



Code Administrators, Industry participants and other interested parties

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Email: industrycodes@ofgem.gov.uk

Date: 25 May 2011

Dear Colleague,

Open letter on Code Modification Urgency Criteria

Industry codes provide the contractual arrangements that underpin the gas and electricity markets. Industry parties are able to propose changes to the existing industry codes through code modification proposals. These modification proposals are normally subjected to detailed industry assessment to ensure the impact of the change is fully considered.

From time to time, industry parties may consider that a code modification proposal should be treated as urgent as its proposed introduction cannot wait for the normal industry process to be completed. Ofgem¹ has a role in agreeing to the urgent status of a code modification proposal².

On the 11 March we published an Open Letter³ to consult on the proposed criteria we intend to apply when deciding whether a modification proposal is to be treated as "urgent". We considered that an urgent modification should:

1. Be linked to an **imminent date** related event **AND** exhibit at least one of the following characteristics:
2. Have a **potential significant commercial impact** upon at least one code party or consumers if not considered urgent;
3. Have a **potential significant impact on the safety and security** of the electricity and/or gas systems if not considered urgent;
4. Needs to be treated as urgent to comply with an **imminent legal requirement** which could not have reasonably been foreseen by the proposer.

This letter and Appendix 2 below summarise the responses we received to our 11 March consultation and sets out our views on the issues raised. Having considered all responses

¹ The terms 'the Authority', 'Ofgem' and 'we' are used interchangeably in this document. Ofgem is the Office of the Gas and Electricity Markets Authority.

² For the following Codes Ofgem decides whether a modification proposal should be considered urgent and/or determines the timetable to follow where a proposal is deemed urgent: Balancing and Settlement Code ('BSC'), Connection and Use of System Code ('CUSC'), System Operator-Transmission Owner Code ('STC'), Uniform Network Code ('UNC'), Independent Gas Transporters Uniform Network Code ('IGT UNC'), Distribution Connection and Use of System Agreement ('DCUSA').

³ The Open Letter can be found on Ofgem website :

<http://www.ofgem.gov.uk/Licensing/IndCodes/Governance/Documents1/Open%20letter%20consultation%20on%20Urgency.pdf>

we have decided to revise our Guidance on Code Modification Urgency Criteria and publish it on our website (the revised Guidance is attached at Appendix 1 below).

Responses to our March open letter and Ofgem views

We received twelve responses to our open letter and these are available on our website⁴. Some of the issues raised by the respondents are summarised below together with Ofgem views. We have also included in Appendix 2 a table of all comments received and our views on these. We are grateful to respondents for providing their comments and we have considered them in reaching our final view.

The majority of respondents were supportive of publishing the criteria, as this promotes transparency and consistency across codes. No respondents were opposed to the Guidance, though some specific suggestions were made to seek to make it more robust and effective.

An additional caveat: "could have reasonably been foreseen by the proposer"

Six of the twelve respondents considered that urgent status should not be granted in circumstances where the imminent date related event could have been reasonably foreseen and the modification proposal was not raised in a timely manner. We agree that we should seek to avoid situations in which a code party, deliberately or inadvertently, delays raising a modification proposal. However, we do not think we should change our criteria to reflect this, as there may be situations in which the imminent date related event could have been foreseen, but treating the proposal as urgent will still be appropriate.

One respondent thought instead that the caveat in the fourth criteria "*which could have reasonably been foreseen by the proposer*" was not required and suggested either removing it or adding it to the other 3 criteria for consistency.

Having reflected on all of the above comments, we have decided to remove the explicit caveat from the fourth criteria. We have however included a general comment in the body of the revised Guidance document: "*we recommend code parties raise modification proposals in a timely manner so that a proposal receives careful industry consideration and avoids the risk of a constrained timetable under the urgency procedure*". When making our decision on urgency, we will of course consider whether the imminent issue could have been reasonably foreseen by the proposer. If the timetable allows for it we will seek the views of the relevant Panel on the application for urgency.

Multiple criteria

Two respondents considered it onerous to require a link between the "imminent date related event" criterion and the other three criteria (the materiality criteria) for the purposes of deciding urgency status. These respondents were concerned that there could be situations in which one or more of the materiality criteria were met, without there being a specific date related event. However, another respondent recognised the importance of this additional requirement and noted that the presence of an imminent date related event does not of itself mean that urgency is appropriate.

We agree that in order for a proposal to be considered urgent there must be consideration both of timeliness and materiality and our proposed drafting sought to clarify this. This would avoid situations in which the proposer cites an "imminent date related event" as a reason for requesting urgency status, with little or no evidence of material consequences if the "standard" modification process is followed. We have therefore decided to retain this "two-tier" test in our Guidance. However, we have considered the concern that there may be circumstances in which there is no specific imminent date related event, but nonetheless

⁴ The 12 non confidential responses can be found on our website at:
<http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=198&refer=Licensing/IndCodes/Governance>
<http://www.ofgem.gov.uk/Licensing/IndCodes/Governance/Pages/Governance.aspx>

a pressing need to address a current issue. We have therefore decided to amend the timing criterion accordingly (See 'Conclusions' below and Appendix 1).

Urgency in order to meet a legal requirement (the fourth criterion)

Two respondents thought the fourth criterion was superfluous, though one considered that it was already covered by the first criterion, while the other considered it covered by the second criterion. A third welcomed this addition.

Industry parties are required to adhere to a number of regulatory instruments and other legal requirements beyond the industry codes. It is therefore important that the industry codes do not place parties in a position of undue conflict with their wider obligations. We therefore remain of the view that the addition of the fourth criterion is appropriate. However, in line with our comments above, we would expect an application for urgent status to focus on the code related implications (including unforeseen implications) of adhering to any relevant legal requirement(s). The effective date of the requirement may not of itself be sufficient to justify urgent status, as this will likely be signalled well in advance, in the public domain and known to industry.

Retrospectivity

One respondent wondered whether it might be worth including some guidance around the criteria that would apply to those who raised an urgent proposal which had retrospective elements. We agree that there may be some correlation between considerations of urgency and retrospectivity and have therefore provided further guidance on this point (See Appendix 1).

Authority discretion

One respondent commented on the general caveats which provide for situations when Ofgem would not allow "urgency" in circumstances where the criteria are met or, on the other hand, grant urgency where they are not met. The respondent was concerned that these caveats may create some uncertainty for those considering urgency status and suggested either giving some practical examples or adding an additional note that such circumstances are expected to be rare.

Another respondent recognised that Ofgem may require a certain degree of flexibility in applying the criteria. They also noted that, as these criteria consider timing, significant commercial impact and security of supply, they could not envisage any circumstances in which these Guidance criteria were met yet Ofgem decide not to grant urgency status.

Having considered the above comments, we have deleted the specific caveats⁵. We have however emphasised that the criteria in the revised Guidance at Appendix 1 are guidance only and are not intended to be exhaustive. We will consider each application for urgency on a case by case basis, and in circumstances where we depart from the Guidance, we will explain the reasons why.

Criteria followed by other Panels (Executive Committees)

One respondent recommended that the Authority should always determine if a modification proposal is to be treated as urgent. We have previously noted that not all of the industry codes modification rules currently allow for the Authority to make this determination. Unless and until those industry codes are modified, we have noted our expectation that those Panels or Committees which instead have a role in determining urgency would have

⁵ The caveats, which we have deleted from our published final version, were: "However, there may be situations when we would not allow "urgency" for a modification regardless of whether the above circumstances are met. An example would be where a modification is complex and therefore requires careful and detailed consideration. On the other hand, there may be situations in which the above criteria are not met but, in accordance with our statutory duties, we would still decide that a modification proposal would be treated as urgent".

regard to the same urgency criteria. The Executive Committees of two such codes responded to our consultation and have already committed to having regard to our Guidance and criteria when making a determination upon urgency.

Conclusions

After considering the views of all respondents we have published our final "Guidance on Code Modification Urgency Criteria" on our website (see Appendix 1). The key aspects are as follows:

The Guidance sets out the factors the Authority will consider in reaching a decision on urgency in the context of industry code modification proposals – it is intended to be illustrative and not exhaustive. Each request for urgency will be considered on its merits on a case by case basis by reference to the Guidance, and in circumstances where we depart from it, we will explain the reasons why. Our current view is that an urgent modification should:

1. Be linked to an imminent issue⁶ or a current issue that if not urgently addressed may cause:
 - a. A significant commercial impact on parties, consumers or other stakeholder(s);
or
 - b. A significant impact on the safety and security of the electricity and/or gas systems; or
 - c. A party to be in breach of any relevant legal requirements.

We would encourage all code parties to have regard to this Guidance and, to the extent their respective codes refer to urgent procedures, ensure that they are applied in a consistent manner. We would particularly welcome any templates or other documentation that refers to implementation dates or timescales for the progression of a modification proposal to include reference to our criteria for determining urgent status.

Yours sincerely

Declan Tomany
Associate Partner Legal - Smarter Grids & Governance

⁶ The imminent issue may be date related.

Appendix 1 – Ofgem⁷ Guidance on Code Modification Urgency Criteria

Who decides a modification proposal is “urgent” and/or determines its timetable?

There are 7 electricity codes and 3 gas codes in Great Britain.

- ❖ For the following codes the Authority decides whether a modification proposal should be considered urgent and/or can determine its timetable:
 - **Balancing and Settlement Code ('BSC')**
 - **Connection and Use of System Code ('CUSC')**
 - **System Operator-Transmission Owner Code ('STC')**
 - **Uniform Network Code ('UNC')**
 - **Independent Gas Transporters Uniform Network Code ('iGT UNC')**
 - **Distribution Connection and Use of System Agreement ('DCUSA')**⁸
- ❖ For the following codes the respective Executive Committee decides whether a modification proposal should be considered urgent and determines its timetable:
 - **Master Registration Agreement ('MRA')**
 - **Supply Point Administration Agreement ('SPAA')**
- ❖ The **Distribution Code** and the **Grid Code** contain no specific rules on urgency.

Though each Code has slightly different rules we would expect the urgency criteria below to be applied in deciding whether a modification proposal should be treated as “urgent”.

We also recommend code parties raise modification proposals in a timely manner so that a proposal receives careful industry consideration and avoids the risk of a constrained timetable under the urgency procedure.

What criteria would the Authority use to determine urgency?

The Guidance sets out the factors the Authority will consider in reaching a decision on urgency in the context of industry code modification proposals – it is intended to be illustrative and not exhaustive. Each request for urgency will be considered on its merits on a case by case basis by reference to the Guidance, and in circumstances where we depart from it, we will explain the reasons why. Our current view is that an urgent modification should:

1. Be linked to an **imminent issue**⁹ or a **current issue** that if not urgently addressed may cause:
 - a. **A significant commercial impact** on parties, consumers or other stakeholder(s); or
 - b. **A significant impact on the safety and security** of the electricity and/or gas systems; or

⁷ The terms “the Authority”, “Ofgem” and “we” are used interchangeably in this document. Ofgem is the Office of the Gas and Electricity Markets Authority.

⁸In the case of the DCUSA the Proposer specifies whether the modification proposal should be considered “urgent”; the Panel then determines the timetable to follow. However, the Authority can direct that an alternative, ‘urgent’ timetable applies in place of that set by the Panel.

⁹ The imminent issue may be date related.

- c. A party to be in breach of any **relevant legal requirements**.

Can an urgent modification proposal contain retrospective elements?

As indicated in past decision letters, it is our view that retrospective modifications should be avoided as they undermine market confidence. It is a general principle that rules ought not to change the character of past transactions, completed on the basis of the then existing rules. However, despite the general principle against retrospective rule changes, we believe that there may occasionally be exceptions that could give rise to the need for a modification which would have retrospective effect.

We consider that it is appropriate to consider any retrospective modifications on a case by case basis, though the particular circumstances that could give rise to the need for a retrospective change could, for instance, include:

- a situation where the fault or error giving rise to additional costs or losses was directly attributable to central arrangements;
- combinations of circumstances that could not have been reasonably foreseen; or
- where the possibility of a retrospective action had been clearly flagged to the participants in advance, allowing the detail and process of the change to be finalised with retrospective effect.

We also consider that in any event, any cost/loss incurred due to the prevailing rules would need to be material in order to warrant a retrospective modification.

Notwithstanding the points raised above, we recognise that a retrospective application of a modification may negate the need for its development to follow an urgent or otherwise contracted timetable, and vice versa. A proposer may therefore wish to consider where the balance between these considerations might appropriately lie, ahead of submitting their proposal.

Do “send back”¹⁰ provisions also apply to “urgent” proposals?

Yes, if we think that we cannot properly form an opinion based on the final modification report.

Can the status of a modification proposal be changed?

Yes, the status of a modification proposal may change from “urgent” to “non-urgent” and vice-versa, if a change in circumstances relating to that proposal warrant it.

Can a modification proposal that follows the Self-Governance path be considered urgent?

Following recent changes to the BSC, UNC and CUSC, a modification proposal raised to one of these codes can be considered as Self-Governance if certain criteria are satisfied. The self governance criteria apply to a proposal that if implemented is unlikely to have a material effect on: existing or future gas or electricity consumers; competition or associated commercial activities; the operation of the relevant gas and electricity system matters relating to sustainable development, safety or security of supply, or the management of market or network emergencies; code governance or modification procedures; and, if it is unlikely to discriminate between classes of users (the “Self-Governance criteria”).

¹⁰ We introduced ‘send back’ powers through our Code Governance Review. The powers apply to the BSC, UNC and the CUSC and allow the Authority to formally return final modification reports to the relevant panel where we consider the analysis, legal text, or any other aspects of the report is deficient and inhibit our ability to make a robust decision.

Given the pre-requisites for Self-Governance and urgency require opposing levels of impact (unlikely if implemented to have a material effect for Self-Governance and a significant impact for urgency), it is unlikely that a modification proposal could fulfil both sets of criteria.

Can a decision on an urgent modification proposal be appealed?

The granting of urgency does not in itself exempt the Authority's decisions on urgent proposals from the right of appeal to the Competition Commission¹¹. However, the Authority can exclude decisions if the delay caused by holding an energy code modification appeal is likely to have a material adverse effect on the availability of electricity or gas.

Who can I contact for further assistance?

If you need further assistance regarding this Guidance please send an email to: industrycodes@ofgem.gov.uk

¹¹ Under the Energy Act 2004

Appendix 2 – Summary of responses and Ofgem view

| Respondents suggestions | Ofgem view |
|---|--|
| Criterion 1: Code parties should raise proposal in as timely manner as reasonably practical and not seek urgency if imminent date related event could have been reasonably foreseen. | We agree in the principle but, as discussed in our letter, we do not think it is necessary to change the criterion. Have added a general caveat to our Guidance. |
| Criterion 4: caveat “which could not have been reasonably foreseen” not needed: either remove it or add it to all the others. | As discussed in our letter, we have considered both this comment and the above and we have decided to remove the explicit caveat from criterion 4 and leave it as a general caveat. |
| Criterion 4 is superfluous as already covered by criterion 1 | As discussed in our letter, we think it is appropriate to keep the fourth criterion |
| Criterion 4 is superfluous as already covered by criterion 2 | As above |
| Include some guidance on principles which apply if proposal has retrospective elements | We have added some guidance on retrospectivity |
| Welcome the addition of the “and” between criterion 1 and the others to avoid using the “imminent date related event” as the only test for urgency | We agree and, as discussed in our letter, we had intentionally added a “two-tiers” test to avoid situations in which urgency is granted only on the basis of imminent date |
| Thinks the “2 tier” test given by the above “AND” is too onerous as there could be instances in which the first criteria is not met though the others are | As discussed in our letter, we have kept the “two-tiers” test. However, we have changed the wording of the first criteria, to account for situations in which there is no imminent date, but a current issue needs addressing. |
| Recommend the Authority should always determine whether a Modification Proposal is to be treated as urgent | As discussed in our letter, we cannot change the codes rules, but we have recommended that all Panels follow our criteria when making their decision. |
| Caveat that Ofgem can decide not to follow the criteria could bring uncertainty; suggestion to add some practical examples or clarify that these circumstances are expected to be rare. | As discussed in our letter, we have decided to delete the specific caveats and leave a general clarification that, as these criteria are guidance only, we will consider each application on a case by case basis. |
| Clarify that the commencement of a network operator’s financial year should not automatically be assumed to be an “imminent date” | We agree as this is a foreseeable event. However, this Guidance is not intended to be exhaustive and we do not think it is appropriate to prejudge specific situations. |
| Criterion 2 should be extended to include any party upon whom the proposed modification would have a material impact | We have added another category of “a stakeholder if appropriate”. |
| Add that a proposal that was not considered to be urgent could become urgent. | We agree and have added this additional clarification |
| Clarify what “normal” timetable means in the case of a proposal for which the urgency status has been revoked | We have removed the word “normal” from the Guidance but timetable will change according to the rules of the Code and Code Administrator Code of Practice |
| Add the possibility for code parties to object to urgency, on the ground of the potential significant commercial impact on them if the change proposal is implemented | We disagree as there would only be an impact if a modification proposal is implemented. Views would in any case be sought during consultation |
| Clarify that reference to the “Authority” also include “Ofgem” | We have added a footnote in the Guidance to clarify this. |