

**Modification Report**  
**“Removal of 9.5.5 of the Modification Rules”**  
**Modification Reference Number 0039**

Version 2.0

This Modification Report is made pursuant to Rule 7.3 of the Modification Rules and follows the format required under Rule 9.6.

**1. The Modification Proposal**

The Proposal submitted was as follows:

“Within the Modification Rules, 9.5.5 provides:

**“If the vote of the Modification Panel under paragraph 9.5.2(b)(i) results in an equal number of votes in favour of, and not in favour of, implementation, the Modification Panel will be deemed to have determined to recommend non-implementation.”**

The appeals process which has been introduced by DTI allows parties to appeal against Ofgem decisions. However, there is no right of appeal when an Ofgem decision accords with a majority recommendation by the UNC Modification Panel. Given the terms of 9.5.5, if half the available Voting Members on the Panel did not support implementation of a Modification Proposal, and Ofgem directed implementation, an appeal would be possible. This would remain the case if 9.5.5 were deleted, since there would be no Panel recommendation in favour of implementation.

If half the available Voting Members on the Modification Panel did not support implementation of a Proposal, and Ofgem did not direct implementation, no appeal would be possible. This is because 9.5.5 provides for a non-implementation recommendation, with which Ofgem would have agreed. Removal of 9.5.5 would reinstate this right of appeal in these particular circumstances. Hence any Ofgem decision would be appealable when the view of Voting Members on the Modification Panel is equally divided between those who do and do not support implementation of a Modification Proposal.”

**2. Extent to which implementation of the proposed modification would better facilitate the relevant objectives**

The Draft Modification Report (DMR) stated: "Implementation of this Modification Proposal would better facilitate the achievement of the Relevant Objective specified in Standard Special Condition A11.2 through development of the mechanism by which any of the uniform network code and each of the network codes prepared by each relevant gas transporter may be modified."

The DMR added: "Implementation of this Modification Proposal would also better facilitate the achievement of the Relevant Objective specified in Standard Special Condition A11.1 (f), the promotion of efficiency in the administration of the network code and/or the uniform network code."

EON, GDF, SGN, SSE, TGP and Gemserv all considered that the proposal would better facilitate the relevant objectives -

EON stated: *“The proposal will better facilitate relevant objective A11.1 (f) the promotion*

*of efficiency in the implementation of and administration of the network code and / or the uniform network code, through ensuring clarity in the governance of the modification procedures.” GDF added: “... this proposed modification would better facilitate GT Licence standard conditions A11.2 and also A11.1(f) as specified.”*

SGN responded: *“As stated in the Modification Report, 9.5.5 could be considered to be ambiguous and could have unintended and potentially significant consequences. SGN believes that the removal of this paragraph would better facilitate the relevant objectives, promoting the efficient administration of the UNC.”*

SSE stated: *“We concur with the proposer's opinion that this proposal would better facilitate the achievement of the relevant objectives specified in Standard Special Condition A.11.2 and A.11.1 (f).”* TGP agreed: *“We agree that the proposal better facilitates the achievement of the Relevant Objective specified in Standard Special Condition A11.1 (f) in so far as the paragraph to be removed is now redundant and to keep it in will only cause unnecessary confusion.”*

Gemserv responded: *“The proposer has argued that implementation would better achieve the relevant objectives specified by Standard Special Condition A11.2 and that in A11.1(f).”* Gemserv continued: *“...the proposal should be implemented because the presumption in 9.5.5 of a panel determination is patently wrong since 9.5.5 only comes into play if the panel has failed to make a determination. Implementation would therefore make the rules more transparent in their operation which is one of the principles of governance.”*

**3. The implications of implementing the Modification Proposal on security of supply, operation of the Total System and industry fragmentation**

The DMR stated: *“No adverse implications in respect of industry fragmentation have been identified.”*

No other response on this aspect was received.

**4. The implications for Transporters and each Transporter of implementing the Modification Proposal, including**

**a) implications for operation of the System:**

The DMR did not identify any such implications.

TGP stated: *“We agree that there are no operational or systems impacts as a result of the implementation of the modification.”*

**b) development and capital cost and operating cost implications:**

The DMR did not identify any such implications.

TGP added: *“Similarly there should be no cost implications”*

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

The DMR did not identify any such implications.

No other response on this aspect was received.

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

The DMR did not identify any such consequences.

No other response on this aspect was received.

**5. The consequence of implementing the Modification Proposal on the level of contractual risk of each Transporter under the Code as modified by the Modification Proposal**

The DMR did not identify any such consequences.

TGP responded: *“We do not believe that implementation of the proposal has any effect on the contractual risk of each transporter or of Users, the level of risk having been set by the legislative introduction of the right of appeal”*

**6. The high level indication of the areas of the UK Link System likely to be affected, together with the development implications and other implications for the UK Link Systems and related computer systems of each Transporter and Users**

The DMR did not identify any such implications.

No other response on this aspect was received.

**7. The implications of implementing the Modification Proposal for Users, including administrative and operational costs and level of contractual risk**

The DMR did not identify any such implications.

No other response on this aspect was received.

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

The DMR did not identify any such implications.

No other response on this aspect was received.

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

The DMR did not identify any such consequences.

SGD responded *“We can see no disadvantages with this proposal, consequences on other obligations and contractual relationships, and do not disagree with the proposer on aspects where views are requested.”*

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

**Advantages**

The DMR stated: *“In the review report presented to the UNC Modification Panel by the Governance Workstream, the Workstream considered that 9.5.5 of the Modification Rules potentially created ambiguity and may have the unintended consequence of preventing an appeal when the Panel was equally split. This Proposal will remove this potential ambiguity.”*

BGT, EON, RWE, SSE, TGP and Gemserv all responded that the Proposal would reduce ambiguity and remove an obstacle to raising an appeal.

BGT responded: *“This section of the Modification Rules had been included for the purpose of clarifying the status of a position reached by the Panel where the votes in favour were exactly half of the votes potentially cast. With further consideration of the paragraph, it is evident that the text of 9.5.5 adds nothing to that section and we concur with the view that it adds, rather than dispels, confusion.”*

EON stated: *“... 9.5.5 creates a discrepancy, where there is a tied vote. To ensure the rules are clear and consistent, all tied votes ought to be open to the right to appeal as the Authority’s decision does not accord with the majority recommendation. This is the intent of the appeals mechanism and, therefore, ought to be appropriately reflected in the Modification Rules.”*

RWE responded: *“We agree with the findings of the Governance Workstream and believe that implementation of this proposal will help create a more judicious modification process by allowing for appeal in instances where the Modification Panel have been unable to recommend either implementation or non-implementation.”*

SSE stated: *“In our view removing Modification Rule 9.5.5 would add clarity to the Panel decision making process and ensure that all interested parties are aware of the circumstances under which they would be entitled to raise an appeal against an Authority UNC Modification decision.”*

TGP responded: *“We agree with the stated advantages and see no disadvantages associated with the proposal”*

Gemserv stated: *“Gemserv believes that implementation of this proposal would have the advantage of improving the transparency of the modification rules as it would remove an inappropriate presumption of a panel determination.”*

### **Disadvantages**

The DMR did not identify any such disadvantages.

TD responded that there are disadvantages and that the Proposal does not better facilitate the relevant objective.

TD responded: *“Para 9.5.2(b)(i) of the Modification Rules requires of the panel to “determine whether or not to recommend implementation”. At present using simple majority voting principles, unless there is a majority in favour of implementation, the vote is determined as having failed and that the panel has determined a recommendation that the proposal should not be implemented. Clearly, where half the panel members present vote in favour, the above principle can not be applied and, hence, paragraph 9.5.5 has been included in the rules to deem the panel's determination. The deeming of a determination, for UNC purposes, does not mean that the determination was as a result of a deemed majority.*

*In this context, rule 9.5.5 serves only to provide an outcome, as required by 9.5.2(b)(i), where none would otherwise be obviously forthcoming. To delete 9.5.5 would be inconsistent with the duties of the panel, as required by 9.5.2(b)(i), to make a determination in favour, or not, of implementation. The lack of a decisive vote should not be left as simply*

*a failure to provide a determination. Transco – Distribution believes that the lack of a determination, in the event half of the voting members at a meeting of the Modification Panel vote in favour of implementation increases, rather than decreases, any purported ambiguity that exists in the process at present. Transco – Distribution believes that such increased ambiguity would not be conducive to the “promotion of efficiency in the implementation and administration of the ..... uniform network code” and, hence, implementation would not better facilitate the relevant objective.”*

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

Eleven representations (from the following) were received with respect to this Modification Proposal. Ten respondents supported implementation and one party did not support implementation.

Transco NTS (Proposer)	(TNTS)	Support
British Gas Trading Ltd	(BGT)	Support
E.ON UK Plc	(EON)	Support
Gaz de France ESS (UK) Ltd	(GDF)	Support
Gemserv	(GS)	Support
Transco Distribution	(TD)	Not in Support
RWE Npower Plc	(RWE)	Support
Scotia Gas Networks	(SGN)	Support
Shell Gas Direct Ltd	(SGD)	Support
Scottish and Southern Energy Plc	(SSE)	Support
Total Gas & Power Ltd	(TGP)	Support

TNTS responded: *“As the initiator of this Proposal, Transco NTS supports its implementation. We have no further comments beyond those contained within the original Proposal.”*

SGN stated: *“SGN supports the proposal to remove 9.5.5 of the Modification Rules. 9.5.5 currently provides that where there is an equal number of votes in favour of and not in favour of implementation, the Modification Panel is deemed to have recommended non-implementation. SGN agrees that this could have unforeseen and unintended consequences in relation to the future right to appeal against any Ofgem decision. It does not seem appropriate that where the Modification Panel is so evenly split and unable to reach a consensus, the right of appeal should be put at risk. Allowing the right of appeal where the Modification Panel does not make a recommendation would seem to be more pragmatic and efficient. The very fact the Panel was unable to reach consensus would tend to suggest the issues being addressed were difficult and / or significant. We do not believe that it was the intention to exclude the right of appeal under such circumstances.”*

TD responded: *“Transco – Distribution believes that further options should be explored in terms of panel voting to compliment the requirement of 9.5.2(b)(i), which could include the option for a panel member to abstain from a vote, since a majority decision could be forthcoming where half the panel attendees vote in favour, should one or more of the panel members present decide to exclude themselves from a particular vote. As there is no obligation on panel member requiring him or her to vote, abstention should be an option for the panel member. Only where the panel fails to make a determination by way of an*

*actual majority should a deemed determination be provided in accordance with 9.5.5, and the fact it is a deemed determination be recorded and forwarded to Ofgem in the Final Modification Report.”*

TD continued: *“To summarise; 9.5.5 allows the panel to discharge its obligation under 9.5.2(b)(i), by way of a deemed determination, but since such determination would not have been the result of an actual majority decision, the ability to appeal Ofgem's decision would be permitted by the Order.”*

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

The DMR did not identify any such requirement.

SGD responded: *“The proposal is in line with discussions at the Governance Workstream and will ensure consistency with the statutory processes on appeals introduced consequentially to the Energy Act 2004. This proposal will ensure that there is no confusion or misunderstandings resulting from any mismatch between Code drafting and legislation.”*

TGP stated: *“It is our view that the removal of 9.5.5 would more correctly align the Modification Rules with the intent of the legislation<sup>1</sup> that has recently been made to introduce a right of appeal to Ofgem decisions on industry code modifications. In this legislation it is clear that an appeal would not be allowed if Ofgem's decision accords with a majority recommendation made by the Modification Panel in the Modification Report and that in any other circumstances an appeal is allowable. Under the Rules, the Panel is only asked to consider whether a Modification should be implemented. Paragraph 9.5.5 was added at the time of the creation of the Uniform Network Code when it was unclear exactly how the legislation to handle appeals would be worded.”*

<sup>1</sup> [Electricity and Gas Appeals \(Designation and Exclusion\) Order 2005](#)

**13. The extent to which the implementation is required having regard to any proposed change in the methodology established under paragraph 5 of Condition A4 or the statement furnished by each Transporter under paragraph 1 of Condition 4 of the Transporter's Licence**

The DMR did not identify any such requirement.

No other response on this aspect was received.

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

The DMR did not identify any such requirement.

No other response on this aspect was received.

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

The DMR stated: *“There are no known barriers to immediate implementation.”*

**16. Implications of implementing this Modification Proposal upon existing Code Standards of Service**

The DMR did not identify any such implications.

No other response on this aspect was received.

**17. Recommendation regarding implementation of this Modification Proposal and the number of votes of the Modification Panel**

At the Modification Panel meeting held on 15 September 2005, of the nine Voting Members present, capable of casting ten votes, seven votes were cast in favour of implementing this Modification Proposal. Therefore the Panel recommended implementation of this Proposal.

**18. Text**

**UNIFORM NETWORK CODE - MODIFICATION RULES**

*Amend 9.5.2 (b) (ii) to read as follows:*

- (ii) submit its recommendation to the Authority, setting out its determination under paragraph 9.5.2(b)(i) ~~(subject to paragraph 9.5.5)~~—and the factors which (in its opinion) justify its determination;

*Delete paragraph 9.5.5*

*Renumber 9.5.6 as 9.5.5*



Subject Matter Expert sign off:

*I confirm that I have prepared this modification report in accordance with the Modification Rules.*

Signature:

Date :

Signed for and on behalf of Relevant Gas Transporters:

**Tim Davis**  
**Chief Executive Joint Office of Gas Transporters**

Signature:

Date :