

**CODE MODIFICATION PROPOSAL No 0312**  
**Introduction of Two-Thirds Majority Voting to the UNC Modification Panel**  
**Version 4.0**

**Date:** 12/10/2010

**Proposed Implementation Date:** 31/12/2010

**Urgency:** Non Urgent

**1 The Modification Proposal**

**a) Nature and Purpose of this Proposal**

**Nature:**

It is proposed that where a direction is made as a result of an obligation or condition in a Gas Transporter 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 Modification Panel arrangements; assuming a Panel comprised of 5 Transporter representatives, 5 Shipper representatives and 1 consumer representative 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. If this proposal is not implemented, it would continue to take 6 votes in favour to achieve a majority recommendation to implement for such Modification Proposals.

For clarity, it is intended that two-thirds majority voting should only apply to Modification Proposals arising either directly from an obligation or condition to bring forward a proposal<sup>1</sup> (i.e. a Modification Proposal raised in response to a direction originating from a licence condition) or indirectly (i.e. a Modification Proposal arising from an industry review process which was initiated to meet a direction originating from a licence condition) from a Transporter's licence condition.

It is proposed that the current simple majority vote shall continue to apply for the purposes of the Panel determination as to whether to recommend implementation, except where the proposer, a respondent or a UNC Panel Member represents that a UNC Modification Proposal addresses the requirements (in full or in part) of a licence direction. In this instance, the Modification Panel shall be required to take a simple majority vote to decide whether simple majority or two-thirds majority voting shall apply for the purposes of the Panel determination as to whether to recommend implementation.

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

Each vote shall be an affirmative vote that in the view of the Modification Panel member, implementation of the Proposal would address the requirements of a licence direction in full or in part. Where a simple majority (of the votes cast) is achieved at this stage, the Modification Proposal shall then be subject to two-thirds majority voting for the purposes of the Modification Panel then making a determination as to whether to recommend implementation. Where the Panel is unable to achieve a simple majority (of the votes cast) at this stage, the Modification Proposal shall remain subject to simple majority voting for the purposes of the Modification Panel making a determination as to whether to recommend implementation.

For clarity, it is intended that each Modification Proposal and each alternative Modification Proposal shall be treated individually and on its own merits. Therefore, it would not automatically follow that if an original Modification Proposal had been determined by the Modification Panel to be subject to two-thirds majority voting that the alternative Modification Proposal shall be also.

Purpose:

The changes proposed here would replace the current arrangements, where a simple majority (i.e. over 50% of the votes cast) is required to recommend implementation of any UNC Modification Proposal. In practice, this means ~~under the current voting arrangements~~ that a Modification Proposal can currently be recommended for implementation provided all Transporter representatives recommend implementation, plus just one Shipper or consumer representative (or ~~all~~ Shipper representatives plus one Transporter or consumer representative), despite the fact that the proposal ~~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.

Furthermore, Modification Proposals originating from a licence condition tend by definition to be controversial, ~~since~~ as they originate not from a signatory to the UNC, but from the Regulator. ~~The effect of two-thirds majority voting is to increase the threat of appeal for Modification Proposals addressing a licence direction.~~ 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 their views seen to be taken into account in the decision making process, ~~as full a voice as possible~~, but without creating an unreasonably high hurdle that might lead to filibustering by parties opposed to a change.

The accountability and transparency of the industry code modification process is enhanced by an effective modification appeals process. Therefore, 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:

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

<sup>3</sup> 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.

*"[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."*<sup>2</sup>

Some Code parties may feel obliged to vote for a proposal originating from a condition of their licence<sup>3</sup>, 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 were to be implemented.

In addition, there may be concerns about the scope for prejudice 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 pre-judgement ~~and any related legal actions.~~

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

This is a 'Non Urgent' Modification Proposal. The proposer ~~suggests~~ recommends a 31 December 2010 implementation date to align with the proposed implementation dates for UNC Mods 0318 - 0325 'Suite of Proposals raised to implement the Industry Codes Governance Review'.

**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 having taken on board comments received, the Proposer now considers this proposal is sufficiently clear to 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**

As an independent regulator, Ofgem is still an administrative body of government and independence does not mean that the regulator should function in a vacuum. Accordingly, its actions should be monitored so that it is fully accountable for those actions. To help facilitate accountability, a system of ‘checks and balances’ is required. The main check currently on substantive decisions by Ofgem comes from the ability of companies to appeal to the Competition Commission. This process allows Code Modification decisions to be independently reviewed, thereby preventing the concentration of powers in a single body (Ofgem). Some Code parties have raised concerns that the proposed SCR process may result in insufficient separation of powers (i.e. Ofgem effectively acting as “judge, jury and executioner”) for the purposes of industry Code governance. Therefore, to maintain balance and to ensure effective separation of powers, the new powers for Ofgem to effectively originate Modification Proposals under SCRs means that the process for arriving at a Panel recommendation must change in response, by introducing a slightly higher hurdle in order to maintain the efficacy of the statutory Energy Code Modification appeals process as envisaged by Parliament.

By reinforcing the concept of separation of powers and maintaining an effective appeals mechanism, the intended effect of the proposal is to protect the open and participatory regulatory decision-making process, where industry participants believe that regulatory decisions take their interests into account. This, in turn, may be expected to provide confidence in the regulatory system from justice “being seen to be done”, which may ultimately attract new entrants to the market or improve competition between existing Shippers (**SSC A11.1 (d)**).

In addition, requiring a higher (two-thirds) threshold of support to achieve a Panel recommendation should itself act as an inducement between proposer, Regulator and wider industry to co-operate on SCR-originated proposals, ensuring as far as possible that a proposal has a broad level of industry support. Failure to achieve a broad level of industry support will almost certainly result in a failure to achieve a recommendation to implement by the Panel (which acts as a filter for appeals broadly based around industry consensus). This in turn opens up the potential for affected parties to access the Competition Commission appeal mechanism if Ofgem were to subsequently disagree with the Panel’s majority view. Ensuring that SCR proposals reflect broad industry consensus should result in fewer subsequent regulatory interventions or issues being re-visited, which may be considered to better facilitate the relevant objectives in terms of promoting efficient administration of the UNC (**SSC A11.1 (f)**).

**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)**

The effect of the proposal is to protect the open and participatory regulatory decision-making process, where industry participants believe that regulatory decisions take their interests into account. The proposer believes that this is likely to maintain or improve confidence in the Code governance process and effectiveness of the overall regulatory regime. This may serve to enhance confidence in the market for any industry participant or affected 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 may be considered to~~will~~ carry more weight, therefore giving a greater degree of legitimacy to proposed Code changes originating from a licence conditionn.

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

**Advantages**

- The key advantages of implementation are set out in detail at Section 3, above. ~~A two-thirds majority lends a greater sense of legitimacy to Code Proposals addressing a licence direction, where there is a Panel recommendation to implement.~~

~~Where there is no Panel recommendation to implement a proposal addressing a licence direction, the threat of appeal is increased which has the effect of improving the accountability of the final decision by the regulator. In the view of the Proposer, this is appropriate and proportionate, given that the Proposal effectively originated from the Regulator. The effect should be to help avoid accusations of Ofgem pre-judging the outcome for those Modification Proposals which address a licence direction.~~

**Disadvantages**

By introducing new rules, the proposal may be considered to add some additional complexity to the existing governance process. ~~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**

An earlier version of this proposal ~~was~~ has been discussed at several Governance Workstreams and comments received have been considered by the Proposer and included, where appropriate.

**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 31 December 2010

**16 Comments on Suggested Text**

**17 Suggested Text**

**Code Concerned, sections and paragraphs**

Uniform Network Code

Modification Rules

**Section(s)**

**Proposer's Representative**

*Richard Fairholme (E.ON UK)*

**Proposer**

*Richard Fairholme (E.ON UK)*

