written to be consistent with the requirements of both the UNC and the Code Administration Code of Practice.

Principle 9 of the Code Administration Code of Practice is that “Legal text will be produced and consulted upon prior to a Modification being recommended for approval” The Code of Practice sets out that:

“To allow users to fully understand and assess the impact of a Modification, the default position will be that legal drafting will always be developed in time to allow for consultation. To achieve this principle:

- The Code Administrators will seek to ensure legal text is produced in time to be issued for consultation;
- Code panels may, by exception, agree that legal text may not be produced in certain circumstances, including where the proposer has produced suggested text as part of the Modification;
- Code panels can agree to minor corrections to legal text at the time of making its final recommendation;
- If the Panel determines that changes to the legal text are appropriate, but considers that they cannot reasonably be considered to be minor, they may instruct the Code Administrator to carry out a further consultation on that revised text;
- Code Administrators will seek to ensure that legal text is produced in a consistent style and that the legal text accurately implements the intent of the Modification.”

Further, Principle 6 of the Code Administration Code of Practice provides that “Before it is consulted on, the proposer will have a right to discuss the legal text of a Modification with those producing the text”.

The UNC Modification Rules provide that the Transporters are responsible for the provision of legal text in support of all modifications. Proposers are free to provide Suggested Text as part of any modification proposal, but the Transporters remain responsible for the text and, while expected to take any Suggested Text into account, may choose to adopt a different approach to that set out in any Suggested Text.

The Modification Rules provide for the Modification Panel to request that legal text is provided for a modification. Unless the Modification Panel specifies a different timescale, the Transporters are obliged to provide text within 15 business days of a request. If the Transporters consider the modification is not sufficiently clear or complete to enable the preparation of text, they are required to provide a written report setting out the reasons for this.

In addition, the Transporters are required to provide legal text for a modification when this is requested by the Authority.

Having provided legal text in response to a request, the Transporters may subsequently amend the text until the time at which the Modification Panel determines whether or not to recommend implementation of a modification, or whether or not to implement a self-governance modification. Subsequent to a final modification report being submitted to the Authority for a decision as to whether or not a modification should be implemented, any

change to the text within the final modification report results in that report being referred back to the Modification Panel, and the Panel may determine that, given the change to the proposed legal text, further consultation should occur.

Legal Representative

The Transporters are to identify and secure the legal resources they consider are appropriate to produce legal text in support of a modification.

The Transporters shall identify a named legal representative in respect of each modification.

The legal representative for a modification should not normally be changed, although it is recognised that there may be circumstances in which it is appropriate for the legal representative to be changed.

Where possible, the legal representative for any alternative modification should be the same as for the original modification. In addition to formal alternatives, if modifications are closely related the Transporters should seek to ensure that the same legal representative is appointed. In addition to the proposer of the original modification, references to the proposer in the remainder of this document should be taken as referring to the proposer(s) of any alternative or closely related modification(s) for which the same legal representative is used.

If requested, the legal representative's name and contact details are to be provided to the proposer. For the avoidance of doubt, however, all contact between the proposer and legal representative is expected to be carried out through the relevant Transporter representative (as named in documents relating to the modification) who will facilitate any required communication. Whenever requested, the Transporter representative will arrange meetings or teleconferences between the proposer and legal representative in order to facilitate effective legal text production.

The legal representative may either produce the text themselves or be supported by others as necessary. However the Transporters remain responsible for the timely delivery of text which would implement the Solution set out in the relevant Modification.

The legal representative will not provide specific legal advice in relation to the commercial aspects of the modification and its impact upon the proposer's business and any legal view provided by the legal representative will not be a substitute for the proposer obtaining its own legal advice.

Development of Text

Subject to the modification proposer agreeing to incorporate suggested changes, modification Workgroups are required to fully develop an unambiguous plain English Solution in a modification in sufficient detail to enable legal text to be prepared. For the avoidance of doubt, it is the proposer's responsibility to ensure that the Solution is fully developed and sufficiently clear to support the preparation of legal text.

Workgroups may recommend to the Panel that legal text for a modification be requested.

At any point during the assessment of a modification, if there are any particular issues that the legal representative believes should be addressed in developing the Solution, these should be advised to the relevant Transporter representative, who should advise the proposer and Code Administrator. The Code Administrator shall ensure that the Workgroup is made aware of any issues raised by the legal representative, and the Workgroup shall seek to address the issues raised in order to facilitate the subsequent production of legal text.

The Workgroup may request a legal view from the legal representative in relation to the modification during the assessment process provided that such advice can be provided objectively, relates only to the subject matter of the modification and consequential impacts of the modification upon UNC generally.

If the legal representative wishes to clarify any points in the Solution, contact should initially be made with the proposer of the modification via the relevant transporter representative.

In support of the legal text provided, the legal representative shall provide a plain English explanatory note setting out the approach taken to converting the Solution into legal text, illustrating how the legal text delivers the intent of the Solution.

The Workgroup shall assess whether the legal text meets the intent of the Solution and the relevant Transporter representative shall advise the legal representative of any areas of the text that are believed to be unclear, in error, or otherwise inappropriate.

If requested by the Workgroup, the legal representative shall seek to attend (either in person or by remote access) a Workgroup meeting at which the text is to be discussed,

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and shall present and explain the text that has been provided and discuss any issues that are raised by Workgroup attendees. In the event that the Workgroup does request a meeting with the legal representative, the Transporter UNC Representative shall normally provide the legal representative with an agenda/list of matters which the Workgroup wishes to be discussed no fewer than 5 Working Days in advance of the proposed meeting. For the avoidance of doubt, it is not expected that the legal representative will attend Workgroup meetings as a matter of course but only where this is considered an economic and efficient means of addressing outstanding issues.

Irrespective of any Workgroup request, the legal representative may attend (either in person or by remote access) any Workgroup meeting in order to understand the modification and provide advice and guidance to the Workgroup regarding any areas that would benefit from amendment in order to support the production of legal text.

The Workgroup should satisfy itself that the legal text is expected to deliver the intent of the Solution, and the Workgroup Report to the Panel should confirm whether or not the Workgroup is satisfied in this respect.

Modification Panel

Prior to a modification being issued to consultation, Panel Members should satisfy themselves that the legal text has been scrutinised and, if implemented, can reasonably be expected to implement the Solution as contained in the Modification.

Modification Panel Members may request that the legal representative be available to advise Members regarding the legal text, and to present the text when requested to do so by the Modification Panel at meetings where the modification concerned is on the agenda.

Any UNC party that has concerns regarding the quality or timeliness of legal text and supporting advice being provided in respect of a particular modification may make representations to the Modification Panel seeking agreement to an alternative legal representative being appointed for that modification.

If any representations are received that propose an alternative legal representative should be appointed, the Modification Panel shall consider those representations and determine whether to request that the Transporters appoint an alternative legal representative.

If the Modification Panel determine to request that an alternative legal representative be appointed, the Transporters shall either inform the Code Administrator of the name of the alternative legal representative or provide a written explanation to the Modification Panel setting out why the Transporters have declined to agree to the Modification Panel's request.

Review

To identify any improvements in the process that can reasonably be introduced, the Code Administrator shall ensure that review of this guidance document and the associated process of legal text production is included on at least one Modification Panel Agenda in each calendar year. All users of this guidance are encouraged to send the Code Administrator suggested changes that they believe would improve this guidance document and the process for producing legal text. If any suggested change is received, the Code Administrator shall put that suggested change on the agenda of the next appropriate Modification Panel meeting.