

Modification proposal:	<b>ESP/ESPP/ESPN122, ESPC046: Amendment of the Network Code Modification Rules to provide clarity on the drafting and provision of Legal Text associated with Modification Proposals.</b>		
Decision:	<b>The Authority<sup>1</sup> directs that this proposal be made<sup>2</sup></b>		
Target audience:	<b>ESP, ESPP, ESPN, ESPC, Parties to the ESP, ESPP, ESPN, ESPC Network Codes, and other interested parties</b>		
Date of publication:	<b>16 Jan 2007</b>	Implementation Date:	<b>To be confirmed by ESP, ESPP, ESPN, and ESPC.</b>

## Background to the modification proposal

The Network Code Modification Rules contain rules relating to the provision of legal text for Modification Proposals. It was felt that uncertainty existed over which Party's responsibility it was to draft the legal text, and at which point in the modification process the text should be issued for consultation. It was felt this had caused progress on some Modification Proposals to be delayed.

In the interests of the timely progression of Modification Proposals, and to provide clarity over how legal text should be dealt with the proposer considered it appropriate to raise the Modifications Proposals which are the subject of this decision letter.

## The Modification Proposal

The proposals introduce provisions which make it clear that the Pipeline Operator is responsible for drafting the legal text for a Modification Proposal. It also clarifies that legal text should be provided for a Modification Proposal regardless of whether the Pipeline Operator considers that a change to the Network Code would be appropriate (the Pipeline Operator's working practice had previously been that legal text did not need to be included if the Pipeline Operator did not believe a change should be approved). It was suggested that providing text for all modifications could be an additional cost that might be construed as less efficient and economic.

Finally, the modification provides that the legal text should be included in the draft modification report in order to provide consultees with sufficient time to comment on the suitability of the text.

The Pipeline Operator noted that although suggested legal text had been provided by the proposer some changes had been made. These included:

- ◆ Clarifying that the responsibility for providing the final legal text and drafts thereof lies with the Pipeline Operator as opposed to the Pipeline Operator in conjunction with other Pipeline Operators;
- ◆ Removing references to Third Party Modifications in the text as no such concept exists in the Pipeline Operator's network codes at present, although a similar reference was included in the Modification Proposal Templates on the basis that this would allow for consistency with other codes; and

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

<sup>2</sup>This document is notice of the reasons for this decision as required by section 38A of the Gas Act 1986.

- ◆ Removing an explicit reference allowing a Proposer to suggest legal text in its modification proposal or to indicate potential areas of the Network Code which may be affected by the Modification Proposal.

## **The Authority's decision**

The Authority has considered the issues raised by the modification proposal and the Final Modification Report (FMR) dated 12 December 2006. The Authority has considered and taken into account the responses to the ESP, ESPP, ESPN, ESPC's consultation on the modification proposal which are attached to the FMR.

The Authority has concluded that:

1. implementation of the modification proposal will better facilitate the achievement of the relevant objectives of the ESP, ESPP, ESPN, ESPC's Network Codes,<sup>3</sup> and,
2. directing that the modification be made is consistent with the Authority's principal objective and statutory duties.<sup>4</sup>

## **Reasons for the Authority's decision**

Although the description of a modification in the Modification Report and the documents which precede it are important aspects in the development of a change, the industry's evaluation of a Modification and the subsequent decision made by Ofgem to approve or reject the change, are ultimately concerned with the legal text setting out the change to the contract. As such, Ofgem agrees that the provision of legal text for all Modifications should be the norm and considers that the Pipeline Operators agreement (or otherwise) to a proposed change should not be a factor in any decision to move away from that expectation. Provision of legal text as envisaged by these changes may facilitate the efficient and economic operation of the system and help the licensee to discharge the obligations placed upon it by its licence.

The modification report recognised the need to provide legal text for comment in good time for consultees to express a view and considered that the draft Modification Report stage would be an appropriate time for it to be introduced. We agree that consultation on legal text is an essential part of any modification and would be supportive of consultation at the earliest appropriate stage in any modification. By ensuring consultation occurs the proposed modification will better facilitate Relevant Objective(s) (a) and (b). We note that it may be possible to consult earlier than the draft Modification Report stage, but consider the draft Modification Report is an appropriate backstop date by which consultation on legal text must have been carried out.

We note that the concept of a Third Party Proposer is not known to the ESP, ESPP, ESPN, and ESPC network codes at present. As such we agree with the decision of the Pipeline Operator to amend the legal text for this Modification Proposal such that it does not refer to that class of Party. As such it seems anomalous to have included a reference to such a Third Party Proposer in the template form used to propose changes to the network code.

The legal text produced by the Pipeline Operator also varied from that suggested by the proposer of the modification by removing an explicit reference which would have allowed a Proposer to suggest legal text in its modification proposal, or to indicate potential areas

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<sup>3</sup> As set out in Standard Condition 9(1) of the Gas Transporters Licence, see: [http://62.173.69.60/document\\_fetch.php?documentid=4311](http://62.173.69.60/document_fetch.php?documentid=4311)

<sup>4</sup>The Authority's statutory duties are wider than the relevant objectives and are detailed mainly in the Gas Act 1986.

of the Network Code which may be affected by the Modification Proposal. This was done on the basis that the changes to the template indicate that the Proposer has the option to provide legal text, and the proposed changes were therefore unnecessary. We note that the changes to the template do not make any reference to the proposer indicating potential areas of the Network Code which may be affected by the Modification Proposal, and in this regard, the legal text may fail to fulfil the intention of the Proposer.

Ofgem notes that the legal text for the modification proposal to which this letter relates states that the Pipeline Operator need not provide legal text in the event that a proposal is urgent, or if it is not reasonably practicable for the Pipeline Operator to do so. In both cases the text provides that the text must be provided as soon as it is practicable to do so. We are concerned that 10.2 (b) could be applied too broadly, but note that Parties could raise a modification to change this provision should it prove necessary to draft it more narrowly.

### **Decision notice**

**In accordance with Standard Condition 9 the Gas Transporters Licence, the Authority, hereby directs that modification proposal ESP/ESPP/ESPN122, ESPC046: Amendment of the Network Code Modification Rules to provide clarity on the drafting and provision of Legal Text associated with Modification Proposals be made.**



**Sarah Harrison**  
**Managing Director, Corporate Affairs**

Signed on behalf of the Authority and authorised for that purpose.