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Modification Proposal 0394 Legal Text for UNC Modification Proposals

Dear Bob,

Thank you for your invitation seeking initial representations with respect to the above Modification Proposal. This response is issued on behalf of National Grid Transmission.

Modification Proposal 0319V: Code Governance Review: Role of Code Administrators and Code Administration Code of Practice

In March 2010 Ofgem published their Final Proposals in respect of the Code Governance Review (CGR) and the modifications to the Gas Transporter's (GT) licence necessary to implement the Final Proposals. Those revisions and the Code Administration Code of Practice¹ (CoP) became effective on the 31 December 2010. Subsequently Modification Proposals 0318 to 0325 (inclusive) implemented the necessary changes to the UNC Modification Rules.

Modification 0319V implemented a number of changes relating to the role of the Code Administrator and the CoP. This proposal included an amendment to implement CoP Principle 9 – Legal Text. The related extract from the proposal can be found below:

- *To aid understanding of a Proposal, amend the Modification Rules to ensure legal text is normally made available prior to the Consultation Phase. The Modification Panel may, prior to the Consultation Phase, by exception, agree that legal text is not required, including instances where the Proposer has produced "suggested text" as part of the Modification Proposal.*

This amendment to the Modification Rules aimed to ensure legal text is normally made available prior to a Proposal entering the Consultation phase but consistent with the CoP, it also introduced the ability for the Modification Panel to agree that legal text is not required in certain instances including where the Proposer has produced Suggested Text as part of the Modification Proposal.

¹ <http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=328&refer=Licensing/IndCodes/CGR>

Since the implementation of Modification 0319V we have seen an increase in the number of proposals that have been raised with Suggested Text included at the outset, as it is now recognised that without text a Modification Proposal is unlikely to progress to Consultation and/or delays could be incurred whilst text is developed.

Under the previous Modification Rules (pre 31st December 2010) very few Modification Proposals included text prior to Consultation and the majority of legal text was produced following a request from the Authority in accordance with Modification Rules section 9.6.1b. As a consequence, in general, legal text was produced in short timescales (3 weeks) and the only party that was able to review the text prepared by the gas transporter was the Authority itself. However, a significant number of Modification Proposals have been successfully implemented via these previous rules and revisions to text post implementation have been rare.

We believe that since the implementation of Modification 0319V every Modification Proposal issued for consultation has included some form of legal text, which in most cases has also been provided to, and reviewed by, the associated Workgroup. The development and review of such text earlier in the governance process has enabled the gas transporter to transpose the Suggested Text into formal/final legal text (often without the need to make substantial changes) and has facilitated the provision of indicative text by Users in particular, in support of their own proposal.

We believe that the way Suggested Text is now being regularly provided before consultation is a significant and valuable improvement on the previous regime. We believe that the current legal text process is more transparent whilst continuing to be flexible enough to facilitate timely and appropriate changes to be made to the legal text by the gas transporters.

National Grid Transmission initial views on Modification Proposal 0394

National Grid Transmission are not opposed to evaluation of the current legal text process and how it could be enhanced further, but we have some concerns as to the justification provided within Modification Proposal 0394 and the associated solution proposed.

Justification

- The Proposer states that *“Some principles within the Code Administration Code of Practice are not currently fully reflected within the UNC since Modification Proposals currently can (and do) proceed to consultation without legal text”*. Modification 0319V is compliant with the exceptions process described in CoP principle 9, which allows the Panel to agree that legal text may not be produced in certain circumstances including when Suggested Text has been provided. Therefore we do not agree that aspects of the UNC rules do not comply with the CoP.
- The Proposer states that *“In practice, the distinction between “suggested” and “formal” legal text is arbitrary and confusing for Code parties and should be removed from Code”*. We believe that the UNC definition of Suggested Text is clear and believe it is helpful to have a distinction between such indicative text and the final text. Currently Suggested Text is predominately provided by the transporters and, as indicated earlier in this response, the Suggested Text included in the Draft Modification Report is often the same or very similar to the final legal text. The

facility to provide “Suggested Text” was established to recognise, encourage and enable proposers, particularly Users, to provide a legal interpretation of their proposal. We do however appreciate that very few Users other than Transporters have to date taken up the facility to provide Suggested Text in support of their own proposals and draft text is generally prepared by the transporters on a User’s behalf during the Workgroup stage. National Grid Transmission would therefore be happy to explore how the rules (Section 9.6.2 in particular) with regards to Suggested Text and legal text could be clarified in order to remove any confusion experienced by UNC parties.

- The proposer states that *“Both “suggested” and “formal” text can be amended at any time in the governance process”* and therefore the UNC does not need to differentiate between the two forms of text. We do not believe that this rule is specified in the UNC or CoP or any other Code. This suggested ability to amend formal text at any time and by any degree would also appear to be at odds with the current restrictions placed on the amendment of a Modification Proposal once it has entered the consultation phase.
- The proposer highlights issues with the transporters producing legal text at a late stage in the process, where directed by the Modification Panel or the Authority to do so. We question whether this concern is valid as it appears to be a comment on the process prior to the implementation of Mod 319V.
- The Proposer states that *“Currently, legal text can be amended by the party directed to prepare it without the knowledge of industry participants (including the proposer or any consultee)”*. This comment does not reflect the National Grid Transmission practice of always seeking the approval of the proposer for any text prepared and/or any subsequent changes. Although the proposal does not contain any evidence or examples of where the transporters are intentionally making amendments to the text that is not consistent with the proposal, we would support a change to require Transporters to obtain the approval of the proposer before submitting the text or revisions to it.
- The proposer states that *“The question of whether a Modification Proposal requires legal text is, in the proposer’s view, an arbitrary one, which could be circumvented by mandating legal text to be provided for all Modification Proposals, pre-consultation phase”*. We believe that it is still appropriate that the Panel and the Authority have the power to direct when legal text is produced, as currently they seek to do so only when the Modification Proposal is fully developed in order to avoid the inefficiencies of trying to provide text for an incomplete or ambiguous proposal. This approach ensures that legal text is only prepared when it is efficient and economic to do so.

Solution

- It is proposed that *“To give all Code signatories contractual certainty, where any change is made to the legal text by the party preparing it after the consultation phase has begun, the change must be reported to the UNC Modification Panel for their consideration and determination on whether the change should affect the progress of the Modification Proposal through the governance process”*. This proposal does not

appear to be consistent with the CoP, which states that “Code Panels can agree to minor corrections to legal text at the time of making its final recommendation” and “If the panel determines that changes to the legal text are appropriate, but considers that they cannot be reasonably be considered to be minor, they may instruct the CA to carry out a further consultation on the revised text”. It should be noted that the Balancing and Settlement Code (BSC) includes rules consistent with the CoP and that a proposal (CMP198) has recently been raised in the Connections and Use of System Code (CUSC) to explicitly introduce this element of the CoP into the CUSC. We consider that this aspect of the proposal would benefit from some changes to make it better reflect the timing in the CoP and ensure the proposal is consistent with the CUSC and BSC.

- It is unclear whether the intention of the above proposal includes changes to text requested by the Authority after the Modification is sent to it for a decision. If this is the intention, then National Grid is also concerned that the above proposal is disproportionate in that, in requiring all legal text changes (made after the consultation has begun) to be brought to the attention of the UNC Modification Panel at the next scheduled Modification Panel, the proposal will cause unnecessary delays and add cost to the process. We believe that the Authority’s legal team provide a valuable role in the review of formal legal text and we have seen no evidence to suggest that changes made following such a review are unfounded or require further industry consultation.
- It is proposed that “The UNC Modification Rules be amended to remove references to “suggested text”. As suggested text is referred to in the CoP, we believe this change would conflict with the CoP.
- It is proposed that “Only Modification Proposals which have legal text can proceed to consultation”. This means that an exceptions process introduced by modification Proposal 0319V is not permitted, which would again be in conflict with the CoP.

In summary we believe that the proposal has a number of elements which conflict with the current CoP and we are not convinced it would better facilitate the achievement of the Relevant Objectives as it would introduce delays and inefficiencies into the current UNC Modification Rules. We therefore would like to work with the proposer to develop the proposal.

Yours sincerely

Chris Shanley