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Dear Bob,

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

E.ON **supports** implementation of this proposal. Furthermore, given that we are currently in the early stages of a gas SCR we believe this proposal is particularly timely and we would therefore anticipate a decision on this proposal from Ofgem before National Grid is directed to raise a proposal(s) after the SCR conclusions are published. Whilst there are two similar Mods under other (electricity) codes currently in the governance process, we urge Ofgem not to wait until all three are with them before making a decision on this particular UNC Modification Proposal. Such delay would in our view be unnecessary and unhelpful in the circumstances.

Overview

The practical effect of the Mod Proposal is to safeguard rights of appeal to the Competition Commission for Code parties in the event that the Authority implements a proposal which it originated and subsequently approves, but which did not achieve a two-thirds majority support of the Modification Panel members.

It would seem proportionate that in the situation where the originator of a proposal is also the final decision maker, that additional checks and balances are required to at least maintain a reasonable level of accountability and transparency of the Code Modification Process. Without this, there may be accusations of pre-judgement due to the insufficient separation of powers.

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Assessment against the Relevant objectives

We continue to support the justification against the relevant objectives, as set out in the proposal and repeated below for ease of reference:

“As an independent regulator, Ofgem is still an administrative body of government and independence does not mean that the regulator should function in a vacuum. Accordingly, its actions should be monitored so that it is fully accountable for those actions. To help facilitate accountability, a system of ‘checks and balances’ is required. The main check currently on substantive decisions by Ofgem comes from the ability of companies to appeal to the Competition Commission. This process allows Code Modification decisions to be independently reviewed, thereby preventing the concentration of powers in a single body (Ofgem). Some Code parties have raised concerns that the proposed SCR process may result in insufficient separation of powers (i.e. Ofgem effectively acting as “judge, jury and executioner”) for the purposes of industry Code governance. Therefore, to maintain balance and to ensure effective separation of powers, the new powers for Ofgem to effectively originate Modification Proposals under SCRs means that the process for arriving at a Panel recommendation must change in response, by introducing a slightly higher hurdle in order to maintain the efficacy of the statutory Energy Code Modification appeals process as envisaged by Parliament.

*By reinforcing the concept of separation of powers and maintaining an effective appeals mechanism, the intended effect of the proposal is to protect the open and participatory regulatory decision-making process, where industry participants believe that regulatory decisions take their interests into account. This, in turn, may be expected to provide confidence in the regulatory system from justice “being seen to be done”, which may ultimately attract new entrants to the market or improve competition between existing Shippers (**SSC A11.1 (d)**).*

In addition, requiring a higher (two-thirds) threshold of support to achieve a Panel recommendation should itself act as an inducement between proposer, Regulator and wider industry to co-operate on SCR-originated proposals, ensuring as far as possible that a proposal has a broad level of industry support. Failure to achieve a broad level of industry support will almost certainly result in a failure to achieve a recommendation to implement by the Panel (which acts as a filter for appeals broadly based around industry consensus). This in turn opens up the potential for affected parties to access the Competition Commission appeal mechanism if Ofgem were to subsequently disagree with the Panel’s majority view. Ensuring that SCR proposals reflect broad industry consensus should result in fewer subsequent regulatory



interventions or issues being re-visited, which may be considered to better facilitate the relevant objectives in terms of promoting efficient administration of the UNC (SSC A11.1 (f)).”

QC Legal Advice for CAP190 and P264

Link to document: <http://www.nationalgrid.com/NR/rdonlyres/3FBF9136-BF6D-456B-8CC1-BD639507EE03/45446/AmendmentproposalsFinalAdvice.pdf>

The advice was provided for CAP 190 under the CUSC and P264 under the BSC as a result of concerns raised by some parties that the proposals may not be implementable (or ineffectual) if they conflicted with the statutory instrument which gives rise to the right of appeal for parties to the Competition Commission for Code Modifications.

The advice noted that the word “majority” is capable of meaning “two thirds majority” for the purposes of interpreting the meaning of the relevant statutory instrument. Furthermore, it is noted by the QC that: *“it would in our view be possible to raise the threshold required by the BSC or CUSC for a Panel to recommend a particular amendment/modification. The threshold could be raised to a requirement for a two-thirds majority”*.

Taking into account the views expressed in the legal advice, we continue to believe that this UNC Modification Proposal would have its desired effect of introducing two-thirds majority voting to the Modification Panel, if implemented.

If you wish to discuss this response in any more detail, please do not hesitate to contact me on T: 02476 181421.

Yours sincerely,

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