

Representation

Draft Modification Report

0387: Removal of Anonymity from Annual Quantity Appeal and Amendment Reports

Consultation close out date: 06 January 2012

Respond to: enquiries@gasgovernance.co.uk

Organisation: **ScottishPower Energy Management Ltd**

Representative: David McCrone

Date of Representation: 06 January 2012

Do you support or oppose implementation?

Not in Support

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

We do not believe that the proposer has provided evidence that “misuse of the AQ Review process” exists and that it is an issue that needs to be addressed. Ofgem already have full transparency over the AQ Review process and the *vires* to challenge any shipper it believes is misusing the process. It is not necessarily appropriate for a competitor or other industry party to perform this function. The proposer has also stated that their identity within the anonymised reports can easily be identified and therefore they are not offered the same protection as other shippers. While shippers acting within the rules may not appear to have anything to fear from the anonymity being removed from such reports, it is not appropriate that the protections that were deemed necessary at the time the reports were created are removed. Indeed, the one Transporter response to MOD81 advocated the change only on the proviso that “National Grid’s confidentiality obligations are protected”. The modification does not set out what has changed that has removed this requirement nor how the proposer has addressed the transporters’ past concerns over confidentiality.

When the MOD81 reports were introduced it was the Transporters who were particularly concerned about ensuring anonymity and meeting their requirements to keep information confidential. Therefore whilst we recognise that the proposer is seeking transparency we are not clear whether or not transparency in the level proposed is acceptable in respect of the confidential information that would be exposed around market shares (by LDZ) and the aggregate AQs of all Shippers (by LDZ). Indeed as explained below the proposer was requested by Ofgem during the development phase to consider other options to afford them the same anonymity as other Shippers, but they chose not to do so. Such a solution would address one of the concerns that the proposer has.

We note that the proposer highlights that they believe that the “lack of transparency does not foster an environment of accountability regarding compliance with Code” and would highlight that it is normal practice for anonymous information to be provided to industry, where the information is commercially sensitive as is the case in the electricity market. What is more important is the oversight of the AQ Review process and the ability for Ofgem to have a view of the activity of the various Shippers in the market – removal of anonymity serves no purpose, as the information that is available around the AQ Review is made available to Ofgem on a non-anonymous basis already, we believe. What is more of a challenge is ensuring that Ofgem have enough transparency and depth of information to allow them to determine if there are any issues. This is something ScottishPower is trying to address through industry developments, like modification 379A.

In particular we do not support this modification as it releases commercially sensitive information in relation to market share and we would even expect such information to be exempt from release under the Freedom of Information Act, on the basis of section 43 “information on the production costs and market share in an industry that could be used by competitors in conjunction with what was already known, to advance their position in the marketplace.” Given that no controls have been explored or proposed around the release of the information we are seriously concerned over this aspect.

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

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We have concerns about how the information that is released into the public domain will be controlled. The modification does not set out what purpose the proposer believes they can serve from the release of this information and there is no explanation of what restrictions should be placed upon it. We believe that the modification lacks sufficient controls to ensure that the data made available is not used for marketing or other purposes outwith the scope of the AQ Review. In particular we would like to seek assurances over who would receive any reports that would have specific Shipper information and how the subsequent release of this information to parties outside of Users would be restricted.

Relevant Objectives:

How would implementation of this modification impact the relevant objectives?

d) Securing of effective competition:

(i) between relevant shippers;

(ii) between relevant suppliers; and/or

(iii) between DN operators (who have entered into transportation

arrangements with other relevant gas transporters) and relevant shippers

As stated above, Ofgem already have the ability to view a shipper's performance in the AQ Review and challenge where they have reasonable suspicion of wrong doing. It is unclear what real benefit shippers would gain from also being able to do this; in fact the release of information on a non-anonymous basis may stifle the opportunity to challenge Shipper behaviour. It is easy to challenge an anonymous ID, but more difficult to raise specific and pointed concerns at an individual company due to issues of defamation/reputational loss. In fact there is a potential unintended consequence that a shipper may suffer reputational damage because of the conclusions drawn by other shippers. If this is made public, whilst the shipper in question may be able to share information to Ofgem that justifies their behaviour, such information may be commercially sensitive and not suitable for the wider public domain or suitable for sharing with direct competitors. Without the ability to address accusations made by other parties that shipper could be unfairly treated. This would be to the detriment of effective competition and therefore be detrimental to relevant objective (d).

The proposer states that the modification will increase protection against potential misuse of the AQ Review process leading to a fairer allocation of costs and therefore further effective competition. There has been no evidence provided to show that such misuse occurs in the amendment phase or that the current arrangements are insufficient. In fact, there is the unintended potential for the AQ information being made available and used by individuals or businesses who may not fully understand the information on display and therefore come to spurious conclusions on behaviour which could be seriously damaging to the reputation of the Shipper business. As such it is not possible to say that this would further the relevant objective as suggested.

f) Promotion of efficiency in the implementation and administration of the Code

There is no evidence in the proposal to confirm that the modification will change the behaviour of shippers or that the current arrangements are not sufficient. Perversely, removing the anonymity may lead to unsubstantiated claims against shippers which require to be investigated and resolved. It is right that shippers remain answerable to Ofgem in this regard.

We are also unclear what benefit is gained by re-publishing the last set of reports with anonymity removed. We believe that these reports have already been made available to Ofgem with Shipper identities revealed and they are free to take what, if any, action they perceive necessary. It would be inefficient for historic data to be re-published and do not understand what the intent of this is, as the proposer has not substantiated this part of the proposal.

We do not believe that the modification would promote the efficiency of the Code and therefore does not further relevant objective (f).

Impacts and Costs:

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

We would not expect to incur any system costs as a result of the implementation of this modification.

Parties should be mindful however of the potential reputational costs as a result of implementation of this modification. If shippers accuse each other of gaming the review, it may not be possible for a shipper to exonerate themselves fully as they are unwilling or unable to place otherwise commercially sensitive data in the public domain.

Parties will also be responsible for meeting the costs of responding to investigations into spurious claims of gaming.

Implementation:

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

If successful, we have no concerns over the implementation date put forward in the modification, but do not agree with the re-issue of historic MOD81 reports, as this would be a cost to Xoserve.

Legal Text:

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

We believe that the legal text as drafted meets the intent of the modification.

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.

At the time of the introduction of the MOD81 reports, transporters had a number of concerns over the impact on their confidentiality obligations. There is nothing set out with the modification that indicates how this has been resolved or whether the transporters and or Xoserve have taken legal advice in this regard. We believe it is important that it is made clear what has changed since that time for this to no longer be a concern and are concerned that Xoserve may put the Transporters in breach of their confidentiality obligations (as set out in the Final MOD Report in relation to comments made by National Grid Distribution in relation to MOD81)¹. For this reason we believe that it important to consider the legal aspect of this proposal.

We are concerned that the precedent this modification, if approved, would set has not been fully considered by the proposer. Removing anonymity from the MOD81 reports would set a precedent for open market operations and could result in other forms of confidential information being opened up to the public view e.g. Filter Failures, LSP amendment and appeals activity, Mod 640 appeals etc.

We understand that the proposer was requested by Ofgem during the development phase to consider what alternatives could address their concerns without the need for the removal of anonymity. To our knowledge no alternative was considered.

Our proposal for an alternative would be that the next release of the MOD81 reports by the Transporter's agent could be published with new anonymous IDs and for the proposer's portfolio to be split under two or more IDs. If this was held over until the next publication of the reports, then shipper portfolios will, we believe, have altered sufficiently so that all parties will be afforded the same level of protection. This would address the main concern that the proposer has said they are trying to address. Ofgem will still receive full visibility of shipper's performance, as now, and so mitigate any perceived risk of the AQ Review process being abused – thus addressing the remaining concern that the proposer has put forward. Further confidence in the AQ Review process could then be achieved through progression of other modifications such as 0379A Provision for an AQ Review Audit and 0380 Periodic Annual Quantity calculation ("Rolling AQ").

We note from National Grid Distribution's response that they have also made a similar suggestion that would offer more protection to parties while retaining confidentiality and we would support the proposer exploring this.

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¹ <http://www.gasgovernance.co.uk/0081>