

Modification proposal:	Uniform Network Code (UNC) 0199: Clarification around the application of the UNC Dispute Resolution Process (UNC199)		
Decision:	The Authority ¹ has decided to reject this proposal		
Target audience:	The Joint Office, Parties to the UNC and other interested parties		
Date of publication:	28 November 2008	Implementation Date:	N/A

Background to the modification proposal

Section A of the UNC General Terms sets out the process for the resolution of disputes between parties to that code.

It is argued that there is a lack of clarity on whether this section of the code can be applied where a User cannot link their dispute directly to a chargeable service covered in Section S of the Transportation Principal Document. The proposal suggests that there have been 'questions raised by Transporters' as to the scope of the clause under its current wording.

The modification proposal

UNC199 proposes to clarify the code by amending section A1.1.2(a) as follows (proposed new text to be inserted is shown as bold and underlined):

1 GENERAL

1.1 Introduction

1.1.1 This Section A provides for the resolution of certain disputes between the Parties.

1.1.2 For the purposes of this Section A:

(a) a "**dispute**" is any dispute or difference arising between the Parties under or in connection with the Code, the Framework Agreement, any Ancillary Agreement or any Supplemental Agreement; **and is not limited to disputes arising from Queries as defined within the Transportation Principal Document Section S.**

(b) in respect of any dispute "**parties**" means the Transporter(s) and/or the User(s) party to such dispute, and "**party**" shall be construed accordingly.

UNC Panel² recommendation

At the Modification Panel meeting held on 18 September 2008, of the 9 Voting Members present, capable of casting 10 votes, 2 votes were cast in favour of implementing this

¹ The terms 'the Authority', 'Ofgem' and 'we' are used interchangeably in this document. Ofgem is the Office of the Gas and Electricity Markets Authority.

² The UNC Panel is established and constituted from time to time pursuant to and in accordance with the UNC Modification Rules.

Modification Proposal. Therefore the Panel recommended rejection of Modification Proposal 0199.

The Authority's decision

The Authority has considered the issues raised by the modification proposal and the Final Modification Report (FMR) dated 24 October 2008. The Authority has considered and taken into account the responses to the Joint Office's consultation on the modification proposal which are attached to the FMR³.

The Authority has concluded that implementation of the modification proposal will not better facilitate the achievement of the relevant objectives of the UNC⁴.

Reasons for the Authority's decision

The rationale for this proposal appears to us to be founded on two principles:

- That the current application of clause A1.1.2 is unclear and disputed by parties; and
- That the proposed change will make the clause unambiguous.

We do not consider that either principle has been demonstrated sufficiently to convince us that a change to the code is merited.

Regarding the first principle, we note that although a dispute over the interpretation of these provisions is alleged in the proposal, and by a minority of Shipper respondents to the industry consultation, it is not clear *from the evidence provided to us* that a substantive dispute actually exists between, or within, the Shipper and Transporter participant groups. Indeed, we note that the consultation response of the Proposer suggests that it holds a common interpretation of the relevant clause with at least two of the Transporters, and we see nothing in other consultation responses that suggest other Transporters, or Shippers, are at variance with this interpretation.

Regarding the second principle, we note that a majority of respondents consider the proposed change is either no clearer, or actually less clear, than the baseline. We do not see a compelling case that the proposed re-wording is more unambiguous than the baseline.

Relevant Objective (d): the securing of effective competition

One User argued that the proposal would reduce the likelihood of the scope of these proposals being disputed to the courts, and that the avoidance of costs associated with that risk would aid competition.

We consider that it is neither apparent that the current rule is unclear, nor that the proposed change introduces clarity. We note that the majority view of industry respondents appears to suggest that, if anything, the proposal may actually increase rather than reduce ambiguity.

³ UNC modification proposals, modification reports and representations can be viewed on the Joint Office of Gas Transporters website at www.gasgovernance.com

⁴ As set out in Standard Special Condition A11(1) of the Gas Transporters Licence, see: http://epr.ofgem.gov.uk/document_fetch.php?documentid=6547

As a consequence, we have not been persuaded that this proposal would help to secure effective competition.

Relevant Objective (f): so far as is consistent with other code objectives, the promotion of efficiency in the implementation and administration of the network code and/or the uniform network code

An argument is made by a minority of parties that this proposal would add clarity to the dispute resolution process, thereby better facilitating this objective by reducing levels of contractual risk between parties.

The argument that UNC199 would improve the clarity of the code was disputed by most respondents. Several suggested that it would set an unhelpful precedent if clarifications are progressed by modification proposal where there is no general agreement that a clarification is needed.

As previously highlighted, from the evidence provided to us, we are not convinced that the baseline is materially unclear or will become clearer as a result of this proposal being made. We therefore hold the view that this objective would not be better facilitated by this proposal.

Other observations

We consider it unlikely that any party would raise a modification for no reason and do not wish to discount the possibility that there may be an entirely valid underlying disagreement between participants on the application of these provisions that has prompted this proposal. However, we can only make a judgement on the evidence available to us and we have not been provided with any credible evidence either to suggest that there is a material dispute between Transporters and Shippers on the practical application of this clause, or to suggest that such a dispute would be alleviated by the change proposed. If a minority of Shippers remain of the view that the current provisions are unclear and need to be modified we suggest that any follow-up modification proposal should seek to make it much clearer in what circumstances the interpretation of the clause has been, or could be, disputed (through practical examples, if possible).

Notwithstanding our rejection of this proposal we fully support the principle of trying to ensure that code provisions are as clear as possible. This reduces both the risk of challenge and other costs of participation. As part of our ongoing review of code governance we wish to improve the transparency and 'user-friendliness' of the industry codes and we would encourage participants to continue to consider ways in which they can be made more simple and easily understood.



Mark Feather

Director, Industry Codes & Licensing

Signed on behalf of the Authority and authorised for that purpose.