

Review Report

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 **Modification Reference Number 0020**

Version 1.0

This Review Report is presented for the UNC Modification Panel's consideration. The consensus of attendees at the Governance Workstream is that, while the Modification Rules are largely consistent with DTI's proposed Appeals mechanism, there would be merit in consideration being given to two UNC Modifications, as described in the draft Modification Proposals attached to this report. It should be emphasised, however, that, contrary to expectations, the anticipated Statutory Instrument (SI) to introduce the Appeals Mechanism had not been laid when the Review Proposal was considered. If the final SI is not as anticipated, there would be merit in the Governance Workstream revisiting this report.

1. Review Proposal

NGT raised the following Review Proposal, which were taken as terms of reference:

"The establishment of a Review Group is proposed, to consider whether or not any modifications to existing UNC Modification rules will be needed following the introduction of the new Appeals mechanism against Authority UNC modification decisions. (e.g. whether any changes are needed in relation to UNC Panel Recommendations, or in other areas, as a result of the introduction of the new mechanism.)

This review proposal is raised following the transitional rules that placed an obligation on Transporters to raise a review proposal in this area."

2. Review Process

In accordance with the Modification Rules, at its meeting on 19 May the Modification Panel determined that the Review Proposal should be referred to the Governance Workstream for consideration, with a request that a report be prepared for the July Modification Panel. Following an initial discussion at the 19 May Governance Workstream, the Workstream met on 9 June, and completed its deliberations on 16 June. This Review Report was subsequently compiled by the Joint Office of Gas Transporters, and was circulated for comment to Workstream attendees.

3. Areas Reviewed

The Workstream discussions focussed on three areas:

- a) Panel recommendations
- b) Implementation timescales
- c) Proposal variation

a) Panel Recommendations

Discussions clarified that a Panel recommendation could only prevent an appeal being raised. That is, no appeal is possible when an Authority decision accords with a Panel recommendation. If the Authority decision is not in line with a Panel

recommendation, or no Panel recommendation is made, the Authority decision is potentially appealable. Decisions can, however, be excluded from the appeals process if the Authority determines that a delay to implementation that reflects the duration of the appeals process would potentially impact security of supply. While some concerns were raised regarding the potential scope this provided to Ofgem to make decisions unappealable, the Ofgem representative was clear that he did not expect this power to be used on other than a very exceptional basis, and a full explanation would be provided of the reasons for the Authority's decision. It was, therefore, generally accepted that no superior alternative existed.

Consideration was given to the existing Modification Rules and whether any change was necessary to the process by which a Panel recommendation is determined. In keeping with the general approach in the Modification Rules, a recommendation to implement a Modification Proposal is only made if supported by a majority of those Voting Members present when a vote is taken. When the Panel recommends implementation, this accords fully with the process envisaged in DTI's draft Statutory Instrument. However, if the Panel does not recommend implementation, for example if there are no votes in favour of implementation, and Ofgem do not direct implementation, in theory an appeal would still be possible since there would not have been a positive recommendation not to implement (as opposed to no recommendation to implement).

While recognising that this left open the possibility of an appeal being raised, it was concluded that this was unlikely to be problematic in practice. Even if an appeal was raised, the Competition Commission had the right not to accept the appeal. It was anticipated that the Commission was likely to take account of the spirit of the appeals process, and hence would be likely to regard the appeal as vexatious. The benefit of being able to absolutely discount an appeal by obtaining a clear non-implementation recommendation was not considered to be significant in the case of non-implementation of a Modification Proposal – business would continue as usual with no disruption as a result of an appeal being launched.

Against this background, the Workstream considered that 9.5.5 of the Modification Rules potentially created ambiguity and may have the unintended consequence of preventing an appeal when the Panel was equally split. Hence it was suggested that a Modification Proposal be raised to remove the following from the Modification Rules:

“9.5.5 If the vote of the Modification Panel under paragraph 9.5.2(b)(i) results in an equal number of votes in favour of, and not in favour of, implementation, the Modification Panel will be deemed to have determined to recommend non-implementation.”

A draft Modification Proposal in this respect is provided in Appendix 1.

b) Implementation Timescales

Implementation timescales for Modification Proposals are not specified in the UNC. The process for establishing appropriate implementation timescales is, therefore, flexible and various circumstances can be accommodated. However, implementation is typically at 0600 hours on the day following receipt of direction from Ofgem.

The Workstream agreed that if an appeal were possible – that is, Ofgem had directed implementation of a proposal which the Panel had not recommended should be implemented – it would generally be beneficial to delay implementation until either

the window for an appeal to be raised had passed, or the outcome of an appeal was known. However, it was concluded that this was best delivered through the existing informal arrangements rather than seeking to specify this in the UNC, thereby ensuring that flexibility is retained. It was also emphasised that Proposer's of potential Modifications should bear this in mind and best practice would involve all Proposals being raised with sufficient time to allow for an appeal prior to implementation. This would be especially important for Modification Proposals which are date related.

c) Proposal Variation

The Modification Rules allow all Modification Proposals to be varied by the Proposer prior to the Consultation Phase. The possibility was raised that the outcome of an appeal to the Competition Commission may be a direction to implement a Modification which was different in some respect to the Proposal initially raised. For example, if the Modification Proposal specified an action occurring at a specific date, that date could have passed. A further example might be that the Competition Commission may direct that part of a Modification Proposal should be implemented, but not the whole Proposal.

Meeting attendees agreed that it would be appropriate to introduce some flexibility such that Proposals could be varied in order to enable Competition Commission decisions to be implemented.

A draft Modification Proposal addressing this issue is provided in Appendix 1.

4. Recommendations

The Modification Panel is invited to accept this report and the recommendations that:

1. No further work is required in respect of the Review Proposal
2. Modification Proposals should be raised to
 - a. remove 9.5.5 from the Modification Rules; and
 - b. enable Modification Proposals to be varied to reflect Competition Commission directions.

Appendix 1: Draft Modification Proposals

Proposal 1: Removal of 9.5.5 of the Modification Rules

Proposed Implementation Date:

If the Modification Panel recommends implementation, 06:00 on the business day following receipt of direction from Ofgem.

If the Modification Panel does not recommend implementation, 06:00 on the sixteenth business day following receipt of direction from Ofgem.

Urgency

Proposer's preferred route through modification procedures and if applicable, justification for Urgency

(see the criteria at

http://www.ofgem.gov.uk/temp/ofgem/cache/cmsattach/2752_Urgency_Criteria.pdf)

This Proposal was developed by the Governance Workstream and included in Review Report 0020. No further development is required and hence it is proposed that it should proceed directly to consultation.

Nature and Purpose of Proposal (including consequence of non implementation)

Within the Modification Rules, 9.5.5 provides:

“If the vote of the Modification Panel under paragraph 9.5.2(b)(i) results in an equal number of votes in favour of, and not in favour of, implementation, the Modification Panel will be deemed to have determined to recommend non-implementation.”

The appeals process which has been introduced by DTI allows parties to appeal against Ofgem decisions. However, there is no right of appeal when an Ofgem decision accords with a majority recommendation by the UNC Modification Panel. Given the terms of 9.5.5, if half the available Voting Members on the Panel did not support implementation of a Modification Proposal, and Ofgem directed implementation, an appeal would be possible. This would remain the case if 9.5.5 were deleted, since there would be no Panel recommendation in favour of implementation.

If half the available Voting Members on the Modification Panel did not support implementation of a Proposal, and Ofgem did not direct implementation, no appeal would be possible. This is because 9.5.5 provides for a non-implementation recommendation, with which Ofgem would have agreed. Removal of 9.5.5 would reinstate this right of appeal in these particular circumstances. Hence any Ofgem decision would be appealable when the view of Voting Members on the Modification Panel is equally divided between those who do and do not support implementation of a Modification Proposal.

Basis upon which the Proposer considers that it will better facilitate the achievement of the Relevant Objectives, specified in Standard Special Condition A11.1 & 2 of the Gas Transporters Licence

Implementation of this Modification Proposal would better facilitate the achievement of the Relevant Objective specified in Standard Special Condition A11.2 through development of the mechanism by which any of the uniform network code and each of the network codes prepared by each relevant gas transporter may be modified.

Implementation of this Modification Proposal would also better facilitate the achievement of the Relevant Objective specified in Standard Special Condition A11.1 (f), the promotion of efficiency in the administration of the network code and/or the uniform network code.

Any further information (Optional), likely impact on systems, processes or procedures, Proposer's view on implementation timescales and suggested legal text

No operational or systems impacts are anticipated.

Suggested Legal text:

Paragraph 9.5.2 (b) (ii): delete (subject to paragraph 9.5.5)

Delete paragraph 9.5.5

Renumber 9.5.6 as 9.5.5

Code Concerned, sections and paragraphs

Modification Rules, 9.5.

Proposer's Representative

Proposer

Proposal 2: Variation of Proposals in light of a Competition Commission direction

Proposed Implementation Date:

If the Modification Panel recommends implementation, 06:00 on the business day following receipt of direction from Ofgem.

If the Modification Panel does not recommend implementation, 06:00 on the sixteenth business day following receipt of direction from Ofgem.

Urgency

Proposer's preferred route through modification procedures and if applicable, justification for Urgency

(see the criteria at

http://www.ofgem.gov.uk/temp/ofgem/cache/cmsattach/2752_Urgency_Criteria.pdf)

This Proposal was developed by the Governance Workstream and included in Review Report 0020. It is suggested that this Proposal would benefit from further development within the Governance Workstream. This would enable full consideration to be given to the nature of the processes which will surround the anticipated appeals process, taking account both of the relevant statutes and also any guidance published by the Competition Commission, DTI and/or Ofgem.

Nature and Purpose of Proposal (including consequence of non implementation)

The proposal is that any Modification Proposal may, provided the Proposer agrees, be varied in light of a Competition Commission direction.

The appeals process which has been introduced by DTI allows parties to appeal against Ofgem decisions. When the Competition Commission hears an appeal, its decision is expected to be in the form of a direction. There may be circumstances where that direction requires implementation in a manner which to some extent differs from the appealed Modification Proposal. For example, a Modification Proposal might envisage initiating an annual process to be completed by 1 October each year. Following an appeal, a Competition Commission direction may be received to implement the Modification Proposal but, in light of the passage of time, saying that the process should be completed by 1 December in the initial year.

The Modification Rules permit all Modification Proposals to be varied prior to the Consultation Phase. Variation in light of a Competition Commission direction is not envisaged by the Modification Rules. In principle, therefore, it may not be possible for a Competition Commission direction to be implemented without a new Modification Proposal being raised. However, this Proposal would also be subject to the Modification Rules and any decision regarding implementation may itself be appealed.

To enable efficient compliance with Competition Commission directions, it is therefore proposed that all Modification Proposals may, with the Proposer's consent, be varied to reflect any Competition Commission direction.

Basis upon which the Proposer considers that it will better facilitate the achievement of the Relevant Objectives, specified in Standard Special Condition A11.1 & 2 of the Gas Transporters Licence

Implementation of this Modification Proposal would better facilitate the achievement of the Relevant Objective specified in Standard Special Condition A11.2 through development of the mechanism by which any of the uniform network code and each of the network codes prepared by each relevant gas transporter may be modified.

Implementation of this Modification Proposal would also better facilitate the achievement of the Relevant Objective specified in Standard Special Condition A11.1 (f), the promotion of efficiency in the implementation and administration of the network code and/or the uniform network code.

Any further information (Optional), likely impact on systems, processes or procedures, Proposer's view on implementation timescales and suggested legal text

No operational impacts are anticipated.

Implementation can follow immediately on direction from the Authority.

Code Concerned, sections and paragraphs

Modification Rules, 6.5.

Proposer's Representative

Proposer