



Promoting choice and
value for all customers

The Joint Office, relevant Gas
Transporters, Shippers and other
interested parties

Your Ref:
Our Ref: Net/Cod/Mod/039
Direct Dial: 020 7901 7355
Email: modifications@ofgem.gov.uk

1 December 2005

Dear Colleague,

Uniform Network Code modification proposal 039: 'Removal of 9.5.5 of the Modification Rules'.

Having considered the issues arising from this proposal and having regard to its statutory duties Ofgem¹ has decided to direct the implementation of the modification, as it believes that it will better facilitate the achievement of the relevant objectives of the Uniform Network Code (UNC), as set out in standard special condition A11 of relevant Gas Transporters licences. In this letter we explain the background to the modification proposal and outline the reasons for making our decision.

Background

As part of the UNC development, the constituency of the Modification Panel was amended in order to be more reflective of the new market structure and provide a balance of influence. To this end, whereas the previous Network Code Modification Panel allowed for nine User representatives and two Transco representatives, the UNC Panel provides one seat for each of the relevant Gas Transporters and five for shippers. However, this also creates a greater potential for a split vote. Paragraph 9.5.5 of the Modification Rules was inserted in order to provide a way forward in the event of a split vote, determining that in the event of such a vote the panel would be deemed to have recommended non-implementation.

The UNC development group were also mindful of the imminent introduction of a mechanism for raising appeals against Ofgem industry code decisions, including those made on the UNC. It was considered likely by the UNC development forum that those decisions which were in accordance with the Modification Panel recommendation would be exempt from appeal.

In order to alleviate the concerns of shippers regarding uncertainty around the imminent appeals mechanism, the transitional rules included a sunrise provision that required the company then known as Transco Plc² to raise a review proposal following the introduction of appeals. This was duly carried out with the raising of UNC review proposal 020³ on 12 May 2005, which was subsequently referred to the Governance work stream.

¹ Ofgem is the Office of the Gas and Electricity Markets Authority. The terms 'Ofgem' and the 'Authority' are used interchangeably in this letter

² Now re-branded National Grid Gas Plc

³ UNC Review Proposal 020: 'Proposal to establish a review group to assess whether any changes are needed to UNC Governance in the light of the imminent introduction of the Appeals mechanism against Authority UNC modification decisions'

The Statutory Instrument allowing appeals against Ofgem's decisions on certain code modifications came into effect 14 July 2005⁴. This was provided for in the Energy Act 2004, which itself followed on from the Government's commitment in its 2003 Energy White Paper⁵ to work with Ofgem to strengthen the transparency and accountability of the code modification process. However, the Statutory Instrument excludes Ofgem's decisions from appeal where they accord with the majority view of the relevant industry panel.

The Modification Proposal

This proposal, which was developed following discussion within the Governance work stream, and included within review report 020⁶, seeks to remove paragraph 9.5.5 of the Modification Rules. This would have the effect of removing a deemed recommendation in the event of a split vote, thereby providing further opportunity for Ofgem's subsequent decision to be appealed.

Respondents' views⁷

There were eleven representations received in response to the consultation on this proposal, ten of which were in support of its implementation, with one opposed. A common theme amongst respondents was that the existence of paragraph 9.5.5 of the Modification Rules had the unintended consequence of excluding a modification proposal from the right of appeal in instances where the panel vote on whether or not to recommend implementation was split and Ofgem subsequently decided to reject the proposal. Some respondents pointed out that the proposals which are subject to a split vote are likely to be the most contentious and therefore appropriately subject to appeal. Some considered that allowing appeals on such decisions would be in keeping with the intent behind introducing them. Several respondents also commented that paragraph 9.5.5 was in itself superfluous and created confusion rather than added clarity.

The respondent who was opposed to the implementation of this proposal felt that paragraph 9.5.5 allowed the Modification Panel to discharge its obligation of determining whether or not to recommend the implementation of a proposal, even in the event of a split vote. This respondent also felt that further options should be explored in terms of panel voting, such as an option for panel members to abstain from a vote.

Panel recommendation

At its meeting of 15 September 2005 the Modification Panel recommended the implementation of this proposal, with seven votes cast in favour. The majority of the Panel felt that paragraph 9.5.5 of the Modification Rules served no real purpose and more importantly could unintentionally exclude a subsequent Ofgem decision from appeal to the Competition Commission. Those expressing a view therefore felt that implementation of this proposal would further the relevant objective of *promoting the efficient implementation and administration of the UNC*.

Ofgem's view

Having considered the views of respondents and the Modification Panel, Ofgem take the view that modification proposal 039 would better facilitate achievement of the relevant code objectives compared to the existing provisions of the UNC.

⁴ The Electricity and Gas Appeals (Designation and Exclusion) Order 2005; SI No. 1646

⁵ www.dti.gov.uk/energy/whitepaper/ourenergyfuture.pdf

⁶ These can be found on the Gas Transporters Information Service (GTIS) formally known as Nemisys. <https://gtis.gasgovernance.com>

⁷ This section is intended to summarise the principal themes of the respondents' views and is not intended to provide a comprehensive overview of the responses received. These can also be found on GTIS.

Ofgem has some sympathy with the views of the respondent who considered that paragraph 9.5.5 serves only to provide an outcome where none would otherwise be forthcoming. There is indeed a chance that without the provision to deem a recommendation of non-implementation in the event of a split vote, the panel could be considered to have failed to reach a determination. However, Ofgem notes and agrees with the view of the Governance Workstream that the Panel recommendation only serves to exclude an appeal from being raised; a split vote would not in itself hinder the further progression of the proposal through the modification process. Ofgem therefore considers that it would be more transparent, consistent and achieve greater accountability to record this actual result of voting than to deem a result.

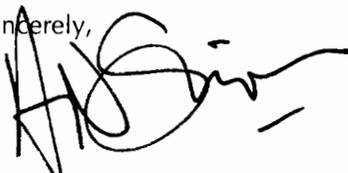
Notwithstanding the above, Ofgem does consider that the panel should make every effort to reach a recommendation. Ofgem notes that the drafting of 9.5.2 b) i) of the modification rules require the panel to "determine whether or not to recommend implementation". Currently, with only one vote being taken, it is not clear whether the views of the panel are genuinely split; the panel members who do not raise a hand may either wish to recommend non-implementation, or have simply not yet reached a conclusion. Ofgem considers, consistent with its interpretation of 9.5.2 b) i), that there would be value in first recording the votes in favour of implementation, then of those opposed. This would clarify where the views of the panel are genuinely split, or potentially whether further debate may be warranted.

In coming to its decision Ofgem has also had regard to its statutory duties, including regard to best regulatory practice. Ofgem considers that the implementation of this proposal will be in keeping with the principles under which regulatory activities should be, among other things, accountable and consistent. Ofgem also considers that the removal of paragraph 9.5.5 would ensure that proposals are, as far as practicable, dealt with in a consistent and accountable manner.

Ofgem's decision

For this reasons set out above, Ofgem has decided to direct the relevant Gas Transporters to implement this modification to the UNC. If you have any comments or queries in relation to this letter, please email us at: modifications@ofgem.gov.uk

Yours sincerely,



Nick Simpson
Director, Modifications