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18th December 2015

WWU response to Code Governance Review (phase 3) Initial Proposals

Dear Marion,

Wales & West Utilities (WWU) transports gas to 2.5M supply points in Wales and south west England.

We have significant concerns about Ofgem's proposals in this consultation for changes to the Significant Code Review (SCR) process for the reasons set out at Question 1 below, but are more supportive of some of the other proposals in the consultation.

We note that all the specific examples in the body of the consultation (and the indicative drafting in Appendix 3) relate to electricity codes. If this is because it is only the electricity codes where there are concerns then this is reasonable, however if it is due to lack of familiarity with gas codes then we would be concerned that the consultation may not properly address gas code issues.

Significant Code Reviews

Question 1: Do you agree that Ofgem should have the ability to lead an end to end SCR process, including the development of code change and legal text.

All the industry codes are, in legal terms, contracts, albeit multiparty contracts. Contracts generally have provisions that exclude the rights of third parties (i.e. those who have not signed the contract but may have some interests in how it is performed or the outcomes) to enforce its terms and almost without exception only allow the parties bound by the contract to raise changes to it. Ofgem's proposals to allow it as a third party to raise, manage, draft and direct implementation goes against this generally accepted legal principle applied by parties to contracts and therefore giving Ofgem these powers needs a strong justification.

The Uniform Network Code already gives Ofgem the role of determining whether or not modification proposals that are material should be implemented. Since, almost by definition, changes under an SCR will be material, Ofgem will have this role to determine whether UNC modification proposals resulting from an SCR should be implemented. For Ofgem to continue discharging this role when gaining the ability to lead an end to end SCR process, including the

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development of code change and legal text, then it will need to clearly demonstrate that the determination role is independent of its role in leading the SCR process. This is not included in the proposals so we assume that separation of powers will not be in place. Without this in place we conclude that the integrity of the UNC modification process could be compromised and therefore we do not support Ofgem having the powers proposed.

More generally, there is clearly a tension between “getting things done” and a full consultative process that ensures that all views are taken into account and potential unintended consequences are identified and assessed. Our concern is that allowing Ofgem sweeping powers to lead the end to end SCR process, develop code changes, draft legal text and then have the final say on whether the modification proposal is implemented means too much power will be given to Ofgem. As Ofgem is not party to the industry codes any problems that results from the process will be experienced by the parties to the code and not directly by Ofgem.

More generally, we think that these SCR proposals are inconsistent with other changes that Ofgem has led, for example the review of the Funding Governance and Ownership of Xoserve (“Xoserve FGO review”). This review concluded Xoserve should be more transparent and Shippers should have a role alongside transporters in both governing Xoserve and how it is operated. The current position where Transporters appoint all the Directors of Xoserve, set the budget, control all the changes to industry systems and so forth was considered to be not satisfactory. We suggest that the Xoserve FGO Review sits uneasily with the option 3 proposals in this consultation which gives Ofgem all the control of the SCR process and the ability to decide what drafting of the proposed modification looks like and the final decision on whether it is implemented.

Finally, it is worth noting that giving a regulator powers under primary legislation to direct code changes (which is not proposed in this consultation but has been mooted in the past) runs the risk of being not transparent and meaning that parties are not aware of the proposed changes to Code. The recent Gas Security of Supply SCR which was done under the current SCR arrangements but where the Authority had powers to direct changes to the UNC using its powers under section 36C of the Gas Act is a good example of this problem. Parties expect UNC changes to be raised as modifications and anything that uses a different process runs the risk of not engaging all parties fully.

Question 2: Do you agree that it is appropriate that Ofgem may set timetables for the code change process under an SCR, when the existing, industry-led code development route is used?

It is clear that if deadlines are set by legislation or licence then there may be a requirement for code changes to be introduced by a deadline and recently there have been a number of examples of this in relation to transmission related modifications which have been driven by European legislation. In the absence of this, the question is whether the regulator should be able to set deadlines. Our view is that if the consultative phase of an SCR process shows a clear positive cost benefit of a change and / or there is clear support for a deadline from stakeholders then Ofgem should be able to set a deadline when the existing industry led code development route is used. In this case it is likely to be appropriate that Ofgem uses its powers to direct a licensee to raise a modification proposal. If Ofgem does direct a licensee to raise a modification proposal we would expect that they direct an appropriate party; for example should the direction approach be taken as a result of the Faster and Reliable Switching SCR then we think that there is merit in considering whether it is reasonable that Shippers rather than Transporters should be directed to raise modifications to the UNC.

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Question 3: Do you have any comments on the licence drafting set out in Appendix 3?

We do not have any comments on the drafting in appendix 3 as this relates to the electricity licence condition C3 Balancing and Settlement Code.

Question 4: Should Ofgem be able to directly raise a modification proposal under the standard process (option 2A)

We are disappointed that the consultation has not asked a specific question on whether respondents prefer options 1, 2, 2A or 3. Our view is that option 3, which is Ofgem's preferred option, is undesirable as it largely subverts the code modification process for the reasons given in our answer to question 1. Option 2A is preferable to option 3 but our preference is for options 1, 2, 2A and 3 in that order. Moving through the options increases Ofgem's ability to impose code changes on code parties with code parties increasingly unable to influence Ofgem if Ofgem is not inclined to listen. We note that as the options give more power to Ofgem then Ofgem's responsibility to ensure that the changes are well thought through increases; however the fact remains that any faults with the solution imposed are likely to impact code parties rather than Ofgem.

Self Governance

Question 1: Do you agree that requiring positive identification of why Authority consent is needed (rather than why it is not) could result in additional modifications being developed under self-governance?

As far as the UNC is concerned WWU agree that changing the self governance criteria in the way proposed is likely to lead to more modification proposals progressing under the self-governance process.

Question 2: Do you agree that guidance on the materiality criteria may assist industry in its assessment of whether a modification should be self-governance or require Authority consent?

We agree that guidance is useful as this will assist parties in raising correctly structured modification proposals; however, care should be taken in defining monetary limits to ensure that there is proper consideration of emerging markets, where current immaterial changes could become material in future periods. One example of this is distributed gas entry which is currently a small part of transporter activity and therefore would be likely to fail any materiality test that was defined in an absolute number of £. This was an issue for modification 0539 - Removal of NTS Exit Commodity Charges for Distributed Gas.

Question 3: Do you agree that any potential guidance is something that panels and code administrators should develop, based on their experience to date of using self-governance?

We agree. The key issue is how materiality is defined and we think that this should be defined by the individual code parties in the context of each code, however broad consistency regarding the appropriate tests is desirable. In terms of materiality, decisions will be required on whether the test is overall impact on the industry or whether it is measured in terms of impact on

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individual organisations. Within each category the next question is whether materiality should be defined in terms of total value or as a percentage. Our response to question 2 is also relevant to this question.

Code Administration

Question 8: Do you agree that the modification process and template should be standardised across all codes?

As we are not familiar with all industry codes across both gas and electricity it is difficult to give a full answer to this question, particularly as there is no summary of the key features of each process and template for each code in the consultation.

Standardisation for the sake of standardisation should be avoided and each process needs to be fit for purpose for its own code so it is wise to be cautious. Where there is no good reason for differences then standardisation has benefits as individuals may tend to seek to raise changes to the code with which they are most familiar rather than to the code where the change, perhaps to introduce a new process, may best sit. We believe that recently at least one UNC modification has been raised that would have been better raised as a SPAA change proposal, most probably for this reason of familiarity with one code over another.

There are links between how the modification or change process is run and the voting mechanism used. If there are sufficient checks and balances during the development and consultation phases to ensure that all parties' views are captured and assessed then it may mean that voting by constituency in which modifications or changes need to be approved (or not rejected) by all constituencies is not required. We think that answering question 8 and question 11 in isolation is not appropriate and process and voting arrangements should be considered together.

Question 9: Is it appropriate that all panel chairs be completely independent of industry?

Our experience of having an independent UNC panel chair is that it adds cost to the process as there is now one more person from the code administrator attending the meetings. As the independent chair only chairs the regular UNC modification panel meetings they cannot be fully conversant with all the issues and need support from the code administrator at the modification panel. An independent chair probably gives comfort to parties that the process is independent which is most valuable if a very contentious issue arises.

We suggest that the answer to the question for an individual panel depends on the number of contentious issues that are likely to come before the panel each year. If the panel deals with non-contentious issues then an independent chair is not needed.

Question 11:

Should DCUSA and SPAA voting be by panel, rather than by all parties

Please see our answer to question 8.

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Question 12: Should code administrators provide a chair for workgroups.

Our experience with UNC modifications is that a meeting chaired by the code administrator is likely to better facilitate getting through the workgroup's business. They are also likely to be more familiar with the process than attendees and therefore will generally ensure that reports are compiled to the correct standard to progress to the next stage of the process.

Question 13: Would including a consumer impacts section on each change proposal form help ensure consumer interests are discussed and published.

We agree that it would, however this pre-supposes that all codes have assessment criteria that include consumer impacts. If they do not, then adding a consumer impacts section onto the change proposal form does not aid the code change decision making process.

Charging modifications

Question 1: Should all 'material' charging modifications proceed through pre-modification processes and demonstrate some initial evidence against the relevant charging objectives prior to being formally raised?

We do not believe that charging modifications need special treatment, nor a requirement for a pre-modification process for material proposals. As regards the UNC there is scope to have pre-modification discussions at workgroups and also for review groups to be formed before modifications are raised, and therefore an optional process to support appropriate modifications prior to being formally raised is available already. Further to this, the UNC Modification Panel has the option to request a proposer to amend or reconsider a modification where it is considered to not properly be thought through, again removing the need for a formal pre-assessment process. If special arrangements apply to charging modifications then parties may seek to claim that a modification is or is not a charging modification to facilitate their own objectives.

As an example UNC modification proposal 0534 – "Maintaining the efficacy of the NTS Optional Commodity ('shorthaul') tariff at Bacton entry points" was raised as a non-charging modification proposal presumably because it re-defined an entry point and did not directly affect charging. Its effect (as suggested by the title) was to change charging arrangements and therefore in terms of its effect there was a good argument that it should have been a charging modification.

Question 3: Should panels develop forward workplans for charging modifications in line with agreed priority area(s) to provide a more robust approach to managing modifications

We do not see that there is a greater argument for forward work planning for charging modifications than there is for any other type of modification for example modifications required as a result of European legislation.

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Question 4: Do you agree that charging modifications which are 'not material' (in line with self-governance criteria should be progressed through the self-governance route?

We agree. We think that charging modifications should follow normal code processes. If the view is that they should have bespoke processes there seems little benefit from bringing transportation charges under the UNC. It would have been better to keep them out of the UNC with bespoke processes put in place by some other mechanism.

Yours sincerely



Steve Edwards
Head of Commercial and Regulation
Wales & West Utilities

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