

Stage 01: Proposal

0364:

An Appeals Process for Entry Capacity Manifest Errors

What stage is this document in the process?

01

Proposal

02

Work Group Report

03

Draft Modification Report

04

Final Modification Report

This proposal would add an Appeal process to the Entry Capacity Manifest Error Process proposed in Mod 341.



The Proposer recommends that this proposal be sent for consultation



High Impact:
Authority



Medium Impact:
Shippers, National Grid, UNCC Members



Low Impact:
Insert name(s) of impact

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About this document:

This document is a proposal, which will be presented by the Proposer to the Panel on 17 February 2011. The Panel will consider the Proposer's recommendation, and agree whether this proposal should proceed to consultation or be referred to a Workgroup for assessment.



3 **Any questions?**

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1 Summary

Is this a Self Governance Modification

No. The Proposer believes that, whilst this proposal might otherwise satisfy the Self-Governance Criteria, it is appropriate that its implementation should be determined by the Authority. This is because it proposes that the Authority should be the Appeal Body, and as such the Proposer anticipates that the Authority will wish to ensure that it is in line with its wider duties and obligations.

Why Change?

Modification Proposal 341 provides for the raising of Manifest Error Claims to National Grid and their determination by the UNCC. Under Proposal 341 the UNCC would be required to determine a) whether a Manifest Error Claim is valid, and if so b) what adjustment should be made to the overrun charges.

Whilst the Proposer believes the process set out in Proposal 341 can stand on its own, it believes the possibility of an appeal to the Authority is appropriate and valuable, because whilst there are robust terms in Proposal 341 requiring impartial consideration by UNCC members, there are also appropriate measures to protect UNCC members against any personal liability.

An appeals process would provide the possibility of scrutiny of the decision making of the UNCC. This should further ensure reasonable and impartial decision making by the UNCC, and also provides a means for re-consideration of the issues in the unlikely event of a biased or otherwise procedurally flawed decision by the UNCC.

This Proposal is conditional on Proposal 341 being implemented because if the Authority rejects 341, then this Proposal will not be required and will be withdrawn by the proposer.

Solution

This proposal would add an appeal process to the Manifest Error Claims process in Proposal 341. It would permit any affected party believing it had grounds for appeal, as set out in this Proposal, to refer a determination of the UNCC on an Entry Capacity Manifest Error Claim to the Authority for consideration. The Authority would be able to make its own determination, refer the matter back to the UNCC or uphold the original determination of the UNCC.

Impacts & Costs

This proposal would enable affected parties to appeal a Manifest Error Claim Decision of the UNCC to Ofgem.

There are no systems costs associated with this proposal. National Grid's costs of implementing changes to overrun charges would be covered by the fee provided for in Mod 341.



What is Proposal 341?

Proposal 341 is an earlier UNC Mod Proposal which, if implemented, would introduce a new process for addressing possible Manifest Errors made by Shippers which lead to Entry Overrun charges being incurred. Proposal 341 has already been raised and the consultation closes on 4th February 2011

What happens if Mod 341 is not implemented by Ofgem?

This proposal would not be needed and would be withdrawn.

Does this proposal change anything in Mod 341 ?

No, the suggested legal text would just be added after the legal text for Mod 341, and there are some additional paragraphs which would go into the Guidance Document.

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Implementation

If the Authority decides to implement Proposal 341, the proposer believes it would be best if this proposal should be implemented at the same time or as soon as possible afterwards

The Case for Change

This proposal would improve the effects on the relevant objectives which are proposed in Proposal 341. By providing a clear mechanism for raising and addressing material deficiencies in a UNCC determination on an Entry Capacity Overrun Manifest Error Claim, it would provide comfort to all market participants, and particularly small participants and new entrants, that reasonable treatment would remain available in the case of an error.

Recommendations

The Proposer believes that the Proposal is sufficiently clear and well-developed to proceed directly to consultation.

So how does this Proposal work with Mod 341?

This proposal proposes an additional Appeals process which just adds on to the end of the process set out in Mod 341.

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2 Why Change?

This proposal is raised to supplement Modification Proposal 341 which seeks to introduce Manifest Error Provisions in relation to Entry Capacity Overruns into the UNC.

This Proposal is conditional on Proposal 341 being implemented because if the Authority rejects 341, then this Proposal will not be required and will be withdrawn by the proposer.

If however, the Authority directs implementation of 341 then the proposer believes that this Proposal would offer important additional benefits.

The arguments for introducing Manifest Error Provisions in relation to Entry Capacity Overruns are made in Proposal 341 and are therefore not repeated here. The following paragraph provides an outline of the process proposed in Proposal 341 to provide a brief summary of the context for this Proposal.

Proposal 341 provides for the raising of Manifest Error Claims to National Grid and their consideration by the UNCC. Under Proposal 341 the UNCC would be required to determine a) whether a Manifest Error Claim is valid, and if so b) what adjustment should be made to the overrun charges. The UNCC would have 55 business days from the date on which the claim was raised to make its determination, and would use the Reference Cost Methodology set out in Proposal 341 to determine what the Adjusted Charges should be.

Whilst the Proposer believes the process set out in Proposal 341 can stand on its own, it believes the possibility of an appeal to the Authority is appropriate and valuable, because:-

1. Whilst there are robust terms in Proposal 341 requiring impartial consideration by UNCC members, there are at the same time appropriate measures to protect UNCC members against any personal liability. An appeals process provides the possibility of further scrutiny of the decision making of the UNCC. This should further ensure reasonable and impartial decision making, and also provides a means for re-consideration of the issues in the unlikely event of a biased or otherwise procedurally flawed decision by the UNCC.
2. The presence of an appeal mechanism should thereby help to avoid the need for its use.

The proposer also believes an appeal process is consistent with the theme of the Self-governance Modification Rules. Under the Self-governance rules, an appeal mechanism is included as 'an essential protection...where the industry takes decisions on modification proposals' (Ofgem, 2008), particularly bearing in mind the interests of small participants and new entrants. Proposal 341 provides for a similar mechanism for the industry to take decisions on its own in the first instance. Therefore the Proposer believes that an appeals process would provide similar protection.

The proposer believes it is appropriate that any party who may be involved in or affected by the determination of the UNCC should have equal access to an appeal process. It is therefore proposed to make the appeal available to directly affected parties, i.e. the Claimant, other Users whose neutrality charges have been or may be affected, National Grid and also to all the voting members of the UNCC (i.e. including the Distribution Network Representatives).

What are the benefits of this proposal ?

This proposal would allow the possibility of scrutiny of a UNCC determination on Manifest Error Claims, thereby improving the independence of UNCC decision making.

Simply having an appeal mechanism available should help avoid the need for its use.

It would also provide a mechanism for re-consideration of the issue, in the unlikely event of a biased or otherwise procedurally flawed decision by the UNCC.

3 Solution

A simple appeals process is proposed which would permit any affected party to appeal a determination of the UNCC in relation to a Manifest Error Claim to the Authority.

The grounds for appeal would be that the determination of the UNCC had not been made in accordance with Section B 2.17 (as modified by Mod 341), and that the failure to comply with Section B had a material impact on the determination of the UNCC.

Since the proposed process is very straightforward, it is set out below in the form of Suggested Legal Text. This would be additional to that proposed in Mod 341 (and for the avoidance of doubt, makes no changes to Mod 341). Key points are highlighted in the side bar.

Suggested Legal Text

It is proposed that section B2.17 of the UNC be modified by adding the following Suggested Legal Text:-

(NB: numbering follows that proposed for Mod 341, hence references to B2.17 are in square brackets)

2.17.9 Appeals

- 2.17.9.1 Where the UNCC makes a determination in relation to a Claim raised pursuant to this paragraph [B 2.17], voting members of the UNCC, National Grid NTS or any User whose charges may be affected (each an 'Appellant') may refer such determination to the Authority, subject to the following provisions. For the avoidance of doubt, the User who raised the Manifest Error Claim may be an Appellant.
- 2.17.9.2 An Appellant may make a reference to the Authority:
- (i) no later than 5 Business Days after the determination is notified to Users pursuant to this paragraph [B2.17];
 - (ii) solely on the grounds set out in paragraph [B 2.17.9.3]; and
 - (iii) by notice in writing, copied to the UNCC Secretary, setting out the grounds for the reference, and the reasons why the Authority should review the determination.
- 2.17.9.3 The sole grounds for a reference are that the determination made by the UNCC was not made in accordance with the provisions of paragraph [B 2.17] and that the failure to comply with the provisions of paragraph [B 2.17] had a material impact on the UNCC's determination.
- 2.17.9.4 Where a determination of the UNCC is referred to the Authority, and provided that the Authority is satisfied that the grounds set out in paragraph [B2.17.9.3] above applies, the Authority may:
- (i) substitute for the UNCCs determination its own determination of the level of Adjusted Overrun Charges in accordance with paragraph [B2.17]; or
 - (ii) remit the matter back to the UNCC to be determined again, in accordance with paragraph [B 2.17];
 - (iii) uphold the determination of the UNCC.
- 2.17.9.5 Where the Authority is not satisfied that the grounds in paragraph [B2.17.9.3] applies, it may reject the appeal.



Who can appeal?

Affected parties ie: any User whose neutrality charges would be affected by the determination, any voting member of the UNCC, and the Claimant.

When can an appeal be raised?

Within 5 business days of the UNCC determination

What are the appeal grounds?

That the determination of the UNCC was not made in accordance with Section B and that the failure to comply with Section B had a material impact on the determination.

What can Ofgem do?

It can i) make its own decision, ii) send it back to the UNCC for re-consideration in accordance with section B or iii) uphold the determination of the UNCC

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- 2.17.9.6 Any decision of the Authority in relation to a reference to it under this paragraph [B2.17.9] will be final and binding on Users and National Grid NTS.
- 2.17.9.7 National Grid NTS shall undertake the adjustments necessary to give effect to the determination of the Authority, either at the time of the next entry capacity Invoice date provided that there are 10 Business Days notice available or otherwise at the time of the subsequent entry capacity Invoice date.
- 2.17.9.8 Users shall pay any invoices issued by National Grid NTS to give effect to the determination of the Authority.
- 2.17.9.9 The UNCC and the Authority shall not act as an expert or an arbitrator in making decisions pursuant to this paragraph [B2.17] and the provisions of the Arbitration Act 1996 shall not apply in respect of any such decisions.
- 2.17.9.10 If the Authority has not published a decision relating to a reference within 55 days of the date on which the reference was submitted, the UNCC may submit a written request to the Authority to enquire as to the current status of the decision and the likely decision date.



Why is para 2.17.9.9 necessary?

The Arbitration Act 1996 sets out specific rules for Arbitration and particularly how arbitration should be carried out. Legally, if Ofgem were considered to be undertaking an Arbitration role, then it would be necessary for it to follow all the requirements of the Arbitration Act. This paragraph just makes it clear that the proposal is not intending that the Arbitration Act 1996 would apply.

Proposal to Update the Guidance Document

A Guidance Document, entitled The 'Manifest Errors Guidance Document' has been proposed to accompany Mod 341 and if approved, would become a UNC Related Document.

A revised version of the Guidance Document, 'Manifest Errors Guidance Document Version 2' is appended to this Proposal, and it is proposed that this should replace the version proposed by Mod 341. For convenience, the additional text included in version 2 is shown below.

Appeals

- 3.24 An appeal to Ofgem is available for the Claimant, affected Users (i.e. those for whom capacity neutrality charges are or may be impacted), voting members of the UNCC and National Grid, as set out in section 11 below.

Appeals

- 11 Appeals**
- 11.1 An appeal process is available if any User, voting member of the UNCC or National Grid believes it has grounds for appeal. This includes the User who made the initial Manifest Error Claim.
- 11.2 Grounds for appeal are that the determination of the UNCC was not made in accordance with Section [B 2.17]. This therefore includes consideration of whether the determination was made in an independent and impartial manner.
- 11.3 An appeal must be raised with Ofgem by notice in writing, copied to the UNCC Secretary, within 5 days of the determination of the UNCC being published to Users
- 11.4 Ofgem will consider the matter and may:-
 - Uphold the determination of the UNCC
 - Send the matter back to the UNCC for re-consideration in accordance with Section B
 - Substitute its own determination for that of the UNCC
- 11.5 The decision of Ofgem on an appeal is final and binding on all Users.

What is the Guidance Document?

The Manifest Errors Guidance Document has been proposed as a new UNC Ancillary Document to provide a 'User Guide' to the processes in Mod 341.

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4 Relevant Objectives

The Proposer believes that implementation of this Modification Proposal will better facilitate the achievement of **Relevant Objectives d, f and possibly a**

Proposer's view of the benefits of XXXX against the Code Relevant Objectives	
Description of Relevant Objective	Identified impact
a) Efficient and economic operation of the pipeline system.	As described below
b) Coordinated, efficient and economic operation of (i) the combined pipe-line system, and/ or (ii) the pipeline system of one or more other relevant gas transporters.	None identified
c) Efficient discharge of the licensee's obligations.	None identified
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.	As described below
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 identified
f) Promotion of efficiency in the implementation and administration of the Code	As described below

The proposer believes that this proposal will better facilitate special condition A11.1 (d) – furthering of effective competition between shippers by:-

- Giving confidence to both potential Claimants and other Users that there is a mechanism by which an improperly concluded determination of the UNCC in relation to a Manifest Error Claim can be rectified
- This would therefore further improve the comfort which would be delivered by implementing Mod 341.
- This comfort should lead to reduced barriers to entry and more active participation in the market, which should further effective competition. Implementing this proposal as well as proposal 341 would increase the extent of this effect.

The proposer believes that this proposal will better facilitate special condition A11.1 (f) – furthering of efficiency in the implementation and administration of the UNC by:-

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- Providing an appropriate and clearly defined mechanism for the scrutiny of UNCC decisions on Manifest Error Claims in relation to entry capacity overruns, thereby providing appropriate protection for Claimants and other affected parties, and
- Reducing the risk of contractual disputes arising from improperly concluded determinations of the UNCC on Manifest Error Claims.

The proposer believes that the proposal may better facilitate special condition A11.1 (a) – furthering of efficient and economic operation of the system, as follows:-

- As referred to in Mod 341, to the extent that greater comfort for participants increases the likelihood of their more active participation in secondary trading, and that greater secondary trading maximizes the amount of capacity available and its efficient utilisation, the efficient and economic operation of the system may be promoted.
- This proposal would further improve the comfort of participants, and hence would also further improve the positive impact on this relevant objective.

5 Impacts and Costs



Costs

National Grid's costs in implementing the outcome of the Appeal would be covered by the fee they would receive under Mod 341, and no additional costs are generated by this proposal.

Costs

There are no additional costs associated with this proposal

Indicative industry costs – User Pays	
Classification of the proposal as User Pays or not and justification for classification	
No User Pays service is proposed in this Modification Proposal	
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"> None
Operational Processes	<ul style="list-style-type: none"> Nothing additional to Mod 341
User Pays implications	<ul style="list-style-type: none"> None

Impact on Users	
Area of Users' business	Potential impact
Administrative and operational	<ul style="list-style-type: none"> Users would have a clear process for raising an Appeal in relation to a Manifest Error Determination by the UNCC
Development, capital and operating costs	<ul style="list-style-type: none"> None
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:
<http://www.gasgovernance.com/networkcodearchive/551-575/>

Impact on Users	
Legislative, regulatory and contractual obligations and relationships	<ul style="list-style-type: none"> Improved

Impact on Transporters	
Area of Transporters' business	Potential impact
System operation	<ul style="list-style-type: none"> None
Development, capital and operating costs	<ul style="list-style-type: none"> None
Recovery of costs	<ul style="list-style-type: none"> None
Price regulation	<ul style="list-style-type: none"> None
Contractual risks	<ul style="list-style-type: none"> Reduced
Legislative, regulatory and contractual obligations and relationships	<ul style="list-style-type: none"> Improved
Standards of service	<ul style="list-style-type: none"> None

Impact on Code Administration	
Area of Code Administration	Potential impact
Modification Rules	<ul style="list-style-type: none"> None
UNC Committees	<ul style="list-style-type: none"> Would provide for scrutiny of a UNCC determination on a Manifest Error Claim relating to Entry Overruns.
General administration	<ul style="list-style-type: none"> Some additional administration required to support the processes

Impact on Code	
Code section	Potential impact
B	Additional text as suggested above

Impact on UNC Related Documents and Other Referenced Documents	
Related Document	Potential impact
Network Entry Agreement (TPD I1.3)	None
Network Exit Agreement (Including Connected System Exit Points) (TPD J1.5.4)	None

Impact on UNC Related Documents and Other Referenced Documents	
Storage Connection Agreement (TPD R1.3.1)	None
UK Link Manual (TPD U1.4)	None
Network Code Operations Reporting Manual (TPD V12)	None
Network Code Validation Rules (TPD V12)	None
ECQ Methodology (TPD V12)	None
Measurement Error Notification Guidelines (TPD V12)	None
Energy Balancing Credit Rules (TPD X2.1)	None
Uniform Network Code Standards of Service (Various)	None
Manifest Errors in relation to Entry Capacity Overruns : Guidance Document (As Proposed by Mod 341)	Additional Text as set out above

Impact on Core Industry Documents and other documents	
Document	Potential impact
Safety Case or other document under Gas Safety (Management) Regulations	None
Gas Transporter Licence	None

Other Impacts	
Item impacted	Potential impact
Security of Supply	No direct implications, although Security of Supply may be improved to the extent that implementation of the proposal better encourages Users to supply gas in an emergency
Operation of the Total System	None
Industry fragmentation	
Terminal operators, consumers, connected system operators, suppliers, producers and other non code parties	None

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6 Implementation



Implementation Timing?

If the Authority decides to implement Mod 341, the proposer believes it would be best if this proposal should be implemented at the same time or as soon as possible afterwards.

Mod 341 would permit claims relating to possible Manifest Errors which occurred prior to its implementation date and since April 2010 to be raised within 1 month of its implementation. Thereafter the UNCC would have 55 Business Days within which to determine any Claim raised.

If approved this proposal would require Appeals to be raised within 5 days of the determination of the UNCC.

It is desirable for this proposal to be implemented at the same time or as soon as possible after Mod 341 so that all parties would have clarity over whether or not an Appeals process will be available for any Claims raised following the implementation of Mod 341.

The proposer believes this should be implemented as soon as possible after Mod 341 to provide clarity and certainty for all parties.

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7 The Case for Change

In addition to that identified the above, the Proposer has identified the following:

Advantages

As well as the advantages mentioned above, implementation would further improve the mitigation of National Grid's perverse incentive not to highlight or address Manifest Errors in Entry Capacity overruns, by providing a mechanism by which an impartial decision or otherwise procedurally flawed decision of the UNCC (which includes National Grid as a voting member) can be overturned.

Disadvantages

None Identified

8 Recommendation

The Proposer invites the Panel to:

- DETERMINE that Modification 0364 progress to Consultation.



What Perverse Incentive?

Mod 341 describes that there is currently a perverse incentive for National Grid not to highlight or address Manifest Errors, since it stands to benefit from the income received through its incentive scheme on Capacity Neutrality.

Mod 341 states that its' implementation would help mitigate the effect of this by setting out clear steps for Users to raise a Claim and for National Grid to co-operate in its consideration.



Proposer Invites the Panel to Determine:

Proceed to Consultation

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