

Stage 05: Draft CUSC Modification Report Annexes

Connection and Use of System Code (CUSC)

CAP190 Two-Thirds majority voting requirement for CUSC Panel recommendations on Amendments arising from licence obligations, Authority requests or obligations

This document is Volume 2 of the Draft CUSC Modification Report and contains the Annexes to the CAP190 draft CUSC Modification Report, including responses to the Code Administrator Consultation.

Published on: 7th October 2011

What stage is this document at?

01	Initial Written Assessment
02	Workgroup Consultation
03	Workgroup Report
04	Code Administrator Consultation
05	Draft CUSC Modification Report
06	Final CUSC Modification Report

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Any Questions?

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Document Control

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Annex 1 – Workgroup Attendance Register

Name	Organisation	Role	23/09/10	18/10/10 (Joint with P264) Teleconference	10/12/10 (Joint with P264) Teleconference	26/01/11 (Joint with P264) Teleconference	24/03/11
Alex Thomason	National Grid	Chair	Yes	No	No	Yes	Yes
Emma Clark	National Grid	NG Rep	Yes	Yes	Yes (part meeting)	Yes	Yes
Bali Virk	National Grid	Technical Secretary	Yes	Yes	No	Yes	Yes
Angie Quinn	National Grid	Legal Rep	N	Yes	Yes	Yes	Yes
Adam Lattimore	ELEXON	ELEXON Rep	NA	Yes	Yes	Yes	No
Andrew Wright	ELEXON	ELEXON Chair	NA	Yes	Yes	Yes	No
Diane Mailer	ELEXON	ELEXON Legal Rep	NA	Yes	Yes	No	No
Stuart Cotten	Drax Power	Workgroup Member	No	Yes	Yes	Yes	Yes
Esther Sutton	E.ON UK	Workgroup Member	Yes	Yes	Yes	Yes (In person)	No*
Lisa Waters	Waters Wye	Workgroup Member	Yes (via teleconference)	Rekha Patel Alternate	Yes	Yes	Yes (via teleconference)
Steven Eyre	EDF Energy	Workgroup Member	Yes	Yes	Yes	No	Yes (via teleconference)
Garth Graham	SSE	Workgroup Member	Yes	Yes	Yes	Yes (In person)	Yes

* Peter Bolitho in place of Esther Sutton

TO **MONICA CARSS-FRISK QC, BLACKSTONE CHAMBERS**
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**INSTRUCTIONS TO COUNSEL
FOR ADVICE**

Counsel is instructed by ELEXON Limited ("ELEXON") and National Grid Electricity Transmission plc ("National Grid") to provide written advice on the validity of a proposal to modify the Balancing and Settlement Code of Great Britain ("BSC"), Modification Proposal P264, and a proposal to amend the Connection and Use of System Code ("CUSC"), Amendment Proposal CAP190, in light of the appeals process provided for under the Energy Act 2004 to appeal decisions of the Gas and Electricity Market Authority (the "Authority") concerning modifications to industry codes.

BSC Modification Proposal P264 ("P264") and CUSC Amendment Proposal CAP190 ("CAP190") seek to change the voting requirements for the BSC Panel and CUSC Amendments Panel respectively from a simple majority to a two thirds majority for the Panels to recommend to the Authority a Modification or Amendment to the BSC and CUSC. The two thirds majority voting requirement will only apply in circumstances where the Authority has directed, instructed or requested a licensee to raise the Proposal to modify or amend the BSC and/or CUSC. Such proposals may result from Significant Code Reviews ("SCR"), a new mechanism to facilitate complex and significant changes which is currently being implemented in the BSC and CUSC following Transmission Licence changes that resulted from the recent "Code Governance Review" conducted by the Authority.

P264 and CAP190, if approved, would affect the ability of a party to appeal the Authority's final determination on a SCR Modification or Amendment because appeals to the Competition Commission are restricted to circumstances where the recommendation of the relevant industry Panel is contrary to the determination of the Authority.

However, concern has arisen that the proposed changes would make requirements under the BSC and CUSC inconsistent with the conditions of appeal specified in the Electricity and Gas Appeals (Designation and Exclusion) Order 2005 ("SI 2005/1646"), which provides that if the Authority consents to a Modification or Amendment Proposal to a designated document which has been given 'a majority recommendation made by the Panel' no appeal shall lie to the Competition Commission under section 173 of the Energy Act 2004.

In particular, we seek advice on the following questions:

1. What is the meaning of 'a majority' under Articles 5 and 6 of SI 2005/1646?
2. Given the meaning of 'a majority' recommendation under Articles 5 and 6 of SI 2005/1646, can the definition of a majority be changed in the BSC and CUSC, as is proposed under P264 and CAP190, for certain Modification and Amendment Proposals?
3. If P264 and CAP190 were implemented in the Codes, would an appeal be possible to the Competition Commission if the Panel did not reach a two-thirds majority (and therefore did not recommend a Modification or Amendment) but a simple majority of Panel Members voted in favour of a Modification or Amendment Proposal?
4. If P264 and CAP190 were implemented in the Codes, certain proposals would require a two thirds majority vote for Panel support, whereas all other Proposals would only require a simple majority vote (i.e. 50% or more), would this inconsistency cause any issues?
5. Given the differences in the change proposal processes set out in the BSC and CUSC, in particular Section F of the BSC and Section 8 of CUSC, does your advice differ in any way with respect to P264 and CAP190?

Following is an overview for Counsel of the operation of the Modification and Amendment procedures under the BSC and CUSC respectively, background to Modification Proposal P264 and Amendment Proposal CAP190, the appeals process under the Energy Act 2004 and SI 2005/1646 and references to further reading that may be of relevance to the issues raised.

BACKGROUND

1 The Balancing and Settlement Code, ELEXON and the BSC Panel

- 1.1 The BSC is a multi-party contract containing the rules and governance for the wholesale balancing and settlement arrangements that exists under the British Electricity Trading and Transmission Arrangements (BETTA). Companies who have Generation and/or Supply Licence must accede to the BSC and become BSC Parties. Other parties who are not Generators and/or Suppliers may accede to the BSC, with wholesale power traders usually acceding to facilitate their trading activities.
- 1.2 ELEXON is the Balancing and Settlement Code Company (BSCCo). It is created by and administers the BSC.
- 1.3 The BSC has mechanisms for the consideration, approval and incorporation of changes to the BSC, known as Modification Proposals (principally contained in Section F of the BSC). Modification Proposals can be submitted by any BSC Party, the National Consumer Council and, in limited circumstances, the BSC Panel. Administering the BSC Modification Procedures is one of the prime functions of the BSC Panel.
- 1.4 P264 is a current Modification proposal before the BSC Panel. P264 is at the assessment stage and the issues outlined in this brief have been identified by the Modification Group made up of industry participants.

BSC Panel Recommendation's on Modification Proposals

- 1.5 For each Modification Proposal, the BSC Panel is required to consult with the industry and make a recommendation to the Authority as to whether or not, in the Panel's opinion, the Proposal should be made. The Authority then determines whether or not to approve or reject the Modification.
- 1.6 The BSC Panel make their recommendation by considering whether the Proposal better facilitates the Applicable BSC Objectives when compared to the current arrangements. The Panel then forms its recommendation by means of a vote. This vote is made based on a simple majority (i.e. over 50%) as set out in Section B 4.4.3 of the BSC:

4.4.3 Except as otherwise expressly provided in the Code, any matter to be decided at any meeting of the Panel shall be decided by simple majority of the votes cast at the meeting (and an abstention shall not be counted as a cast vote).

- 1.7 The BSC Panel's recommendation is then issued to the Authority as part of the Modification Report.
- 1.8 For business relating to Modification Proposals the BSC Panel currently has 11 voting Panel Members, all of whom are required to act impartially when acting as a Panel Member:
 - a Chairman (appointed by the Authority) (who can only vote where a casting vote is required on a split decision/recommendation);
 - two independent members (appointed by the Chairman);
 - two consumer members (appointed by the National Consumer Council);
 - five industry members (elected by BSC Parties); and
 - a further industry member appointed by the Chairman to represent the interests of any class or category of Party that is not reflected in the Panel composition.

- 1.9 The Panel also has representatives from National Grid, Distribution System Operators and Ofgem who are non-voting members.

2 The CUSC and the CUSC Amendments Panel

- 2.1 The Connection and Use of System Code ("CUSC") is the contractual framework for connection to, and use of, National Grid's high voltage transmission system. It is a licence based code administered by National Grid setting out within it the principal rights and obligations in relation to the Connection and/or use of the GB Transmission System and also relating to the provision of certain balancing services. National Grid is required under the Transmission Licence to be a party to the CUSC. It is also a requirement for holders of a generation, distribution or supply licence to be a party to the CUSC Framework Agreement and comply with the CUSC. Non-licensed market participants cannot sign the CUSC.
- 2.2 Like the BSC, the CUSC has mechanisms for the consideration, approval and incorporation of changes, known as Amendment Proposals. An Amendment Proposal can be made by a CUSC Party, a BSC Party or National Consumer Council, and, in limited circumstances, the CUSC Amendments Panel or Relevant Transmission Licensee, as defined in the CUSC.
- 2.3 CAP190 is a current Amendment Proposal before the CUSC Panel.

CUSC Panel Recommendation's on Amendment Proposals

- 2.4 In a similar fashion to the BSC arrangements, the CUSC Amendments Panel is required to consult with the industry and make a recommendation to the Authority as to whether or not it believes that the Amendment Proposal should be approved or rejected; based on an assessment of the merits of the proposal against the Applicable CUSC Objectives.
- 2.5 The CUSC Panel forms its recommendation by means of a vote. This vote is made based on a simple majority (i.e. over 50%) as set out in Section 8.10.3 of the CUSC:
- 8.10.3 Except as otherwise expressly provided in the CUSC, and in particular Paragraph 8.5.2, any matter to be decided at any meeting of the Amendments Panel shall be decided by simple majority of the votes cast at the meeting (an abstention shall not be counted as a cast vote).*
- 2.6 The CUSC Panel's recommendation is then issued to the Authority as part of the Amendment Report.
- 2.7 The CUSC Panel consists of the following members:
- 7 Industry elected members (1 vote each)
 - 1 National Consumer Council member (1 vote)
 - 2 National Grid members (1 vote between them)
 - 1 Panel Chairman (no vote for Panel recommendations)
 - 1 Authority representative (no vote)
- 2.8 There is also a provision in the CUSC to allow the Authority to appoint an additional Panel member with the ability to vote, where the Authority considers that there is a class or category of person whose interests are not currently reflected in the make up of the Panel. Currently there is no Authority-appointed Panel member.

3 Ofgem Code Governance Review

- 3.1 In November 2007 the Office of Gas and Electricity Markets (Ofgem) launched a Code Governance Review. The aim of the review was to reduce the complexity and fragmentation, and increase the transparency and accessibility, of the electricity and gas industry codes. In July 2010, following industry consultation on the proposals, Ofgem directed that licence modifications be made to the BSC and CUSC to implement the Code Governance Review Final Proposals. The necessary amendments to the industry codes need to be in place by 31 December 2010.
- 3.2 One of the Code Governance Review changes is the introduction of Significant Code Reviews (SCRs). This change is contained in Modification Proposal P262, the Final Report for which is due to go before the BSC Panel on 11 November 2010.

Significant Code Reviews

- 3.3 Ofgem has introduced the SCR process to provide a role for Ofgem to holistically review a code based issue (for the main commercial industry codes) and speed up industry reform. Ofgem will have the ability to start a SCR where a Modification/Amendment Proposal is likely to have significant impacts on consumers, competition or other issues relevant to their statutory duties such as sustainable development. Ofgem will have the sole right to raise SCRs, but will consult on the scope of the review before commencing a SCR.
- 3.4 Once commenced, the SCR may utilise a number of industry workshops to develop a SCR conclusion. The SCR conclusion may result in a direction from the Authority that:
- Requires National Grid as the Licensee to raise a Modification(s)/Amendments(s) to the BSC/CUSC (SCR Modification/Amendment Proposal); or
 - States that no changes to the BSC/CUSC are needed.
- 3.5 A SCR Modification/Amendment Proposal would be progressed through the Modification/Amendment Procedures in the same manner as a normal Modification/Amendment Proposal. As such, the Panel will (after industry consultation) make a recommendation to the Authority as to whether or not, in the Panel's opinion, the Proposal should be made. As with any other Modification/Amendment Proposal the Panel forms its recommendation by means of a majority vote. The Authority will then determine whether or not to approve or reject the Proposal.

4 Industry Concern – Raising of P264/CAP190

- 4.1 Concern has been expressed in the industry that the introduction of SCRs will place the Authority in a position where it will be making a determination on a Proposal which it has directed be raised. This concern is compounded by the fact that SCR Proposals are likely to be in areas that have significant impacts on the industry.
- 4.2 As Parties may only appeal to the Competition Commission on decisions of the Authority that are counter to the simple majority recommendation of the Panel; BSC Modification Proposal P264 and a CUSC Amendment Proposal CAP190 have been raised to modify the Code recommendation voting thresholds.
- 4.3 Both P264 and CAP190 propose that when the BSC/CUSC Panel votes on its final recommendation for a Modification/Amendment Proposal that National Grid as the Licensee has been directed to raise

by the Authority, a two-thirds majority vote would be required to recommend approval¹. If the two-thirds majority is not reached by the Panel, the Panel recommendation would be to reject the Proposal.

4.4 The aim of these Proposals is to introduce an additional check to the code modification process where the Authority directs the raising of the Modification/Amendment Proposal in addition to determining the final outcome. The change attempts to enhance the ability of Parties to appeal decisions of the Authority to the Competition Commission where they are likely to have significant impacts on consumers, competition or other issues relevant to Ofgem's statutory duties. The proposers feel that as the right to appeal a decision of the Authority hinges on the Panel recommendation, it would be unfortunate if a Party was denied the option of appealing the implementation of a potentially contentious Proposal where only a simple majority of Panel votes had been achieved.

4.5 Ofgem acknowledged such concerns in its Final Proposals:

“To the extent that parties believe that further checks and balances are needed in relation to SCR modification proposals, it may be possible to pursue them through changes to the modification rules. For instance, while panel recommendations are currently made on the basis of a simple majority, the rules could be changed to require a different threshold for SCR modification proposals. We have ourselves considered the case for introducing a different threshold for SCR modification proposals but do not believe that there is a compelling case for doing so at this time. However, we note that parties can bring forward proposals and we would of course consider them on their merits.” (para 1.65)

5 The Competition Commission Appeals Route for both BSC and CUSC

5.1 The Energy Act 2004 provides that Parties may appeal certain Authority determinations on Modification/Amendment Proposals to the Competition Commission.

5.2 In particular, section 173 of the Energy Act 2004 provides that an appeal shall lie to the Competition Commission from a decision of the Authority to which section 173 applies. Section 173 applies to Authority determinations on Modification Proposals to the BSC and Amendment Proposals to the CUSC on the basis that the BSC and CUSC are documents which are made under conditions of an electricity licence and those documents are designated by Order SI 2005/1646.

5.3 Article 4 of Order SI 2005/1646 excludes certain decisions from appeal by placing conditions on the appeal criteria. The relevant conditions for the BSC and CUSC are contained in articles 5 and 6 of the Order and require the giving of a consent to a majority recommendation made by the Panel in the Modification/Amendment Report. This is why the meaning of a majority recommendation is important to Parties.

¹ As set out in Section B 4.4.3 of the BSC, the initial wording in that paragraph does envisage that different majority requirements can be introduced to Panel voting in different circumstances

5.4 I set out the wording of Articles 5 and 6 of SI 2005/1646 in full:

Article 5

(1) The condition referred to in article 4(2)(a) is that the decision consists in the giving of a consent to a majority recommendation made by the Panel in the Modification Report.

(2) In this article, the words "Panel" and "Modification Report" have the same meanings as in the Balancing and Settlement Code.

Article 6

(1) The condition referred to in article 4(2)(b) is that the decision consists in the giving of a consent to a majority recommendation of Panel Members in the Amendment Report.

(2) In this article –

(a) "majority recommendation" means a recommendation that is supported by the majority of those views of Panel Members which, in the reasonable opinion of GEMA, are clearly expressed in the Amendment Report; and

(b) the words "Panel Members" and "Amendment Report" have the same meanings as in the Connection and Use of System Code.

The Appeals Process Context

5.5 In April 2003 the former Department of trade and Industry ("DTI") issued a consultation document "Strengthening the Transparency and Accountability of the Gas and Electricity Industry Code Modification Process". As a result of consultation sections 173-177 of the Energy Act 2004 were introduced providing for the creation of a statutory right of appeal to the Competition Commission, with the proviso:

'(5) The Competition Commission may refuse permission only on one of the following grounds-

(a) that the appeal is brought for reasons that are trivial or vexatious;

(b) that the appeal has no reasonable prospect of success'.

5.6 In 2004, DTI consulted on the draft Order to give effect to the appeal provisions, further proposing that, in line with the Government's initial view set out in the explanatory notes to Section 173 of the Act, appeals would not be allowed where the delay occasioned by an appeal could have a negative impact on security of supply, "*or where GEMA's decision agrees with the recommendation of the panel in the case of the BSC, or with a certain proportion of code participants in the case of the CUSC*".

5.7 In 2004 it was not standard practice for all Code Panels to make recommendations; a CUSC Panel recommendation did not exist. Thus the original drafting for the Statutory Instrument referred only to the views of the CUSC Panel or respondents and did not include a reference to a BSC Panel majorityⁱ.

5.8 The draft Order was subsequently amended (acknowledged in DTI's Response to the Consultation on the draft Orderⁱⁱ) and their Regulatory Impact Assessmentⁱⁱⁱ, to include the reference to a BSC Panel majority in the final draft: "*The final Order provides for decisions where Ofgem agrees with a panel recommendation based on a majority panel view to be excluded from appeal. This is an intentional clarification of procedures in the unlikely event of a hung panel decision reaching*

Ofgem, under current or future code governance arrangements: were Ofgem to make a decision based on a recommendation from a hung panel, the decision would be appealable”.

- 5.9 However, it was emphasised that *“It was not DTI’s intention in introducing the appeals mechanism fundamentally to alter the workings of the panel, or to provide a mechanism by which the workings and decisions of the panel itself can be appealed even where Ofgem has not departed from the panel view.”*

6. Further Information

- 6.1 This section contains further information on context and links to relevant documentation.

Relevant Code Sections

Links to the relevant BSC Sections are here:

[Section B - The Panel](#)

[Section F - Modification Procedures](#)

Links to the Relevant CUSC sections are here:

[CUSC sections](#)

Law and extrinsic materials

Energy Act: <http://www.legislation.gov.uk/ukpga/2004/20/contents/enacted>

Explanatory Notes on the Act:

Part 3, Chapter 4 Sections 173-176: <http://www.legislation.gov.uk/ukpga/2004/20/notes/division/6/2/4/2>

Part 3, Chapter 4 Sections 172-186: <http://www.legislation.gov.uk/ukpga/2004/20/notes/division/7/4>

Schedule 22: <http://www.legislation.gov.uk/ukpga/2004/20/notes/division/8/22>

Competition Commission Appeals guidance: <http://www.competition-commission.org.uk/appeals/energy/>

The Electricity and Gas Appeals (Designation and Exclusion) Order 2005:

<http://www.legislation.gov.uk/uksi/2005/1646/contents/made>

Further information on Ofgem Code Governance Review

[Ofgem Final Proposals](#)

Proposals

[P264](#)

[CAP190](#)

ⁱ 2004 DTI consultation on the draft Order:

http://webarchive.nationalarchives.gov.uk/tna/+http://www.dti.gov.uk/energy/consultations/appeals_secondary_or_der.pdf/

ⁱⁱ 2005 DTI Response to consultation on draft Order:

<http://www.decc.gov.uk/assets/decc/what%20we%20do/uk%20energy%20supply/energy%20markets/regulation/appeals/file28686.pdf>

ⁱⁱⁱ 2005 DTI Explanatory Memorandum to and Regulatory Impact Assessment for The Electricity and Gas Appeals (Designation and Exclusion) Order 2005:

http://www.legislation.gov.uk/uksi/2005/1646/pdfs/uksiem_20051646_en.pdf

BSC MODIFICATION PROPOSAL P264

CUSC AMENDMENT PROPOSAL CAP190

ADVICE

A. INTRODUCTION

1. We are asked to advise ELEXON Limited and National Grid Electricity Transmission plc on two related proposals to modify the Balancing and Settlement Code of Great Britain (“BSC”) and the Connection and Use of System Code (“CUSC”).
2. The proposals (P264 and CAP190) are intended to ensure that where the Gas and Electricity Markets Authority (“GEMA”) directs a modification to the BSC or the CUSC in circumstances where less than two thirds of the relevant industry panel have voted in favour of the modification, there is a right to appeal to the Competition Commission.
3. In summary, on the basis of the information currently before us, we consider that P264, relating to the BSC, will be effective in achieving its stated objective. However, the provisions of the CUSC are significantly different, and we consider that CAP190 is unlikely to achieve its stated objective.

B. BACKGROUND

The BSC

4. National Grid is required to have in force the BSC under the terms of Transmission Licence Standard Condition C3.1. At Standard Condition C3.4, the Transmission Licence specifies that the BSC must include certain modification procedures, which lead to the submission to GEMA of a panel

report analysing the modification proposal. Transmission Licence Standard Condition C3.5(a) states that, following the receipt of such a report, GEMA may direct the licensee to make a modification to the BSC if it, “is of the opinion that a modification set out in such report would, as compared with the then existing provisions of the BSC and any other modifications set out in such report, better facilitate achieving the applicable BSC objective(s).”

5. The BSC is a multi-party contract containing the rules and governance arrangements for wholesale balancing and settlement arrangements. Companies with generation and/or supply licences must become BSC parties, and other parties may also accede to the BSC.
6. The BSC itself is administered by a Panel established under BSC Section B and by the BSC Company and its subsidiaries (ELEXON Ltd, described as “BSCCo” in the BSC) established under BSC Section C. Under BSC Section B paragraph 1.1.2:

“The Panel shall comprise the following members:

- (a) the person appointed as chairman of the Panel in accordance with paragraph 2.1;
 - (b) not more than five persons appointed by Trading Parties in accordance with paragraph 2.2;
 - (c) not more than two persons appointed by the National Consumer Council in accordance with paragraph 2.3;
 - (d) the person appointed by the Transmission Company in accordance with paragraph 2.4;
 - (e) not more than two persons appointed by the Panel Chairman in accordance with paragraph 2.5; and
 - (f) the person appointed (if the Panel Chairman so decides) by the Panel Chairman in accordance with paragraph 2.6.”
7. Under BSC Section B paragraph 2.8.1, Panel members shall act impartially and shall not be the representative of the body or persons by whom they were appointed as Panel Members.
 8. Paragraphs 4.4.1-4.4.5 of Section B provide, as relevant:

“4.4.1 At any meeting of the Panel any matter to be decided shall be put to a vote of Panel Members upon the request of the chairman of the meeting or of any Panel Member. [...]

4.4.3 Except as otherwise expressly provided in the Code, any matter to be decided at any meeting of the Panel shall be decided by simple majority of the votes cast at the meeting (and an abstention shall not be counted as a cast vote).

4.4.4 The Panel Chairman shall not cast a vote as a Panel Member but shall have a casting vote on any matter where votes are otherwise cast equally in favour of and against the relevant motion; provided that where any person other than the Panel Chairman is chairman of a Panel meeting he shall not have a casting vote.

4.4.5 The Panel Member appointed by the Transmission Company shall not cast a vote in relation to any decision to be taken pursuant to Section F in relation to any Modification Proposal.”

9. BSC Section F contains procedures for modifying the BSC. Section F paragraph 2.1.1 sets out those bodies which can make a proposal to modify the BSC. GEMA is not a party to the BSC and is currently unable to put forward a proposal to modify the code.
10. The procedures for modifying the BSC consist of three broad phases – the Definition Procedure (paragraph 2.5), the Assessment Procedure (paragraph 2.6), and the Report Phase (paragraph 2.7) – which may not all apply in each case. There is provision for consultation on the Modification Proposal, and the development of Alternative Modification proposals (paragraph 2.6.4).
11. Where a Modification Proposal or Alternative Modification proceeds to the Report Phase, there is provision for the Modification Secretary to prepare and consult upon a draft Modification Report (paragraph 2.7.4).
12. Paragraph 2.7.5 provides:

“2.7.5 The Panel shall consider the draft Modification Report at the next following Panel meeting and, having taken due account of the representations contained in the summary referred to in paragraph 2.7.4(e), the Panel shall determine:

(a) whether to recommend to the Authority that the Proposed Modification or any Alternative Modification should be made;

(b) whether to approve the draft Modification Report or to instruct the Modification Secretary to make such changes to the report as may be specified by the Panel;

[...]"

13. Under paragraph 2.7.7, the Modification Report must contain (among other things):

“(a) the recommendation of the Panel as to whether or not the Proposed Modification or any Alternative Modification should be made”

14. There is also a definition of “Modification Report” in the General Glossary at BSC Annex X-1:

“‘Modification Report’ means, in relation to a Proposed Modification (and any associated Alternative Modification), the report prepared or to be prepared in accordance with Section F2.7”

15. As set out above, under the terms of Transmission Licence Standard Condition C3.5(a), following receipt of the report, GEMA may direct the licensee to make a modification to the BSC. It is important to note that GEMA may direct the licensee to make a direction whether or not the modification was recommended by the Panel in the Modification Report.

The CUSC

16. National Grid is required to have in force the CUSC under the terms of Transmission Licence Standard Condition C10.1 and C10.2. At Standard Condition C10.6, the Transmission Licence specifies that the CUSC must include certain modification procedures, which lead to the submission to GEMA of a panel report analysing the modification proposal. Transmission Licence Standard Condition C10.7(a) states that, following the receipt of such a report, GEMA may direct the licensee to make a modification to the CUSC if it, “is of the opinion that a modification set out in such report would, as compared with the then existing provisions of the CUSC and any alternative modifications set out in such report, better facilitate achieving the applicable CUSC objectives.”

17. The CUSC is the contractual framework for connection to, and use of, National Grid's high voltage transmission system. National Grid is required under its Transmission Licence to be a party to the CUSC. Holders of generation, distribution and/or supply licences must be parties to the CUSC Framework Agreement and comply with the CUSC.
18. The operation of the CUSC, and the provisions for modification, are similar to those relevant to the BSC.
19. Under CUSC paragraph 8.2.1.2:

“The Amendments Panel shall comprise the following members:

 - (a) the person appointed as the chairman of the Amendments Panel (the “Panel Chairman”) by The Company in accordance with Paragraph 8.3.1, who shall (subject to Paragraph 8.10.4) be a non-voting member;
 - (b) not more than seven persons appointed by Users in accordance with Paragraph 8.3.2;
 - (c) two persons appointed by The Company in accordance with Paragraph 8.3.2;
 - (d) not more than one person appointed by the National Consumer Council representing all categories of customers, appointed in accordance with Paragraph 8.3.2; and
 - (e) the person appointed (if the Authority so decides) by the Authority in accordance with Paragraph 8.3.3.”
20. “The Company” is defined in CUSC Section 11 as National Grid Electricity Transmission plc.
21. Under CUSC paragraph 8.2.4.1, Amendments Panel members shall act impartially and shall not be the representative of the body or persons by whom they were appointed as Panel Members.
22. Paragraphs 8.10.1-8.10.5 provide, as relevant:

“8.10.1 At any meeting of the Amendments Panel any matter to be decided which shall include the Amendments Panel Recommendation Vote shall be put to a vote of Panel

Members upon the request of the Panel Chairman or any Panel Member. [...]

8.10.3 Except as otherwise expressly provided in the CUSC, and in particular Paragraph 8.5.2, any matter to be decided at any meeting of the Amendments Panel shall be decided by simple majority of the votes cast at the meeting (an abstention shall not be counted as a cast vote).

8.10.4 The Panel Chairman shall not cast a vote as a Panel Member but shall have a casting vote on any matter other than in the Amendments Panel Recommendation Vote where votes are otherwise cast equally in favour of and against the relevant motion, but where any person other than the actual Panel Chairman or his alternate is acting as chairman he shall not have a casting vote.

8.10.5 The two Panel Members appointed by The Company pursuant to Paragraph 8.2.1.2(c) shall together have one vote in relation to each matter which shall be cast jointly by agreement between them or, where only one of The Company Panel Members is present at a meeting, by that The Company Panel Member.”

23. The provisions for the consideration of modification proposals are set out from CUSC paragraph 8.15. Paragraph 8.15.1 sets out those bodies which can make a proposal to modify the CUSC. GEMA is not a party to the CUSC and is currently unable to put forward a proposal to modify the code.
24. In summary, the CUSC amendment provisions allow for any Amendment Proposal to be amalgamated with a pre-existing proposal, to be considered by a Working Group, or to proceed directly to wider consultation for the development of alternative proposals (paragraphs 8.16-8.19).
25. Paragraph 8.20 provides as relevant:

“8.20 AMENDMENT REPORT

8.20.1 Subject to The Company’s consultation having been completed, The Company shall prepare and submit to the Authority a report (the Amendment Report”) in accordance with this Paragraph 8.20 for each Amendments Proposal which is not withdrawn.

8.20.2 The matters to be included in an Amendment Report shall be the following (in respect of the Amendment Proposal):

(a) the Proposed Amendment and any Working Group Alternative Amendment;

(b) the recommendation of The Company as to whether or not the Proposed Amendment (or any Working Group Alternative Amendment as provided below) should be made;

(c) a summary (agreed by the Amendments Panel) of the views (including any recommendations) from Panel Members and/or the Working Group as the case may be made during the consultation in respect of the Proposed Amendment and of any Working Group Alternative Amendment; [...]

(k) details of the outcome of the Amendments Panel Recommendation Vote.

[...]

8.20.4 A draft of the Amendment Report shall be tabled at the Panel Meeting prior to submission of that Amendment Report to the Authority as set in accordance with the timetable established pursuant to Paragraph 8.16.4 at which the Panel Chairman will undertake the Amendments Panel Recommendation Vote.

8.20.5 A draft of the Amendment Report following the Amendments Panel Recommendation Vote will be circulated by The Company to Panel Members (and in electronic mails to Panel Members, who must supply relevant details, shall meet this requirement) and a period of no less than five (5) Business Days given for comments to be made on the Amendments Panel Recommendation Vote. Any unresolved comments made shall be reflected in the final Amendment Report. [...]"

26. "Amendments Panel Recommendation Vote" is defined in CUSC Section 11 as:

"The vote of Panel Members undertaken by the Panel Chairman in accordance with Paragraph.20.4 as to whether they believe each Proposed Amendment, or Working Group Alternative Amendment would better facilitate achievement of the applicable CUSC Objective(s)."

27. As set out above, under the terms of Transmission Licence Standard Condition C10.7(a), following receipt of the report, GEMA may direct the licensee to make a modification to the CUSC. It is important to note that GEMA may direct the licensee to make a direction whether or not the modification was recommended in the Amendment Report.

The right to appeal against GEMA determinations

28. Under s.173 of the Energy Act 2004:

“173 Appeals to the Competition Commission

(1) An appeal shall lie to the Competition Commission from a decision by GEMA to which this section applies.

(2) This section applies to a decision by GEMA if—

(a) it is a decision relating to a document by reference to which provision is made by a condition of a gas or electricity licence;

(b) that document is designated for the purposes of this section by an order made by the Secretary of State;

(c) the decision consists in the giving or refusal of a consent by virtue of which the document has effect, or would have had effect, for the purposes of the licence with modifications or as reissued; and

(d) the decision is not of a description of decisions for the time being excluded from the right of appeal under this section by an order made by the Secretary of State.

(3) An appeal against a decision may be brought under this section only by—

(a) a person whose interests are materially affected by it; or

(b) a body or association whose functions are or include representing persons in respect of interests of theirs that are so affected.

(4) The permission of the Competition Commission is required for the bringing of an appeal under this section.

[...]

(7) An order excluding decisions from the right of appeal under this section may provide—

(a) for the exclusion to apply only in such cases as may be determined in accordance with the order; and

(b) for a determination in accordance with the order to be made by such persons, in accordance with such procedures, and by reference to such matters and the opinions of such

persons (including GEMA), as may be provided for in the order.

(8) An order made by the Secretary of State under this section is subject to the negative resolution procedure.

(9) In this section—

“consent” includes an approval or direction;

“gas or electricity licence” means a licence for the purposes of section 5 of the Gas Act 1986 (c 44) or section 4 of the 1989 Act (prohibition on unlicensed activities).”

29. The BSC and the CUSC are designated for the purposes of s.173 by article 3 of the Electricity and Gas Appeals (Designation and Exclusion) Order 2005 (SI 2005/1646; the “2005 Order”).

30. We have been provided with the following documents which led up to and accompanied the publication of the 2005 Order: (i) an October 2004 DTI consultation on the draft Order; (ii) a June 2005 DTI Response to the consultation on the draft Order; (iii) DTI’s Explanatory Memorandum to and Regulatory Impact Assessment relating to the 2005 Order.

31. By article 4 of the 2005 Order:

“(1) No appeal shall lie to the Competition Commission under section 173 of the Act from a decision made by GEMA on or after the date on which this Order comes into force, which consists in the giving or refusal of a consent by virtue of which a document designated in article 3 has effect or would have had effect as mentioned in section 173(2)(c) of the Act, if the relevant condition is satisfied in respect of that decision.

(2) For the purpose of paragraph (1), the relevant condition is--

(a) in the case of a decision in relation to the Balancing and Settlement Code, the condition in article 5(1);

(b) in the case of a decision in relation to the Connection and Use of System Code, the condition in article 6(1);

(c) in the case of a decision in relation to a Network Code, the condition in article 7(1); [...].”

32. Articles 5-7 provide:

“5. (1) The condition referred to in article 4(2)(a) is that the decision consists in the giving of a consent to a majority recommendation made by the Panel in the Modification Report.

(2) In this article, the words "Panel" and "Modification Report" have the same meanings as in the Balancing and Settlement Code.

6. (1) The condition referred to in article 4(2)(b) is that the decision consists in the giving of a consent to a majority recommendation of Panel Members in the Amendment Report.

(2) In this article--

(a) "majority recommendation" means a recommendation that is supported by the majority of those views of Panel Members which, in the reasonable opinion of GEMA, are clearly expressed in the Amendment Report; and

(b) the words "Panel Members" and "Amendment Report" have the same meanings as in the Connection and Use of System Code.

7. (1) The condition referred to in article 4(2)(c) is that the decision accords with a majority recommendation made by the Modification Panel in the Modification Report.

(2) In this article, the words "Modification Panel" and "Modification Report" have the same meanings as in the Uniform Network Code.”

33. We note that under s.173(2)(c) Energy Act 2004, an appeal shall lie to the Competition Commission from a decision by GEMA if the decision consists in the “giving or refusal” of a consent. Under s.173(9) Energy Act 2004, a “consent” includes an approval or direction. The natural reading of s.173(2)(c) Energy Act 2004 is therefore that the reference to the “giving ... of a consent” means a direction by GEMA that an amendment/modification be made; whereas the reference to the “refusal of a consent” means a decision by GEMA *not* to direct that an amendment/modification be made. Section 173 therefore grants the right of appeal if GEMA directs that a modification be made or if GEMA decides not to direct that a modification be made.

34. However, under the 2005 Order (pursuant to s.173(7) Energy Act 2004), certain decisions are excluded from the right of appeal. There is in our opinion an ambiguity about the scope of this exclusion.
35. It is arguable that the effect of the 2005 Order is only to exclude the right of appeal where GEMA directs an amendment/modification in accordance with a majority recommendation. In support of this interpretation, we note the following:
- (a) Under articles 5(1) and 6(1) of the 2005 Order, the right of appeal is excluded where GEMA's decision consists in the "giving of a consent to a majority recommendation". As set out above, we consider that under s.173 Energy Act 2004 the expression "giving of a consent" means "directing an amendment/modification". It is arguable that these words should be given the same meaning in the 2005 Order as they have in the Energy Act 2004, such that the Order *only* excludes the right of appeal where GEMA directs an amendment/modification, *not* where it decides not to direct an amendment/modification.
 - (b) This reading of articles 5(1) and 6(1) is strengthened by a comparison with article 7(1), which states that the right of appeal in relation to a network code is restricted whenever GEMA's decision "accords with a majority recommendation". This is arguably a broader expression than the "giving of a consent to a majority recommendation". It is therefore arguable that, whilst article 7(1) excludes *both* decisions to direct an amendment/modification *and* decisions not to direct an amendment/modification, articles 5(1) and 6(1) only exclude decisions to direct an amendment/modification. It might be said that had Parliament intended articles 5(1) and 6(1) to exclude a broader category of decisions, it would have used the language used in article 7(1).
36. On the other hand, it might be said that the 2005 Order excludes the right of appeal if GEMA directs an amendment/modification or if GEMA decides not to direct that a modification be made, provided that (in either case) GEMA's decision is in accordance with a majority recommendation. In particular:

- (a) We understand from the DTI Response to the consultation on the draft Order that this was the DTI's intention in drafting the 2005 Order. We consider that, given the ambiguity in the wording of the Order, a Court or the Competition Commission would have particular regard to the drafters' intention.
 - (b) It is arguable that this interpretation sits more naturally with the precise wording of articles 5(1) and 6(1), which refers to "the giving of a consent to a majority recommendation". On the interpretation suggested at paragraph 35 above, those words must be read to mean "the giving of a consent in accordance with a majority recommendation". But it might be said that the more natural reading of the expression is that "the giving of a consent to a majority recommendation" means, simply, consenting to (or approving) a majority recommendation.
 - (c) There is also no obvious reason why the provisions relating to network code appeals should be any different to appeals relating to the BSC or the CUSC. The DTI consultation Response suggests that network code appeals should be treated in the same way as other appeals.
37. For these reasons, we consider that whilst it is clear that there is no right of appeal where GEMA *directs* an amendment/modification in accordance with a majority recommendation, it is unclear whether or not there is a right of appeal where GEMA decides *not to direct* an amendment/modification in accordance with a majority recommendation. There are in our view strong arguments either way.
38. However, it is not necessary to reach a concluded view on this issue in order to advise on P264 and CAP190. The question for those purposes is: whatever the existing scope of the exclusion of the right to appeal, would P264 and CAP190 be successful in further narrowing the scope of the exclusion? We address that question below.

39. In November 2007, Ofgem commenced a review of the industry codes, including the BSC and the CUSC.
40. In its Final Proposals document of 31 March 2010, Ofgem set out its conclusions in light of the review. In particular, Ofgem signalled its intention to introduce a process for conducting “Significant Code Reviews” (“SCRs”), a process pursuant to which Ofgem will itself be able to drive changes to the BSC/CUSC. SCRs therefore represent a move away from the previous position in which Ofgem could not itself propose a modification to the BSC/CUSC.
41. The Transmission Licence was amended in July 2010 to include provision for the SCR process (see in particular Standard Conditions C3.4(aa) and C3.4C (in relation to the BSC) and C10.6(aa) and C10.6C (in relation to the CUSC). In summary, GEMA may initiate an SCR where a modification/amendment proposal is likely to have a significant impact on consumers, competition or other issues relevant to GEMA’s statutory duties such as sustainable development. Once an SCR has been initiated, there will be a consultation process. Following that process, GEMA will have the power to require National Grid (as licensee) to propose a modification or amendment to the BSC or CUSC. Such a proposal will then follow the modification procedures summarised above. We understand that National Grid was given until 31 December 2010 to make the necessary amendments to the BSC and the CUSC to bring these new licence conditions into effect.
42. Ofgem’s March 2010 Final Proposals document acknowledges that concerns were raised about the possibility of appealing against modifications directed by GEMA following an SCR. Paragraph 1.65 of Appendix 2 states:

“To the extent that parties believe that further checks and balances are needed in relation to SCR modification proposals, it may be possible to pursue them through changes to the modification rules. For instance, while panel recommendations are currently made on the basis of a simple majority, the rules could be changed to require a different threshold for SCR modification proposals. We have ourselves considered the case for introducing a different threshold for SCR modification proposals but do not believe that there is a compelling case for doing so at this time. However, we note

that parties can bring forward proposals and we would of course consider them on their merits.”

43. Proposals P264 and CAP 190 respond to this suggestion.

Proposals P264 and CAP190

44. We have not been provided with any proposed text for proposals P264 and CAP190, which has not yet been drafted.

45. Proposal P264 (relating to the BSC) contains the following summary:

“This modification proposes a requirement for a two-thirds majority on votes that determine the Panel’s recommendation for implementation on licence originated Modifications. For the avoidance of doubt, in this context licence originated Modifications shall mean Modifications that the licensee is obligated to raise; an example being those Modifications that result from the conclusion of a Significant Code Review (SCR). This would replace the current arrangements, where a simple majority would be required to recommend the implementation of a licence originated Modification.

As an example, where a licensee has been directed to raise a Modification in line with the conclusions of a SCR (as set out by Ofgem), the voting principle used by the Panel for determining a recommendation on the resulting Modification would be subject to the two-thirds majority voting principle. It is proposed that the two-thirds majority voting principle would require the number of votes in favour of approval to be at least twice the number of votes against approval; if this hurdle is not reached, the Panel will recommend that the Modification is rejected in order to preserve the appeal route, should the Modification to change the current arrangements be approved by the Authority.

For all other Modifications that are not covered by the above description, the current simple majority voting principle shall prevail for Panel recommendation votes.”

46. Proposal CAP190 (relating to the CUSC) contains a similar summary:

“It is proposed that where an Amendment Proposal being presented to the CUSC Panel for a recommendation vote has been raised to comply in full or in part with a Licence change, or following an Authority direction, request or obligation (e.g. potentially from a Significant Code Review (SCR) should this be facilitated under the CUSC), a recommendation to

implement that Amendment Proposal by the CUSC Amendments Panel must be based on at least two-thirds of votes cast by those Panel members present being in favour of implementation. Thus if the Panel comprises 7 members plus 1 Consumer Focus representative and 2 National Grid representatives (with one vote) and that all 9 votes are cast, it would take at least 6 votes in favour for the Panel to recommend implementation of such a Proposal. As at present an abstention would not count as a vote cast.

Where the Panel does not have a two thirds majority, even if the votes cast do make any majority, the Panel recommendation will be maintain the status quo and not implement the Amendment. This would also be the case where the Panel reaches no decision, for example where the vote is split 4:4.

For clarity, it is intended that this Proposal should only apply to Amendment Proposals arising either directly from a Licence condition or Authority request, direction or instruction to bring forward a proposal (i.e. a Proposal raised in response to a Licence condition or SCR conclusions) or indirectly (i.e. a Proposal arising from an industry review process which was initiated to meet a Licence condition or SCR conclusions). For all other Amendment Proposals the current rules shall continue; i.e. a simple majority of votes cast is required, with an abstention not counted as a vote cast.”

C. ANALYSIS

P264

47. The first issue is what is meant by “majority” in article 5 of the 2005 Order. The Order itself contains no definition of the term.
48. Of the definitions of “majority” in the Oxford English Dictionary (September 2010) the following are relevant:

“**I.** Being greater; the greater part. [...]

3. a. The greater number or part; a number which is more than half the total number, esp. of votes; *spec.* (in a deliberative assembly or electoral body) the group or party whose votes amount to more than half the total number, or which has the largest share of votes; the fact of having such a share. Freq. with *of*. Also more generally: a substantial number, a

significant proportion. Usu. with *pl.* concord. Cf. PLURALITY *n.* 3, 4.” [...]

4. The number by which the votes cast for one party, etc., exceed those for the next in rank.”

49. It would in our view be difficult to contend that “majority” in the 2005 Order means simply “a substantial number” or “a significant proportion”. Such a definition is vague and would give rise to uncertainty as to the reach of the Order.
50. We have considered whether it could be argued that “majority” should be read so as to mean “two-thirds majority”, or “a majority of two to one”, which would bring the language of the 2005 Order into line with what is envisaged by P264. It is clear that the word “majority” is capable of bearing this meaning: see Definition 4 in the extract from the OED above. However, such an interpretation would in our view be met by the response that, had the 2005 Order intended to mean “two-thirds majority”, it would have said so. The fact that it does not contain any such qualification is a strong indicator that none was intended.
51. In our view, the natural reading of the word “majority” in the 2005 Order, and that which a Court would adopt, is that given in Definition 3.a. above, namely “a number which is more than half the total number”.
52. This leaves open the question of whether article 5(1) of the 2005 Order relates to the majority *of votes cast*, or to a majority *of Panel members*. It is not strictly necessary to answer this question in order to assess the effectiveness of P264. However, our view is that a Court would be likely to conclude that it means a majority *of votes cast*:
 - (a) Article 5(1) is concerned with a “majority recommendation”. Under the BSC, it is the Panel which makes a recommendation, not individual members. Under BSC paragraph 4.4.3, except as otherwise expressly provided in the BSC, any matter to be decided at any meeting of the Panel shall be decided by “simple majority of the votes cast at the meeting”.

Construing article 5(1) to relate to a majority of votes cast would therefore be consistent with the BSC.

- (b) Conversely, since the Modification Report does not contain the views of individual Panel members, a reading of article 5(1) which required GEMA to identify and consider the views of the majority of Panel members would arguably be unworkable. If the Panel were to recommend a modification, it would not necessarily be possible for GEMA to tell from the Modification Report whether the recommendation was made by the majority of Panel members, or only by the majority of votes cast.
53. Our view is therefore that article 5(1) of the 2005 Order removes the right of appeal where GEMA agrees with the recommendation of the Panel¹, provided that the recommendation was supported by more than half of the votes cast.
54. However, this does not lead to the conclusion that P264 will be ineffective. In particular, it is in our view strongly arguable that:
- (a) As we have noted above, article 5(1) removes the right of appeal where GEMA's decision consists in the "giving of a consent to a majority recommendation made by the Panel" (emphasis added).
 - (b) In this regard, article 5 may be contrasted with article 6, which states expressly that, in relation to the provisions relating to the CUSC, there is no right of appeal where GEMA's decision consists in giving consent to "a majority recommendation of Panel Members" (emphasis added).
 - (c) It follows that, in contrast to article 6, article 5 places the emphasis squarely on the Panel's recommendation.
 - (d) Indeed, under the BSC, it is only the Panel which makes a recommendation; not individual Panel members.
 - (e) If the BSC were to require a two-thirds majority vote in favour of certain classes of modifications, then it would follow that, unless two-thirds of

¹ We use the word "agrees" neutrally, without prejudice to the arguments considered in paragraphs 34-37 above.

Panel members voted in favour, there would be no Panel recommendation in favour of the proposed modification. Rather, the Panel recommendation would be against the proposed modification.

- (f) In the circumstances of paragraph (e) above, if GEMA were to direct a modification despite the Panel's recommendation, GEMA would not be giving "a consent to a majority recommendation made by the Panel" within article 5(1). The right of appeal to the Competition Commission would therefore be unaffected.

55. It might be said that the analysis set out above renders the word "majority" in article 5(1) nugatory. The analysis, it might be said, proceeds as if article 5(1) removes the right of appeal where GEMA's decision consists in the "giving of a consent to a [...] recommendation made by the Panel". There would be no need, on this view, for article 5(1) to contain the word "majority" since: (a) any recommendation made by the Panel requires at least a majority of voting members; and (b) on the analysis set out above, even if a majority of voting members were to vote in favour of a modification, that would not suffice to remove the right of appeal unless the relevant threshold were met (i.e., under P264, two-thirds of voting members).

56. However, it is in our view arguable that the word "majority" is not nugatory, and that it is instead designed to ensure that if GEMA were to consent to a modification recommended by the Panel without the support of the majority of voting members, that decision would be appealable. This appears to be what was intended by the drafters of the Order; DTI's June 2005 Response to the Consultation on the Draft Order stated at page 20 that:

"The final Order provides for decisions where Ofgem agrees with a panel recommendation based on a majority panel view to be excluded from appeal. This is an intentional clarification of procedures in the unlikely event of a hung panel decision reaching Ofgem, under current or future code governance arrangements: were Ofgem to make a decision based on a recommendation from a hung panel, the decision would be appealable."

57. Under the BSC as currently drafted, there is no such thing as “a recommendation from a hung panel”, since in the event of a tied vote the BSC Panel would not be able to make any recommendation. However, it is possible that the BSC could be amended to allow for recommendations in such circumstances. The word “majority” appears to have been inserted to cater for that possibility.
58. It is also relevant that the 2005 Order is concerned with restricting a right of appeal granted by statute. It is in our view arguable that a Court should construe such a restriction narrowly, and that it should resolve any ambiguity in favour of the appellant.
59. For the reasons set out above, our view on balance is that a modification to the BSC along the lines proposed by P264 would be effective in guaranteeing a right of appeal to the Competition Commission unless GEMA’s decision is in accordance with a recommendation supported by a two-thirds majority of the Panel.

CAP190

60. The position in relation to proposal CAP190 to amend the CUSC is in our view more difficult.
61. As we have noted above, article 6 of the 2005 Order precludes the right of appeal where GEMA gives consent “to a majority recommendation of Panel Members in the Amendment Report.”
62. “Majority recommendation” is defined as “a recommendation that is supported by the majority of those views of Panel Members which, in the reasonable opinion of GEMA, are clearly expressed in the Amendment Report”. This definition therefore consists of two ‘limbs’:
- (a) first, there must be “a recommendation”;
 - (b) second, that recommendation must be “supported by the majority of those views of Panel Members which, in the reasonable opinion of GEMA, are clearly expressed in the Amendment Report.”

63. This gives rise to the question of whose recommendation counts for the purpose of the first limb of the definition. As set out above, the CUSC contains provision for the Panel to vote on any proposed amendment, and the Amendment Report should contain details of the outcome of the Amendments Panel Recommendation Vote (CUSC paragraph 8.20.4). It is therefore arguable that it is only the Panel's own recommendation which counts for the purposes of the first 'limb' of deciding whether there is a "majority recommendation". It might be said that there is otherwise no point in including a procedure whereby the Amendments Panel votes on its recommendation. If this analysis is correct, it would follow that, if CAP190 were implemented, then without a two-thirds majority vote in favour of the amendment there would be no relevant recommendation and accordingly no "majority recommendation" within the meaning of article 6.
64. The difficulty with this analysis is that the CUSC also allows for the Amendment Report to contain other recommendations apart from that given by the Amendments Panel itself:
- (a) The report must contain the recommendation of The Company (paragraph 8.20.2(b));
 - (b) The report must also contain a summary of recommendations from Panel Members and/or the Working Group (paragraph 8.20.2(c)).
65. It might therefore be said that the ordinary reading of the reference in article 6 to "a recommendation" is to any recommendation set out in the Amendment Report, whether or not it gained the approval of the Panel in the vote. As to the argument that the vote would therefore be rendered redundant, it would be said that the vote is still necessary or helpful: (a) to inform GEMA's decision as to the desirability of the amendment; and (b) because it is helpful for the purposes of the second limb of the definition of "majority recommendation" to know how individual Panel Members voted.
66. This interpretation of a "majority recommendation" – according to which any recommendation is sufficient to satisfy the first limb of the definition, and not just a recommendation of the Panel – is also arguably supported by the

emphasis in article 6 on a “majority recommendation *of Panel Members*”, as opposed to a “majority recommendation *of the Amendments Panel*”. This language arguably indicates that the emphasis is on the views of Panel Members rather than the view of the Panel.

67. For these reasons, we conclude that the “recommendation” referred to in the first limb of the definition of “majority recommendation” encompasses not only recommendations made by the Amendments Panel itself, but rather any recommendation set out in the Amendment Report.
68. Turning to the second limb of the definition, the recommendation must be “supported by the majority of those views of Panel Members which, in the reasonable opinion of GEMA, are clearly expressed in the Amendment Report.” It is not entirely clear how it is envisaged that such views are to be expressed, but it seems to us that they may be expressed through voting, or otherwise. We note that CUSC paragraph 8.20.5 provides for a draft of the Amendment Report to be circulated to Panel Members after the vote, and for comments to be made on the vote. Any “unresolved” comments are to be reflected in the final Amendment Report. It appears that this may be a further mechanism for Panel Members to express their views on a recommendation.
69. For the reasons given above in relation to the BSC, we consider that the meaning of “majority” is “a number which is more than half the total number”. In relation to the pool from which this majority must be drawn, article 6 states expressly that the relevant figure is the majority “of those views of Panel Members which, in the reasonable opinion of GEMA, are clearly expressed in the Amendment Report”.
70. For these reasons, we conclude that the effect of article 6 of the 2005 Order is to exclude a right of appeal where GEMA gives consent to a recommendation contained in the Amendment Report, whether or not that recommendation was made by the Amendments Panel itself, and provided that the recommendation was supported by more than half of the total number of Panel Member views which, in the reasonable opinion of GEMA, are clearly expressed in the Amendment Report. The key differences from the position in relation to the

BSC are that, for the purposes of article 6, a recommendation does not need to be a recommendation of the Panel after voting, and the views of Panel Members can be expressed other than through voting on a proposal.

71. It follows that an amendment in the terms envisaged by CAP190 would be unlikely to achieve its objective. Changing the threshold needed for the Amendments Panel itself to recommend an amendment would not alter the circumstances in which a decision could be appealed to the Competition Commission.

Other potential amendments to the CUSC

72. As set out above, the principal difficulty with CAP190 is the existing CUSC framework, which provides for the Amendment Report to include more than one “recommendation”. It is therefore possible that the objectives of CAP190 might be achieved by a more radical proposal. In particular, if the CUSC were amended so that the only recommendation required in an Amendment Report was the recommendation of the Amendments Panel, a similar analysis would apply to that set out above in relation to the BSC. In particular, it would then be possible to provide that there would only be a “recommendation” if it was supported by two thirds of voting members.
73. Any new proposal would of course require detailed consideration and further legal analysis. We highlight three points:
 - (a) As mentioned at paragraph 54 above, article 6(1) of the 2005 Order focuses on the recommendation of “Panel Members”, in contrast to article 5(1) which focuses on a recommendation by “the Panel”. It might therefore be said that, in relation to the CUSC, the focus of the 2005 Order is on the views of *Panel Members* rather than on the view of *the Panel* as a body. For this reason, we consider that any amendment to the CUSC designed to introduce a two-thirds voting requirement is more likely to be vulnerable to challenge than a similar amendment to the BSC.
 - (b) We understand that it is a requirement of National Grid’s licence that any CUSC Amendment Report should include National Grid’s

recommendation. If so, any amendment to the CUSC to remove such a requirement would need to be accompanied by an amendment to National Grid's licence. Any amendment to the CUSC would of course need to be consistent with the terms of the licence.

- (c) It has been suggested to us that, given the complexity of amending both the CUSC and the National Grid licence, the same objectives might be met more simply by amending the 2005 Order itself. We agree that, if such a step is practicable, the 2005 Order could in principle be amended in such a way as to meet the objectives set out in CAP190.

D. CONCLUSION

74. In conclusion, and addressing the five questions posed in our instructions, we advise as follows.

1. What is the meaning of 'a majority' under Articles 5 and 6 of SI 2005/1646?

75. We consider that "majority" means "a number which is more than half the total number".

76. As to the meaning of "majority recommendation", we consider that:

- (a) for the purposes of article 5, a "majority recommendation" is a recommendation made in accordance with the votes of more than half the total number of votes cast by Panel Members;
- (b) for the purposes of article 6, a "majority recommendation" is a recommendation contained in the Amendment Report, whether or not that recommendation was made by the Amendments Panel itself, and provided that the recommendation was supported by more than half of the total number of Panel Member views which, in the reasonable opinion of GEMA, are clearly expressed in the Amendment Report.

2. Given the meaning of 'a majority' recommendation under Articles 5 and 6 of SI 2005/1646, can the definition of a majority be changed in the BSC and CUSC, as is

proposed under P264 and CAP190, for certain Modification and Amendment Proposals?

- 77. Changing the meaning of “majority” in the BSC and CUSC would not change its meaning in the 2005 Order.
- 78. However, it would in our view be possible to raise the threshold required by the BSC or CUSC for a Panel to recommend a particular amendment/modification. The threshold could be raised to a requirement for a two-thirds majority.
- 79. The effect of such a change on the right to appeal is summarised in answer to question 3 below.

3. If P264 and CAP190 were implemented in the Codes, would an appeal be possible to the Competition Commission if the Panel did not reach a two-thirds majority (and therefore did not recommend a Modification or Amendment) but a simple majority of Panel Members voted in favour of a Modification or Amendment Proposal?

- 80. In relation to P264: yes, because the 2005 Order only excludes the right of appeal where GEMA’s decision endorses a recommendation by the Panel. If the Panel did not recommend a modification then the right of appeal would remain, even if a simple majority of Panel Members had voted in favour. For reasons set out above, we consider that a Court would be more likely than not to agree with our conclusion on this issue.
- 81. In relation to CAP190: the position is more finely balanced, but in our view the answer is likely to be no. In relation to the CUSC as it is currently drafted, the 2005 Order is not in our view concerned with whether or not GEMA’s decision endorses a recommendation by the Panel; it is concerned (in summary) with whether it endorses the majority view of Panel Members. Changing the threshold for a Panel recommendation would not directly affect the right to appeal.

4. If P264 and CAP190 were implemented in the Codes, certain proposals would require a two thirds majority vote for Panel support, whereas all other Proposals

would only require a simple majority vote (i.e. 50% or more), would this inconsistency cause any issues?

82. We are not aware of any issues which might arise in consequence of such a disparity. We would be happy to advise further if concerns are raised in connection with any particular issues.

5. Given the differences in the change proposal processes set out in the BSC and CUSC, in particular Section F of the BSC and Section 8 of CUSC, does your advice differ in any way with respect to P264 and CAP190?

83. Yes, for reasons set out above.

Monica Carss-Frisk QC

Tristan Jones

Blackstone Chambers

4 February 2011

Neil Feinson
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CAP190 Workgroup Chair

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21 February 2011

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Dear Neil

The Electricity and Gas Appeals (Designation and Exclusion) Order 2005

I am writing to you as Chair of the CUSC Workgroup for CUSC Modification Proposal (CMP) 190: "Two-Thirds Majority Voting requirement for CUSC Panel recommendations on Amendments arising from Licence obligations, Authority requests or obligations".

CMP190 seeks to change the threshold required for the CUSC Modifications Panel to recommend implementation of a CMP to the Authority¹. The threshold would be increased from the current simple majority of the Panel Member votes cast to two thirds of Panel votes cast for those CMPs which arise from a Licence obligation, Authority request or obligation. Should the two thirds majority not be reached, the Panel Recommendation would be deemed to be rejection of the CMP in question.

During the industry assessment process for this CMP, National Grid, in conjunction with ELEXON, sought legal advice from a QC as to whether CMP 190, if implemented within the CUSC, would be effective, given that the relevant Statutory Instrument² (SI) does not specify what a "majority" is. The QC's advice highlighted two areas of ambiguity within the SI: one specific to the CUSC and the second generic across all the industry codes covered by the SI³.

Please note that the advice we have received from the QC concludes that CMP190 would be unlikely to achieve its stated objective as things currently stand and therefore without a change to the SI it is likely that CMP190 would need to be withdrawn. A potential alternative approach may be to change the CUSC to remove the multiple recommendations, as explained under Issue 1 below, however this would not resolve all of the SI ambiguities we identify in this letter.

I am therefore writing to you to raise awareness of these two areas of ambiguity within the SI and seek your advice as to how such ambiguity can be resolved. I have set out the two issues in more detail below.

Issue 1: Majority Recommendation within the CUSC

During the Workgroup discussions of CMP190, it was noted that the SI (2005/1646) which governs appeals to decisions of the Gas and Electricity Markets Authority (GEMA) does not specify what a

¹ The Gas and Electricity Markets Authority (GEMA) or more often referred to as 'Ofgem'.
² The Electricity and Gas Appeals (Designation and Exclusion) Order 2005 (SI 2005/1646)
³ The BSC, the CUSC and the UNC are the codes affected by the SI.

"majority" is and that this called into question whether CMP190 would have any effect if it were implemented in the CUSC.

It is worth noting that a similar Modification Proposal, P264, was raised to the BSC with similar issues with the same SI.

National Grid and ELEXON, on behalf of the CMP190 and P264 Workgroups respectively, sought joint advice from a QC as to her interpretation of the SI. The advice, dated 4th February 2011, is attached to this letter for your information.

The QC considered that "majority" in the SI means "a number which is more than half the total number" (para 75), and that implementing a change to the code (be that the CUSC or the BSC) would not change the meaning within the SI, but would be effective in ensuring the right of appeal remained open should GEMA direct implementation of a code proposal which had not reached two thirds majority Panel recommendation.

However, the QC noted the differences in the wording of the SI between the CUSC and other codes and concluded that although P264 would be likely to be effective, CMP190 would not.

The issue for the CUSC centres on the SI's definition of "majority recommendation". The SI states that an appeal to GEMA is not possible where GEMA gives consent *"to a majority recommendation of Panel Members in the Amendment Report"* where a majority recommendation is *"a recommendation that is supported by the majority of those views of Panel members which, in the reasonable opinion of GEMA, are clearly expressed in the Amendment Report"*.

There are three elements here: the first is that the CUSC Panel Amendment Report to the Authority contains more than one recommendation⁴; the second is that the SI refers to the majority of views of CUSC Panel Members, as opposed to a majority recommendation made by the Panel, as is the case for the BSC. The third is a minor one, but worth noting – the term "Amendment Report" no longer exists in the CUSC as it was changed to "Modification Report" in December 2010, as a result of the changes to the CUSC required to implement Ofgem's Code Governance Review.

With regard to multiple recommendations within the Amendment Report, this refers to the report including both the results of the Panel Recommendation Vote and a separate "Company Recommendation". As the QC notes, this issue could be resolved by removing the requirement for a Company Recommendation from the CUSC.

However, the second element regarding consistency with the other codes in the SI would remain. It is not clear to us why the appeal rights for the BSC are based on a recommendation of the Panel collectively, whereas the rights for the CUSC focus on the views of individual Panel Members. It would seem appropriate to align the arrangements across the BSC and CUSC.

Issue 2: Rights of Appeal

The second issue raised by the QC in relation to the SI relates to a potential ambiguity in the scope of exclusions from the right of appeal of industry code decisions by GEMA to the Competition Commission. Please note that this issue is not specific to CMP190 or P264, but may impact all codes covered by the SI.

Paragraphs 28 to 38 of the attached advice contain the QC's explanation. In summary, the QC identified an ambiguity in the SI wording that makes it unclear whether there is a right of appeal where GEMA decides not to direct a Modification Proposal be implemented in accordance with a majority recommendation from the Panel. Essentially, if a code Panel⁵ recommends, by majority, to reject a Modification Proposal and GEMA rejects that Modification Proposal, the QC considered that one interpretation of the SI wording would be that that decision would still be appealable. The QC noted that this interpretation is not in line with the DTI's stated intention in drafting the order (para 36(a)), however, given that a potential ambiguity exists, it may be worth clarifying this within the SI.

⁴ One from National Grid, as the Transmission Licensee, and one from the CUSC Panel is the 'norm' although if a Workgroup is established then they also provide one as well.

⁵ Be that the CUSC, BSC or UNC Panel.

Summary

In summary, we are seeking your views on the following issues:

- Amending the SI to provide consistency for the BSC and CUSC with regard to a "majority recommendation";
- Amending the SI to align the terminology used in the SI and the CUSC (specifically changing "Amendment Report" to "CUSC Modification Report"); and
- Clarifying the rights of appeal across all codes, in respect of the perceived existing ambiguity around appealing (to the Competition Commission) a GEMA decision which agrees with a Panel recommendation to reject a Modification Proposal;

We would appreciate the opportunity to discuss these issues with you in person. If you wish to discuss further please do not hesitate to contact me in the first instance on 01926 656379 or alex.thomason@uk.ngrid.com.

Yours sincerely

Alex Thomason
Chair, CAP190 Workgroup
(Senior Commercial Analyst, National Grid)

Cc: Mark Cox, Associate Partner, Industry Codes and Licensing, Ofgem
Tim Davis, CEO, Joint Office of Gas Transporters (UNC)
Andrew Pinder, Chairman, ELEXON (BSC)
Alison Kay, CUSC Modifications Panel Chair, National Grid (CUSC)
Electralink (DCUSA and SPAA)
Gemserv (iGT UNC and MRA)
Workgroup Members

Enc: QC Advice on P264 and CAP190 dated 4 February 2011⁶

⁶ The advice from the QC refers to a number of related documents, such as sections of the BSC and CUSC and the parts of the Transmission Licence – for the sake of brevity I have not included them with this letter; however, if you require copies of these documents please let me know.

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16 March 2011

Dear Alex

RE: THE ELECTRICITY AND GAS APPEALS (DESIGNATION AND EXCLUSION) ORDER 2005

Thank you for your letter of 21st February to Neil Feinson concerning a proposal to change the threshold required for the CUSC Modifications Panel to recommend implementation of a CMP to the Authority.

I regret that there are currently significant obstacles to DECC making any commitment, at least at this stage, to a more formal consideration of your proposal. Not least of which, we are currently facing a very busy Parliamentary timetable and resources and timing issues may therefore be a factor. In particular, we would wish to run any final proposals past our own legal team who are fully engaged on this Parliamentary work.

I also understand that Ofgem considered appeal rights in the Final Proposals for the Code Governance Review project and did not consider any changes necessary. With this in mind, it would be helpful if you could set out how vital these suggested revisions are to maintaining a robust industry governance framework. I would ask you to also consider how you might meet your objectives through means other than legislation.

I am, of course, happy to discuss over the phone or to meet up if you feel that would be helpful.

Yours faithfully,

PHIL HICKEN

Modification proposal:	Balancing and Settlement Code (BSC¹) P264: Two-thirds majority Panel recommendation on licence originated Modifications		
Decision:	The Authority ² has decided to reject this proposal		
Target audience:	National Grid Electricity Transmission Plc (NGET), Parties to the BSC and other interested parties		
Date of publication:	20 July 2011	Implementation Date:	n/a

Background to the modification proposal

The BSC Panel³ collectively provides a recommendation to the Authority on whether a modification to the BSC should be approved or not. Ten Panel members⁴ may vote on a modification recommendation with the independent Panel chair holding a casting vote in the case of deadlock. The Panel's final recommendation to approve a modification requires a simple majority in favour of a proposal – one vote more in favour of a modification than against, excluding abstentions. Failure to achieve a simple majority leads to a Panel recommendation to reject.

Should the Authority's decision on a BSC modification differ from the Panel's majority recommendation, an aggrieved party who wishes to legally challenge that decision may seek to bring an Energy Code Modification Appeal to the Competition Commission (CC)⁵. The appeals process was introduced by the Energy Act 2004 and is underpinned by secondary legislation. The BSC is a designated code for the purposes of the CC's appeals process. The circumstances in which an appeal may be brought are circumscribed - an appeal on a BSC modification is excluded where the Authority's decision accords with a majority recommendation made by the Panel⁶. In these circumstances, an aggrieved party that wishes to challenge an Authority decision that accords with the Panel's recommendation may only do so by way of judicial review.

As a result of Ofgem's Code Governance Review (CGR)⁷, the Significant Code Review (SCR) process was introduced to allow Ofgem to initiate a discussion on significant changes to industry codes and licences which may be needed to address a specific issue with cross-code and cross-code/licence impact identified by Ofgem as a result of, amongst other things, its wider statutory duties. On the conclusion of a SCR process, the Authority may direct the relevant licensee to raise changes to relevant codes and the licensee is obliged to do so. In the case of the BSC, NGET would be obliged, at the Authority's direction, to raise a BSC modification(s) as a result of a SCR⁸. Once raised,

¹ NGET is obliged through its electricity transmission licence to establish and maintain the BSC, including the rules for making modifications to the BSC. This obligation is contained in Standard Licence Condition C3 of the electricity transmission licence: http://epr.ofgem.gov.uk/document_fetch.php?documentid=4151

² The terms 'the Authority', 'Ofgem' and 'we' are used interchangeably in this document. Ofgem is the Office of the Gas and Electricity Markets Authority.

³ The BSC Panel is established and constituted pursuant to and in accordance with Section B of the BSC.

⁴ The voting members of the Panel consist of 5 elected industry members, 1 other industry member appointed by the Panel chair should, in the chair's opinion, the 5 elected members not fully reflect industry interests, 2 independent members also appointed by the Panel chair and 2 members appointed by the relevant consumer body (Consumer Focus). Panel members must act impartially.

⁵ Details of the appeals process for energy code changes are set out on the Competition Commission website: <http://www.competition-commission.org.uk/appeals/energy/>

⁶ SI 2005/1646 Article 5 (1).

⁷ The Code Governance Review final proposals are available here:

<http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=297&refer=Licensing/IndCodes/CGR>

⁸ Standard Licence Condition C3.4 (aa).

the modification would follow the normal industry process culminating in a Final Modification Report (FMR) being referred to the Authority for decision.

The modification proposal

The proposer, Drax Power Limited, raised P264 in August 2010. The proposal seeks to amend the BSC modification rules in the following way:

- any BSC modification which the licensee (NGET) has been obliged by its licence to raise (i.e. currently only a SCR directed modification) would require a two-thirds majority Panel recommendation in favour of approval, otherwise it would be recommended for rejection. In the case of the current Panel, at least 7 members (out of 10) would need to support approval of the modification, if all Panel members voted, to achieve a two-thirds majority

An alternative proposal (P264 Alternative) was developed by the Workgroup assessing the proposal. The alternative proposal would apply the two-thirds voting rule as above and also apply the rule to any modifications suspended or subsumed as a result of a live SCR process⁹.

In the proposer's view, the introduction of the SCR process allows the Authority to originate modifications (SCR directed modifications) which would place the Authority in the position of 'judge, jury and executioner' for those modifications. The raising of the voting threshold for Panel recommendations on SCR directed modifications would increase the checks and balances on the Authority by preserving the right of appeal to the CC when otherwise only a simple majority of Panel members' votes would be needed to approved these modifications.

The Workgroup considered that the alternative proposal expands the scope of the checks and balances by extending the introduction of a higher voting threshold to modifications subsumed or suspended during a SCR process (and which re-enter the process after the conclusion of a SCR) as they would have been subsumed or suspended as a direct result of the launch of a SCR and would relate to the same issue or defect.

In the Workgroup's view, the alternative proposal would better facilitate the achievement of Applicable BSC Objectives (a), (c) and (d). Objective (a) would be better met as NGET would rely on the approval of SCR directed (and subsumed/suspended) modifications by a higher voting threshold to reduce the risk of appeal, creating a more efficient process for progress of these modifications. Objective (c) would be better met as there would be more certainty for BSC parties that the use of a higher voting threshold would preserve their rights of appeal. Objective (d) would be met by ensuring that fewer legal challenges would result on SCR directed (and subsumed/suspended) modifications because of the higher voting threshold, increasing the overall efficiency of implementing modifications.

BSC Panel recommendation

On 9 June 2011, the BSC Panel considered the draft FMR for P264 and the responses to it. The Panel recommended by a majority that the alternative Modification be made. The

⁹ As a result of the CGR changes to the BSC, a proposal raised after a SCR is launched which may fall within the scope of the SCR can be suspended by the proposer or subsumed within the SCR on the direction of the Authority and may re-enter the codes process at the conclusion of the SCR process. The Authority may exempt a proposal from being subsumed within the SCR so that it can follow the standard modification process.

Panel considered that the Alternative better facilitates Applicable BSC Objectives (a), (c) and (d). A minority of the Panel considered that neither the proposed nor the alternative Modifications better facilitate the applicable BSC objectives. The Panel's views can be found in full in the FMR.

The Authority's decision

The Authority has considered the issues raised by the modification proposal, the alternative proposal and the FMR dated 15 June 2011. The Authority has considered and taken into account the responses to Elexon's¹⁰ consultation on the modification proposal and the alternative proposal which are attached to the FMR¹¹.

The Authority has concluded that implementation of either the modification proposal or the alternative proposal will not better facilitate the achievement of the applicable objectives of the BSC¹².

Reasons for the Authority's decision

We note the initial views expressed by Panel members when making their provisional recommendation and subsequently when making their final recommendation. We also note the views expressed by consultation respondents throughout the progress of P264.

Applicable BSC Objective (a): the efficient discharge by the licensee of the obligation imposed upon it by its licence

We do not agree that the proposal would better facilitate this objective. NGET's role under its licence obligation is to raise a BSC modification(s) in line with the SCR directions made by the Authority – it would be a matter for NGET to determine how to frame the SCR directed modification(s) it raises, taking account of the Authority's decision. The Authority's SCR direction may be high level principles or more detailed in scope¹³. Once raised, the SCR directed modification(s) would follow the standard modification process and a Panel recommendation would be made to the Authority. It would be the Panel's recommendation and the Authority's subsequent decision that would give rise to any right of appeal to the CC. It is not clear how a higher voting threshold for SCR directed modifications will make it more likely that the transmission company will raise a well considered robust modification as a result of an SCR direction. Equally, it is unclear how a higher voting threshold will lead to a lower risk of appeal. We do not consider the proposal provides any assurance to NGET one way or another that it has discharged its licence obligation efficiently.

Applicable BSC Objective (c): promoting effective competition in the generation and supply of electricity

We note the views of some respondents that SCR directed modifications may deal with contentious issues and therefore may be more susceptible to appeal because of their impact and that the right of appeal should be preserved as a result. We also note the concerns of some respondents that Ofgem will be acting as 'judge, jury and executioner'

¹⁰ The role and powers, functions and responsibilities of Elexon are set out in Section C of the BSC.

¹¹ BSC modification proposals, modification reports and representations can be viewed on the Elexon website at www.elexon.co.uk

¹² As set out in Standard Condition C3(3) of NGET's Transmission Licence - see link at footnote 1.

¹³ See paragraph 1.51 of Appendix 1 to our CGR Final Proposals dated 31 March 2010:

http://www.ofgem.gov.uk/Licensing/IndCodes/CGR/Documents1/CGR_Finalproposals_310310.pdf

by initiating a SCR, making SCR directions on its conclusion (should directions result from the SCR process) and reaching decisions on any SCR directed modifications. We further note concerns from some respondents that some materially affected parties who may not have the resources to engage with the SCR process may find themselves disadvantaged once SCR directions are made and SCR directed modifications are raised.

We do not agree that the proposal would better facilitate this objective. The SCR process is intended to be open, transparent and accessible to all parties. One of our concerns when initiating the Code Governance Review was that it was the lack of transparency and inclusivity of code change processes that may deter new entrants and small participants from involvement in energy markets. While the Authority leads the SCR process, we are committed to ensuring that each SCR is carried out in an open and inclusive manner and that all interested parties can engage with the process to address the issues highlighted by the Authority.

Similarly, at the conclusion of a SCR process, the Authority would, based on the evidence gathered during the process, determine whether any SCR directed modification(s) is needed. There is no requirement on the Authority to direct code changes and those changes which are directed may allow the relevant licensee some flexibility within the scope and intent of the direction, allowing for further development of proposals through the code governance processes. Ofgem would keep an open mind on the development of any SCR directed modifications prior to the delivery of the FMR.

Ofgem has recently launched two SCRs¹⁴. As neither has concluded, it is too early to say whether our and parties' expectations of the SCR process have been borne out. We will keep the present arrangements under review and have indicated that external factors may affect the future development of the code governance processes¹⁵. We consider that the arguments in favour of the proposal give rise to benefits that appear at best to be tenuous when compared against the applicable BSC objectives and do not consider that the proposal addresses a genuine issue at this time. However, should we consider it appropriate to refine the SCR process further in light of experience, we would be willing to undertake a review with industry at the relevant time.

The CGR licence changes make it clear that any Authority direction(s) to a transmission licensee to raise a SCR directed modification do not fetter the voting rights of the BSC Panel members¹⁶ - the licence and the BSC explicitly preserves the status quo in this regard. In light of this, no strong case has been presented that there is an obvious defect in the current governance arrangements and we can see no justification at this time to consider making it more difficult for the Panel to achieve a majority recommendation for licence directed modification proposals and for treating such proposals differently to other modification proposals with regard to voting thresholds.

¹⁴ A gas Security of Supply SCR was launched in January 2011 and Project TransmiT was launched as a SCR in July 2011. Details of both are available on the Ofgem website: <http://www.ofgem.gov.uk/>

¹⁵ E.g. We referred to the implementation of the Third Package in CGR final proposals.

¹⁶ Standard Licence Condition C3(4C) "The Authority's published conclusions and directions to the licensee shall not fetter the voting rights of the members of the panel or the recommendation procedures informing the report described at paragraph 4(b)(v)". Also, BSC Section F, paragraph 5.3.1.(d) states "the Authority's Significant Code Review Conclusions (if any) or direction in respect of the SCR Modification Proposal shall not fetter the views of the relevant Workgroup, the voting rights of the Panel or the recommendation of the Modification Report in respect of such SCR Modification Proposal."

BSC Panel members are under a duty to act impartially and not represent any interests¹⁷. It is accepted that all BSC modification proposals ought to be judged on their respective merits and whether a proposal better facilitates one or more of the applicable BSC objectives. The recommendation made by the Panel should reflect this approach rather than a desire to preserve a party's ability to appeal a proposal by making it more difficult to achieve a majority recommendation.

Applicable BSC Objective (d): promoting efficiency in the implementation and administration of the balancing and settlement arrangements

We note the views of respondents that the requirement for a higher voting threshold to approve SCR directed modifications would ensure that the Authority makes more robust decisions on these modifications which would make the SCR process more efficient. We also note the view that more decisive Panel recommendations to approve would be delivered by a higher voting threshold for SCR directed modifications and would reduce the risk of a recommendation to approve on the casting vote of the Panel chair, potentially closing off the right to appeal to the CC.

We do not agree that the proposal would better facilitate this objective. The proposal, if implemented, would introduce a different voting process for an SCR directed modification (including for suspended and subsumed proposals as per the alternative proposal). We consider that this would introduce additional complexity into the governance arrangements, and we see no justification to consider making it more difficult for the Panel to achieve a majority recommendation for licence directed modification proposals and for treating these proposals differently to other modification proposals with regard to voting thresholds. We consider the arguments put forward in support of this objective to be at best tenuous and that the proposal would not better promote efficiency of the BSC governance arrangements.

Other issues arising from modification P264

More broadly, we note that the modification would if approved alter the application of a statutory appeals process that has been subject to Parliamentary scrutiny through the industry codes modification process with the trigger being changed from simple majority to two thirds majority for licence directed proposals. In rejecting the proposal on its merits, we have noted the QC advice disclosed with the FMR, but we have not needed to reach a final view on the legality or appropriateness of this aspect of the proposal for the purposes of our decision.

For the reasons set out above, we have decided not to direct the implementation of either P264 'Two-thirds majority Panel recommendation on licence originated Modifications' or the P264 Alternative.

Declan Tomany

Associate Partner Legal - Smarter Grids and Governance

Signed on behalf of the Authority and authorised for that purpose

¹⁷ Section B 2.8.1 of the BSC.

Modification proposal:	Uniform Network Code (UNC¹) 312: Introduction of Two-Thirds Majority Voting to the UNC Modification Panel (UNC 312)		
Decision:	The Authority ² has decided to reject this proposal		
Target audience:	The Joint Office, Parties to the UNC and other interested parties		
Date of publication:	20 July 2011	Implementation Date:	N/A

Background to the modification proposal

The UNC Panel³ collectively provides a recommendation to the Authority on whether a modification to the UNC should be approved or not. Eleven Panel members⁴ may vote on a modification recommendation. The Panel's final recommendation to approve a modification requires a simple majority in favour of a proposal - one vote more in favour of a modification than against, excluding abstentions. Failure to achieve a simple majority leads to a Panel recommendation to reject.

Should the Authority's decision on a UNC modification differ from the Panel's majority recommendation, an aggrieved party who wishes to legally challenge that decision may seek to bring an Energy Code Modification Appeal to the Competition Commission (CC)⁵. The appeals process was introduced by the Energy Act 2004 and is underpinned by secondary legislation. The UNC is a designated code for the purposes of the CC appeals process. The circumstances in which an appeal may be brought are circumscribed - an appeal on a UNC modification is excluded where the Authority's decision accords with a majority recommendation made by the Panel⁶. In these circumstances, an aggrieved party who wishes to challenge an Authority decision that accords with the Panel's recommendation may only do so by way of judicial review.

As a result of Ofgem's Code Governance Review (CGR)⁷, the Significant Code Review (SCR) process was introduced to allow Ofgem to initiate a discussion on significant changes to industry codes and licences which may be needed to address a specific issue with cross-code and cross-code/licence impact identified by Ofgem as a result of, amongst other things, its wider statutory duties. On the conclusion of a SCR process, the Authority may direct the relevant licensee to raise changes to relevant codes and the licensee is obliged to do so. In the case of the UNC, the Gas Transporters would be

¹ The Gas Transporters are under an obligation through their Gas Transporter Licences to establish network codes which set out the contractual framework by which gas is to be transported across their pipeline system, and to establish and operate rules for modifying the network codes. The UNC was prepared by the Gas Transporters pursuant to Standard Special Condition A11 of their Transporter Licences:

<http://epr.ofgem.gov.uk/index.php?pk=folder590301>

² The terms 'the Authority', 'Ofgem' and 'we' are used interchangeably in this document. Ofgem is the Office of the Gas and Electricity Markets Authority (GEMA).

³ The UNC Panel is established and constituted from time to time pursuant to and in accordance with the UNC Modification Rules.

⁴ The Panel consists of 5 appointed representatives of gas transporters, 5 appointed representatives of gas shipper/supplier users and 1 representative appointed by the relevant consumer body (Consumer Focus). Panel members may represent those who have appointed them.

⁵ Details of the appeals process for energy code changes are set out on the Competition Commission website:

<http://www.competition-commission.org.uk/appeals/energy/>

⁶ SI 2005/1646 article 10 (1).

⁷ The Code Governance Review final proposals are available here:

<http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=297&refer=Licensing/IndCodes/CGR>

obliged, at the Authority's direction, to raise a UNC modification(s) as a result of a SCR⁸. Once raised, the modification follows the normal industry process culminating in a Final Modification Report (FMR) being referred to the Authority for decision.

The modification proposal

The proposer, E.ON UK, raised modification proposal UNC312 in October 2010. The proposal seeks to amend the UNC Modification Rules in the following way:

- when a Gas Transporter is directed through its licence to bring forward a modification, a Panel recommendation to approve the modification would require a two-thirds majority of Panel members who vote. In the case of the current Panel, at least 7 members (out of 11) would need to support approval of the modification if all Panel members voted;
- the requirement for a two-thirds majority would apply to modifications raised in response to a direction originating in a licence condition, for instance as the result of a SCR direction, or where a modification arises from an industry review process directed as the result of a licence condition. The legal text identifies SCR directed modifications as the only ones to which this definition currently applies;
- the proposer of the modification, a respondent to a consultation on the modification or a Panel member can trigger the requirement for a two-thirds majority vote. The UNC Panel would determine, by simple majority whether a simple majority vote or two-thirds majority vote is required for the Panel's recommendation. If the Panel cannot determine which voting threshold applies, the Panel's recommendation is provided by simple majority vote;
- the voting threshold to apply to each alternative to the original licence directed modification would be determined in its own right and there would be no automatic application of the same voting threshold to the original and any/all alternatives.

In the proposer's view, the accountability and transparency of the industry code modification process is enhanced by an effective modification appeals process but a licence directed modification proposal may be viewed as being controversial as it originates from the regulator and not a UNC signatory. As such, it is important that parties' rights to appeal are assured under the Energy Codes Modification Appeals process. The proposer referred to comments made by the CC in the UNC116 appeal and the perception of prejudgment in circumstances where the Authority is the promoter of a proposal. It is suggested that concerns on the scope for or potential accusations of prejudgment by the Authority would be met by the extra safeguard proposed by the modification. Reference is made to the risk that code parties may feel obliged to vote for a proposal originating from a condition of their licence, and it is this potential skewing of the Panel vote that this proposal also seeks to address.

In terms of the relevant objectives, the proposer considered that the modification would better facilitate effective competition – by reinforcing the concept of separation of powers and maintaining an effective appeals mechanism, the intended effect of the proposal is to protect the open and participatory regulatory decision making process. This may be expected to provide confidence in the regulatory system which may ultimately attract new entrants to the market or improve competition. The proposer also considered that

⁸ Standard Special Condition A11.10 (aa)

the modification would promote efficiency in the implementation and administration of the network codes by ensuring the need for greater consensus between the proposer, Ofgem and industry parties before a licence directed modification is raised. If a consensus did not arise, this would be reflected in a Panel recommendation to reject which, in the event that the Authority approved the modification, would keep open the right of a CC appeal.

UNC Panel recommendation

The UNC Modification Panel considered UNC312 on 16 June 2011 and of the eleven possible votes, five were cast in favour of implementing the modification. The Panel therefore did not approve implementation of UNC312.

The Authority's decision

The Authority has considered the issues raised by the modification proposal and the FMR dated 17 June 2011. The Authority has considered and taken into account the responses to the Joint Office's consultation on the modification proposal which are attached to the FMR⁹.

The Authority has concluded that implementation of the modification proposal will not better facilitate the achievement of the relevant objectives of the UNC¹⁰.

Reasons for the Authority's decision

We note that there were mixed views in support of and opposed to the proposal. The main arguments were provided against two of the UNC Relevant Objectives.

Standard Special Condition A11.1 (d): securing effective competition between shippers, suppliers, etc

We note the views of those supporting the proposal that accountability and 'checks and balances' are required in circumstances where the Authority is regarded as the originator of a code modification. Given these new powers, it is said that a slightly higher hurdle should be introduced to maintain an appropriate appeals mechanism to provide for scrutiny of contentious proposals. We also note the concerns of those respondents that the Authority could, for licence directed modifications, be seen as 'judge, jury and executioner' which may result in an insufficient separation of powers. By maintaining an effective appeals mechanism, the intended effect of the proposal is to protect the open and participatory regulatory decision making process. This may be expected to provide confidence in the regulatory system from justice being seen to be done which may ultimately attract new entrants to the market or improve competition between existing shippers.

We do not agree that the proposal would better facilitate this objective. The SCR process is intended to be open, transparent and accessible to all parties. One of our concerns when initiating the Code Governance Review was that it was the lack of transparency and inclusivity of code change processes that may deter new entrants and small participants from involvement in energy markets. While the Authority leads the SCR process, we are

⁹ UNC modification proposals, modification reports and representations can be viewed on the Joint Office of Gas Transporters website at <http://www.gasgovernance.co.uk/>. The Joint Office is the code administrator for the UNC.

¹⁰ As set out in Standard Special Condition A11(1) of the Gas Transporters Licence, see link at footnote 1.

committed to ensuring that each SCR is carried out in an open and inclusive manner and that all interested parties can engage with the process to address the issues highlighted by the Authority.

Similarly, at the conclusion of a SCR process, the Authority would, based on the evidence gathered during the process, determine whether any SCR directed modification(s) is needed. There is no requirement on the Authority to direct a licensee to raise code changes and those changes which are directed may allow the relevant licensee some flexibility within the scope and intent of the direction, allowing for further development of proposals through the code governance processes. Ofgem would keep an open mind on the development of any SCR directed modifications prior to the delivery of the FMR.

Ofgem has recently launched two SCRs¹¹. As neither has concluded, it is too early to say whether our and parties' expectations of the SCR process have been borne out. We will keep the present arrangements under review and have indicated that external factors may affect the future development of the code governance processes¹². We consider that the arguments in favour of the proposal give rise to benefits that appear at best to be tenuous when compared against the relevant objectives and do not consider that the proposal addresses a genuine issue at this time. However, should we consider it appropriate to refine the SCR process further in light of experience, we would be willing to undertake a review with industry at the relevant time.

We do not agree that the relevant licensee which raises a SCR directed modification would be expected to vote in favour of it at the Panel vote. The CGR licence changes make it clear that any Authority direction(s) to a Gas Transporter licensee to raise a SCR directed modification do not fetter the voting rights of the UNC Panel members¹³ - the licence explicitly preserves the status quo in this respect. We therefore do not agree that there would be a presumption that the relevant Panel members would always vote in favour of a SCR directed modification raised by their company. In our view, no strong case has been presented that there is an obvious defect in the current governance arrangements and we can see no justification at this time to consider making it more difficult for the Panel to achieve a majority recommendation for licence directed modification proposals and for treating such proposals differently to other modification proposals with regard to voting thresholds.

Standard Special Condition A11.1 (f): promoting efficiency in the implementation and administration of the network code

We note the arguments made in support of the proposal against this objective that a desire for consensus may allow the development of SCR directed proposals that have broad support from industry and the regulator, in the absence of which a higher voting threshold would preserve the appeal rights of parties. We also note the counter-arguments that significant code changes involve 'winners' and 'losers' and therefore it is unlikely that consensus will be achieved.

We do not consider that the proposal better facilitates this objective. The proposal would if implemented establish a number of additional voting processes that would need to be undertaken to determine whether a SCR directed modification(s) and any alternatives would require a Panel recommendation based on 'simple' majority or 'two thirds' majority

¹¹ A gas Security of Supply SCR was launched in January 2011 and Project TransmiT was launched as a SCR in July 2011. Details of both are available on the Ofgem website: <http://www.ofgem.gov.uk/>

¹² E.g. We referred to the implementation of the Third Package in CGR final proposals.

¹³ Standard Special Condition A11.15C.

prior to any vote on the modification(s) itself. It is possible that the directed mod would require two thirds majority recommendation but that an alternative could be considered on the basis of simple majority. In our view, this would introduce additional complexity into the governance process that would not better promote efficiency of the UNC modification arrangements.

Other issues arising from modification UNC312

More broadly, we have noted the views of Consumer Focus that the approval of this modification would set a precedent to unwind or materially alter the application of a statutory appeals process that has been subject to Parliamentary scrutiny through the industry codes modification process. In rejecting the proposal on its merits, whilst it would have been helpful for this issue to have been squarely addressed in the FMR, we have not needed to reach a final view on this aspect of the proposal for the purposes of our decision.

We also note the wider comments of the CC in the UNC116 appeal and the risks of considering selected extracts of the CC's decision in isolation - the issue of prejudgement was not upheld in that case notwithstanding strongly held GEMA views which it maintained having listened to contrary industry opinion. The CC accepted GEMA's submission that it has an agenda based on its statutory obligations, and that it will necessarily carry that agenda, and certain long-held opinions into the process of deciding upon code modifications.

Decision notice

In accordance with Standard Special Condition A11 of the Gas Transporters Licence, the Authority hereby directs that modification proposal UNC312: *'Introduction of Two-Thirds Majority Voting to the UNC Modification Panel'* be rejected.

Declan Tomany

Associate Partner Legal - Smarter Grids and Governance

Signed on behalf of the Authority and authorised for that purpose

Workgroup Terms of Reference and Membership

TERMS OF REFERENCE FOR CAP190 WORKGROUP

RESPONSIBILITIES

1. The Workgroup is responsible for assisting the CUSC Modifications Panel in the evaluation of CUSC Modification Proposal CAP190: Two-thirds majority voting requirements for CUSC panel recommendations on Modification Proposals arising from Licence obligations, Authority requests or obligations, tabled by Wyre Power at the Modifications Panel meeting on 3rd September 2010.
2. The proposal must be evaluated to consider whether it better facilitates achievement of the Applicable CUSC Objectives. These can be summarised as follows:
 - (a) the efficient discharge by the Licensee of the obligations imposed on it by the Act and the Transmission Licence; and
 - (b) facilitating effective competition in the generation and supply of electricity, and (so far as consistent therewith) facilitating such competition in the sale, distribution and purchase of electricity.
3. It should be noted that additional provisions apply where it is proposed to modify the CUSC amendment provisions, and generally reference should be made to the Transmission Licence for the full definition of the term.

SCOPE OF WORK

4. The Workgroup must consider the issues raised by the Modification Proposal and consider if the proposal identified better facilitates achievement of the Applicable CUSC Objectives.
5. In addition to the overriding requirement of paragraph 4, the Workgroup shall consider and report on the following specific issues:
 - a) Consider any alternative amendments;
 - b) Review any illustrative legal text;
 - c) Consider any legal opinion procured (in conjunction with ELEXON for BSC Modification Proposal P264);
 - d) National Grid's response to the Proposer's view, expressed in the Modification Proposal form, that "The Company member, [who] may feel obliged to vote for the Proposal they have been required to raise".
6. The Workgroup is responsible for the formulation and evaluation of any Workgroup Alternative CUSC Modification (WACMs) arising from Group discussions which would, as compared with the Modification Proposal or the current version of the CUSC, better facilitate achieving the Applicable CUSC Objectives in relation to the issue or defect identified.
7. The Workgroup should become conversant with the definition of Workgroup Alternative CUSC Modification which appears in Section 11 (Interpretation and Definitions) of the CUSC. The definition entitles the Group and/or an individual member of the Workgroup to put forward a WGAA if the member(s) genuinely believes the WACM would better facilitate the achievement of the Applicable CUSC Objectives, as compared with the Modification Proposal or the current version of the CUSC. The extent of the support for

the Modification Proposal or any WACM arising from the Workgroup's discussions should be clearly described in the final Workgroup Report to the CUSC Modifications Panel.

8. Workgroup members should be mindful of efficiency and propose the fewest number of WACMs possible.
9. All proposed WACMs should include the Proposer(s)'s details within the final Workgroup report, for the avoidance of doubt this includes WACMs which are proposed by the entire Workgroup or subset of members.
10. There is an obligation on the Workgroup to undertake a period of Consultation in accordance with CUSC 8.20. The Workgroup Consultation period shall be for a period of 3 weeks as determined by the Modifications Panel.
11. Following the Consultation period the Workgroup is required to consider all responses including any WG Consultation Alternative Requests. In undertaking an assessment of any WG Consultation Alternative Request, the Workgroup should consider whether it better facilitates the Applicable CUSC Objectives than the current version of the CUSC.

As appropriate, the Workgroup will be required to undertake any further analysis and update the original Modification Proposal and/or WACMs. All responses including any WG Consultation Alternative Requests shall be included within the final report including a summary of the Workgroup's deliberations and conclusions. The report should make it clear where and why the Workgroup chairman has exercised his right under the CUSC to progress a WG Consultation Alternative Request or a WACM against the majority views of Workgroup members. It should also be explicitly stated where, under these circumstances, the Workgroup chairman is employed by the same organisation who submitted the WG Consultation Alternative Request.

12. The Workgroup is to submit its final report to the CUSC Panel Secretary on 28 April 2011 for circulation to Panel Members. The final report conclusions will be presented to the Modifications Panel meeting on 6 May 2011.

MEMBERSHIP

13. The following individuals have nominated themselves to become Workgroup members:

Role	Name	Representing
Chairman	Alex Thomason	National Grid
National Grid Representative*	Emma Clark	National Grid
Industry Representatives*	Garth Graham	SSE
	Lisa Waters	Waters Wye Associates – for Wyre Power
	Esther Sutton	E.ON UK plc
	Steven Eyre	EDF Energy
	Stuart Cotten	Drax
Authority Representative	N/A	
Technical Secretary	Bali Virk	National Grid
Observers	N/A	

NB: A Workgroup must comprise at least 5 members (who may be Panel Members). The roles identified with an asterisk in the table above contribute toward the required quorum, determined in accordance with paragraph 14 below.

14. The chairman of the Workgroup and the Modifications Panel Chairman must agree a number that will be quorum for each Workgroup meeting. The agreed figure for CMP190 is that at least 5 Workgroup members must participate in a meeting for quorum to be met.
15. A vote is to take place by all eligible Workgroup members on the Modification Proposal and each WACM. The vote shall be decided by simple majority of those present at the meeting at which the vote takes place (whether in person or by teleconference). The Workgroup chairman shall not have a vote, casting or otherwise. There may be up to three rounds of voting, as follows:
 - Vote 1: whether each proposal better facilitates the Applicable CUSC Objectives;
 - Vote 2: where one or more WACMs exist, whether each WACM better facilitates the Applicable CUSC Objectives than the original Modification Proposal;
 - Vote 3: which option is considered to BEST facilitate achievement of the Applicable CUSC Objectives. For the avoidance of doubt, this vote should include the existing CUSC baseline as an option.

The results from the vote and the reasons for such voting shall be recorded in the Workgroup report in as much detail as practicable.

16. It is expected that Workgroup members would only abstain from voting under limited circumstances, for example where a member feels that a proposal has been insufficiently developed. Where a member has such concerns, they should raise these with the Workgroup chairman at the earliest possible opportunity and certainly before the Workgroup vote takes place. Where abstention occurs, the reason should be recorded in the Workgroup report.
17. Workgroup members or their appointed alternate are required to attend a minimum of 50% of the Workgroup meetings to be eligible to participate in the Workgroup vote.
18. The Technical Secretary shall keep an Attendance Record for the Workgroup meetings and circulate the Attendance Record with the Action Notes after each meeting. This will be attached to the final Workgroup report.
19. The Workgroup membership can be amended from time to time by the CUSC Modifications Panel.

RELATIONSHIP WITH MODIFICATIONS PANEL

20. The Workgroup shall seek the views of the Modifications Panel before taking on any significant amount of work. In this event the Workgroup chairman should contact the CUSC Panel Secretary.
21. The Workgroup shall seek the Modifications Panel's advice if a significant issue is raised during the Consultation process which would require a second period of Consultation in accordance with 8.20.17 of the CUSC.
22. Where the Workgroup requires instruction, clarification or guidance from the Modifications Panel, particularly in relation to their Scope of Work, the Workgroup chairman should contact the Modifications Panel Secretary.

MEETINGS

23. The Workgroup shall, unless determined otherwise by the Modifications Panel, develop and adopt its own internal working procedures and provide a copy to the Panel Secretary for each of its Modification Proposals.

REPORTING

24. The Workgroup chairman shall prepare a final report to the April 2011 Modifications Panel responding to the matters set out in the Terms of Reference, including all Workgroup Consultation Responses and Alternative Requests.
25. A draft Workgroup Report must be circulated to Workgroup members with not less than five Business Days given for comments, unless all Workgroup members agree to three Business Days.
26. Any unresolved comments within the Workgroup must be reflected in the final Workgroup Report.
27. The chairman (or another member nominated by him) will present the Workgroup report to the Modifications Panel as required.

Appendix 1: Indicative Workgroup Timeline

The following timetable is suggested for progressing the CAP190 Workgroup. Please note that the timetable for the Modification Proposal process post-Workgroup is included for ease of reference (*in italics below*).

3 September 2010	Modifications Panel Meeting – agree Workgroup Terms of Reference
23 September 2010	First Workgroup meeting (using scheduled GSG meeting as host)
8 November 2010	Joint QC legal advice sought for CAP190 and P264
10 December 2010	Second Workgroup Meeting
21 January 2011	QC Meeting
W/C 31 January 2011	Third CAP190 Workgroup Meeting
10 February 2011	Circulate draft Workgroup Consultation for comment
23 February 2011	Publish Workgroup Consultation
16 March 2011	Deadline for responses to Workgroup Consultation
W/C 21 March 2011	Post-consultation Workgroup meeting (to review consultation responses, confirm any alternatives and undertake Workgroup vote)
7 April 2011	Draft Workgroup Report circulated for comment
14 April 2011	Deadline for comment on Workgroup report
26 April 2011	Publish final Workgroup report for Panel Papers
6 May 2011	Present Workgroup report to Modifications Panel
12 May 2011	<i>Issue industry consultation (3 weeks)</i>
3 June 2011	<i>Deadline for industry responses</i>
8 June 2011	<i>Draft Modification Report published</i>
15 June 2011	<i>Deadline for industry comment</i>
16 June 2011	<i>Publish draft Modification Report with panel papers</i>
24 June 2011	<i>Modifications Panel Meeting – Panel Recommendation Vote</i>
29 June 2011	<i>Circulate updated draft Modification Report with Panel Recommendation Vote for Panel comment</i>
6 July 2011	<i>Deadline for Panel Members' comments on draft Modification Report</i>
7 July 2011	<i>Send final Modification Report to Authority</i>
11 August 2011	<i>Indicative date for Authority decision (25 Working Day KPI)</i>
25 August 2011	<i>Indicative implementation date (10 Working Days after decision)</i>

NB. The timetable has been updated to take account of the postponement of the second Workgroup meeting to allow time for a joint legal brief to be circulated for CAP190 and BSC Modification Proposal P264 and for a meeting with the QC in London to take place following discussion of the legal advice. As a result, an extension was sought for the submission of the Workgroup Report to the Modifications Panel, from December 2010 to April 2011 (April meeting taking place in May due to Bank Holiday).

The draft legal advice received from the QC raised an issue with CAP190 and Article 6 of Statutory Instrument 2005/1646 and there is the possibility that CAP190 would have no effect if implemented. Therefore the timetable in red font is dependant on further clarification following a meeting with the QC and their final legal advice.

CUSC Amendment Proposal Form	CAP:190
Title of Amendment Proposal: Two-Thirds Majority Voting requirement for CUSC Panel recommendations on Amendments arising from Licence obligations, Authority requests or obligations	
Description of the Proposed Amendment <i>(mandatory by proposer)</i> : <p>It is proposed that where an Amendment Proposal being presented to the CUSC Panel for a recommendation vote has been raised to comply in full or in part with a Licence change, or following an Authority direction, request or obligation (e.g. potentially from a Significant Code Review (SCR) should this be facilitated under the CUSC), a recommendation to implement that Amendment Proposal by the CUSC Amendments Panel must be based on at least two-thirds of votes cast by those Panel members present being in favour of implementation. Thus if the Panel comprises 7 members plus 1 Consumer Focus representative and 2 National Grid representatives (with one vote) and that all 9 votes are cast, it would take at least 6 votes in favour for the Panel to recommend implementation of such a Proposal. As at present an abstention would not count as a vote cast.</p> <p>Where the Panel does not have a two thirds majority, even if the votes cast do make any majority, the Panel recommendation will be maintain the status quo and not implement the Amendment. This would also be the case where the Panel reaches no decision, for example where the vote is split 4:4.</p> <p>For clarity, it is intended that this Proposal should only apply to Amendment Proposals arising either directly from a Licence condition or Authority request, direction or instruction to bring forward a proposal (i.e. a Proposal raised in response to a Licence condition or SCR conclusions) or indirectly (i.e. a Proposal arising from an industry review process which was initiated to meet a Licence condition or SCR conclusions). For all other Amendment Proposals the current rules shall continue; i.e. a simple majority of votes cast is required, with an abstention not counted as a vote cast.</p> <p>It is suggested that a Proposer should indicate on the CUSC Amendment Proposal Form whether they believe that implementation of their Proposal would meet the requirements of a Licence direction, Authority request, direction or instruction, in full or in part; in which case it should be subject to two-thirds majority voting for the final Panel recommendation. The Panel would review this and confirm by simple majority vote whether or not two-thirds or the default simple majority voting would apply for their final recommendation vote to be presented to the Authority.</p> <p>Alternatively the Panel could write to the Proposer asking that they confirm that the Amendment Proposal falls into one of the categories subject to a two thirds majority vote.</p> <p>It is suggested that the voting approach determined by the Panel for the original Proposal would also apply to any Alternative(s) raised, any such solution(s) having also been raised to comply with the relevant direction or licence change.</p> <p>The proposal is that all Proposed Amendments that meet the criteria are subject to the two thirds majority vote. This would include Licence conditions arising from a price control or other regulatory process that result in a CUSC Amendment being raised.</p> <p>To cover Amendments that may also be fulfilling SCR conclusions, in part or in full, the voting would also be applied to Amendments subsumed into an SCR or suspended during an SCR process. The proposer recognises that an alternative may be to exclude such Amendments.</p>	
Description of Issue or Defect that Proposed Amendment seeks to Address <i>(mandatory by proposer)</i> : Introducing two-thirds majority voting for recommendation of Licence-originated, Authority directed, requested or instructed Amendment Proposals would safeguard Parties' Appeal rights regarding those Proposals likely to be of greatest impact on industry.	

The requirement to recommend rejection where a two thirds majority cannot be achieved likewise protects and strengthens these appeal rights.

The Panel vote on whether to recommend implementation of an Amendment Proposal determines the ability of a Party or Parties to appeal the Authority's final determination on that Proposal: in order to appeal such a determination, the Authority's decision must be counter to the Panel's recommendation to the Authority. The government having given rights of appeal that allow parties to question the Authorities' policy decisions (rather than the narrower Judicial Review appeal grounds) it signalled that its policy was to implement a check on regulatory powers to change industry contracts. This Amendment seeks to protect those appeal rights and should help achieve better regulation by making the Authority decisions more robust, well argued and supported by appropriate analysis.

The implementation of Ofgem's Code Governance Review recommendations (via the associated changes to Licence conditions) will enable Ofgem to conduct Significant Code Reviews. SCR instigation, assessment and conclusions will all be led by Ofgem, who propose that:

"Ofgem should have the ability to start a SCR where a modification proposal is likely to have significant impacts on consumers, competition or other issues relevant to our statutory duties such as sustainable development." (Code Governance Review Final Proposals 2.29)

The desirability of protecting Parties' appeal rights on any matters where the Authority is 'the effective progenitor of a proposal' was highlighted by the Competition Commission's 2007 appeal decision regarding UNC Modification Proposal 116. This is particularly critical when as the Code Governance Review confirmed, matters addressed by SCRs are likely to be major issues on which the industry may have been unable to reach consensus in the past. Thus Amendment Proposals raised to comply with any SCR Direction issued to a licensee to progress Ofgem's SCR conclusions may well be contentious with potentially major impact on certain Parties. Ofgem acknowledged such concerns in their Final Proposals which also stated:

"To the extent that parties believe that further checks and balances are needed in relation to SCR modification proposals, it may be possible to pursue them through changes to the modification rules. For instance, while panel recommendations are currently made on the basis of a simple majority, the rules could be changed to require a different threshold for SCR modification proposals." (Appendix 2, 1.65)

This proposal thus seeks to introduce an appropriate check to ensure that where potentially contentious issues are addressed via Licence originated Amendment Proposals, an appropriate level of support is required for the Panel recommendation that will ultimately determine the ability of a Party to appeal an Authority determination. This is particularly pertinent to the CUSC Panel where The Company member, who may feel obliged to vote for the Proposal they have been required to raise, is indeed a voting Panel member, potentially one of a quorum of just 6.

The proposal also addresses a related issue raised during the Code Governance Review. The Final Proposals noted that the Panel Chairman should be independent and will be appointed by Ofgem. If the Chairman then gets a casting vote, or seeks to steer the debate, the Chair may effectively close the route to appeal. The Authority's documents appear to foresee this problem arising on Licence originated or Authority directed/requested Amendments:

"We have noted the concern that the independent chair's casting vote should not be able to determine whether or not an SCR proposal is subject to appeal. We note that a casting vote is only relevant where there would otherwise be deadlock and the panel is required to make a determination. We do not consider that a casting vote is necessary in the case of a recommendation, which can legitimately reflect a split vote without hindering the ongoing progress of a proposal; it will simply be recorded as such in the modification report to the Authority." (3.35)

Were Ofgem in future to recommend that the Panel Chairman has a vote, or it appoints another Panel member, as it can under CUSC 8.3.3, this proposal would still ensure that a significant majority is achieved in the very limited circumstances in which the proposal would apply. We believe that in creating the rights of parties to appeal the nature of an Ofgem decision (rather than the limited Judicial Review scope) the government clearly intended that the right to appeal should

be open for contentious issues. This modification would preserve and strengthen those rights.

The proposer is aware that the Authority has at times also requested Amendments are raised without an SCR process (e.g. transmission access) or via other regulatory processes, such as in a price control. Any changes that result in Amendments where the Authority could be perceived as the originator as well as the approver of a change should require greater support from the Panel to ensure the changes can be appealed by those not party to the original origination discussions.

Wyre Power believes that this proposal is particularly important to smaller players who may not have the staff to participate in the resource intensive processes of an SCR, or may not monitor all of the consultations on price controls, so will not necessarily have seen some of these changes coming. This means it may only be at the point of an Amendment being raised that they become aware that the proposal impacts their business. Knowing that such changes must carry a two thirds majority vote will offer some comfort to them that the governance process is weighted towards facilitating appeals where there is a proportion of the market who do not support the change.

We would note that we do not think that the main impact of this Amendment would be to increase the number of appeals, as they themselves are resource intensive and expensive. However, we do believe that it will improve the regulator process, reducing regulatory risk, by encouraging Ofgem to make robust, well analysed decisions. The potential for appeals more than appeals themselves should create the right incentives for good regulation.

Impact on the CUSC *(this should be given where possible):*

Amendments to Section 8. A new section on the CUSC Amendment Proposal Form.

Impact on Core Industry Documentation *(this should be given where possible):*

None anticipated.

Impact on Computer Systems and Processes used by CUSC Parties *(this should be given where possible):*

None anticipated.

Details of any Related Modifications to Other Industry Codes *(where known):*

UNC modification proposal 0312: 'Introduction of Two-Thirds Majority Voting to the UNC Modification Panel'.

BSC modification proposal P264: "Two-thirds majority requirement for Panel recommendations on licence originated modifications".

Justification for Proposed Amendment with Reference to Applicable CUSC Objectives** *(mandatory by proposer):*

The proposer believes that implementation of this Amendment Proposal would better facilitate the Applicable CUSC Objective:

(a): "the efficient discharge by the licensee of the obligations imposed upon it under the Act and by this licence", specifically with regard to the obligation under standard condition C10 of the licence.

The change suggested by this Proposal is a minor alteration to the working practice of the CUSC Panel which would address the concerns raised at the Competition Commission, in the Code Governance Review and recognised by Ofgem in their Final Proposals. It is efficient for the licensee to meet the spirit of the regime as well as the letter of the licence conditions imposed under the Governance review. This means taking account of the appeal rights created by government and trying to protect and enhance them. The appeal rights become more important in a situation

where Ofgem will run a review, select the solution and then sign off the Amendment, which seriously alters the role of Ofgem.

It will be a more efficient process if the risks associated with these sorts of Amendment are subject to a higher threshold as it will indicate clearly to the Authority the level of support that a change has. This in turn should improve the incentive of the Authority to act in a manner consistent with good regulation, for example not putting badly drafted licence conditions on the licensee and ensuring all the decisions are robust to challenge, were one to arise.

Implementing two-thirds majority voting on Amendment Proposals arising from Licence obligations, Authority requests, obligations or directions reduces the uncertainty and risk of time and money being wasted on legal challenges that might otherwise be raised when Panel recommendations are finely balanced.

In the longer term the efficiency of the market will be helped if a more robust regulatory regime is developed. The Authority getting a clear steer from participants may reconsider some of their proposed solution. They may be encouraged to engage more widely with the participants earlier in the process, as they will need robust decision making processes to accept Amendments that do not have significant support and thus may want earlier dialogue to ensure all angles are covered. It would be in the interests of the market as a whole that the governance process is robust, transparent and open to challenge.

This solution is also in line with that put forward under the BSC and UNC, which will help to ensure consistency across the industry codes.

It would also better facilitate the Applicable CUSC Objective:

(b) "facilitating effective competition in the generation and supply of electricity, and (so far as consistent therewith) facilitating such competition in the sale, distribution and purchase of electricity."

This Amendment Proposal will ensure that Panel recommendations on potentially contentious Amendment Proposals resulting from Licence changes, SCR directions or other Authority requests and obligations are subject to an appropriate level of support from the expert Panel Members, and that Parties' rights to appeal Authority decisions regarding such Proposals are protected. The support of the CUSC signatories is vital if the contract is to develop in such a way as to encourage new entrants to the market. Market entry is vital to maintaining competitive pressure in the market.

Perceived regulatory risk is increasing with the Authority taking a more active role in the design and operation of the market. When civil servants are seen to be significantly impacting the way businesses operate this creates a barrier to entry. For example a regime that can change pricing rules with limited notice can be seen as being too risky for a new entrant. To increase competition the CUSC governance process should try to reduce regulatory risk and create a stable investment background where new entrants and smaller players feel they will have rights of recourse against any bad regulation.

This Amendment may be of particular relevance to smaller players who do not have the resources to participate in the SCR or price control type of processes (with many meetings and pages of documents). The raising of an Amendment Proposal may be the first opportunity that they have had to consider the impact of a change on them, possibly raising issues the SCR has not considered. To close down the route of appeal for such parties will increase the regulatory risk that they face. Regulatory risk is far greater if (like smaller players) you do not have the resources to fully participate in the regulatory process due to the work load created by activities such as SCRs. We note that in 2004 the original cash-out review consultation only received responses from big players and in 2006, though the response was better, there are still only 18 responses to the impact assessment.

Details of Proposer: Organisation's Name:	Wyre Power
Capacity in which the Amendment is being proposed: (i.e. CUSC Party, BSC Party or "National Consumer Council")	CUSC Party
Details of Proposer's Representative: Name: Organisation: Telephone Number: Email Address:	Lisa Waters Wyre Power 020 8286 8677 lisa@waterswyre.co.uk
Details of Representative's Alternate: Name: Organisation: Telephone Number: Email Address:	Esther Sutton E.On UK 024 7618 3440 esther.sutton@eon-uk.com
Attachments (Yes/No): No If Yes, Title and No. of pages of each Attachment:	

Notes:

1. Those wishing to propose an Amendment to the CUSC should do so by filling in this "Amendment Proposal Form" that is based on the provisions contained in Section 8.15 of the CUSC. The form seeks to ascertain details about the Amendment Proposal so that the Amendments Panel can determine more clearly whether the proposal should be considered by a Working Group or go straight to wider National Grid Consultation.
2. The Panel Secretary will check that the form has been completed, in accordance with the requirements of the CUSC, prior to submitting it to the Panel. If the Panel Secretary accepts the Amendment Proposal form as complete, then he will write back to the Proposer informing him of the reference number for the Amendment Proposal and the date on which the Proposal will be considered by the Panel. If, in the opinion of the Panel Secretary, the form fails to provide the information required in the CUSC, then he may reject the Proposal. The Panel Secretary will inform the Proposer of the rejection and report the matter to the Panel at their next meeting. The Panel can reverse the Panel Secretary's decision and if this happens the Panel Secretary will inform the Proposer.

The completed form should be returned to:

Steven Lam
Commercial
National Grid
National Grid House
Warwick Technology Park
Gallows Hill
Warwick
CV34 6DA

Or via e-mail to: steven.lam@uk.ngrid.com

(Participants submitting this form by email will need to send a statement to the effect that the proposer acknowledges that on acceptance of the proposal for consideration by the Amendments Panel, a proposer which is not a CUSC Party shall grant a licence in accordance with Paragraph

8.15.7 of the CUSC. A Proposer that is a CUSC Party shall be deemed to have granted this Licence).

3. Applicable CUSC Objectives** - These are defined within the National Grid Electricity Transmission plc Licence under Standard Condition C10, paragraph 1. Reference should be made to this section when considering a proposed amendment.

CAP190 – Two-Thirds majority voting requirement for CUSC Panel recommendations on Amendments arising from licence obligations, Authority requests or obligations

Industry parties are invited to respond to this consultation expressing their views and supplying the rationale for those views, particularly in respect of any specific questions detailed below.

Please note that no Workgroup recommendations have been made in respect to CAP190 in light of the developments that occurred during the Workgroup phase. More detail on the issues that arose out of CAP190 is provided in the consultation.

Please send your responses by **5pm on 22 September 2011** to cusc.team@uk.ngrid.com.

Please note that any responses received after the deadline or sent to a different email address may not receive due consideration by the CUSC Modifications Panel when it makes its recommendation to the Authority.

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Respondent:	<p>Esther Sutton</p> <p>esther.sutton@eon-uk.com</p>
Company Name:	E.ON UK
<p>Do you believe that CAP190 better facilitates the Applicable CUSC Objectives than the CUSC baseline? Please include your reasoning.</p>	<p><i>For reference, the Applicable CUSC Objectives are:</i></p> <p><i>(a) the efficient discharge by the licensee of the obligations imposed upon it under the Act and by this licence; and</i></p> <p><i>(b) facilitating effective competition in the generation and supply of electricity, and (so far as consistent therewith) facilitating such competition in the sale, distribution and purchase of electricity.</i></p> <p>Yes, we believe that CAP190 would better facilitate both Objective (a) and (b), particularly (b).</p> <p>A threshold for recommendation has to exist, but it is unfortunate that the right to appeal implementation of a proposal directed by the Authority can currently be blocked by a finely balanced 51:49% split of CUSC Panel votes. It would be reasonable to change the majority required to prohibit an Appeal being raised from >50% to >66%. This safeguard would be particularly appropriate for the situation where the Authority may be the effective progenitor of a CUSC Modification Proposal that it then directs to implement. Even where this is not the case and proposals have been voluntarily put forward by any party, the current arrangements may also deter new entrants who can see that a major, contentious change to trading arrangements can be introduced without the possibility of being appealed to the Competition Commission by any party. Also, although there may</p>

	<p>be goodwill to undertake an open SCR process, resource constraints at smaller parties may mean that it is simply not possible for them to fully engage. The existing simple majority voting arrangements thus mean that a proposal may be directed without engagement in its development from such parties, and the opportunity for anyone to appeal a decision being blocked by only 51% Panel support. By ensuring that directed proposals are only recommended by the Panel, thus only not appealable if they achieve >2/3 support not merely >50%, this change would help to safeguard appeal rights thus reduce risk to all parties. This would give greater confidence to both existing parties and any considering entering the market.</p> <p>Consequently we see the main benefits of CAP190 being under Objective (b).</p> <p>Benefits can also be seen under Objective (a). It would be good governance to introduce checks and balances to ensure that a body could not raise and decide upon a change without the right to appeal being maintained. The fact that under 2/3 majority voting the right to appeal could still be prohibited by one vote is not a valid objection to increasing the majority threshold. One vote may always determine whether a certain percentage of support is received; the point is that requiring a 66% majority means that appeal rights would not be limited in those cases where the Panel opinion on the merits of a proposal is very finely balanced. As this situation seems most likely to occur on more contentious matters, the very ones likely to be the subject of an SCR, it is desirable to put this protection in place before any SCR Directions are issued.</p>
<p>What are your views on the default implementation date and how CAP190 should be implemented?</p>	<p><i>Please see section 5 of the consultation document.</i></p> <p>As per our answer to question 1, CAP190 should be implemented as soon as possible hence the standard CUSC implementation of 10 working days after an Authority decision is appropriate.</p> <p>For most modifications, prospective implementation, i.e. for the change only to apply to modifications raised after the change is implemented, is desirable. If the CUSC Panel makes a recommendation on 30/09/11, as the Authority has a KPI to make modification decisions within 25 working days we would hope that a decision on CAP190 should be made by 04/11/11 for implementation if applicable on 18/11/11. However, in case this timescale slips and as protecting appeal rights is such a fundamental matter, we would support retrospective application of CAP190 to all SCR-directed modifications. As Ofgem has indicated that they intend to adhere to a challenging timetable for Project TransmiT SCR, it seems possible that a TransmiT modification might be directed in late 2011. Especially as there is only likely to be a maximum of one or two SCRs a year, it would be unfortunate if 2/3 majority voting did not apply to the first such directed modification.</p>

**Do you have any other
comments?**

No.

CAP190 – Two-Thirds majority voting requirement for CUSC Panel recommendations on Amendments arising from licence obligations, Authority requests or obligations

Industry parties are invited to respond to this consultation expressing their views and supplying the rationale for those views, particularly in respect of any specific questions detailed below.

Please note that no Workgroup recommendations have been made in respect to CAP190 in light of the developments that occurred during the Workgroup phase. More detail on the issues that arose out of CAP190 is provided in the consultation.

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Respondent:	Gary Henderson Gary.henderson@uk.ibm.com 01355 35 2875
Company Name:	IBM (UK) Ltd. (for and on behalf of ScottishPower)
Do you believe that CAP190 better facilitates the Applicable CUSC Objectives than the CUSC baseline? Please include your reasoning.	<p>We agree that the Modification is better than the baseline, and would aid achievement of the following objectives:</p> <p>Objective a) ensuring that the process is open, clear and transparent to all will help National Grid better achieve Objective a. By setting a higher standard in cases where a contentious decision is to be made, the likelihood of appeal is reduced, ensuring a more efficient operation of the Licence.</p> <p>Objective b) Parties, especially smaller Parties, will be reassured that their right to Appeal has been reinforced. New entrants, likewise, can be reassured that large and contentious changes will not be sprung on them without more consideration and work being done in the analysis and decision making phases. This is one of the factors key to ensuring that investment can be safely made and maintaining stability.</p>
What are your views on the default implementation date and how CAP190 should be implemented?	<i>We believe that, as there are no system or process changes relating to this modification there is no reason that an immediate implementation could not be achieved. The process should not only apply to new modifications, but also be applied to modifications already raised which have not already been voted</i>

	<i>on by the Panel.</i>
Do you have any other comments?	<i>No</i>

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Respondent:	Steven Eyre steven.eyre@edfenergy.com
Company Name:	<i>EDF Energy</i>
Do you believe that CAP190 better facilitates the Applicable CUSC Objectives than the CUSC baseline? Please include your reasoning.	<p>We note that the Proposed Modification was not fully developed given the outcome of similar modifications proposed under the BSC and the UNC. However, EDF Energy continues to believe that the principle behind this Proposed Modification could better meet the applicable CUSC objectives compared to the baseline. We consider this proposal could potentially better facilitate Objective (b) as it would deliver enhanced checks & balances within the governance process in respect of modifications that are proposed following a direction by the Authority. The proposal would potentially keep the appeals route open to parties in respect of modification proposals that might be complex and potentially contentious resulting from a Significant Code Review (SCR). This proposal could promote regulatory scrutiny and thereby increase market and investor confidence in the governance process.</p> <p>Greater checks and balances in the governance process in respect of modification proposals imposed on the industry from the regulator was a significant issue that was identified during the development of the significant code review process. In fact Ofgem itself had identified that a change to the voting arrangements could allay fears in respect of Ofgem imposing the raising of modifications and ultimately determining upon them.</p> <p>We accept that changes to the statutory instrument would be the ideal method of resolving the defect identified. However, it is clear that there is currently no appetite from DECC to address this issue in the short term. Consequently, we see no reason</p>

	why a modification to the CUSC should not proceed on the basis that it better meets the CUSC objectives compared to the baseline.
What are your views on the default implementation date and how CAP190 should be implemented?	We believe the default implementation date of 10 working days after the Authority decision is appropriate. We also believe if implemented the proposal should only apply to modifications raised after the implementation date.
Do you have any other comments?	No.

