



Industry participants, customers  
and other interested parties

---

*Promoting choice and  
value for all customers*

Direct Dial: 020 7901 7458  
Email: [industrycodes@ofgem.gov.uk](mailto:industrycodes@ofgem.gov.uk)

3 June 2010

Dear Colleague,

### **Statutory consultation on licence modifications required to implement the Code Governance Review Final Proposals**

This letter sets out our final decision on the licence modifications necessary to implement our final proposals<sup>1</sup> for the Code Governance Review published on 31 March 2010. Accompanying this letter we have published the statutory notices for the licence modifications to implement the new arrangements. Relevant licensees have until 1 July 2010 to decide whether to accept or reject these proposed licence modifications.

#### **Background**

The Authority is committed to policies and processes that are consistent with better regulation principles and that reduce administrative burden on business while maintaining effective consumer protection. As part of that commitment, in November 2007, we announced the Review of Industry Code Governance. At the end of March 2010 we published our Final Proposals for the Code Governance Review which covered:

- i) Significant Code Review and Self Governance proposals;
- ii) Proposals on the role of code administrators and small participant and consumer initiatives;
- iii) Proposals on the governance of network charging methodologies; and
- iv) Proposed approach to environmental assessment within the code objectives.

At the same time, consultations were issued on the proposed licence modification drafting to implement our Final Proposals and on the Code Administration Code of Practice. During this consultation period a workshop on the proposed licence drafting was held on 23 April 2010 (the "Workshop") to aid respondents in considering the proposals.

#### **Introduction**

This letter sets out a summary of responses both to the Workshop and also to the consultation on licence drafting. Respondents' comments from the Workshop were

---

<sup>1</sup> A copy of which can be found here:

[http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?file=CGR\\_Finalproposals\\_310310.pdf&refer=Licensing/IndCodes/CGR](http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?file=CGR_Finalproposals_310310.pdf&refer=Licensing/IndCodes/CGR).

considered and revised draft licence modification text was issued to respondents on 6 May 2010, offering respondents a further opportunity to consider our updated 'minded to' position.

All non-confidential responses to the consultation received are published on our website.

Annex 1 of this letter summarises the responses received to the consultation, any changes we have made as a result of the responses and the rationale for these changes. Annex 2 of this letter summarises the comments received during the Workshop and our views. The contents of this Annex 2 were circulated to Workshop attendees on 6 May 2010 together with suggested provisional revisions to the licence modifications (subject to consideration of responses received on close of consultation).

The workshop and consultation process worked very effectively in enabling us to develop improved licence drafting. There have been a number of changes to the licence drafting following this process, in the main, to ensure that the drafting better reflects our Final Proposals into the licence. There are three more material issues that have been raised and these are addressed further below.

### **Summary of Proposed Licence Modifications**

The proposed licence modifications introduce in relation to the BSC, CUSC and UNC:

- (a) Two new code modification routes:
  - (i) Significant code reviews for wholesale changes led by the Authority. This will involve a pre-launch consultation, a post launch consultation, conclusions and either a direction to the relevant licensee(s), or a statement that no direction will be made.
  - (ii) Self-governance for change proposals with a non-material impact, meaning that the relevant panel can decide on the proposal, with an appeal route to the Authority.
- (b) Ability for the Authority to 'send back' modification reports, for example, where analysis is insufficient or out of date.
- (c) Gas and electricity transmission connection and use of system and gas distribution use of system charging methodologies into the CUSC and UNC. Such methodologies will become subject to the relevant code modification rules.
- (d) A requirement that code administrators:
  - (i) Act consistently with the Code Administrator Code of Practice; and,
  - (ii) Act as a 'critical friend', in particular to small participants.
- (e) A licence requirement that panels have voting consumer representation.
- (f) A requirement to assess (where the impact is likely to be material) the quantifiable impact of the code modification proposals on greenhouse gas emissions in accordance with Authority guidance.

The proposed licence modifications also introduce point (f) above to the Distribution Connection and Use of System Agreement ("DCUSA"), the Distribution Code, the Grid Code, the System Operator-Transmission Owner Code ("STC") and the independent Gas Transporter Uniform Network Code ("iGT UNC").

### **Final Changes to the Proposed Licence Modifications**

There have been a number of changes to the draft licence modifications and the reasons for these are set out in more detail in Annex 1 and 2. We also propose three more material changes which are set out below.

#### *Timing of implementation*

Most respondents felt that the implementation date of 1 November 2010 was too challenging given the desire to ensure 'robust' modifications were put forward for decision. The implementation date was the date by which the arrangements should take effect within

the relevant code. Industry considered the timescale for implementation too tight to accommodate a workgroup stage.

We also note the proposed implementation timetable presented to the CUSC panel by National Grid Electricity Transmission plc on 21 May 2010. This set out that while 1 November 2010 was achievable it relied on there being no working group stage for modifications and/or a need for extraordinary panel meetings. A programme which included a working group stage and/or the use of no extraordinary panel meetings provided an end of December implementation date.

In light of the above, we have amended the implementation date to 31 December 2010 to assist the licensees in meeting their new licence obligations. Nevertheless, we consider that industry should aim to progress the necessary code modifications as soon as possible.

We confirm that while we intend to direct, subject to the statutory consultations, the proposed licence modifications in early July 2010, the licence modifications become effective in the relevant licences on and from 31 December 2010. Therefore the deadline for full implementation of the resultant code changes is 31 December 2010.

#### *Transitional Provisions*

During the Workshop and in formal responses, it was suggested that transitional measures for charging methodology change proposals already in flight as at 1 November 2010 were necessary. We therefore inserted transitional provisions for charging methodologies in the proposed licence modifications. Any charging methodology change proposals in respect of which a report has been sent to the Authority before 31 December 2010 (revised from 1 November 2010) will continue under the current regime. Any other proposals which are in development will be required to transfer to the new regime. Accordingly, licensees should carefully consider when the appropriate time for raising charging methodology change proposals may be.

As there was no support for transitional provisions in relation to non-charging methodology modification proposals, we have removed the suggested paragraphs provisionally inserted after the Workshop.

#### *Self-governance appeals*

Following discussion at the Workshop, we have included further detail on self-governance appeals for clarity. The new provisions confirm that a self-governance decision may not be implemented while an appeal is outstanding. They also clarify that: (i) any such appeal shall be dealt with in accordance with the Authority's decision or direction; and, (ii) that if the Authority takes a decision on a modification following an appeal, the status of the panel's determination will become a recommendation. This is relevant in relation to potential appeals of our decision to the Competition Commission.

#### **Next Steps**

The following statutory consultations close on **1 July 2010**:

- (a) Notice to all electricity transmission licensees of Modification of the Standard Licence Conditions of the **Electricity Transmission Licences** under section 11A of The Electricity Act 1989:
- Standard condition B12 (System Operator – Transmission Owner Code);
  - Standard condition C3 (Balancing and Settlement Code);
  - Standard condition C4 (Charges for use of system);
  - Standard condition C5 (Use of system charging methodology);
  - Standard condition C6 (Connection Charging Methodology);
  - Standard condition C10 (Connection and Use of System Code); and

- Standard condition C14 (Grid Code).
- (b) Notice to National Grid Gas plc of Modification of Standard Condition 4B (Connection Charging Methodology) and consequential modification to Special Condition C7 (Charging obligations) of **National Grid Gas Plc's Gas Transporter Licence** in respect of its National Transmission System under section 23 of the Gas Act 1986
- (c) Notice to all gas transporters for whom standard condition 9 of their gas transporter licence is in effect of Modification of Standard Condition 9 (Network Code and Uniform Network Code) of the **Gas Transporter Licences** under section 23(3) of the Gas Act 1986.
- (d) Notice to National Grid Gas plc, Northern Gas Networks Ltd, Scotland Gas Networks plc, Southern Gas Networks plc and Wales & West Utilities Ltd of Modification of the Standard Special Conditions of the **Gas Transporter Licences** under Standard Special Condition A2 (Private Collective Licence Modification Procedure in respect of Standard Licence Conditions applicable to both NTS and DN Licences):
- Standard Special Condition A5 (Obligation as regard charging methodology);
  - Standard Special Condition A11 (Network Code and Uniform Network Code); and
  - Standard Special Condition A12 (Joint Office Governance Arrangements).
- (e) Notice to all electricity distribution licensees of Modification of the Standard Conditions of the **Electricity Distribution Licences** under section 11A of the Electricity Act 1989:
- Standard Condition 21 (Distribution Code); and
  - Standard Condition 22 (Distribution Connection and Use of System Agreement).

Any representations or objections to the proposed modifications may be made on or before **1 July 2010** and sent to:

Clare Cameron  
 Licensing and Codes Manager, Industry Codes & Licensing  
 Office of Gas and Electricity Markets  
 9 Millbank  
 London  
 SW1P 3GE  
 or by email to: [industrycodes@ofgem.gov.uk](mailto:industrycodes@ofgem.gov.uk)

All responses will normally be published on Ofgem's website and held in the Research and Information Centre. However, if respondents do not wish their response to be made public then they should clearly mark their response as not for publication.

Yours faithfully

Mark Cox  
**Associate Partner, Industry Codes and Licensing**

## Annex 1

### Summary of responses to the Code Governance Review Final Proposals Licence Drafting Consultation and Ofgem views

This Annex summarises the responses received to the Code Governance Review Final Proposals published on 31 March 2010 (the "Final Proposals") and the accompanying Licence Drafting Consultation also published on 31 March 2010 (the "Consultation"). We summarise the responses received in respect of each of the questions asked in the Consultation.

Annex 2 summarises responses received during our licence drafting workshop on 23 April 2010 (the "Workshop") and our views. The points covered in both Annexes have been taken into account in reaching the final version of the proposed licence modifications.

Several respondents made comments on the policy underpinning our Final Proposals. We stated in our Final Proposals and our Consultation that we were not seeking comments on the policy giving rise to the proposed licence modifications. Accordingly, we have not addressed these specifically below.

Some replies suggested making changes to the relevant objectives of the Balancing & Settlement Code ("BSC"), Connection & Use of System Code ("CUSC") and Uniform Network Code ("UNC"). Such changes fall outside the scope of our Final Proposals and we have therefore not addressed the suggestions.

Respondents provided a number of detailed, relatively minor, drafting suggestions covering both the proposed changes to the licences and also to some licence provisions where no changes have been proposed. We have incorporated some of these minor drafting changes, but have taken a view that a number of the proposed changes are not necessary and have therefore maintained the existing drafting.

#### Questions asked in Chapter 2 of the Consultation

##### Question 1: Is the amending nature of the proposed changes appropriate?

Only two respondents made express comments.

One considered that changing the existing conditions was more appropriate than adding in new conditions.

The second believed that: (i) the licence should only have one amendment simply requiring the licensee to raise code modifications to reflect our Final Proposals; and, (ii) changes should not be made simply to align the BSC, CUSC and UNC.

We are continuing with the amending nature of the licence changes. This will provide clarity. It will keep related provisions together and maintain existing numbering. This will help avoid potential confusion. Our view is that it will also confirm the basic tenets which must apply to the BSC, CUSC and UNC. By keeping these principles the same across the three codes, it should help understanding and transparency of process across those codes.

##### Question 2: 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?

None of the respondents were aware of any material differences in effect.

One respondent did however note an intentional difference relating to the UNC. This is the ability for the Authority to appoint a second consumer representative.

No changes to the licence modifications have been made as a result of these comments.

Question 3: Do you agree with our preservation of existing condition provision numbering?

Respondents agreed with preservation of existing condition provision numbering. Therefore no changes to the licence modifications have been made as a result of these comments.

Question 4: Do you agree with our approach to existing "house style"?

Respondents broadly agreed with the approach to existing house style.

One respondent felt that all defined terms should have capital letters. Given that the majority of respondents wished to keep 'house style', which includes the use of lower case letters for defined terms, we have not made this change.

Question 5: Do you agree with the order and placement of the new provisions?

One respondent agreed with the order and placement of the new provisions and did not think it would be necessary to reverse the order of paragraphs 15A and 15C of Standard Special Licence Condition A11.

Another respondent considered that Standard Special Licence Condition A11(6)(d) relating to the Panel would be better placed in paragraph 9 relating to modification procedures. However, we disagree, as there is a potential that Panel functions may extend beyond modification business. Further, by leaving the position of the text, its placement is aligned with the BSC and CUSC.

Question 6: Do you agree with the references to panel consultation on the availability of the self-governance route?

Respondents were broadly in favour of consultation, but felt that the original draft licence changes would lengthen the modification process.

These comments were also raised in the Workshop and have been taken into account in the revised licence modifications.

However, we disagree with one respondent's view that any Panel consultation would be incomplete without Ofgem's view, as the consultation is to obtain industry comments.

One respondent also believed that the codes should require a unanimous decision for the self-governance route to proceed. We consider that this is a matter for the code modifications and not for the licence changes.

Whilst we have taken account of comments received at the Workshop, we disagree that paragraph 15B of Standard Special Condition A11 should be changed to an Ofgem right to veto within a specific timescale. In some circumstances, we may be unable to make an instant decision and industry comments should be borne in mind. Further, the current drafting prevents wasted time/costs in progressing a modification that is later re-directed to another route.

Question 7: What are your views on the appropriateness of replicating the provisions relating to the UNC in Standard Special Condition A11(6)(d)(ii) for the CUSC and BSC?

One respondent asked for clarification of our intended use of the ability to appoint a further consumer representative. We consider it inappropriate to define this in the licence as it will depend upon the circumstances of each case. We are likely, however, to appoint a further representative if we believe that a particular section of consumers is under-represented. The duration of any appointment will depend on the particular circumstances, but may be temporary.

Another respondent considered that the BSC, CUSC and UNC should all refer to at least one consumer representative. We do not feel that this would add more clarity and therefore have not made this change.

Finally, one respondent noted that whilst some codes already provide for a consumer representative and therefore a change in text is not strictly necessary, inclusion of this requirement in the licence aids consistency and avoids code modifications aimed at changing this.

Question 8: Do you agree with the appropriateness of the proposed deletions of provisions superseded by the code modification rules (as amended) and have you identified any potential unintended or unforeseen consequences?

One respondent felt that deletion of superseded paragraphs helped avoid potential dual governance. Three respondents welcomed retention of paragraph 8(b) of Standard Special condition A4.

We propose not to delete paragraph 8(b) of Standard Special Condition A4. Given that no amendments are therefore being made to Standard Special condition A4, this text has been excluded from the extracts setting out the licence modifications.

Question 9: What are your views on the interaction of the charging-specific timing restrictions and obligations?

There was support for inclusion of charging methodologies ('CM') in the codes.

However, one respondent felt that CM changes should happen simultaneously with the current price change. Following feedback at the Workshop, we have removed the 3 month change 'window' from the licence modifications. This leaves it open for the codes to confirm change periods.

There was a suggestion that we prohibit CM change proposals pending insertion of the CMs into code. Whilst we agree licensees should carefully consider whether it would be more appropriate to raise any change proposals after the modification process has changed, we do not consider a prohibition appropriate. This is to prevent any chance that an otherwise urgent proposal is delayed.

One respondent considered that paragraph 9(ab)(i) of standard special condition A11 should only refer to Standard Condition 4B in National Grid Gas plc's NTS licence. Accordingly, to ensure consistency between the text of different licences, we have clarified this point by adding the text 'in respect of the NTS operator only'.

We disagree with the same respondent's comment that they may not be able to continue to comply with standard special condition A4 as the outcome of the modification proposal is out of their hands. We consider that code provisions implementing our Final Proposals should ensure that licensees remain able to meet their obligations.

Another respondent commented that there is a potential conflict between notice timescales for changing charges, other than capacity charges and CMs, or that this potential conflict would be avoided by removing paragraph 2A(b) of standard special condition A5. Whilst we consider it important to retain existing notice periods, we also note that code provisions implementing our Final Proposal should ensure that licensees remain able to meet their obligations.

Finally, one respondent commented that whilst they supported CM changes only being made at specific times of year, they disliked the proposed change 'window'. We have taken this comment into account in the final licence drafting and removed the 'window'.

Question 10: Do you agree with the wording of the licensee obligation to provide information/assistance to affected parties?

One respondent was in favour of provision of information on charging methodologies.

Another welcomed the inclusion of the phrases 'insofar as reasonably practicable' and 'may reasonably request' in that licence obligation.

Two respondents expressed concern about potentially being required to release commercially sensitive information. We do not envisage sensitive information being released. Our view is that information should be provided on how methodologies are calculated, but sensitive information on the values input to the formulas and their basis need not necessarily be released if it would impair competition or damage the CM owner's business.

Question 11: 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?

Three respondents made specific comments agreeing to the above deletion.

One went on to suggest that guidance be issued on 'quantifiable impact'. Our guidance on this matter is set out in Appendix 4 of our Final Proposals. This guidance will be updated and re-published from time to time.

Question 12: Do you agree with the treatment of connection charging methodologies in the gas transporter licences.

There was general support for inclusion of CMs and exclusion of gas distribution connection CMs.

One respondent considered that as the changes to standard condition 4B were outside of the scope of gas distribution network operators, standard special condition A11 should only refer to standard special condition A4. Accordingly, to ensure consistency between the text of different licences, we have clarified this point by adding 'in respect of the NTS operator only' to paragraph 9(ab)(i) of standard special condition A11.

Question 13: 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?

One respondent considered that NTS or distribution specific changes should be implemented by special conditions in either Part C or Part D and that paragraph 4(b) of standard condition 4B should be switched off in the NTS licence and replaced with a special condition in Part C. We do not propose to move the proposed licence changes as suggested. In our view, the current positioning adds clarity as the paragraphs on charging methodologies are kept together. The current positioning also leaves scope, should it become appropriate in the future, to include further charging methodologies. We have however added 'in respect of the NTS operator only' to paragraph 9(ab)(i) of standard special condition A11 for clarity.

Question 14: Are the lead-in times and implementation timescales proposed appropriate?

All respondents felt that the implementation date of 1 November 2010 was challenging. This view was based on the potential time that code modification proposals implementing the licence changes may take in development, the desire to avoid 'rushed' modifications and the need for robust legal text. Accordingly, for the reasons set out in our covering letter, we have revised the implementation date to 31 December 2010. Nevertheless, we expect industry to endeavour to progress the proposed changes as soon as reasonably practicable. In this regard, we note that industry has been aware of the proposed changes

resulting from the code governance review during our previous consultations. Further, our Final Proposals were published on 31 March 2010 confirming our policy which gave licensees an opportunity to start discussing draft modification proposals in preparation for implementation.

One respondent asked for confirmation that the deadline for implementing the changes to be brought about by the proposed licence modifications was 1 November 2010 and not June 2010. We confirm that whilst we intend to direct, subject to the statutory consultations, the proposed licence modifications in early July 2010, the licence modifications become effective in the relevant licences on and from 31 December 2010, therefore the deadline for implementing the resultant code changes is 31 December 2010. Following responses received during the Workshop, we have inserted transitional paragraphs in respect of CMs. These provisions clarify the position in respect of CM change proposals already in flight at 31 December 2010. We do not consider that cross-references between paragraphs within the same conditions would add further clarity. We therefore do not propose to insert cross-references between the transitional paragraphs and each relevant modification.

Another respondent wanted confirmation that insertion of the CMs in their current format as a new section of the UNC would be sufficient (i.e. that they would not have to be re-drafted in similar language to the remainder of the UNC first). Whilst we agree that this may be the most efficient way to include the CMs in the UNC, we make no judgment on whether any consequential amendments to the CMs' text may be needed as a result, this being a matter for licensees.

It was suggested that the reference to 'best endeavours' be changed to 'reasonable endeavours'. We do not agree with this proposal. Licensees should do everything within their power to implement the changes arising from the licence modifications within the relevant timeframe.

Question 15: Are any transitional measures required?

Respondents suggested that transitional measures for CM change proposals already in flight as at 1 November 2010 were necessary. In response to comments raised during the Workshop, we inserted transitional provisions for CMs in the proposed licence modifications. Any CM change proposals in respect of which a report has been sent to the Authority before 31 December 2010 will continue under the current regime. Any other proposals which are in development will be required to transfer to the new regime. Accordingly, licensees should carefully consider when the appropriate time for raising CM change proposals may be.

We note one respondent's comment that paragraphs 10A and 10B of standard special condition A5 did not work in practice as the paragraph containing the requirement for a report was being removed. Whilst we agree that this requirement is being removed, the deletion does not take effect until 31 December 2010. Please see our response under question 14 above for further detail.

As no express request was made for transitional provisions in relation to non-charging methodology modification proposals, we have removed the suggested paragraphs provisionally inserted after the Workshop, subject to consideration of responses received on close of consultation, in respect of standard conditions C3 and C10 and standard special condition A11.

Question 16: 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?

Two respondents commented that they had not identified any other or consequential changes needed.

Another respondent suggested the need to explicitly state who has the power to modify the BSC following a decision taken via the self-governance route. Paragraph 5(e) of standard condition C3 expressly states that only the licensee has the power to modify the BSC. It is therefore open for the code to further detail implementation of self-governance decisions.

Question 17: Are there any definitions in the standard licence conditions that are now redundant or need updating?

No respondents identified any definitions requiring change.

One respondent queried the need to retain the definition of 'transition modification provisions'. We have retained this definition as the phrase continues to appear in the licences.

Question 18: Do you consider it appropriate to repeat the condition-specific definitions in the global definition conditions?

Two respondents did not and one respondent did prefer condition specific definitions repeated in the global definition section. Given the lack of appetite for repetition of the condition specific definitions, we have not included these in the global definition condition.

Question 19: Do you consider the new defined terms are appropriate?

Two respondents felt that the licences should set out expressly in respect of Significant Code Reviews: (i) that Authority directions will be clear and sufficiently detailed; (ii) that the timetable for compliance only starts once the licensee has confirmed that they understand what is required; and, (iii) that any Authority direction will confirm what compliance is. However, we do not believe that further text is necessary. Any Authority directions will be set out as clearly as possible. Such directions will follow a period of consultation, during which we expect licensees to fully engage. As a result, licensees should identify at this time any matters they would like clarified or explained for discussion. Finally, our view is that compliance with a direction is to do what it requires, for example, to raise (and not withdraw) a modification proposal.

One respondent considered: (i) that there was no need for a definition of 'charging methodology forum'; and, (ii) (a) did not like inclusion of an undefined term of 'Code Administrators Code of Practice' in the definition for 'code of practice' ('CoP'); and, (b) felt the CoP should not be mandated in the licence. We believe that inclusion of the forum clarifies that new forums are not necessary to comply with the licence and also provides for discussion of CM change proposals in a suitable place. Further, we disagree with the first comment concerning the CoP. We feel it is necessary to include the name of the document in the definition and have therefore left this in the licence drafting for clarity. Finally, inclusion of reference to the CoP ensures that code administrators are employing best practice.

Finally, one respondent considered that: (i) the Authority's process for designating affected parties would benefit from clarification; (ii) the definition of 'charging methodology forum' should refer to UNC charging methodologies; (iii) any charging methodology 'window' should be included in the code only; (iv) comments made at the Workshop about deleting code signatories in the definition of the CoP had been reflected; and, (v) the definition of 'industry code' should include a list of all codes. We consider that detail on the designation process for affected parties is not a matter for licence drafting. We envisage that designation would follow a request to us and a consultation on any intention to designate. We have included the suggested reference to UNC, removed the proposed change 'window' (as discussed above) and the reference to signatories in the definition of the CoP (to reflect comments received at the Workshop). However, we do not consider it necessary to list all current industry codes in the definition.

Question 20: Do you agree with the proposed house-keeping amendments? Do you propose any additional house-keeping amendment?

One respondent was in favour of the proposed house-keeping amendments.

A second respondent suggested making reference to paragraph 2A of standard special condition A4 in paragraph 9(ab)(ii) of standard special condition A11 for completeness. We agree and have made this addition.

Question 21: Have you identified any unintended consequences of the licence drafting?

One respondent thought that the self-governance process, as set out in the licence drafting, had the potential to lengthen the modification process. We have taken this view into account in the final text. To reflect this comment (also raised during the Workshop), we have revised the definition of self-governance statement to removed the potential need for an additional initial consultation on the applicable modification route. We have also amended paragraphs 13A of standard conditions C3 and C10 and paragraph 15D of standard special condition A11 so that the period for us to override the panel's filtering decision runs concurrently with the modification process.

Another respondent felt that the licence left it unclear as to whether codes or the CoP take precedence. However, we disagree as the CoP expressly states that the codes take precedence. The licence drafting sets out a requirement to act consistently with the CoP. In our view this does not alter the hierarchy as expressed.

Finally, one respondent suggested that a change to the BSC's relevant objectives would be necessary to ensure that the interests of distributors were taken into account in reaching decisions, especially under the self-governance route where the Authority was not taking a decision (as the Authority considers such interests under its statutory duties). Our comments on amendments to the relevant objectives generally are set out above.

In respect of self-governance, because we have set a non-material threshold (related to our duties) it is unlikely that anything that has a material impact on distributors would feature in this route in any case. However, a distributor is a BSC party and so they could raise an appeal against a panel's self-governance determination which would provide a safeguard as the Authority could then assess the modification proposal on its merits as before.

Question 22: Do you agree with the proposed approach and detail of the potential alignment, accuracy and clarification amendments?

One respondent felt this was an appropriate step.

Another respondent disagreed with the proposed insertion of paragraph 20A in standard special condition A11<sup>2</sup>. They felt that if paragraph 20A(b) of that condition were retained, it should expressly state that this does not prevent the licensee from participating in the modification process. However, we do not propose to remove these provisions. Paragraph 20A requires licensees to take reasonable measures to secure and implement changes. Paragraph 20A(b) prohibits the licensee from taking unreasonable steps to delay consequential changes. Our view is that neither of these provisions prevents a licensee from proper participation in the code modification process. This respondent also felt that the word 'material' in all revised drafting in standard special condition A11 should be replaced with 'where relevant' or 'as appropriate'. However, we do not agree with this proposed change as use of the word 'material' is discussed and agreed in our Final Proposals.

---

<sup>2</sup> Note that paragraph 20A has been renumbered to paragraph 19A. Therefore references in this Annex to paragraph 20A are now to paragraph 19A.

Question 23: Do you have any other (non-policy related) comments on the proposed licence drafting?

One respondent considered paragraph 4(ac) of standard condition C3 was now redundant in light of the revised text. We agree with this comment and have removed this subparagraph and equivalent provisions for standard condition C10 and standard special condition A11.

Another respondent considered that paragraph 4(b)(v) of standard condition C3 (and equivalent provisions for standard condition C10 and standard special condition A11) should revert to 'proposed modification'. We have made this change.

One respondent considered that: (i) the licence should express compliance is with principles as set out in the boxes in the CoP and that the notes underneath the boxes are for guidance only; and, (ii) there is an element of duplication in paragraph 1(e)(i) of standard condition C3. We do not agree that further detail is needed about the CoP principles. This is clarified in the CoP itself, which can only be amended by the code administrators with our approval. We disagree with the comment about duplication. In our view it is necessary to confirm that the paragraph relates the CoP as approved by the Authority as well as that any changes to the CoP must be approved by the Authority.

Another respondent made the following comments:

- (i) They believe that the deletion in paragraph 2 of standard special condition A5 will conflict with standard special condition A11, as the report is no longer within the licensee's hands with regards to CMs. From 31 December 2010, the requirement in paragraph 2 of standard special condition A5 to furnish the Authority with a report will be deleted and no longer apply. Any reports/notices on CM change proposals will be furnished to the Authority by the panel under the code modification procedures from 31 December 2010. Accordingly, in our view, no conflict should arise.
- (ii) They feel that the voting arrangement set out in paragraph 6(d) of standard special condition A11 should only refer to the consumer representative. We disagree, as the UNC will need to provide the chairman with an ability to vote, for example, to break tied situations under the self-governance route.
- (iii) They think that paragraph 9(d) of standard special condition A11 does not work without a definition of consumer representative. We consider that the detail provided in paragraph 6(d) is sufficient for this purpose.
- (iv) They consider that paragraph 9(h) of standard special condition A11 should be removed. We disagree as this includes the requirement for consistency with the aspects of the CoP relating to code processes.
- (v) With regard to the definitions section, they think references to the Electricity Act 1989 in the definition of 'industry code' should be removed. We disagree with this suggestion as licensees should consider any consequential changes that may be appropriate.

A further respondent commented that: (i) They thought further detail was necessary on what is required to satisfy a requirement to raise a modification. We consider that this will be clarified by the direction(s) issued by the Authority and therefore no further clarification is currently necessary. (ii) They dislike that they cannot appeal if there is no real prospect of success. This test is also employed by the courts, therefore we believe that it is reasonable. (iii) They consider that the word 'approved' should be inserted in paragraph 20A of standard special condition A11. We disagree as the paragraphs also capture the modification process when no decision has yet been made.

The final respondent commented that:

- (i) Reference to 'powers' in relation to code administrators is inappropriate. We consider that inclusion allows the licensee to give the code administrator everything it will need to fulfil its remit.
- (ii) They believe the reference to any successor body to the National Consumer Council should be removed as any change would require a licence change in any event. We

- disagree that a deletion is necessary and this inclusion future-proofs at least this licence provision.
- (iii) They stated that reference to other code administrators requires a definition. We disagree that anything more is required as these will be the other entities administering the other industry codes in existence from time to time.
  - (iv) They consider that references to 'workgroup' to reflect the CoP should revert to code wording. We disagree as codes should, where possible, use common terminology to assist transparency.
  - (v) They would like to know how the non-objection in relation to extensions of time would work in practice. We envisage that the notice and objection would be written.
  - (vi) They were unclear why 'small participants' were no longer expressly referred to in paragraph 4(b)(i) of standard condition C3. Our view is that this is because they fall within 'BSC parties' and/or 'other persons as may have an appropriate interest' and therefore express reference is not necessary.
  - (vii) They believed that paragraph 5(aa) of standard condition C3 should state that it applies where a modification is not progressed within an appropriate timescale and/or the modification does not reflect Ofgem policy conclusions. Our view is that reports may be sent back, for example, for deficiencies in analysis, which the suggestions would not capture.
  - (viii) They comment that there should be a re-direction if a self-governance statement is not made or is withdrawn and the Authority determines self-governance applies. Our view is that this matter can be set out in the relevant code provisions as the licence drafting sets out the minimum requirements.
  - (ix) They are unclear from paragraph 13C of standard condition C3 what is required to be 'created'. Our view is that this includes code modifications and consequential changes to non-code documents.
  - (x) They consider 'unfairly prejudiced' to be unclear in the appeal provisions. This is a consideration taken by appellate courts. We therefore consider it appropriate to take account of whether a party is unfairly detrimentally impacted.
  - (xi) They consider it unclear what paragraph 23A of standard special condition A11 adds to 20A of standard special condition A11. Our view is that paragraph 23A of standard special condition A11 expressly relates to implementing the licence changes by 31 December 2010. However, paragraph 20A of standard special condition A11 is an ongoing obligation without a specific deadline.

Question 24: Are there any aspects of the drafting that you do not understand or that you consider inappropriate?

Only one respondent made specific comment. However, this comment related to policy fixed in our Final Proposals concerning halting modification proposals falling within the scope of a significant code review and therefore has not been addressed as set out above.

Question 25: Are our substantive proposed changes appropriate in order to give effect to the underlying policy of the Final Proposals?

One respondent felt it appropriate to leave much of the detail of implementation to the codes.

Another respondent felt that a simple licence change requiring licensees to amend the codes to reflect the Final Proposals was all that was needed. In our view, the licence drafting sets out the minimum requirements to implement the Final Proposals.

### **Questions asked in Chapter 3 of the Consultation**

Question 1: Are there any comments that are still valid but you consider have not been addressed by us, either in our reply or in the revised licence drafting?

One respondent felt there should be: (i) more detail of significant code reviews and use of send-back powers; and, (ii) that there should be an appeal in respect of significant code review decisions regardless of the relevant panel's recommendation.

We confirm our intention to issue guidance on significant code reviews. We therefore do not feel it necessary to include further detail in the licence drafting.

Whilst we note the concern raised about appeals, appeal routes to the Competition Commission are set out in secondary legislation and are therefore not within our gift to amend. However, paragraph 3.35 of chapter 3 and paragraph 1.65 of appendix 2 of our Final Proposals discuss potential mitigation of such concerns through the codes.

Question 2: Are there any aspects of this chapter regarding which you seek additional clarification or to which you would like to respond?

One respondent wanted confirmation that if a report was sent back to the panel, the panel could conduct a new assessment and provide further detailed explanation for its decision. We consider that if such re-consideration and explanation is appropriate, the panel should do this.

### **Further changes to the licence drafting**

We set out further minor changes to the proposed licence drafting below which we think are required to give proper effect to certain aspects of Final Proposals.

At the request of participants in the Workshop, the word 'may' was provisionally inserted before 'in the opinion of the Authority' in paragraphs 13B of standard conditions C3 and C10 and paragraph 15E of standard special condition A11, subject to consideration of responses received on close of consultation. On further review, we do not believe that this suggested addition effectively adds anything to these paragraphs. Accordingly, we have removed this insertion and instead replaced 'does' in paragraphs 13B(a)(ii)(1)-(2) and 15E(a)(ii)(1)-(2) with 'may'. Further, in those paragraphs, we have inserted the word "or" between renumbered sub-paragraphs (a)(i) and (a)(ii) as that was our Final Proposal (see paragraph 1.17 of appendix 3 of Final Proposals).

Finally, we have made additions to the paragraphs in standard conditions C3 and C10 and standard special condition A11 dealing with self-governance to clarify that:

- (i) A self-governance modification may not be implemented:
  - (a) Unless consultation responses are sent to the Authority at least 7 days before the panel makes its determination;
  - (b) If an appeal has been raised up to and including 15 days after the panel's determination; and,
  - (c) Where an appeal has been raised, if an Authority decision or panel reconsideration is required.
- (ii) The panel's determination on a self-governance modification proposal is to comply with the relevant provisions of paragraph 4(b) of standard condition C3 paragraph 6(b) of standard condition C10 and paragraph 15(a) of standard special condition A11.
- (iii) In the event that the Authority makes a decision following an appeal, the panel determination shall be treated as a report submitted to the Authority. This clarification is why we have confirmed that a panel's determination should comply with the relevant provisions referred to above.

## Annex 2

### Summary of responses to the Code Governance Review Final Proposals Licence drafting Consultation made during the workshop on 23 April 2010 and Ofgem views

Topic	Comment	View
SCR	Seeking clarity that mods held pending SCR conclusions are suspended only and can be resurrected once SCR ended.	No block on modifications except certain ones during SCR review phase. If a proposer whose modification has been subsumed within the SCR still wishes to raise their modification once the SCR conclusions have been published, then they can raise it as an alternative to the licensee's modification proposal.
	Suggestion that re-phrase section seeking to impose restrictions on third parties (e.g. on raising mods falling within live SCR), so as clearer that requirement is to include something in the code to this effect.	Re-phrased so that licence says that the BSC shall provide for this.
	C3 4(aA) - they would like it to read 4(aa) instead.	Agree.
	C3 4B - belief that this is currently unworkable as it requires all mods to go to Ofgem with report as to whether part of SCR which will cause unnecessary delay. It was suggested that we 'reverse' some of the wording in 4B so that mods are deemed exempt unless Ofgem says otherwise.	4B and 3(b)(iiA) revised for clarity.
	C3 4B(a) - feeling that 'appropriate' should be 'material'.	No longer relevant given revision to 4B
	C3 4B(b) - questioned whether needed word 'properly'.	No longer relevant given revision to 4B
	C3 4B(c) - typo - need to change ref to (i) to (a).	No longer relevant given revision to 4B
	C3 4C - feeling that timescales for Authority not a matter for licence. Suggested re-phrase to say will get directions within ... time and what to then.	4C revised to place action on licensee.
	There was some confusion of the SCR phase 1 label.	Removed reference to 1 for clarity.
	SCR phase 1, para (ii) in the Transporters licence needs to read as 15C(b) and not 15B.	Agree.
	Transporter - 15C - typo in that no 15C(a).	Agree.
	Transporter - 15C - Wales & West pointed out that transporters can't currently raise joint mods.	Not matter for licence. Can be covered in code to either allow joint modifications or to require licensees to agree modification proposer.
	Definition of SCR - suggested that end of (ii) and (iii) don't fit in current list.	Revised for clarity.
	Definition of SCR - suggested delete [policy].	Agree.

	Definition of SCR - suggestion at (b) that add 'relevant' before the word obligations.	Agree.
	Definition of SCR - there was a suggestion to include something saying that they can assume a deemed statement that no direction is issued if not heard anything within 28 days.	See revised 4C.
	Definition of SCR - there was a suggestion that we swap (a) and (b) over in order.	Does not affect meaning or understanding of definition.
	C3 - 4C - there was a suggestion that we incl. 'by the Authority' in (b).	See revised 4C.
SG	There were some concerns that by requiring a report containing all representations before our clock for overturning filtering decision starts could delay mods.	We are currently reviewing the drafting and further comments will follow shortly.
	13B - Suggestion that the parties and consumer reps can appeal.	Those parties listed in 4(a) allowed to appeal.
	13B - some concern over phrase 'in the opinion of the Authority', as felt smacks of pre-determination.	Included the word 'may' as clarification.
	13B - some dislike of 'unfairly prejudiced'. Felt should be affected parties.	Threshold needed as appellant will need to explain why they feel they are more harshly treated by the modification than others (i.e. an appeal is for something more than the simple fact you are not in support of the modification). Code rules could specify unfair prejudice could be as against a class of participant and not just individual ones.
	15D(ii) - some felt that reference to requirements of para 15D, should read as requirement of SG criteria.	Agree.
Env.	There was a question over whether GHG emissions should be defined.	Defined in the guidance.
	Agreement that [quantifiable] should be kept.	N/A
	Agreed should leave everything in [] in purple on page 8.	N/A
CAs	C3 1(e) - do not like inclusion of '[powers]'.	Inclusion allows the licensee to give the CA everything it will need to full its remit.
	C3 1(e) - suggestion that (i) refers to 'in conjunction with other CAs'.	Agree.
	C3 1(f) - Agreed to leave in words in [].	N/A
	A11 6(d) - some feeling that would sit better in para 9.	Potential that Panel functions may extend beyond modification business. By leaving the position of the text as it is, it will be aligned between the BSC, CUSC and UNC.
	A11 6(d) - agreed to leave in text in [].	N/A
	There was some suggestion of viewing Authority appointment of a consumer rep as judge, jury and executioner.	Not a licence drafting matter.

	There was some concern over the wording of [accord/be consistent with] the CoP when the licensees don't have full control over alignment via mods to code or CoP.	Including words 'be consistent with' to ensure that the codes comply with the CoP.
	C3 4(aD) - (ii) - some dislike of 'operation' and feeling should refer to mod process instead.	Caveated by phrase 'in so far as is reasonably practicable'.
	C3 4(aD) - (iii) - there was some questioning of CA independence depending on what was meant by 'representation'.	Does not require advocacy of change proposals, so not an issue.
	C3 4(aD) - (iii) - some feeling that the words in [] should be harmonised with CUSC and UNC as in CoP, or the words in () should be removed as being too much details for the licence.	'modification group' rephrased to workgroup.
	C3 4(b)(iv) - questioned whether need '[workgroup stage]' reference / suggestions wording should be consistent throughout BSC/CUSC/UNC as per CoP.	Revised so that remove reference to workgroup and consultation stages because detail under Principle 7 of the CoP requires alternatives only within the workgroup stage.
	C3 4(b)(iv) - queried whether part 2 should be an ability to veto rather than a positive approval being needed each time.	Revised.
	C3 - 7(b) - Wished to retain clause.	Disagree needed, as BSC may continue to include this without it being a licence requirement.
	UNC point only - 10 - need to include ability for non-code parties to raise an Alternative (e.g. consumer reps).	Licence sets out the minimum, this can be dealt with under the code rules.
	C3 4(b)(v) - suggestion that pluralise Alternative.	Agree.
	C3 4(b)(vi) - suggestion that this should be changed to a veto.	Revised.
	C3 5(aA)(i) - suggestion that 'amendment' should read as 'modification'.	Agree.
	Definition of CoP - suggestion not to list CAs or refer to signatories, but to simply state CAs.	Agree.
	Definition of CoP - (b) - suggest simply refer to as approved from time to time by the Authority rather than include first date.	Agree.
	Suggestion that get rid of definition of small participant.	Disagree. Policy set in FP.
	A11 9(h) - queried whether para necessary. Suggested that should say 'to the extent that they are relevant'. Same concern with requirement to [accord/be consistent with] CoP as above.	Agree to add to the extent that they are relevant. Keeping to be consistent with.
	A12 4(iv) - should ref to 15(b)(ii).	Agree.
CMs.	C10 - 6(a)(ii) - suggestion should either incl. 'materially' in definition, or remove it.	Text and definition revised for clarity.
	C10 - 6(a)(ii) - suggestion that window should be removed and included in code only.	This was a suggestion for risk mitigation. Could include measure such as this in code.

C10 - 6(aE)(i) - there was a suggestion that this should simply ref to the development and discussion of CMs and not to the forums.	Forums can operate in whatever manner the code dictates. Comment relates to policy.
C10 - 14A - suggestion that incl a 'reasonable endeavours' ref.	Included 'best endeavours'.
A4 (pg 78) - queried about whether to remove 8(b).	As per Wales and West comments, paragraph remaining.
A5 - 2 - consider why keeping first part of text at the start of the para.	Not removing original text as relates to disposal of assets (which is UNC specific) and a power of the Secretary of State.
A11 - 6(e) - queried need for this. Felt if required should be in Network Code.	Not being removed. Reflects discussions prior to policy conclusions that charging methodologies would be inserted into the UNC. This will also mean that proposers of modifications may have an appeal route.
Joint Office disliked definition of forums as felt different to those that currently exist.	Includes related arrangements.
UNC only - pointed out need to check which elements switched on/off for different licensees.	Agreed to double check.
Queried transitional arrangements re CMs.	New clause inserted.