

Ofgem Guidance on Code Modification Urgency Criteria

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

- ❖ For the following codes the Authority¹ 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')**²
 - **Smart Energy Code ('SEC')**
 - **Grid Code**
- ❖ For the Retail Energy Code ('REC') the Code Manager makes an initial determination on the urgency status of a modification in accordance with the criteria and principles in this document³.

Though each Code has slightly different rules, apart from the Distribution Code, which currently does not contain any specific rules on urgency, we would expect the urgency criteria below to be applied in deciding that a modification proposal should be treated as

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 In 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.

³ The urgency status may change as a result of: (a) further review by the Code Manager as the modification progresses; (b) review by the Change Panel following the application of a Party, the Consumer Representative or a REC Service Provider Authority; and/or (c) determination by the Authority at any time, at its own volition or following the application of a Party, the Consumer Representative or a REC Service Provider

“urgent”. We also recommend code parties to raise modification proposals, especially modification proposals that may have cross-code impacts, 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 we use to determine urgency?

This Guidance sets out the factors we 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 be linked to an **imminent issue⁴ 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**.

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

⁴ The imminent issue may be date related.

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 and, where appropriate, consider seeking independent legal or expert advice on where the balance between these considerations might appropriately lie, ahead of submitting their proposal.

Do “send back”⁵ 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 warrants it.

Can an EBGL⁶ related modification be urgent?

Electricity Balancing Guidelines (EBGL) related modification proposals raised under BSC, CUSC and the Grid Code can be treated as urgent but they must still adhere to the mandatory one month industry consultation. Other stages in the modification process can be altered to reflect the proposal’s urgent status.

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

Under most of the codes, a modification proposal 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;

⁵ We introduced ‘send back’ powers through our Code Governance Reviews. The powers 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.

⁶ Electricity Balancing Guidelines: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R2195&from=EN>

code governance or modification procedures; and, if it is unlikely to discriminate between classes of users (the “Self-Governance criteria”).

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. However, as set out above, we would consider each case on its merits.

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 and Markets Authority⁷. However, the Authority can exclude decisions if the delay caused by holding an energy code modification appeal against that decision 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

⁷ Under section 173 of the Energy Act 2004