

# Governance Workstream Minutes

## Thursday 9<sup>th</sup> June 2005

### 10 Old Bailey, London

#### Attendees

Tim Davis (Chair) (TD)	Joint Office of Gas Transporters
John Bradley (Secretary) (JB)	Joint Office of Gas Transporters
Mike Young (MY)	BGT
Christiane Sykes (CS)	EON
Phil Broom (PB)	Gaz de France
Stephanie Gott (SG)	Gemserv
Beverley Grubb (BG)	Scotia Gas Networks
Sam Parmar (SP)	Statoil
Steve Ladle (SL)	Total Gas and Power Ltd
Richard Dunn (RD)	Transco NTS
Lisa Waters (LW)	WatersWye Associates
Angela Pierce (AP)	Dti
David Curran (DC)	Dti
Jon Dixon (JD)	Ofgem

#### 1. Appeals against Ofgem Code Modification Decisions

This meeting was held in order to progress Review Proposal 0020 *“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”*

David Curran presented a summary of “The Electricity and Gas Appeals (Designation and Exclusion) Order” which is shortly to be laid before Parliament. He commented that although it was in draft form it was unlikely to change significantly prior to coming into force.

The ensuing questions and discussion were as follows:

LW enquired whether only an impacted party was permitted to lodge an appeal. DC replied that a Party would need to be materially affected or to represent a group that was materially affected by the Ofgem decision.

LW also asked about provisions for new codes. DC replied that it was intended that the appeals process should apply to future codes but in that event, a change to the order would have to be made.

MY asked about Independent Gas Transporters’ codes. DC replied that this had been discussed but the decision had been taken to exclude them on materiality grounds. This would be reviewed if any new large independent networks were formed.

Discussion took place on whether appeals would be permitted where the Panel had not come to a view. TD expressed the view that the following words from one of the slides, which reflect the draft order, were clear on this aspect: “An Ofgem decision is unappealable if: ‘the decision accords with a majority recommendation made by the Modification Panel in the Modification Report’”. If the Panel had declined to make a recommendation, then the Ofgem decision could not be held to be in accord with a majority decision and, in consequence, the decision would be appealable.

BG referred to recent Urgent Modification Proposals where the Panel had declined to make a recommendation. It was agreed that, as things stood, any subsequent decision by Ofgem would be appealable. JD asked whether the Panel should have two votes – the first to decide whether the Panel should make a recommendation, the second on the recommendation itself (if the first vote was carried). In discussion,

Section 9.5.5 of the Modification Rules was also reviewed. This stated: "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 Workstream were asked whether this clause should be removed once the appeals mechanism comes into force. SL asked whether this removal would be compatible with licence requirements. It was, however, concluded that this aspect would be considered by Ofgem if a Proposal was raised to remove this clause.

AP suggested that, if this situation was viewed as unsatisfactory, the Workstream should consider whether any changes in the Panel's governance arrangements should be made. However, the view was expressed that in the event of no recommendation from the Panel followed by a decision not to implement by Ofgem, the Competition Commission might not grant permission to appeal on the grounds of it being vexatious.

Discussions were held on what indications would be given where an Ofgem decision on a Modification Proposal was appealable. JD indicated that, once this order came into force, the implementation letter would state whether that decision was appealable or not.

LW requested clarification on the grounds for Ofgem's discretion in respect of Security of Supply. JD stated that Ofgem would have discretion only for Modification Proposals where the lack of action within the fourteen weeks of an appeal process would adversely affect Security of Supply. Even in that event, Ofgem would give full reasons for reaching this conclusion in its decision letter. DC commented that if a party wished to contest such a decision the option of a Judicial Review would exist. It was recognised by dti that Ofgem would be, to some extent, taking on the role of "judge and jury" but it suggested that Ofgem would be best positioned to rule on Security of Supply issues. TD confirmed that the current Modification Report templates include a section for Security of Supply issues to be reviewed by the Subject Matter Expert and for comments to be made in the representations. JD also commented that whilst Ofgem does not formally participate in the representations it would, where possible, signal, prior to issuing its decision letter, that Security of Supply considerations were likely to influence its decisions on appealability. CS expressed the view that this element of discretion was her greatest concern with the process. JD repeated the assurance that Ofgem would always seek to signal the likelihood of applying this discretion as early as possible within the Modification process.

TD expressed the view that reversing an implementation decision could be a problem where implementation had become effective. This raised the question on whether the Modification Rules should be more explicit and include something on the implementation timetable. LW referred to the Electricity Balancing and Settlement Code where their Panel had set a range of timetables that were dependent on the date on which Ofgem had reached a decision. BG asked whether, under the current rules, the Panel could vote on an implementation date. SL responded that the Transporter usually sets the implementation date in consultation with Ofgem. He asked, however, whether the Transporter previously included a recommendation on implementation date in the Final Modification Report. TD replied that this had not been a specific requirement. SL expressed the view that the Panel should not take on the role of approving implementation dates.

LW raised the possibility of a Proposal being implemented despite an Ofgem decision to the contrary and enquired how the appeal process would work in that event. JD responded that Ofgem were not able to use the appeals process. There was a consensus that the industry should not take on the risk associated with defiance of an Ofgem implementation decision.

SL asked for details of the process by which implementation dates are revised. TD replied that the process was the issue of a new implementation notice.

BG expressed the view that this aspect should be reviewed. A rule was suggested that the implementation date for any appealable decision should be set at least sixteen working days following the issue of a decision letter. A further rule would be that in the event of an appeal the implementation date should be linked to the end of appeal decision. LW stated a preference for a case by case approach rather than rely upon rules such as these. BG expressed the view that any decision on deferring implementation should take account of materiality.

Other issues raised were the process to be followed if the Competition Commission had ruled in favour of the appeal. TD suggested that the Modification Rules should be revised to allow for the

Proposal to be varied, if required to implement the Competition Commission's decision. This would avoid raising a new Proposal. DC pointed out that such a provision might be useful if the Competition Commission decided to adopt the third option ie Appeal upheld, Ofgem and others directed to give effect to the modification decision.

There was some discussion on other codes, particularly in electricity. RD stated that CUSC had to give itself the flexibility required in order to change implementation dates. DC also referred to discussions on how the appeals process might work in the circumstances of several "competing" Proposals. It was concluded, however, that in these circumstances the Competition Commission would be able to merge appeals and to use its good sense in reaching a rational conclusion.

TD summarised the issues raised by the meeting as follows:

1. Should the Modification Rules be changed to avoid the potential of an appeal where the Panel and Ofgem were agreed that a Proposal should not be implemented? This would arise if a Panel vote to recommend implementation did not receive majority support.
2. Should clause 9.5.5 (equal Panel votes for and against) be reviewed?
3. Should the implementation process be clarified and specified in the Modification rules?
4. Should the Modification Rules be amended to allow proposals to be varied to reflect a Competition Commission decision?
5. General concern on use of Security of Supply reasons to prevent appeals leaving a Judicial Review as the primary means of disputing an Ofgem decision, but no obvious alternative.

As the proposer of Review Proposal 020, Transco NTS agreed to consider these aspects and bring further proposals to the next Workstream. **Action: RD**

## 2. Urgency Rules

TD referred to the teleconference on a recent Urgent Proposal and the conclusion from the ensuing discussion that Urgent Modification processes should be reviewed.

JD suggested the primary issue was whether a panel recommendation should be sought. SP and CS agreed with this but also emphasised that if the Panel was required to make a decision on a Proposal, sufficient time should be allowed for the Panel to make its decision. SP suggested that a week should be the minimum time. However, the suggestion was also made that longer timescales than a normal Proposal should apply, as the Panel would have less involvement in the Proposal prior to the submission of the draft Final Modification Report.

BG pointed out that views would be established in the responses themselves. Would a recommendation, therefore, be required? SL distinguished between a normal Proposal where the Panel was "in the loop" with an Urgent Proposal where the Panel is "out of the loop". If a Panel view were required, should the Proposal be urgent?

JD assured the Workstream that Ofgem paid more attention to the responses than to the Panel Recommendation. He did recognise, however, that the proposed appeals process might change this balance of attention. JD supported the implication that normal processes should be used where possible and suggested that the Panel consider using its flexibility in timetabling as a means of reducing the need for urgency. This prompted discussion on how Urgency might speed-up a Proposal which is proceeding too slowly. CS asked whether the proposer would have to withdraw its proposal and submit a new one along with a request for Urgency. TD responded that this would not be necessary as Urgency can be sought by the proposer at any stage of the process.

CS supported the view that it was inconsistent for one element, ie the panel recommendation, to be retained where all other processes has lapsed. TD pointed out that the default in the Modification Rules was to follow normal processes, unless Ofgem agreed otherwise.

There would, therefore, be opportunities within the process for Panel Members to acquaint themselves with the Proposal. BG was concerned about potential for Urgency to be used for the purpose of short-cutting Panel consideration. TD mentioned other codes expected Panel decisions on Urgency. LW suggested that this was related to the make-up of the Panel and suggested that the make-up of the UNC Panel compared favourably with that existing for certain other codes.

However, if the Panel were to develop its decision making powers the question arises on whether other groups, such as interconnector users or end-consumer groups, should be represented.

In response to the question on the desirability of taking a Panel vote, JD suggested that the Panel might wish to support an Urgent proposal that commanded widespread support and was linked to an imminent date. One person should not be able to frustrate implementation by using the appeals process and a Panel decision to support the Proposal, linked to an Ofgem approval, should avoid this possibility.

Whilst recognising this point, SP still maintained the requirement of making a recommendation on an Urgent Modification Proposal would put a high onus on Panel Members. SL pointed out, in support of this view, that many decisions were not crystal clear and therefore the Panel might not wish to make one.

The possibility of a double vote ie one on competence, the second the recommendation itself was a possibility. TD suggested that the rules could be modified to, specifically, allow the Panel to decline to make a recommendation. However, he also pointed out that the Panel was required to submit reasons – such as not being given sufficient time to come up with a view. He then asked whether this should apply to all Proposals or just Urgent Proposals. The consensus was that this should apply to all Proposals. TD mentioned another prospective Proposal where a decision would be desirable by July 12<sup>th</sup>. This might be a case where a Panel recommendation might assist were the Appeals process in place.

TD summarised the discussion under the following headings:

1. Should the Panel make recommendations on implementation, especially for Urgent Proposals?
2. If so, what rules should apply in respect of notice period required eg five days minimum.
3. How much of these rules should be in the UNC Modification Rules? Some or all could be in a best practice guidelines document under the governance of Panel.
4. Should the Panel be able to make a decision on Urgency?

TD suggested that a meeting attendee might wish to raise a Modification Proposal in order to address these issues. SL responded that he would consider doing so. **Action: SL**

To assist the process, JD offered to examine the rationale behind granting Urgency to the last twenty Urgent Proposals of this type and to share his findings with the Workstream – this was agreed. **Action: JD**

### 3. Any Other Business

BG referred to the Network Code Proposal 0714 “Use of Principles of Governance in Applying Section Y of Network Code.” Transco in its response had suggested that “the Principles of Governance could be incorporated into the Terms of Reference for the Panel.” The meeting recognised that currently the Panel does not have specific Terms of Reference which raised the question on how these principles might be adopted. Transco NTS was therefore requested to make a suggestion on this. **Action: RD**