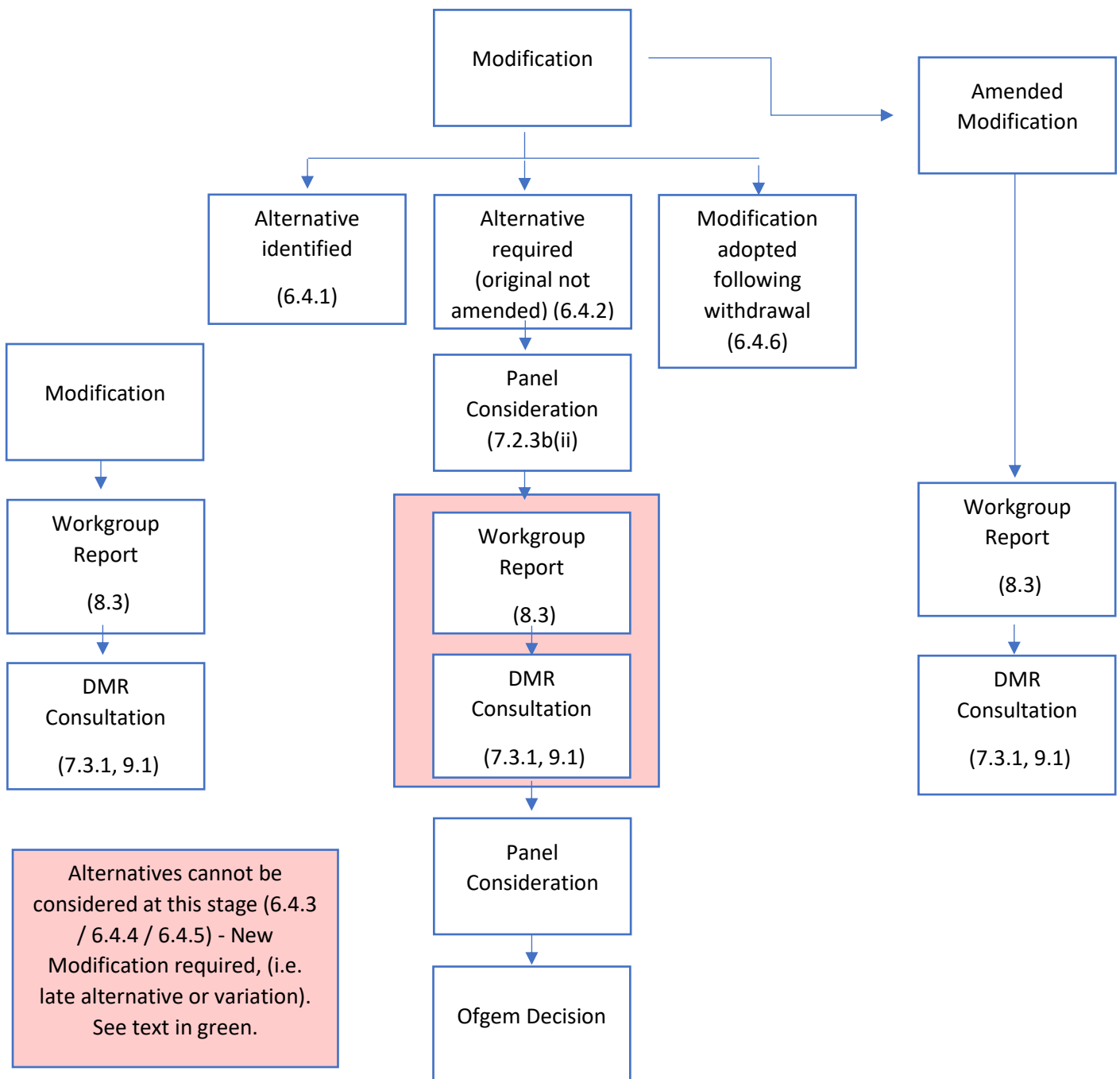


Panel Action: PAN 01/08: The Governance Workgroup is requested to provide recommendations on the criteria to be adopted for considering alternative Modifications.



An extract of the Modification Rules (6.4.2) is included for clarity below - see text in yellow.

6.4 Alternative Proposals

6.4.1 In respect of a Modification Proposal which the Modification Panel pursuant to paragraph 7.2.3 has determined should be referred to a Workgroup:

(a) where the Modification Proposal is made in respect of the Uniform Network Code, any person who is eligible to make an alternative Modification Proposal under paragraph 6.1.1;

(b) where the Modification Proposal is made in respect of an Individual Network Code, any person who is eligible to make an alternative Modification Proposal under paragraph 6.1.2;

being a person other than the Proposer, may, subject to paragraph 6.4.5, make an alternative Modification Proposal in accordance with paragraph 6.2 and the Workgroup shall only consider an alternative Modification Proposal made under this paragraph 6.4.1 if it is made no less than five (5) Business Days before the next meeting of the Workgroup. Where there are fewer than five (5) Business Days before such Workgroup meeting the alternative Modification Proposal will be included on the agenda for the following Workgroup meeting.

6.4.2 Where a Modification Proposal has been referred to a Workgroup and the Workgroup requests that the Modification Proposal should be amended but the Proposer of the Modification Proposal does not agree to amend the Modification Proposal, any person (other than the Proposer) who is eligible to make an alternative Modification Proposal under paragraph 6.4.1 may, in accordance with paragraph 6.2, make an alternative Modification Proposal under this paragraph 6.4.2 which shall include the amendment.

6.4.3 Where the Modification Panel has determined a Modification Proposal should be referred to a Workgroup and:

(a) the Workgroup Report in respect of such Modification Proposal has been sent to all Members in accordance with paragraph 8.4; or

(b) the Modification Panel has made a determination to refer the Workgroup Report in respect of such Modification Proposal back to the Workgroup for revision or further work under paragraph 8.5.1(b)(ii) and such Workgroup Report has been sent to all Members in accordance with paragraph 8.4 after such revision or further work;

an alternative Modification Proposal shall not be made in respect of Modification Proposal or be considered by the Workgroup under paragraph 6.4.1.

6.4.4 Where the Modification Panel has determined a Modification Proposal should be referred to a Workgroup under paragraph 7.2.3(b)(ii) and the Workgroup Report in respect of such Modification Proposal has been sent to the Modification Panel an alternative Modification Proposal shall not be made in respect of such Modification Proposal or be considered by the Workgroup under paragraph 6.4.1.

6.4.5 An alternative Modification Proposal may not be made:

(a) in respect of a Modification Proposal after the Modification Panel pursuant to paragraph 7.2.3(b) has determined such Modification Proposal should proceed to Consultation;

(b) where the Authority directs a Transporter in writing that an alternative Modification Proposal shall not be made in respect of a Modification Proposal; or

(c) by the Authority, unless such alternative Modification Proposal is either:

(i) one which the Authority reasonably considers is necessary to comply with or implement the Regulation and/or any relevant legally binding decisions of the European Commission and/or the Agency for the Cooperation of Energy Regulators; or

(ii) in respect of a Significant Code Review.

In case of paragraph (b), the Transporter shall notify the Secretary about the direction as soon as reasonably practicable after it has been received by the Transporter, and the Modification Panel shall ensure that a Modification Proposal will not be considered as an alternative Modification Proposal to the relevant Modification Proposal.

6.4.6 In respect of any Modification Proposal which is withdrawn pursuant to paragraph 6.5.1, or deemed withdrawn pursuant to paragraph 6.5.4 or 6.5.6, any of the parties (except for the Proposer):

(a) in paragraph 6.1.1 (where such proposal is made pursuant to paragraph 6.1.1); or

(b) in paragraph 6.1.2 (where such proposal is made pursuant to paragraph 6.1.2),

may, but shall not be required to, either raise an alternative Modification Proposal in accordance with paragraph 6.2) or adopt the withdrawn proposal (in which case the adopted proposal shall continue through the Modification Procedures from the point at which it was withdrawn).

7.2.3 Subject to paragraphs 7.2.2, 7.2.8 and 7.2.11, the Modification Panel may, without prejudice to paragraph 7.2.4, determine that:

(a) a Modification Proposal:

(i) either satisfies the Self-Governance Criteria or does not; and, if applicable

(ii) satisfies the Fast Track Self-Governance Criteria

For the avoidance of doubt, a Modification Panel determination under 7.2.3(a)(ii) must be unanimous

(b) a Modification Proposal:

(i) subject to paragraph 7.2.3(d), should proceed to Consultation in accordance with paragraph 7.3; or

(ii) should be referred to a Workgroup for Workgroup Assessment in accordance with paragraph 7.5 (and the Modification Panel may determine the Terms of Reference for such work (including terms as to the identity of any third parties to be consulted) and the date upon which it requires the Workgroup to submit its Workgroup Report);

(iii) should be deferred to a subsequent meeting of the Modification Panel for further discussion; or

(iv) be implemented, subject to unanimous determination under 7.2.3(a)(ii) that Fast Track Self-Governance Criteria are satisfied and subject to Panel determining unanimously that the Modification Proposal be implemented; or

(v) be referred back to the Proposer for further development.

8.4 Circulation of Workgroup Reports

Each Workgroup Report shall (subject to paragraphs 5.4.1 and 5.4.2) be sent to all Members as soon as reasonably practicable but in any event not less than eight (8) Business Days prior to the meeting of the Modification Panel at which that report is to be discussed.

8.5 Discussion of Workgroup Report

8.5.1 Having:

(a) discussed the Workgroup Report; and

(b) allowed any person who attended and participated in the relevant Workgroup (in attendance at the meeting of the Modification Panel) to express any views on the substance of the Workgroup Report or the conduct of the consideration of the Modification Proposal by the Workgroup, the Modification Panel shall determine:

(i) that the Modification Proposal shall proceed to Consultation in accordance with paragraph 7.3; or

(ii) to refer the Workgroup Report back to the Workgroup for revision or further work; or

(iii) to continue to consider or to consider further the Workgroup Report at a subsequent meeting of the Modification Panel.

Panel Action: PAN 01/08 – Information provided by Ofgem, Received 30 August 2019 by email.

Nothing in this e-mail fetters the discretion of the Authority in relation to UNC696/UNC701 or any other modification. The views expressed below reflect our provisional thinking and are subject to change.

UNC Panel has actioned Governance Workgroup to discuss and provide recommendations on the criteria to be adopted to for considering alternative modifications. This is the

result of a discussion at Panel on whether UNC696/701 should be considered alternative modifications.

We note that there is no legal text for UNC696/UNC701, despite the fact that UNC696 has already been sent to consultation, and so the robustness of any assessment on whether the two modifications are “alternatives” is necessarily limited for all parties. Therefore, our views at this time are based on a qualitative reading of the proposed business rules (as at 15 August).

At that meeting we expressed our view that UNC696/701 are proposing different solutions to the same issue and that those solutions are, arguably, mutually exclusive. Good governance and best regulatory practice would suggest that industry and Ofgem would benefit from seeing both modifications alongside each other as alternatives in the same report to ensure an effective comparison can be made against each modification.

There was a suggestion at Panel that the consequence of this view would be widening of the definition and application of alternative modifications, since the two modifications potentially differed in scope.

Whilst Governance Workgroup is not discussing either modification we believe it useful to further clarify our position at this time with respect to UNC696/701 so that the discussion on alternatives more widely is fully informed.

Our view at this time is that UNC696/UNC701 are closely linked therefore, it would be more consistent with good governance principles if the two modifications were to be examined in parallel. This is because it would appear that UNC696/UNC701 conflict with each other in a number of aspects.

For instance, both modifications envisage that any new or additional capacity requested under the UNC for certain non-NTS Supply Points should only take effect from the date set out in the relevant Network Exit Agreement (NExA). However, UNC696 proposes that this rule only be applied in relation to Daily Metered (DM) Supply Points, whereas UNC701 proposes that this rule should be applied in relation to both DM and non-DM Supply Points. Furthermore, UNC696 proposes that this rule be applied retrospectively from September 2018 whereas UNC701 does not propose to have retrospective application.

As UNC696/UNC701 arguably propose a mutually exclusive approach in certain aspects, it follows that it would not be possible for Ofgem to accept both modifications if these were presented to it simultaneously. Therefore in our view, these considerations would indicate that the two modifications are alternatives.

With regards to good regulatory practice, in a hypothetical scenario where both modifications were accepted with two separate decisions, the chronologically second decision would have the effect of amending or removing elements introduced by the chronologically first decision. Hence, the separation of the two modifications could lead to uncertainty as similar issues would be subject to the prospect of two consecutive amendments in the course of a few months.

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Recommended criteria to be adopted for considering alternative Modifications.

The following draft criteria have been developed based on comments extracted from the Panel minutes, as a means of aiding discussion by the Workgroup. These, alongside the above views of Ofgem and the Modification rules were reviewed by the

Workgroup on 02 September 2019. Comments/considerations made by the Workgroup have been captured against the draft criteria below.

- Proposed alternative has been raised promptly [what test would be applied to demonstrate promptness – could this be done inline with existing /revised Mod rules] and is not proposing a significant [how is this materiality defined – what is appropriate period of development time] development period
- Proposed alternative is addressing the same issue although the approach might be different [some participants felt it would be difficult to measure this].
- Not a true alternative if both could be implemented without impacting [how is this defined – what does it mean in relation to implementation/overwriting of the text from the first Mod] the other
- Not an alternative if no discussion has taken place in the relevant workgroup (including pre-modification) discussions have taken place
- Not an alternative if it would unduly delay [subjective – how would it be determined?] the original Modification
- Not an alternative if the proposed alternative has a [much] different scope/features and proposed timeline [how is this determined]

In conclusion the Workgroup felt defining a set of criteria may be difficult as it would need to cope with numerous situations and in some cases the criteria were very subjective (as demonstrated by the above comments/considerations on the draft criteria).

A Workgroup participant suggested that a better approach would be to clarify the timings with regards to when an alternative Modification can be made or not. Some concerns were raised that the length of time given to the Workgroup Stage was a key factor and a short period may mean that it would be difficult to always raise alternative Modifications prior to the completion of the Workgroup Report.

It was agreed that the above would be considered further at the next workgroup.

04 November 2019 Governance Workgroup

Workgroup Participants suggested that the above bullets and questions could be consolidated into some text to be added to the Modification template – in green italics as questions which a potential Modification Proposer should be answering if they wish to propose an alternative Modification and to prompt discussions at Panel.

Questions considered at December Governance Workgroup

- Has the proposed alternative been raised promptly, given the timescales for the original Modification?

- Is the proposed alternative addressing the same issue with a different approach?
- Could the two solutions be implemented together or are they mutually exclusive?
- Has discussion of the alternative solution taken place in the relevant workgroup and/or as pre-modification?
- How much alignment is there between the two timescales?
- How much alignment is there between the scope/features?

Overall the Workgroup agreed that these questions cannot be set in the Uniform Network Code (UNC) as hard rules, and instead should be provided as guidance for Proposers and for Panel to review. Some of the points raised on these were as follows:

Regarding question 3 on whether two solutions could be implemented together or whether they were mutually exclusive, the Workgroup queried if they were mutually exclusive, did it mean they could not be implemented together? PL commented that if the two solutions were mutually exclusive, it was possibly not an Alternative Modification. Kirsty Dudley (KD) mentioned that if two Modifications can be delivered separately, they can proceed together. If they eventually merge, that would be acceptable. Ofgem can ask for Workgroups and Workgroup Reports to be combined.

The Workgroup also discussed the interactions which should take place between the Proposers of the original and the Alternative Modification. The view was that the Proposer of the Alternative Modification should ask the original Proposer to amend their Modification to take their views into account. If not, this then triggers the drafting of the Alternative Proposal under Modification Rules 6.4.2. In addition, more emphasis will be put on pre-modification engagement, especially through the Critical Friend process.

Regarding alignment of the timescales of the original and Alternative Modifications, question 5, PL queried whether it was implied that when an Alternative was raised, they were automatically agreeing to the timescales proposed in the original Modification. TS stated that there may be a situation when the timescales cannot be aligned. PL queried whether it was mandated under the Modification Rules? RH was not sure this view is correct and said the Joint Office will check this and revert to the Workgroup, and if this is indeed mandated, she will change the question.

Post Meeting update:

The Modification Rules are silent on timescales so it would be for the Modification Panel to decide a reasonable timescale for a new Modification, taking into account other information relating to whether it was a true alternative as well.

The Workgroup also discussed scopes of the original and Alternative Modifications and agreed that they can have different scopes, as without a difference in scope, the new Modification would not be an Alternative. TS noted that the new Modification can however be a separate Modification and no longer an Alternative if it widens the scope of the original Modification beyond recognition.

Further to the above discussions, RH asked the Workgroup if there were any additional questions to add for consideration when an Alternative Modification is to be raised. PL stated raising the Alternative Modification late in the process has an adverse implication when drafting the Legal Text. TS mentioned that it would be helpful to have clarity around how pre-modifications are discussed and it would be helpful to have consistency around this.

Suggested additional Question for consideration at January Governance Workgroup meeting:

- What will be the effect on production of Legal Text for the Modifications concerned?