



Wales & West House Tŷ Wales & West
Spooner Close Spooner Close
Celtic Springs Celtic Springs
Coedkernew Coedcernyw
Newport NP10 8FZ Casnewydd NP10 8FZ

T. 029 2027 8500
F. 0870 1450076
www.wwutilities.co.uk

Mark Cox
Associate Partner, Industry Codes and Licensing
Ofgem
9 Millbank
London
SW1P 3GE

12 May 2010

Dear Mark,

Codes Governance Review Initial Proposals – illustrative licence modification drafting

Our comments in this response are limited to our views on the most appropriate way to implement any changes brought about by the Industry Code Governance Final Proposals and the current draft licence modification proposals. Please refer to our previous responses for our detailed comments on each area of the policy decisions that Ofgem have included in the Final Proposals.

We would welcome further discussion on these matters, both with industry participants and the Authority, prior to any formal licence modification proposals being issued. This is clearly a complex subject area and we believe the publication of draft licence amendments prior to formal consultation would benefit the governance process. Draft licence conditions would give all parties the opportunity to address any new or consequential issues and reduce the risk of transporters not being able to accept the proposed licence modifications.

An alternative to numerous licence conditions could be the introduction of a single Licence Condition which obligates DNOs and TOs to implement changes brought about by the Final Proposals within a certain timescale (the arrangements for this could be similar to Standard Special Condition D8 that was introduced in the Gas Distribution Licence to review and develop proposals to reform the DN interruption arrangements). The changes could then be considered and developed and implemented through code arrangements. This could prove a move flexible and less complex solution for all parties.

It is our view that Licence Modifications alone would not be sufficient to implement the Code Governance Review recommendations as UNC Modification Proposals would also be required (due to the changes in the modification rules as defined under SSLC A11). The complexities of the recommendations within the Final Proposals, as per the comments below, are extremely difficult to reflect in legal drafting and this is further justification for limiting, or potentially postponing, licence amendments.

24 hour gas escape number
Rhif 24 awr os bydd nwy yn gollwng

0800 111 999*

*calls will be recorded and may be monitored
caiff galwadau eu recordio a gellir eu monitro

Wales & West Utilities Limited
Registered Office:
Wales & West House, Spooner Close, Coedkernew, Newport NP10 8FZ
Registered in England and Wales: No. 5046791



We do acknowledge that to implement the concept of 'self-governance' and 'significant code reviews' licence changes are required. However, the level of detail required in this licence to facilitate this could be a simplified version of what has been proposed.

Further to the above, we believe the existing Network Code arrangements have delivered significant industry benefit and we need to ensure that the level change is appropriate to the level of additional benefit to be gained. Through our day to day involvement with all industry participants we do not detect a large dissatisfaction with the existing regime and therefore we should apply caution in implementing complex licence obligations in this area.

As we have previously stated, we would like to change UNC governance where there are clear benefits identified. We are not supportive of wholesale changes to UNC governance arrangements that are based on deficiencies in other codes or purely to demonstrate consistency (i.e. changes for change's sake). We think it is more appropriate to address the underlying root causes.

We have responded, where appropriate, to the questions set out in the main Consultation document (44/10) and our responses can be found below in Appendix 1. We have provided our detailed comments on the current draft licence amendments in Appendix 2. These comments are based on the revised drafting that Ofgem issued following the workshop held on 23 April 2010

We hope you find our response constructive and helpful. We hope that the final outcome in this complex area is both appropriate and workable. We think where possible, simplicity and minimal licence amendments may provide the best way forward.

Appendix 1 – Consultation Questions

Q1 – Is the amending nature of the proposed changes appropriate?

As we have detailed in previous responses, we do not believe that the level of proposed licence amendment is necessary in order to successfully take forward the outputs from the Ofgem Code Governance Review. Although we appreciate that for some areas of proposed change licence changes are required, for example self governance and significant code reviews, the remainder of changes should be facilitated through changes to the relevant codes.

Ofgem may not be able to propose changes to relevant industry codes but they could adopt an alternative approach of creating a licence obligation for each relevant transporter to take forward the output from the Code Governance Review. This mechanism has previously been used for NTS Exit Reform, DN Interruption Reform and, more recently, NTS Linepack services (new NG NTS Standard Special Condition C27).

Reducing the amount of change within the transporter licence will in turn reduce the risk that future developments in code governance are not restricted by existing licence conditions. Once again, we would recommend that Ofgem reconsider the broad brush licence amendment approach being taken with the Code Governance Review and instead adopt a 'light-touch' regulatory approach.

Q2 – Where the licence drafting differs between different licence conditions, because of intrinsic differences as between those licence conditions, but where the underlying policy position is identical, do you agree that the substantive effect is materially the same?

As a gas distribution network operator we are not subject to, or have any extensive knowledge of, the Electricity Transmission licence or the Electricity Distribution licence. From the discussions that took place at the Ofgem led licence drafting workshop, we were not aware of any significant differences between the effect of the proposed changes other than those that were intended and form part of the Final Proposals (e.g. differing number of consumer panel representatives for the UNC).

The alternative implementation method that we mention in our response to Q1 would also have the benefit of avoiding substantive differences within the applicable licences.

Q3 – Do you agree with our preservation of existing condition provision numbering?

Due to the significant changes being proposed, especially to Standard Special Condition A11, the condition provision numbering does seem somewhat over complicated and confusing. However, we do support retaining this numbering convention due to the cross-referencing implications that would be created if it were to be changed.

Q4 – Do you agree with our approach to existing "house style"?

We are supportive of the existing "house style" of the licence drafting.

Q5 – Do you agree with the order and placement of the new provisions?

In general, the placement of provisions within the licence does appear to be appropriate. We do not believe, as Ofgem suggest as an option, that 15A and 15C of SSLC A11 should be placed in reverse.

Q6 – Do you agree with the references to panel consultation on the availability of the self-governance route?

We agree that the modification panel should be consulted on whether the self governance route is available for a modification proposal. It is our view that only modification proposals that are unanimously supported by the panel as appropriate for self governance should proceed in accordance with 15D. This is a matter that should be addressed within the modification rules within the UNC, the licence drafting should simply enable modifications to be made without Ofgem approval with the safeguards of Ofgem intervention and a mechanism for appeals.

Q7 – What are your views on the appropriateness of replicating the provisions relating to the UNC in SSLC A11(6)(d)(ii) for the CUSC and BSC?

We believe that A11(6)(d)(ii) is wholly inappropriate due to the consequential impacts it creates on a code-party's right of appeal to the Competition Commission. We also do not believe that having two voting consumer representatives, compared to the one representative within the BSC and CUSC, has been justified. We have some specific comments on the form of the licence drafting within SSLC A11(6)(d)(ii) and we have included this within Appendix 2. UNC Modification Proposals 0286 & 0286A are currently being considered within the modification process and we expect that the Final Modification Report for both proposals will be issued to Ofgem later this month. Our consultation response contains further views on the role of consumer representatives within UNC governance.

Q8 – Do you agree with the appropriateness of the proposed deletions of provision superseded by the code modification rules (as amended) and have you identified any potential unintended or unforeseen consequences?

Our understanding is that the changes to SLC 4B do not impact on us, or any other gas distribution network operator, as the inclusion of connection charging methodologies relates only to NG NTS. We therefore have no comments on the appropriateness of deletions within SLC 4B.

We do not believe that the proposed deletion within SSLC A4(8)(b) is appropriate or necessary. This clause relates to charges that are not subject to the charging methodology

and therefore remain unchanged by the Code Governance Review output and should remain within the licence. The revised licence drafting that was issued by Ofgem on 6 May 2010 confirms that Ofgem are minded to retain this paragraph.

Q9 – What are your views on the interaction of the charging-specific timing restrictions and obligations?

The revised drafting of SSLC A11(9) has changed (aB) to (ab), we are supportive of this amendment.

The proposed drafting of SSLC A11(9)(ab)(i) contains a reference to Standard Condition 4B, this is inappropriate as our connection charging methodology under SLC 4B will not be subject to the modification procedures within SSLC A11. This reference should only, if at all, appear in the NG NTS licence and all references to SLC 4B must be removed from the DN version of SSLC A11.

In general, under these proposals, it seems wholly inappropriate for WWU to ensure that our charging methodology is compliant with any of the provisions within SSLC A4. Any modification proposal made under SSLC A11 is subject to a recommendation by the modification panel and a decision by the Authority (unless self governance is utilised). With a single vote on the modification panel it does not seem right or appropriate that we can continue to apply the requirements of SSLC A4 when the outcome of modification proposals is out of our control.

Q10 – Do you agree with the wording of the licensee obligation to provide information/assistance to affected parties?

The term “material” is used within law as “non-trivial” and its use will therefore mean that anyone would qualify for assistance and/or information. The provision of information and assistance to affected parties will be a significant burden on gas transporters and will also require us to release commercially sensitive information. We therefore do not believe this mechanism is appropriate and, if it is to remain, further controls will be needed to address these concerns.

Q11 – Do you agree with the proposed deletion of the word ‘financial’ and the phrase ‘on society’ in respect of the proposed drafting for Environmental Assessment and Code Objectives?

The proposed drafting of SSLC A11(15)(a)(iv)(bb) reissued on 6 May 2010 was amended to include the terms “*quantifiable*” and “*treatment of carbon costs and..*”. We are satisfied that, on the occasions that this requirement applies, that the proposed wording is suitable.

Q12 – Do you agree with the treatment of connection charging methodologies in the gas transporter licences.

We are pleased to see that Ofgem have removed SLC 4B from the scope of the Code Governance Review for gas distribution network operators. As mentioned above, the corresponding changes within the gas distribution network versions of SSLC A11 should only include references to SSLC A4 and not SLC 4B.

Q13 – Do you agree that the modification of Standard Special Condition A11 will not affect the application of the Special Conditions pertaining to the NTS operator licence?

We have not assessed the potential impact that the proposed changes to SSLC A11 may have on NG NTS.

Q14 – Are the lead-in times and implementation timescales proposed appropriate?

We do not believe that the timetable set out in Table 1.5 of the Final Proposals is appropriate and it has the potential to lead to modification proposals being inadvertently rushed through in order to achieve a generic target implementation date. Conversely, if all relevant modification proposals have not been implemented this could place gas transporters in breach of their licence.

As Ofgem are aware, the modification process can often take several months to complete depending on the complexity of the subject matter. Although elements of the Final Proposals are fairly straightforward others are not. For example, the self governance process and the establishment of a process and committee to deal with charging methodologies will lead to significant industry debate and development. It is unlikely that this will start until the outcome of the formal licence consultation is known and this is not expected to be until July 2010. As part of the output of Code Administrators Working Group it has been suggested that development / progression of a modification proposal should be limited to a certain period. It is unknown what this period of time will be for UNC modification proposals but we envisage that it will no less than 6 months. It would therefore seem logical that Ofgem apply a similar length of time to the introduction of any licence amendments. This would give a target modification proposal implementation date of no earlier than January/February 2011.

An alternative way of dealing with this would be set an appropriate date within the licence (e.g. February 2011) with a “unless otherwise directed” clause that would allow for Ofgem to take the appropriate action should any reasonable delays occur (as the process is out of the direct control of any individual gas transporter).

We would also request that Ofgem take the opportunity, prior to issuing the formal licence modification consultation, to publish the final proposed licence drafting and allow a short time for licensees (only) to make any final comments (limited to legal / drafting matters and not about Ofgem policy decisions).

Q15 – Are any transitional measures required?

Transitional arrangements are required and we are pleased that, following the licence drafting workshop, Ofgem have included additional drafting within SSLC A11. As we have mentioned above, we do not believe that the date of 1 November 2010 is achievable or practical and will place false expectations upon the industry. We also believe that if a date is to be 'hard-coded' in the relevant licence that there should be an additional clause allowing Ofgem to direct a later date if necessary (this would supplement the reasonable endeavours clause that Ofgem have proposed in the revised drafting).

If Ofgem adopted the alternative approach we have suggested for licence changes then there would be less transitional matters to deal with. Licence amendments could be timed to take place at the same time any related modifications proposals are to be made. This does create a layer of dual governance and dependence; however, this is not a new issue and has been managed effectively in the past.

Q16 – Have you identified any other or consequential changes not highlighted in this chapter that we should make to the licence conditions to reflect our Final Proposals?

We have made comments on specific paragraphs of the licence drafting within Appendix 2. We have not checked any cross-references within other licence conditions, it is our assumption that this will be carried out by Ofgem prior to issuing any formal licence amendment consultation.

Q17 – Are there any definitions in the standard licence conditions that are now redundant or need updating?

We are not aware of any definitions within the licence that are redundant or that need to be updated. As with our previous answer, our assumption has been that Ofgem will carry such a review of licence definitions prior to issuing any formal licence amendment consultation.

Q18 – Do you consider it appropriate to repeat the condition-specific definitions in the global definition conditions?

We do not believe it is appropriate to repeat any of the condition specific definitions within the global definition conditions. If any of the condition specific definitions appear elsewhere, with a consistent meaning, then we would expect Ofgem to identify this and only include them within the relevant global definition condition (and such changes should be made now rather than awaiting a future review).

However if a wider review of the gas transporter licence is to be carried out, we believe that all definitions should be gathered together in one place alphabetically, definitions specific to particular conditions can be identified in the definition. This approach provides greater clarity and allows all definitions to be read together. Whilst having condition specific definitions in the individual conditions to which they relate may make those individual conditions easier to read, they are not conducive to clarity for the licence as a whole.

Q19 – Do you consider the new defined terms are appropriate?

Concern was raised at the licence drafting session with a number of the new definitions within SSLC A11. Due to the detail that has been proposed in the licence drafting it has been necessary to include numerous new definitions that would usually not be necessary. Although Ofgem have addressed some of the issues previously raised we have the following additional comments:

“charging methodology forum” – we do not believe that this defined term is required as this should be detailed within the modification rules with the UNC. This is not consistent with other workgroups / forums as they are not detailed within SSLC A11.

“Code of Practice” – This definition has been defined with the undefined term ‘Code Administration Code of Practice’. By including the Code of Practice in the licence (which we do not believe is appropriate) it also suggests that there will be one for each code that it relates to. It is our view that a Code of Practice should be seen as a ‘best-practice’ and compliance an aspiration, it is therefore not appropriate for it to be included within SSLC A11 and should only be referenced in the relevant industry code.

Q20 – Do you agree with the proposed house-keeping amendments? Do you propose any additional house-keeping amendment?

None of the proposed house keeping amendments relate to the gas transporters licence and therefore we have not commented on their appropriateness.

Q21 – Have you identified any unintended consequences of the licence drafting?

The most significant consequence of the proposed licence drafting is the impact that voting consumer representatives will have on organisations right of appeal to the Competition Commission in relation to Authority decisions on UNC modification proposals. We do not believe that the licence drafting fulfils the intent of giving consumers a greater voice in the UNC and the consequences of this have not been addressed. Modification proposals 0286 & 0286A have already been raised within the UNC to take forward the output from the Code Governance Review and we therefore request Ofgem remove the consumer representative clauses from the drafting of SSLC A11.

We have included more specific comments on the proposed licence changes with Appendix B below.

Q22 – Do you agree with the proposed approach and detail of the potential alignment, accuracy and clarification amendments?

The additional obligation contained within the suggested SSLC A11(20A)(a) appears to be a freestanding obligation that is not directly linked to UNC modification proposals or procedures. It is therefore not appropriate and should be removed.

The additional obligation within SSLC A11(20A)(b) also appears to be superfluous to SSLC A11. If this is to remain then it must be amended to reflect that it can not prevent any licensee participating in the modification process and prevent them from casting votes (either for or against) or making representations in relation to such modification proposals.

The amendments to SSLC A11(15)(a) are generally okay although somewhat unnecessary (as they are matters addressed within the UNC and this places a layer of unwarranted dual governance on such provisions). We welcome the change that has been proposed following the licence drafting workshop that places decisions on timescales with the modification panel members but retains an Ofgem right to veto.

SSLC A11(15)(a)(iv)(bb) details the necessary measures when considering the environmental impacts of a modification proposal. As mentioned in Q10, the use of the word “*material*” is subjective and in a legal sense can be seen as anything that is non-trivial. We would welcome the removal of the term “*material*” from all revised drafting with SSLC A11 and use of more appropriate wording (e.g. “*where relevant*”, “*as appropriate*”).

Q23 – Do you have any other (non-policy related) comments on the proposed licence drafting?

We have nothing further to add to the comments above or to the details provided below in Appendix 2.

Q24 – Are there any aspects of the drafting that you do not understand or that you consider inappropriate?

We have nothing further to add to the comments above or to the details provided below in Appendix 2.

Q25 – Are our substantive proposed changes appropriate in order to give effect to the underlying policy of the Final Proposals?

Although the proposed changes will give effect to the underlying policy of the Final Proposals we do not believe it is the most efficient or effective way to achieve this. We would welcome a ‘light-touch’ approach in terms of licence changes with the detail being delivered via modification proposals that will be required regardless of the detail contained within the licence. We would appreciate Ofgem’s thoughts on the alternative approach that has been suggested by transporters and hope that this may lead to a reduction in licence amendments and the associated issues that this brings.

Appendix 2 – Comments on draft Transporter licence Conditions

The comments below are based upon the revised proposed licence drafting that was issued on 6 May 2010 following the drafting workshop hosted by Ofgem. We have not restated our views on the changes made following the workshop where our views accord with Ofgem's suggested amendments. Our comments are limited to the appropriateness of the drafting and not a reflection on our view of Ofgem policy decisions contained in the Final Proposals (unless the drafting conflicts).

Changes to Standard Condition 4B (SLC 4B)

The changes to SLC 4B are limited to NG NTS and we therefore have no further comments on the proposed drafting of this licence condition.

Changes to Standard Special Condition A4 (SSLC A4)

We would like to make the following comments on the proposed licence amendments:

8(b) proposed deletion – As explained previously, 8(b) should not be deleted as it covers charges that are not subject to the charging methodology (*this has been addressed in the revised drafting issued on 6 May 2010*).

Changes to Standard Special Condition A5 (SSLC A5)

We would like to make the following comments on the proposed licence amendments:

(1) Additions – No comments.

(2) Deletion of paragraph – Paragraph 2 has been deleted and the original text has become part of paragraph (1), it is not clear on whether this is intentional. The licence will be left without a paragraph (2) and presumably will create cross-reference issues elsewhere.

(3) Conflict with A11 – Paragraph (3) requires a report and potential modifications to be provided to the Authority. It does not seem appropriate to do this when the charging methodology will be within the UNC and effectively no longer in the control of the licensee.

(5) Addition – No comments.

Changes to Standard Special Condition A11 (SSC A11)

We would like to make the following comments on the proposed licence amendments:

(1) *Addition and deletion* – No comments.

(1)(f) *Deletion* – No comments.

(2) *Deletion of duplicated relevant objective provision* – No comments.

(6)(c) *Creation of “code administrator”* – This should not form part of the network code (and then by default be subject to the modification rules) as this sets out the requirement for the code administrator. This should be moved to Standard Special Condition A12 (Joint Office Governance Arrangements).

(6)(d)(ii) *Number of consumer representatives* - The drafting allows for “a” consumer representative to be appointed and “any other” consumer representative. Legal cases have shown that the use of these terms is not necessarily in the singular and, as drafted, this can be interpreted as the NCC and Ofgem having the ability to appoint unlimited number of panel members. The drafting should be explicit and refer to “one” in both cases.

(6)(d)(ii) *Ability to vote* – This final sentence appears to be part of (6)(d) but we believe this is meant to be part of (6)(d)(ii). This needs to be clarified as the current drafting can be interpreted as the final sentence applying to both (6)(d)(i) & (ii).

(6)(e) *Addition of UNC charging methodologies* – It is not appropriate for charging methodologies to be included here. Paragraph 6 sets out the arrangements for the required content of the UNC and in particular the terms of transportation arrangements that are common between gas transporters. Each gas transporter has an obligation under SLC A4 to have a charging methodology and this will not necessarily be consistent with other gas transporters. It is therefore inappropriate for this to be included in paragraph 6 of SSC A11. The Code Governance Review established the desire for the charging methodology to be subject to the UNC modification rules, this has been achieved through the proposed changes to SSC A4. There is no need for the charging methodologies to form part of the legal document that is the UNC, this would be inconsistent with all other documents, methodologies etc that are subject to the UNC modification rules. The additional sub-paragraph (6)(e) should be removed.

(9)(a) *Addition to cover SCR process* – No comments.

(9)(aa) *role of code administrator* – No comments.

(9)(ab) *compliance with charging obligations* – Please see our response to Question 9 in Appendix 1.

(9)(ac) *charging methodology forum* – Please see our response to Question 9 in Appendix 1.

(9)(b) *Addition* – No comments.

(9)(bA) *Addition* – No comments.

(9)(d) *Addition* – Without a definition of consumer representative this clause is unworkable. We suggest that the sentence is revised to say qualify the “any persons” part with “including small participants and consumer representatives”. The code administrator can not be obligated via the gas transporter licence to promote modification proposals to all consumer representatives (if they are not defined).

(9)(dA) *Addition* – Removal of the word “proper” as it is not required.

(9)(e) *Addition* – No comments.

(9)(f) *Addition* – No comments.

(9)(h) *Addition* – This paragraph is not required and should be removed. The requirements to be consistent with the Code of Practice are set out in paragraph 6 and should not be replicated elsewhere.

(10)(a) *Addition* – No comments.

(10)(aa) *Addition* – No comments.

(10)(ab) *Addition* – No comments.

(10)(b) *Additions* – No comments.

(10)(b)(ii) *Additions* – Since the revised drafting this sub-paragraph no longer works. The point here is that workgroups should be subject to a time limit although (10)(b) relates to the making of alternative proposals. This sub-paragraph, if deemed necessary, should be moved to elsewhere within SSLC A11.

(13)(c) *Additions* – No comments.

(15) *Additions* – No comments.

(15)(a) *Additions* – No comments.

(15)(a)(iv) *Additions* – No comments.

(15)(a)(iv)(aa) *Additions* – No comments.

(15)(a)(iv)(bb) *Additions* – Please see our response to Question 22 in Appendix 1.

(15)(b) *Additions* – No comments.

(15)(b)(ii) *Additions* – No comments.

(15A)(a)&(b) *Additions* – No comments.

(15B) *Additions* – No further comments.

(15C) *Additions* – No further comments.

(15D)(a)-(e) *Additions* – No comments.

(15E) *Additions* – This includes a reference to “Parties to the uniform network code” which is not a defined or a legally correct term. Suggest that this is reworded to be clear on who has the right of appeal.

(20A) *Additions* – Please see our response to Question 22 in Appendix A.

(23A) *Additions* – Reasonable endeavours is more appropriate here and should be changed from best endeavours

(23B) *Additions* – Please see our response to Question 14 & 15 above.

(24) *“charging methodology forum” definition* – As mentioned above, this is not required and the definition is too wide and encompassing. The use of the word “material” is unclear and should be removed / revised.

(24) *“industry code” definition* – References to electricity should be removed as they are not appropriate.

(24) *“materially affected party” definition* – Use of the word material is misleading and should be revised or removed. This applies to all uses of the word “material” within A11 (as per comments in Appendix A).

(24) *“self governance criteria” definition* – remove square brackets from [gas] in (i)(aa). (ii) contains unnecessary reference to “parties to the UNC” and also duplicates gas transporters with DN operators.

(24) *“small participant” definition* – The definition is open ended and subjective.

Changes to Standard Special Condition A12 (SSC A12)

We would like to make the following comments on the proposed licence amendments:

(1)(i) *Additions* – The additional cross reference to paragraphs within A11 is not required. At most this should simply reference SSLC A11.

(1)(i) *Addition* – No comments.

(4)(a)(iii) *Addition* – No comments.

(4)(a)(iv) *Addition* – No comments.

(4)(a)(vA) *Addition* – This reference is no longer valid as (15D)(b)(i) does not exist in the revised drafting (this should be (15D)(a)(i)).

We hope you find our response constructive and helpful. We hope that the final outcome in this complex area is both appropriate and workable. We think where possible, simplicity and minimal licence amendments may provide the best way forward. We look forward to further engagement with you in this subject area.

If you have any questions on this response then please do contact me or alternatively, contact our UNC representative Simon Trivella (contact details below).

Yours sincerely,



Steve Edwards
Head of Regulation and Commercial
Tel: 029 2027 8836
Email: Steven.J.Edwards@wwutilities.co.uk

cc:
Simon Trivella
Commercial Manager, Regulation and Commercial
Tel: 07813 833174
Email: Simon.Trivella@wwutilities.co.uk