

Modification Report
Energy Balancing Credit Committee Members Personal Liability
Modification Reference Number 0668
Version 1.0

This Modification Report is made pursuant to Rule 8.9 of the Modification Rules and follows the format required under Rule 8.9.3.

1. The Modification Proposal

It is proposed that a provision should be included in the Network Code Section X1.2 (Energy Balancing Credit Committee) that would indemnify EBCC committee members from personal legal action by Users for decisions made in their capacity as EBCC members and Users accept that all decisions made by the committee are made in good faith.

This Modification Proposal will align the Gas Industry with the Electricity Balancing Settlement Code (BSC) which does have protection for its members.

2. Transco's Opinion

Transco's opinion is that this Modification Proposal should be implemented.

EBCC members have requested that Transco proposes this Modification on its behalf to seek protection for its members. The Modification Proposal has been developed by the EBCC and discussed at the newly formed Credit sub group of the Supply Point and Billing Workstream.

As the Energy Balancing Credit Committee (EBCC) members do not currently have any protection from possible liability claims made against them personally in respect of decisions that they make as EBCC members on behalf of the Shipper Community, existing/future members may be reluctant to make decisions on behalf of the Shipper Community as these may result in an action and/or claim being brought against them personally by Users. This could lead to a situation where the EBCC would cease to function effectively and could impact on the future governance of the Energy Balancing regime.

The proposed change will bring the Network Code in line with the Electricity Balancing Settlement Code (BSC) which currently provides protection for members of comparable sub-committees.

3. Extent to which the proposed modification would better facilitate the relevant objectives

The role of the EBCC is to minimise the financial risk of potential default by an individual shipper operating in the Energy Balancing regime by protecting its members against any personal liability action. It ensures that the existing governance arrangements for the Energy Balancing regime are maintained as they better facilitate the relevant objectives through the efficient and economic operation of the pipeline System.

**4. The implications for Transco of implementing the Modification Proposal , including
a) implications for the operation of the System:**

Transco is not aware of any impact to the operation of the system.

b) development and capital cost and operating cost implications:

Transco is not aware of any development or capital costs from the implementation of the Modification Proposal.

c) extent to which it is appropriate for Transco to recover the costs, and proposal for the most appropriate way for Transco to recover the costs:

Implementation would not cause Transco to incur any additional costs.

d) analysis of the consequences (if any) this proposal would have on price regulation:

Transco is unaware of any such consequence.

5. The consequence of implementing the Modification Proposal on the level of contractual risk to Transco under the Network Code as modified by the Modification Proposal

Transco does not believe that implementing this Modification Proposal would have any consequence on the level of contractual risk to Transco under the Network Code.

6. The development implications and other implications for computer systems of Transco and related computer systems of Users

Transco is not aware of any implications for computer systems

7. The implications of implementing the Modification Proposal for Users

Transco is not aware of any implications on Users by implementation of this Modification Proposal.

8. The implications of implementing the Modification Proposal for Terminal Operators, Consumers, Connected System Operators, Suppliers, producers and, any Non-Network Code Party

No such implications have been identified

9. Consequences on the legislative and regulatory obligations and contractual relationships of Transco and each User and Non-Network Code Party of implementing the Modification Proposal

No such implications have been identified.

10. Analysis of any advantages or disadvantages of implementation of the Modification Proposal

Advantages

- Existing and future EBCC committee members would be protected against any personal liability action brought by Users affected by decisions made by the committee. This would mitigate any risk borne personally by EBCC members and should ensure that existing/future members would be comfortable to make decisions on behalf of the Shipper Community. Moreover, it could dissuade current and future Users from being EBCC members resulting in dissolution of the EBCC as individuals would be reluctant to take on the role due to fears of personal liability. Ultimately, this sequence of events would lead to a loss of governance arrangements in respect of the Energy Balancing Credit Regime.

No disadvantages have been identified.

11. Summary of the Representations (to the extent that the import of those representations are not reflected elsewhere in the Modification Report)

Representations have been received from seven Users all of which support implementation of this Modification Proposal.

Total Gas and Power Ltd ("TFE"), British Gas Trading ("BGT"), Scottish and Southern Energy ("SSE"), Scottish Power UK Ltd, Energy ("EDF"), RWE Innogy and Powergen UK

In support of this Modification Proposal Powergen stated "*Through providing protection for EBCC members in respect of personal liability claims, the proposal should facilitate decision making in the group, on behalf of the Shipper Community*". It further added that the EBCC provides a constructive forum for the discussion of credit issues and stated "*the potential dissolution of such a group, in the event that this proposal is not implemented, would be to the detriment of the Shipper Community*".

TFE supported implementation of the Modification Proposal and shared the views of Powergen by stating "*The Energy Balancing Credit Committee exists to attempt to minimise the financial risk to all Users as a result of potential default by one or more individual shippers*". TFE raised the point about the increasing reluctance by individuals to become EBCC members due to concerns over personal liability exposure through recommendations made in good faith at the Committee. If as a result of this reluctance the Committee ceased to operate, TFE stated "*this could only be detrimental to the overall operation of the market through the potential for an increase to the financial risk as a result of individual User default*".

BGT were also supportive of the principle that members of the Energy Balancing Credit Committee (EBCC) acted in good faith on behalf of the shipper community and stated "*In this capacity individual members should be indemnified from actions brought by any party aggrieved by the actions that may follow the collective decision of the EBCC where correctly constituted*".

EDF stated "*With the recent spate of Shipper credit issues and ensuing termination of some shipper's licences in the last few years, this modification will further the relevant objectives by removing any hindrance to EBCC member's decisions*"

The views from SSE and Scottish Power support implementation of the Modification Proposal and considered that these provisions should be put in place as soon as possible.

- **Legal Text**

Although BGT confirmed its support for the Modification Proposal it did suggest reconsideration and revision of the legal text to incorporate the provision of indemnity in line with the Electricity Balancing and Settlement Code (BSC). It stated "*We note that the proposed text in this proposal simply states that “No member of EBCC shall be liable ... “ and “ each User and Transco waives any such liability ... “. It does not provide indemnity for members” . We believe that indemnity is a preferable arrangement*". In addition to this it also suggested deletion of the word 'properly' in the 1.2.7 line 3 of the legal text.

EDF also raised an issue with the legal text as the drafting and stated "*It needs some refining to include female members of the Committee so that they are legally protected also. For instance, instead of 'he' in the legal text this should be relaced by 'EBCC members' or simply by 'members' ."*

Transco's Response:

In response to BGT's question concerning the level of protection, Transco is not proposing to indemnify members against any claims from any person in addition to claims from Users as to do so may compromise Transco's neutral position in respect of Energy Balancing . The current drafting is consistent with the provisions in X1.3.6 as Transco is not indemnified for implementing the provisions of the Supplement rather, it is simply not liable for taking any step contemplated by the Supplement and in effect, each User waives any such liability that Transco may have. In terms of the deletion of the word 'properly' from the legal text, Transco is of the view that EBCC members must be acting properly in the performance of their duties as EBCC members and it should not therefore be deleted from the text.

Transco has revised the legal text following the issue raised by EDF concerning the reference to 'he' and version 2 of the legal text which accompanies this report now refers to 'member'.

- **Network Code Sub Committees**

SSE requested clarification on whether this is an issue for any other Transco or Network Code Panels, Committees or Working Groups.

Transco Response:

Transco confirmed that the provisions in section V10.3.6 of the Network Code only apply to sub committees, where individuals are appointed to represent Users for their individual contribution to the business of the sub committee and not to the Users by whom they are employed. There is no other sub committee that make comparable decisions as those defined in section X1.2 of the Energy Balancing Supplement.

- **General Issues**

SSE requested clarification on how any risk relating to the effectiveness of the committee could be resolved if it was diminished as a direct consequence of any potential personal legal action given that there would not be any financial impact on Transco or Users. In addition to this SSE stated *"I am also unclear what happens where it is found a committee member has not acted in good faith"*.

Transco Response:

The draft legal text contains the contractual remedy for this situation in that it will prevent Users from making claims against committee members. In respect of EBCC members acting in good faith there are already contractual obligations on each member and in any event the decisions made are subject to a Quorate vote and no single member is responsible for making sole decisions.

12. The extent to which the implementation is required to enable Transco to facilitate compliance with safety or other legislation

Transco is unaware of any change in legislative, regulatory obligations or contractual relationship of Transco, and each User or Non-Network Code Party as a consequence of implementing this Modification Proposal.

13. The extent to which the implementation is required having regard to any proposed change in the methodology established under Standard Condition 4(5) or the statement furnished by Transco under Standard Condition 4(1) of the Licence

This proposal is not required to facilitate any such change.

14. Programme of works required as a consequence of implementing the Modification Proposal

No program of works are required as a consequence of implementing this Modification Proposal.

15. Proposed implementation timetable (including timetable for any necessary information systems changes)

This Modification Proposal can be implemented immediately as no changes are required to information systems.

16. Recommendation concerning the implementation of the Modification Proposal

Transco recommends that this proposal is implemented.

17. Restrictive Trade Practices Act

If implemented this proposal will constitute an amendment to the Network Code. Accordingly the proposal is subject to the Suspense Clause set out in the attached Annex.

18. Transco's Proposal

This Modification Report contains Transco's proposal to modify the Network Code and Transco now seeks direction from the Gas & Electricity Markets Authority in accordance with this report.

19. Text

SECTION X: NETWORK CODE SUPPLEMENT: ENERGY BALANCING CREDIT MANAGEMENT

Add the following paragraphs at the end of paragraph 1.2.6

1.2.7 No member of the Energy Balancing Credit Committee shall be liable (whether in contract or tort including negligence or otherwise) to Transco or any of the Users for anything done when acting properly in or in connection with his office under the Code, or anything done in what such member in good faith believes to be the proper exercise and discharge of the powers, duties, functions and discretions of that office in accordance with the Code; and each User and Transco waives any such liability that any such member may have and any claim in respect thereof.

1.2.8 Nothing contained in paragraph 1.2.7 shall exercise or limit the liability of a member of the Energy Balancing Credit Committee:

(a) for death or personal injury resulting from the negligence of such member; or

(b) in any case where such member has in the exercise and discharge of its powers, duties, functions and discretions acted in bad faith or fraudulently.

Signed for and on behalf of Transco.

Signature:

Terry Grove
Service Delivery manager
Support Services

Date:

Gas and Electricity Markets Authority Response:

In accordance with Condition 9 of the Standard Conditions of the Gas Transporters' Licences dated 21st February 1996 I hereby direct Transco that the above proposal (as contained in Modification Report Reference **0668**, version **1.0** dated **09/12/2003**) be made as a modification to the Network Code.

Signed for and on Behalf of the Gas and Electricity Markets Authority.

Signature:

The Network Code is hereby modified with effect from, in accordance with the proposal as set out in this Modification Report, version **1.0**.

Signature:

Process Manager - Network Code
Transco

Date:

Annex

1. Any provision contained in this Agreement or in any arrangement of which this Agreement forms part by virtue of which The Restrictive Trade Practices Act 1976 ("the RTPA"), had it not been repealed, would apply to this Agreement or such arrangement shall not come into effect:
 - (i) if a copy of the Agreement is not provided to the Gas and Electricity Markets Authority ("the Authority") within 28 days of the date on which the Agreement is made; or
 - (ii) if, within 28 days of the provision of the copy, the Authority gives notice in writing, to the party providing it, that he does not approve the Agreement because it does not satisfy the criterion specified in paragraphs 1(6) or 2(3) of the Schedule to The Restrictive Trade Practices (Gas Conveyance and Storage) Order 1996 ("the Order") as appropriate

provided that if the Authority does not so approve the Agreement then Clause 3 shall apply.
2. If the Authority does so approve this Agreement in accordance with the terms of the Order (whether such approval is actual or deemed by effluxion of time) any provision contained in this Agreement or in any arrangement of which this Agreement forms part by virtue of which the RTPA, had it not been repealed, would apply this Agreement or such arrangement shall come into full force and effect on the date of such approval.
3. If the Authority does not approve this Agreement in accordance with the terms of the Order the parties agree to use their best endeavours to discuss with Ofgem any provision (or provisions) contained in this Agreement by virtue of which the RTPA, had it not been repealed, would apply to this Agreement or any arrangement of which this Agreement forms part with a view to modifying such provision (or provisions) as may be necessary to ensure that the Authority would not exercise his right to give notice pursuant to paragraph 1(5)(d)(ii) or 2(2)(b)(ii) of the Order in respect of the Agreement as amended. Such modification having been made, the parties shall provide a copy of the Agreement as modified to the Authority pursuant to Clause 1(i) above for approval in accordance with the terms of the Order.
4. For the purposes of this Clause, "Agreement" includes a variation of or an amendment to an agreement to which any provision of paragraphs 1(1) to (4) in the Schedule to the Order applies.