Joint Office of Gas Transporters

Representation

Draft Modification Report

0312 - Introduction of Two-Thirds Majority Voting to the UNC Modification Panel

Consultation close out date: 19 May 2011

Respond to: enquiries@gasgovernance.co.uk

Organisation: Consumer Focus

Representative: Richard Hall

Date of Representation: 06 May 2011

Do you support or oppose implementation?

Not in Support

Please summarise (in one paragraph) the key reason(s) for your support/opposition.

We have some sympathies for the underlying policy intention of 312, and agree in principle that it may be appropriate for modifications prompted by SCRs to be subject to a different test for appeals eligibility than other modifications. But we do not consider that it is appropriate to try and deliver this aim through a code modification; the Energy Act 2004 clearly envisages that the Secretary of State – alone – will designate the characteristics of decisions eligible for appeal. Setting a precedent of gerrymandering the application of statutory instruments through industry code modification would appear highly undesirable and in any event the decision making body on this proposal (the Authority) is subject to an acute conflict of interest. Notwithstanding the QC advice provided in the context of the BSC and CUSC modifications, we remain acutely sceptical as to whether a change of this kind can be legally made, and certainly doubt that it can be ethically made.

Are there any new or additional issues that you believe should be recorded in the Modification Report?

We think this proposal essentially raises two main issues:

- A policy question, on whether or not the admissibility of Authority decisions for appeal should be altered to reflect the introduction of Significant Code Reviews; and
- A procedural question, on whether or not this can (and for that matter, should) be achieved by altering the way that industry code panels reach their recommendations.

We think the report does a reasonable job in addressing the policy question but essentially ignores the procedural question.

We do however recognise from discussions at the Modifications Panel and elsewhere that there is little or no appetite within the industry to procure any UNC specific legal advice – so this may perhaps be more fairly categorised as an old issue that has never been adequately tackled rather than a genuinely new issue.

Relevant Objectives:

How would implementation of this modification impact the relevant objectives?

We agree with the Workstream that objectives (a), (b), (c) and (e) are not relevant.

We do not agree that either (d) or (f) would be facilitated.

Regarding objective (d), we do actually agree in principle that competition may be better facilitated by making it easier to appeal decisions prompted by Significant Code Reviews but only if this is delivered through the appropriate procedural means, which is by the Secretary of State revising his description of those decisions eligible for appeal (i.e. revising the appropriate Statutory Instrument). We consider that this proposal seeks to circumvent the appropriate statutory process. We are sceptical that gerrymandering the application of a statutory instrument is legally viable, and are worried that there is scope for considerable unintended consequences if a judgement call is taken that it is (i.e. it would set a precedent that industry codes can be used to unwind, or materially alter the application of, legislation). Because of these concerns, we think this proposal is as likely to reduce regulatory certainty as increase it; we do not consider that it better facilitates competition.

Regarding objective (f) we are not convinced this objective is either facilitated or impeded by this proposal. We recognise the argument that industry (and by extension, consumers) time and money can be saved where consensus decisions can be found that are not endlessly revisited, disputed or tweaked by subsequent modifications. But we think that SCR-prompted modifications, pretty much by definition, are never going to be consensus decisions regardless of where the appeals eligibility threshold is set – because they are inherently likely to be highly material and therefore create pronounced winners and losers. Changing appeals eligibility isn't going to make SCRs a straightforward consensual process; this proposal wouldn't hurt, but it wouldn't help either

Impacts and Costs:

What analysis, development and ongoing costs would you face if this modification were implemented?

The impacts and costs of this proposal lie less in what it does in isolation but in the broader precedent it would create that the application of statutory instruments could be materially unwound or altered by industry codes.

Many basic consumer protections are framed in statute and, if approved, we would want to understand the extent to which this precedent created a loophole through which other primary or secondary legislation could be unwound; we might well incur expense through commissioning QC advice on this matter. I could not put a cost estimate on this because the nature of any advice sought would be contingent on the nature and potential implications of the GEMA decision, which we are not in a position to forecast.

Implementation:

What lead-time would you wish to see prior to this modification being implemented, and why?

We do not support this modification, however were it to be deemed capable of implementation we see no reason why it could not be implemented quickly.

In the interests of running an orderly market, if this modification were to be made it would be appropriate to co-ordinate the timing of any implementation such that this aligned with any changes to the BSC and CUSC (i.e. so that the right of appeal across the three main codes was mutually consistent at any given moment in time).

Legal Text:

Are you satisfied that the legal text will deliver the intent of the modification?

No, although this does not reflect any implied criticism of the quality of the legal text but rather a wider view that we doubt that this change can be made legally at all.

Is there anything further you wish to be taken into account?

Please provide any additional comments, supporting analysis, or other information that that you believe should be taken into account or you wish to emphasise.

The Energy Act 2004 is quite clear that the right to designate which codes, and which decisions on those codes, are eligible for appeal rests with the Secretary of State alone. Section 174 sets out that decisions are eligible for appeal if 'the decision is not of a description of decisions for the time being excluded from the right of appeal under this section by an order made by the Secretary of State'.

Where UK energy legislation establishes powers and duties it is liberally peppered with dual references to the Secretary of State and to the Gas and Electricity Markets Authority (GEMA), the intention being to make clear that either body may exercise that power or carries that duty.

But in this instance, no dual-key is established – it is clear that the 'description of decisions for the time being excluded from the right of appeal' is a judgement call reserved for the Secretary of State. There is a very obvious and extremely good reason why this should be so – because the GEMA is subject to an acute conflict of interest in this matter; it is not appropriate for a body subject to appeal to be able to choose which of its decisions are open to this right.