



**Consumer
Focus**
Campaigning for a fair deal

**Consumer Focus response to
consultation on modification proposals
286/286A – consumer representatives
voting rights**

7 May 2010

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About us

Consumer Focus is the statutory consumer champion for England, Wales, Scotland and (for postal consumers) Northern Ireland. We operate across the whole of the economy, persuading businesses, public services and policy makers to put consumers at the heart of what they do.

Consumer Focus tackles the issues that matter to consumers, and aims to give people a stronger voice.

We don't just draw attention to problems – we work with consumers and with a range of organisations to champion creative solutions that make a difference to consumers' lives.

Introduction

It is widely acknowledged that this is a time of change for the GB energy market. Regardless of which political party forms the new government there will be changes to the way in which the market operates. There has never been a more important time for energy consumers to have a strong advocate and voice in relevant forums to ensure an energy market that operates transparently, provides protections for the more vulnerable and also provides fair energy prices.

Within our statutory remit Consumer Focus (legally known as the National Consumer Council) works for the interests of consumers across England, Wales, Scotland, particularly for energy consumers through advocacy and campaigning. We are committed to acting on behalf of vulnerable consumers. Our role includes the provision of advice to government and regulators and also to provide advocacy through any other relevant forum that might impact on consumer well-being.

We strongly support modification proposal 286 'Extending modification panel voting rights to consumer representatives'.

We do not support 286A because it would give consumer representatives second class voting rights.

We outline our arguments below.

Our response

The Uniform Network Code (UNC) is currently the only major industry code panel without consumer representative voting rights. Modification proposal 286 proposes a clear and simple change to change the existing two consumer representatives' position from non-voting members to voting members.

While these modification proposals were raised before the Authority released its final decision on the Code Governance Review it has recently given a very clear position on this issue stating that:

“We remain of the view that a consumer representative on the UNC Panel will be able to offer views from the important perspective of the impact on consumers, who ultimately pay the costs associated with the operation of the gas trading arrangements. This view should be capable of being expressed as part of the recommendation on whether to accept or reject a proposal”¹

It further stated that neither 286 nor 286A conflicts with proposed licence conditions.

As is their right some industry parties have put forward arguments for the rejection of 286 or both 286 and 286A. Common themes to these arguments relate to the potential effect of such voting rights on their ability to challenge Authority decisions at the Competition Commission ('CC') and our remit.

We outline our response to those arguments below, along with a commentary of our experience on other Panels given that 286A seeks to constrain voting rights to only some Panel decisions.

Impact on parties ability to challenge Authority decisions

Some parties have expressed concern that voting consumer representatives could skew Panel recommendations with the result that some Authority decisions may no longer be eligible for the right of appeal.

We think such arguments naturally prompt two questions:

- Is there a material risk that our votes would prevent others from appealing?
- If there is, does this risk unwind the other benefits of the proposal?

The answers to both are clearly no.

The right to appeal designated Authority decisions to the CC was introduced by the Energy Act 2004. In the six years that this right has existed, we estimate that the Authority will have made approximately 900 modification decisions.²

Of these, only three have been appealed to the CC:

- The approval decision for P194, which the BSC Panel (including the consumer representatives) voted unanimously to reject;

¹ Extract from its 31 March 2010 document, 'Code Governance Review – Final Proposals'.

² In its 30 June 2008 document, 'Review of industry code governance – scope of the review', the Authority stated that it had made over 150 modification decisions in the preceding year. It does not appear to have been an unusual year.

- The approval decision for UNC116V, which the UNC Panel voted 8 to 2 to reject; and
- The rejection decision for UNC116A, which the UNC Panel voted 9 to 1 to approve.

In none of these three circumstances could two consumer representative votes have swayed the overall Panel recommendation; and by extension the eligibility of the decision for appeal.

The past is never a guarantee of the future, but this does suggest that the risk is considerably overstated.

Stepping back from this (very limited) statistical risk, the reliance on this argument for rejection shows a fairly fundamental ignorance of what the CC appeals process is intended to enable.

The statutory right of appeal to the CC was intended to give any party materially affected by the outcome of an Authority decision the right of remedy, i.e. to correct an error of judgement or process. The right to lodge an appeal is not constrained to code signatories – nor was it ever intended to be; read Hansard.

To point out the obvious: Consumer Focus, acting as the statutory proxy for all energy consumers, is materially affected by the outcomes of all Authority decisions – because consumers ultimately reap the benefits, or suffer the consequences, of them.

Indeed, we are more materially affected by the outcomes of Authority decisions than some existing voting UNC Panel members; noting that some modifications are Shipper-only and do not materially affect Transporters but that all modifications are paid for by consumers.

Despite this greater interest, we have lesser rights. This is fundamentally unfair.

It should not be assumed that an Authority decision is a proxy consumer vote. We have different statutory duties to the Authority and provide an independent voice on consumer issues.

Giving consumer representatives the right to vote on Panel recommendations will provide a clearer means for the views of consumers to be reflected in the industry change process.

Experiences of other panels

At the two major industry code panels where consumer representatives have the right to vote – the Balancing and Settlement Code (BSC) and Connection and Use of System Code (CUSC) – the consumer voice is actively sought and appears to be genuinely appreciated by industry parties. Our experience to date has been that industry parties see our presence AND vote as an important part of industry debate and decisions.

Industry parties in these forums acknowledge that the consequences of many changes to industry arrangements do impact on end users, such as domestic, industrial and commercial customers. It is therefore crucial that the consumer's voice is represented in these important forums.

It is for these reasons that we believe that this approach on other panels is and should be considered best practice and therefore adopted by the UNC.

Alternative proposal 286A would require that consumer representatives do not vote on non-modification business.

There does not appear to be any rationale for the inclusion of this restriction beyond the seemingly widely held desire in the (gas) industry to ensure that any voting rights given to consumer representatives are as watered-down as possible.

On both the BSC and CUSC the consumer representative(s) has the right to vote on all business considered by the panel without this exclusion. This has never proven to be an issue on either code; and it is not clear that there is any good reason why we should not be able vote on such matters on the UNC.

Again, we must go back to the earlier point that consumers are materially affected by the industry codes because ultimately they pay for them. There should be no taxation without representation. We cannot support any proposal that would give consumers second class voting rights – which is what 286A proposes to do.

Our remit

Since inception, our policy focus has concentrated on the interests of residential and small business consumers. This reflects the pre-existence of effective independent consumer groups representing the views of larger industrial and commercial energy consumers rather than any statutory bar (i.e. a desire not to duplicate the work of others, rather than a preclusion on activity in this area).

Our statutory remit is ‘whole economy’ and includes all energy consumers – from the smallest residential user to the largest industrial user.

Notwithstanding this – and setting aside our lack of support of 286A - if the Authority were to conclude that it wished to implement 286A rather than 286 then we would welcome it additionally choosing to invoke the powers proposed by the Code Governance Review that would allow it to appoint an additional consumer representative from a different organisation. Consumers could only benefit from a wide range of consumer views being represented on the Panel.

Conclusion

We recommend that modification proposal 286 is implemented and that 286A is rejected.

Consumer Focus response to UNC's consultation on modification proposals 286/286A consumer representatives voting rights

For further information on this consultation response, contact Abigail Hall, Senior Policy Advocate, Regulated Industries Team on 020 7799 7934 or via email at abigail.hall@consumerfocus.org.uk

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