

Stage 01: Proposal

0394:

Legal Text for UNC Modification Proposals

Proposes changes to the arrangements governing legal text for UNC Modification Proposals, in line with best practice principles.



The Proposer recommends that this self-governance modification should be referred to a Workgroup for assessment



High Impact:



Medium Impact:



Low Impact:
All Code signatories

What stage is this document in the process?

01

Proposal

02

Workgroup Report

03

Draft Modification Report

04

Final Modification Report

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About this document:

This document is a proposal, which will be presented by the Proposer to the Panel on 18 August 2011. The Panel will consider the Proposer's recommendation, and agree whether this is a self-governance modification and should be referred to a Workgroup for assessment.



3 Any questions?

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1 Summary

Is this a Self-Governance Modification

It is the proposer's view that this proposal is a Self-Governance Modification since it seeks to codify best practice rather than introduce new obligations. The proposer does not consider that there is likely to be a material impact on:

1. Existing or future gas consumers; or
2. competition in the shipping, transportation or supply of gas; or
3. the operation of one or more pipe-line system(s); or
4. matters relating to sustainable development, safety or security of supply, or the management of market or network emergencies; or
5. the uniform network code governance procedures or the network code modification procedures; or
6. discrimination.

Why Change?

The proposer has identified three key defects with the current arrangements:

1. There are inadequate controls on the extent to which legal text for a Modification Proposal can be changed once the consultation phase has begun. Currently, legal text can be amended by the party directed to prepare it without the knowledge of industry participants (including the proposer or any consultee). As a result, the actual text which is implemented in the UNC may differ from that consulted upon; but without the knowledge of the affected parties. This undermines the purpose of having legal text available for the consultation phase, which is to understand the potential impact of the change on UNC contractual terms.
2. In practice, the distinction between "suggested" and "formal" legal text is arbitrary and confusing for Code parties and should be removed from Code.
3. Some principles within the Code Administration Code of Practice are not currently fully reflected within the UNC since Modification Proposals currently can (and do) proceed to consultation without legal text. It is in all parties' best interests that they understand the impact of a Modification Proposal at the detailed contractual term level, which provision of legal text ahead of the consultation phase would allow.

Solution

To tackle the three defects identified above, it is proposed that:

1. To give all Code signatories contractual certainty, where any change is made to the legal text by the party preparing it after the consultation phase has begun, the change must be reported to the UNC Modification Panel for their consideration and determination on whether the change should affect the progress of the Modification Proposal through the governance process.
2. The UNC Modification Rules be amended to remove references to "suggested text".
3. Only Modification Proposals which have legal text can proceed to consultation.

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Impacts & Costs

Impacts:

1. Those parties preparing legal text will have to report any changes (however minor) to the Modification Panel for their consideration and determination. The Panel will then have to determine the appropriate route for the Modification Proposal through the governance process, which may be to accept the change, for further consultation to be initiated, or for the Modification to be referred to a Workgroup for Assessment
2. There will no longer be the concept of “suggested” legal text in the UNC.
3. Legal text will be mandated and fully worked up at an earlier stage in the governance process; i.e. before the consultation phase can begin for all Modification Proposals.

Costs:

There are not expected to be any system costs arising from this proposal, if implemented.

Implementation

No specific timescale is proposed.

The Case for Change

By providing proportionate controls around changes to legal text, removing ambiguity around the status of legal text and ensuring legal text is always provided pre-consultation, Standard Special Condition A11.1 (f) “...*the promotion of efficiency in the implementation and administration of the...Uniform Network Code*” can expect to be better facilitated.

Recommendations

The proposer recommends that this proposal proceeds to a Workgroup for assessment.

2 Why Change?



UNC Definitions

Background

"Suggested" legal text

Currently, a proposer is able to provide "suggested" legal text as part of their Modification Proposal. However, this is entirely at the Proposer's discretion since there is no obligation to prepare "suggested" text at any point in the UNC governance process. Where it is provided, in the proposer's view, it is nothing more than a "first draft" of how the relevant sections of the UNC may look, if the Modification Proposal were to be implemented. Given that the Transporters are typically the party which is directed to provide "formal" legal text, there is a reasonable chance that the "formal" text will not be identical to the "suggested" text provided by the proposer, unless the same party is drafting both texts. It can be argued therefore, that "suggested" text could be potentially misleading to parties when considering the impact of a Modification Proposal and may well influence how they respond during the consultation phase. On this basis, the proposer does not consider there is any future role for "suggested" text in the UNC governance process.

"Formal" legal text:

The "Text of Modification" (referred to within this Modification Proposal as "formal" text) can only be provided by Transporters, where directed by the Modification Panel or the Authority. For many UNC Mod Proposals, particularly before Ofgem's recent Governance Review, "formal" legal text was typically only produced when the Authority requested it, often after the consultation phase had completed. In some instances, this has resulted in the Transporters having difficulty in producing detailed legal text at a late stage in the Modification Process if the proposal is considered unclear. This may then lead to disputes between parties over whether the legal text reflects the intention of the Modification Proposal or whether implementation is even feasible. Clearly this is not efficient.

Furthermore, whilst The Modification Panel has the power to direct the preparation of "formal" legal text, although increasingly it does so, there remains no absolute obligation to do so. Indeed, the Panel often defers to Ofgem to ask whether formal legal text should be prepared. The question of whether a Modification Proposal requires legal text is, in the proposer's view, an arbitrary one, which could be circumvented by mandating legal text to be provided for all Modification Proposals, pre-consultation phase.

"Draft" Legal text

As described above, a formal requirement to produce text exists only where the Modification Panel asks for this to be included in the draft Modification Report or Ofgem ask for text. In keeping with the Code Administration Code of Practice, the Transporters also provide text for Workgroup Assessment, and this is termed "draft", having no formal status under the Modification Rules.

Need to improve clarity and transparency

In practice, the distinction between "suggested" and "formal" legal text is arbitrary and potentially confusing for Code parties, quite apart from "draft" text produced outside the Modification Rules. Both "suggested" and "formal" text can be amended at any time in the governance process. Hence, both forms of legal text referred to within the Modification Rules can only really be considered draft versions of the actual text which may ultimately form the binding contractual terms of the UNC. The UNC is a bilateral commercial contract between the owners and operators of the Gas Networks and its

"Suggested Text":
means indicative legal text, in respect of a Modification Proposal, which has been provided by the Proposer other than legal text which is prepared under 9.6.1.
(UNC Modification Rules, Section 2, Interpretation, Defined Terms)

Text of Modification

9.6.1 The text of each Modification shall be prepared as follows:

- (a) in relation to a User Proposal or a Third Party Modification Proposal, the Transporters shall prepare the text of the Modification:
 - (i) where directed by the Modification Panel, for inclusion in the draft Modification Report prepared pursuant to paragraph 9.1.1; or
 - (ii) if requested or directed to do so by the Authority;
- (b) in relation to a Transporter Proposal the Transporter who is the Proposer shall:
 - (i) where directed by the Modification Panel, prepare the text of the Modification (for inclusion in the draft Modification Report prepared under paragraph 9.1.1); or
 - (ii) if requested or directed to do so by the Authority.

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Users. It is, therefore, of utmost importance that parties to that contract understand in necessary detail the nature, purpose and impact of any proposed changes to it; which only fully developed legal text can provide.

The Code Administration Code of Practice recommends that legal text should accompany all Modification Proposals before the consultation phase begins. Given that this best practice is currently not applied consistently across all UNC Modification Proposals, the proposer believes there is scope for change, to ensure that in all cases legal text is provided on a consistent and well understood basis.

It also feels unsatisfactory from a good governance point of view, that the industry has a process to ensure Modifications are clear enough to proceed to consultation, but the same level of rigour is not always (or consistently) applied to the actual legal text which would be implemented into UNC. Since the legal text is more important than the explanation which accompanies it (effectively the Modification Proposal), the proposer believes there is a compelling case for increased checks and balances on legal text by introducing a change control process.

3 Solution



Insert heading here

Use this column in a Q and A style for explanations, in order to preserve the flow of the main text.

Insert text here

Remove references to “suggested” legal text

It is proposed to amend the Modification Rules to remove references to “suggested” text. Implementation of this proposal would remove the concept of “suggested” text from the UNC. Thereafter, any legal text provided to the Code Administrator for incorporation within Modification Reports would be considered the actual legal text which would go into UNC, if the Proposal was implemented.

Introduce requirement to include legal text before consultation phase

It is proposed to insert a requirement into the UNC Modification Rules that only Modification Proposals which have legal text (including “no change” where this is appropriate) can proceed to the consultation phase. With the removal of the concept of “suggested” text, this means that the legal text provided must be the same as that which will go into the UNC if the proposal is implemented. This will ensure that parties have absolute certainty at the time of consultation that they can see what relevant sections or clauses of the UNC are affected.

It is proposed that this is supported by a change to the Modification Panel voting rules, such that the Panel has to make an additional determination before the Proposal can proceed to the consultation phase, on whether the legal text accurately reflects the intent of the Modification Proposal to which it relates. This majority vote determination would be prior to the existing determination on whether a Modification Proposal should proceed to consultation. Where the Panel determines that the legal text does not accurately reflect the intent of the Modification Proposal, the Proposal and the legal text shall be referred back to the relevant Workgroup.

The requirement to have legal text within the Draft Modification Report shall also require the removal of Section 7.3.1 (a)(i) – “the Modification Panel shall...determine whether the preparation of text is required with the Draft Modification Report” since it will be a redundant question.

For clarity, although the Transporter will in practice normally prepare legal text, this does not preclude the Proposer from preparing the legal text if they wish (at their own expense). In either case, provided the Workgroup and the Modification Panel is satisfied that it is sufficiently clear and the text accurately reflects the intent of the Modification Proposal, the Modification Proposal can proceed to consultation.

Introducing a change control process for legal text

To give all Code signatories contractual certainty, it is proposed that where any change is proposed to the legal text of a Modification Proposal after the consultation phase has begun, the change must be brought to the attention of the UNC Modification Panel at the next scheduled Modification Panel for their consideration and a determination on whether or not the change to legal text is immaterial (consistent with the existing Variation rules within the UNC Modification Rules, section 6.5.4). This would require a unanimous vote in favour if the change is to be accepted as immaterial. If the change is accepted, the modification process would continue. If the change is not accepted, the Panel would determine whether the Modification should be referred to a Workgroup for Assessment; or be issued for further consultation.

For clarity, to aid efficient development of a proposal and associated legal text, changes to the legal text can be made before the consultation phase has begun and these changes would not have to be reported to the Panel. However, in line with the existing

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UNC rules around notice of changes to a Modification Proposal, changes to legal text cannot be made more than 5 business days before the Modification Proposal is due to be considered by the Modification Panel, unless the Panel decides to accept it as short notice business (Modification Rules, section 5.3.2).

For clarity, nothing proposed in this Modification Proposal would prevent or restrict the content of changes to legal text. However, any changes after the consultation phase has commenced would have to be brought to the attention of the Modification Panel for their consideration and determination of whether such changes are immaterial, including after the Final Modification Report has been submitted to the Authority and up until the date of implementation.

4 Relevant Objectives

Implementation is expected to better facilitate the achievement of **Relevant Objective f.**

Benefits against the Code Relevant Objectives

Description of 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	Yes

f) Promotion of efficiency in the implementation and administration of the Code

1. Removal of the concept of "suggested" text would eradicate the potential uncertainty and confusion arising from the existing arrangements, whereby parties are unclear about the status of text which is provided within the Modification template section on legal text. This change would clarify and simplify the rules, thereby promoting efficiency in the governance arrangements.

2. Introducing a requirement to have legal text in the Modification Proposal before it can proceed to the consultation phase would remove the current arbitrary determination process by the Modification Panel on whether or not to direct the preparation of legal text. The requirement that legal text is always provided would enable potential drafting issues to be identified and resolved at an earlier stage in the governance process. This requirement would also impose the necessary discipline on Proposers and Workgroups to ensure that the actual, detailed impact of a Modification Proposal within the context of the wording of the UNC is understood and clearly articulated. This should ensure that only Proposals which are fully developed, clear and implementable would be presented to the Panel for a decision on whether it should proceed to consultation. Whilst this may involve more detailed work by industry participants at the development stage, ultimately it should reduce the

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potential for Modification Proposals to be held up by legal text drafting problems (or new issues) at a late stage in the process.

3. Introducing a change control process for legal text would ensure a proportionate level of rigour is applied to potential changes to the contractual terms of the UNC. This would ensure that the intent of a Modification Proposal and Code parties' understanding of its impact is not subsequently altered due to changes to legal text which go unreported. This increase in transparency around changes to legal text would improve efficiency in the implementation of the UNC.

5 Impacts and Costs

Consideration of Wider Industry Impacts

Implementation would help to increase consistency between the major energy codes, as envisaged in the Code Administration Code of practice. No adverse impact on other wider industry issues is anticipated.

Costs

Indicative industry costs – User Pays	
Classification of the proposal as User Pays or not and justification for classification	
No user pays service is created or modified by this modification and hence it is not a User Pays modification.	
Identification of Users, proposed split of the recovery between Gas Transporters and Users for User Pays costs and justification	
N/A	
Proposed charge(s) for application of Users Pays charges to Shippers	
N/A	
Proposed charge for inclusion in ACS – to be completed upon receipt of cost estimate from Xoserve	
N/A	

Impacts

Impact on Transporters' Systems and Process	
Transporters' System/Process	Potential impact
UK Link	<ul style="list-style-type: none">No impact
Operational Processes	<ul style="list-style-type: none">No impact
User Pays implications	<ul style="list-style-type: none">No impact

Impact on Users	
Area of Users' business	Potential impact
Administrative and operational	<ul style="list-style-type: none">No impact
Development, capital and operating costs	<ul style="list-style-type: none">No impact
Contractual risks	<ul style="list-style-type: none">Reduced



Where can I find details of the UNC Standards of Service?

In the Revised FMR for Transco's Network Code Modification
0565 Transco Proposal for Revision of Network Code Standards of Service at the following location:
www.gasgovernance.co.uk/sites/default/files/0565.zip

Impact on Users	
Legislative, regulatory and contractual obligations and relationships	<ul style="list-style-type: none">No impact

Impact on Transporters	
Area of Transporters' business	Potential impact
System operation	<ul style="list-style-type: none">No impact
Development, capital and operating costs	<ul style="list-style-type: none">No impact
Recovery of costs	<ul style="list-style-type: none">No impact
Price regulation	<ul style="list-style-type: none">No impact
Contractual risks	<ul style="list-style-type: none">Reduced
Legislative, regulatory and contractual obligations and relationships	<ul style="list-style-type: none">No impact
Standards of service	<ul style="list-style-type: none">No impact

Impact on Code Administration	
Area of Code Administration	Potential impact
Modification Rules	<ul style="list-style-type: none">Implementation will require the Modification Rules to be amended, as outlined above.
UNC Committees	<ul style="list-style-type: none">UNC Panel will have additional agenda items to consider where changes to legal text are made.
General administration	<ul style="list-style-type: none">Small increase

Impact on Code	
Code section	Potential impact
Modification Rules	<ul style="list-style-type: none">To be determined through Workgroup Assessment
	<ul style="list-style-type: none">To be determined through Workgroup Assessment

Impact on UNC Related Documents and Other Referenced Documents	
Related Document	Potential impact
Network Entry Agreement (TPD I1.3)	<ul style="list-style-type: none">No impact

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Impact on UNC Related Documents and Other Referenced Documents	
Network Exit Agreement (Including Connected System Exit Points) (TPD J1.5.4)	<ul style="list-style-type: none"> No impact
Storage Connection Agreement (TPD R1.3.1)	<ul style="list-style-type: none"> No impact
UK Link Manual (TPD U1.4)	<ul style="list-style-type: none"> No impact
Network Code Operations Reporting Manual (TPD V12)	<ul style="list-style-type: none"> No impact
Network Code Validation Rules (TPD V12)	<ul style="list-style-type: none"> No impact
ECQ Methodology (TPD V12)	<ul style="list-style-type: none"> No impact
Measurement Error Notification Guidelines (TPD V12)	<ul style="list-style-type: none"> No impact
Energy Balancing Credit Rules (TPD X2.1)	<ul style="list-style-type: none"> No impact
Uniform Network Code Standards of Service (Various)	<ul style="list-style-type: none"> No impact

Impact on Core Industry Documents and other documents	
Document	Potential impact
Safety Case or other document under Gas Safety (Management) Regulations	<ul style="list-style-type: none"> No impact
Gas Transporter Licence	<ul style="list-style-type: none"> No impact

Other Impacts	
Item impacted	Potential impact
Security of Supply	<ul style="list-style-type: none"> No impact
Operation of the Total System	<ul style="list-style-type: none"> No impact
Industry fragmentation	<ul style="list-style-type: none"> No impact
Terminal operators, consumers, connected system operators, suppliers, producers and other non code parties	<ul style="list-style-type: none"> No impact

6 Implementation

No implementation timescale is proposed. As self-governance procedures are proposed, implementation could be 16 business days after a Modification Panel decision to implement.

7 The Case for Change

None in addition to that identified above.

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8 Legal Text

In the interest of best practice, the proposer recommends that legal text should be prepared by the Transporters once the Modification Proposal has been fully developed through Workgroup assessment and before it proceeds to consultation.

9 Recommendation

The Proposer invites the Panel to:

- DETERMINE that Modification 0394 progresses to a Workgroup for assessment.