

Representation - Draft Modification Report UNC 0765

New retrospective debit and credit charges to reflect changes to the treatment of Entry Capacity Revenue between October and December 2020

Responses invited by: **5pm on 20 September 2021**

To: enquiries@gasgovernance.co.uk

Please note submission of your representation confirms your consent for publication/circulation.

Representative:	Richard Fairholme
Organisation:	Uniper
Date of Representation:	17/9/2021
Support or oppose implementation?	Oppose
Relevant Objective:	<p>c) None</p> <p>d) Negative</p> <p>g) None</p>

Reason for support/opposition: Please summarise (in one paragraph) the key reason(s)

We **do not support** implementation of this proposal. The key reason is that it is retrospective in nature by seeking to correct an administrative oversight by National Grid, which Users played no part in, but became unwitting recipients of neutrality funds. The responsibility for updating their processes to reflect new UNC arrangements is the sole responsibility of NGG. It is something that Shippers have no direct control over. The Final Modification Report for 0678A was published in April 2019, at which point the proposals were finalised. The Ofgem decision was published in April 2020 and implemented 1 October 2020. This provided up to 18 months for NGG to consider the impact of a revised charging methodology on capacity neutrality and to make the required changes. However, this seems not to have occurred. As a result, we can only conclude that NGG failed to act diligently in this instance.

NGG has argued that they never intended for the neutrality funds to be distributed in the way they were, but in our view, the intention is irrelevant. For example, in UNC Proposal 0341¹ it was clearly never the intention of the User to under-book capacity and incur significant overrun charges. There are many parallels between these Modification proposals, as both were raised to correct an internal error or oversight. It should be noted that UNC 0341 proposal was rejected by Ofgem² and opposed by NGG³, primarily

¹ [0341- Manifest Errors in Entry Capacity Overruns](#)

² https://www.gasgovernance.co.uk/sites/default/files/ggf/FINAL_UNC%200341%20Decision%20Document.pdf

because of the retrospective approach and concerns that this may have on the wider market.

Implementation: *What lead-time do you wish to see prior to implementation and why?*

We do not support implementation.

Impacts and Costs: *What analysis, development and ongoing costs would you face?*

No new costs are likely to be incurred beyond invoice validation, if this proposal is implemented.

Legal Text: *Are you satisfied that the legal text will deliver the intent of the Solution?*

No view.

Are there any errors or omissions in this Modification Report that you think should be taken into account? *Include details of any impacts/costs to your organisation that are directly related to this.*

No.

Please provide below any additional analysis or information to support your representation

Retrospectivity and regulatory decision making

In any regulated industry retrospective decision making should, as a matter of principle, be avoided as far as possible. The effect of decisions with retrospective effect is to increase future legal uncertainty, thereby undermining confidence in the market, damaging investor certainty and increasing operating risks. In turn, this can harm competition in the market and increase the costs to end consumers. In a recent paper published in the Journal of Energy & Natural Resources Law – “Retrospective application of legal rules in the European Union: recent practice in the energy sector”, the author notes that:

“The continual availability of energy is economically and socially essential, but is primarily reliant on private operators and investments to be maintained and developed. Investments in the energy sector are typically highly capital intensive and require long payback periods. This in turn calls for legal and regulatory stability for such investments by the legislator. While changes to laws are inevitable, such changes should be implemented prospectively and take into account the legitimate expectations attached to existing investments.”

Whilst the context is different, the point is that retrospective decisions have impacts which can go well beyond the issue at stake. It is for these sound and rational reasons

³ [04 February 2011 Representation - National Grid NTS \(gasgovernance.co.uk\)](https://www.gasgovernance.co.uk/04-February-2011-Representation-National-Grid-NTS)

that we have yet to see a retrospective UNC proposal implemented since the inception of the Network Code in 1996. Our primary concern, therefore, is that 25 years of good regulatory practice is not undermined by a desire to unwind what is nothing more than an error caused by inadequate internal checks. In the past, this has not been sufficient to justify retrospective action, as highlighted by the Ofgem rejection of UNC 0341.