

What stage is this document in the process?

- 01 Initial Written Assessment
- 02 Definition Procedure
- 03 Assessment Procedure
- 04 Report Phase

## Stage 03: Assessment Report

# P264: Two-Thirds Majority Panel Recommendation on Licence originated Modifications

P264 proposes that for Modification Proposals the Licensee has been obligated to raise, a two-thirds majority vote of the BSC Panel will be required to recommend approval to the Authority. If a two-thirds majority is not reached, the Modification will be progressed with a recommendation for rejection.

P264 Alternative suggests extending these provisions to all Modifications raised during an SCR Phase that have been suspended or subsumed.



Modification Group recommends **Approval** of the Alternative Modification



High Impact:  
BSC Panel, ELEXON

P264  
Assessment Report

08 April 2011

Version 1.0

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## About this document:

This document is an Assessment Report, which ELEXON will present to the Panel on 14 April 2011, on behalf of the P264 Modification Group. It outlines the solution, impacts, costs, benefits and the implementation approach for this change. It includes the Group's recommendation as to whether the change should be approved.

The Panel will consider the Group's recommendations, and will agree an initial view on whether or not this change should be made. The Panel will then seek industry views on its initial recommendation.



**Any questions?**

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## Why Change?

The concept of Significant Code Reviews (SCRs) has recently been introduced into the Transmission licence and the BSC. At the conclusion of a SCR the Licensee (National Grid) may be obligated to raise a SCR Modification Proposal to the BSC in accordance with a direction from the Authority.

The Proposer believes that this compromises the independence of the Authority and that extra checks and balances should be introduced to ensure that a body cannot effectively raise and decide upon a change without the right to appeal being maintained, or other such restrictions.

## Proposed Solution

P264 proposes that a two-thirds majority will be required to recommend approval when the BSC Panel votes to determine its final recommendation on a Modification that the Licensee has been obligated to raise. If a two-thirds majority is not reached, the Modification will be recommended for rejection.

## Alternative solution

The Group has also developed an Alternative solution that expands the type of Modifications to which the two-thirds voting rule would apply. In addition to those Modifications captured under the Proposed, it includes all Modifications raised during an SCR Phase that have been suspended or subsumed.

## Impacts & Costs

P264 would impact the Panel's voting practice. The cost to implement either the P264 Proposed or Alternative Modification is estimated at £1,200 equating to 5 man days effort.

## Implementation

10 Working Days following an Authority decision

## The Case for Change

The Group believes that the Proposed and Alternative Modification would better facilitate **Applicable BSC Objectives (a), (c) and (d)**.

## Recommendations

The recommendation of the Modification Group is **approval** of P264 **Alternative**.

## 2 Why Change?

### How does it work now?

#### Current Panel practice

When progressing a Modification Proposal the BSC Panel makes a recommendation to the Authority as to whether or not it believes the modification should be approved. Ten Panel members have the opportunity to vote on the progression of a Modification Proposal, with the final recommendation based on a simple majority i.e. over 50% of the vote. If a majority cannot be formed and the vote is deadlocked, the Panel Chair shall have the casting vote.

#### Appealing decisions

Once the Authority has made a determination on the approval of a Modification Proposal there is an opportunity to appeal the decision to the Competition Commission. The Competition Commission has a number of criteria that must be met before an appeal can be considered. One criterion is that the Authority determination must be contrary to the majority recommendation of the BSC Panel. So, if the Panel recommends rejection and the Authority approves the Modification then an appeal can be raised. If the Panel recommends approval and the Authority approves the Modification, then no appeal can be raised.

It should be noted that if an appeal is excluded due to the criteria of the Competition Commission, it does not prevent a party from seeking to challenge the Authority's decision via an alternative route of judicial review in the High Court. Although an appeal to the High Court can only be on grounds of process, not on the merits of the case considered.

Further information on the Competition Commission appeals process can be found at the following link: [Competition Commission Appeals](#)

#### Licence originated Modifications

The Transmission Licence includes a number of obligations that National Grid, as the Licensee, must meet. Part of these obligations includes raising Modification Proposals to amend the BSC as a result of wider industry issues.

An example of such an obligation would be the SCR process. The SCR process has been introduced to facilitate the progression of significant industry wide changes. The conclusion of an SCR may result in an Authority direction being issued to National Grid that, in accordance with its licence, obligates it to raise a Modification to the BSC in order to implement the conclusions of an SCR.

### What is the issue?

In its review of Code governance Ofgem concluded that it should have the ability to start a Significant Code Review where a modification proposal is likely to have significant impacts on consumers, competition or other issues relevant to its statutory duties. In the view of the Proposer, Modifications that result from Licence obligations are likely to be high impact changes that will have significant commercial implications for Parties. As such, they are likely to be contentious. Such Modifications are also likely to address areas where historically Parties have not been able to reach a consensus, further adding to the complexity and contentious nature of the changes.

The current simple majority Panel voting process could result in a change being recommended for approval based on a very slim majority. Such borderline consensus may increase the risk of appeals being raised where a controversial Modification is not progressed with decisive support. It may also increase the risk of judicial reviews being



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#### SCRs

The SCR process has been introduced to facilitate the progression of significant industry changes in the most efficient manner. Ofgem has the sole right to raise SCRs, but will consult on the scope of the review before commencing the SCR.

Further information on SCRs can be found in [Modification P262 Final Modification Report](#) or at the following link: [Ofgem Code Governance Review](#)

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raised, which are more costly and time consuming than appeals to the Competition Commission.

The Proposer is also concerned that, in the case of SCRs, the direction to raise a SCR Modification Proposal will be issued by the Authority who will also make the determination. It is also possible that any future Modifications raised as a result of a licence obligation will be directed and determined on by the Authority. Having appropriate checks and balances and ensuring Parties can appeal such changes (where appropriate) would be good governance and best practice.

Therefore, the appropriate provisions should be introduced into the BSC to ensure a suitable level of support from the industry before a licence originated Modification is recommended for approval, and to protect the ability of a party to raise an appeal on the approval of such a potentially complex and contentious change.

### 3 Proposed Solution

P264 proposes that a two-thirds majority will be required to recommend approval when the BSC Panel votes to determine its final recommendation on a Modification Proposal which the Licensee has been obligated to raise.

If a two-thirds majority is not reached, the Modification will be progressed as recommended for rejection.

To reach a two-thirds majority approval there must be at least twice the number of votes for approval, than the number of votes for rejection, of the total votes cast. If a Panel member chooses to abstain from the vote, then that vote is not considered a vote for rejection and does not count towards the total vote cast. For example, if 10 voting Panel members attend a meeting and 6 vote for approval, 2 vote for rejection and 2 abstain. The 'abstain' votes would not count as a vote for rejection. Therefore, the Panel recommendation would be to approve the modification as the majority would be 6 against 2 and provide the required two-thirds majority. This is in line with current procedure as detailed in Section B 4.4.3.

#### What is the driver for the Change?

The Proposer has clarified that the defect they wish to address is that the concept of SCRs has introduced a process which made Ofgem the 'judge, jury and executioner' of a change. Such a situation is not good governance if the correct checks and balances are not introduced; these checks and balances should aim to ensure that a body cannot effectively raise and decide upon change without provision for greater protection of the right to appeal, or other such restrictions.

#### Licence Obligated Changes

The Proposer also clarified what they meant by 'Licence obligated Modifications'. This was any Modification which Ofgem had directed, instructed or requested the Licensee raise, and which could be linked to an obligation to raise such a change in the Transmission Licence. After discussion the Group believed that such a definition would currently only cover the SCR process under the BSC.

Although it had been the Proposer's intention to only cover off the SCR process within the BSC, they used the phrase 'Licence obligated Modifications' as an attempt to future-proof the Code for any similar processes, implemented at a later date, that also obligated a licensee to raise Modifications.

The Group questioned whether any Department of Energy and Climate Change (DECC) directed changes should come under this umbrella. However, the Group agreed that since DECC have to undergo a parliamentary process before directing a change, there was no threat to independent decision-making and good governance.

The Group noted that other Parties hold licenses, for example Suppliers have a Supply Licence. However, it was clarified that under the current arrangements it is only National Grid, as the Transmission Licensee, that can be obligated under the Transmission Licence by the Authority to raise a Modification Proposal; and that the term Licence Obligated Modification was attempting to future proof any other Licensees being introduced, other than National Grid,

## 4 Alternative solution

### Background

The P264 Proposed solution focuses solely on those Modifications which Ofgem have directed, instructed or requested the Licensee to raise, and which could be linked to an obligation to raise such a change in the Transmission Licence.

Under the current License and BSC provisions, the Proposed solution only applies to those Modifications that National Grid are obligated to raise as a result of an SCR conclusion.

### Significant Code Reviews and the SCR Phase

Once commenced, an SCR will utilise a number of industry workshops to develop an SCR conclusion. The SCR conclusion may result in an Authority direction that:

- Requires National Grid as the licensee to raise SCR Modification Proposal(s) to the BSC; or
- States no changes to the BSC are needed.

The period between the SCR commencing and SCR closing is known as the 'SCR Phase'.

Modification Proposals raised before the commencement of the SCR Phase progress through the standard BSC Modification Process as normal. The Proposers may choose to withdraw their Modifications or 'suspend' them awaiting the outcome of the SCR Phase.

Modification Proposals raised during an SCR Phase which are linked to the SCR topic will be subsumed. If a Modification is subsumed it will 'freeze' in the Modification Process until the conclusion of the SCR Phase. Once the SCR phase is complete the Modification will re-enter the change process (unless the proposer believes their issue has been addressed by the SCR and they withdraw the Modification). The intention is to subsume those Modifications that are linked to the SCR topic to prevent the same work being done under the BSC and the SCR. If Ofgem believes a Modification is not linked to a SCR then they may declare it exempt and it will progress through the Modifications Process as normal.

### Alternative Solution

The Alternative solution that the Group has developed would expand the scope of the P264 Proposed Modification to include all SCR subsumed or suspended Modifications that are re-entered into the change process following the conclusion of the SCR Phase.

Any Modification that is Subsumed or suspended will automatically require a two-thirds majority Panel vote.



### Recommendation

Modification Group recommends approval of the P264 Alternative Modification.

## Other Potential Alternatives?

The Group discussed 3 other potential alternatives which were later discarded. Details of these can be found in Attachment B.

## 5 QC Advice

As part of the assessment of P264 the Group sought external Legal advice from a QC. The Group wished to understand the interaction between the Statutory Instrument, the BSC and P264. The full QC advice is attachment A to this document and contains views for both P264 and CAP190 (a similar proposal raised under CUSC).

The Group initially asked 5 questions of the QC. These are summarised below:

Q1. What is the meaning of 'a majority' under Articles 5 of SI 2005/1646?
The meaning of "majority recommendation" is a recommendation made in accordance with the votes of more than half the total number of votes cast by Panel Members.
Q2. Can the definition of a majority be changed in the BSC as proposed under P264?
Yes you could. However, it would not change the meaning of "majority" in the SI. The effect of such a change on the right to appeal is summarised in answer to question 3 below.
Q3. If P264 were implemented, 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) but a simple majority voted in favour of a Modification?
Yes, because the SI only excludes the right of appeal where Ofgem'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.
Q4. If P264 were implemented certain proposals would require a two thirds majority vote, whereas other Proposals would only require a simple majority vote (i.e. 50% or more), would this inconsistency cause any issues?
No.
Q5. Given the differences in the change processes set out in the BSC and CUSC, does your advice differ in any way with respect to P264 and CAP190?
Yes, due to the drafting of the CUSC, the proposed CAP190 is not possible in its current format and it would not meet the stated objective..

### Follow up questions

The Group followed up the QC's advice with a further three P264 related questions. These are summarised along side the answers below.

Q1. Would the proposed P264 amendments be likely to stand the test of a Competition Commission appeal if they were implemented in the Code? Our concern is introducing a process into the Code that has less than 50% chance of being upheld when challenged.
Yes, it would be robust to challenge.
Q2. The response to question 3 above means that if Ofgem rejects a Modification, regardless of whether or not there has been a majority recommendation to approve by the Panel, it is appealable to the Competition Commission. Is our understanding correct?
Yes. The wording of the SI allows for any rejected Modification to be appealed to the Competition Commission. However, the supporting documentation available which clearly states that this was not the intention of the SI would mean that such an appeal would be unlikely to be accepted.
Question 3. Would any of the Alternatives alter your advice?
No. They are all viable changes.



### **Appeal all rejected Modifications?**

As noted in the questions above the Group queried the QC's advice that any rejected Modification, regardless of Panel majority vote, could be taken to the Competition Commission for appeal.

This view seemed contrary to the current industry understanding of the circumstances in which a right of appeal arises. It is currently believed that an appeal may only be made to the Competition Commission when Ofgem has made a determination on a Modification that is counter to the majority recommendation of the Panel i.e. the majority of the Panel recommends approval and Ofgem rejects or via versa.

This is based on the DTI's response to the consultation on the draft order for the Energy Act 2004 which states "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 further supported by 5 (i) of SI 1646 which states and appeal is excluded if "...the decision consists in giving of a consent to a majority recommendation made by the Panel..."

After discussing this issue with the QC they believed that the SI could be interpreted to allow an appeal any decision to reject. 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.

The Work Group has since contacted DECC to get their opinion on this matter. DECC has responded indicating that resource and workload means they do not have the time to look into this issue at the present and that consideration should be given to how vital these changes are.

## 6 Impacts & Costs

### Costs

ELEXON Cost	ELEXON Service Provider cost	Total Cost
£1,200 (5 Man Days)	£0	<b>£1,200</b>

### Impacts

#### Impact on BSC Systems and process

None identified

#### Impact on BSC Parties and Party Agents

None identified

#### Impact on Transmission Company

Modification Proposals raised will be subject to a two-thirds majority Panel vote.

#### Impact on ELEXON

Change Management to support the BSC Panel and ensuring correct process.

#### Impact on Code

Code section	Potential impact
Section F	To allow for the new processes as defined above

## 7 Implementation

The P264 Group recommend an implementation approach of **10 Working Days** following an Authority decision

The Group also propose that P264, if approved, should only apply to Modifications raised after the implementation date of P264 and would not impact those Modification Proposals already in the process.



### Recommendation

Modification Group recommends approval of the P264 Alternative Modification.

Whilst the P264 Group believes that both the Proposed and Alternative Modifications should be approved; the Group's **unanimous** recommendation is that P264 Alternative **will better** facilitate the achievements of the **Applicable BSC Objectives (a), (c) and (d)**.

### Is P264 Proposed better than the current arrangements?

The majority of the Group believed that P264 is better than the current arrangements. They did so because they felt the Proposed Modification would better facilitate:

#### Applicable BSC Objective (a) as:

- National Grid is obligated under their license to raise SCR changes. If there is certainty that such changes can be appealed they are better delivering their licence obligation, providing safe guards for themselves and others. This is more efficient hence better facilitates Applicable Objective (a); and
- If National Grid fulfils its License obligation by having Licensee raised SCR Modifications recommended for approval by a two-thirds majority, Parties are less likely to appeal the decision and therefore National Grid would have completed their obligation in the most efficient way.

#### Applicable BSC Objective (c) as:

- Minority industry views are better able to influence a Panel if two thirds of votes cast are required;
- The BSC is a contract. P264 would better protect Parties' rights to appeal when there is a change to that contract which may discriminate between Parties;
- Small Parties may not have the time and resource to become involved in SCRs. P264 would safeguard their right to appeal SCR changes;
- Keeping the appeals route open would make it easier for Parties to enter the market as there is certainty that Parties can appeal;
- Ensuring that sufficient checks and balances exist results in a more robust governance process and therefore encourages greater investor strength within the market; and
- Providing a strong Panel view to Ofgem helps makes issues clear and safeguards interests of the majority view of the industry.

#### Applicable BSC Objective (d) as:

- Appeals route to the Competition Commission better protected, providing certainty over process; and
- Ensuring greater support in order to recommend complex/contentious modification proposals might result in fewer legal challenges to such proposals thereby leading to greater efficiency in implementing changes to the BSC.

One member of the Group did not believe that P264 Proposed Modification was better than the current arrangements. They believed that subjecting Modifications raised by National Grid to a two thirds majority vote was second guessing where a Party would raise an appeal. They felt it was more likely that a party may choose to raise an appeal where it considers that it has a strong case and the impact on its business warrants the costs and effort of doing so.

The member was also unconvinced that having only one additional vote to secure the two thirds majority required would not make much difference in practice, and only represented a marginal difference from the current process.

Overall this Group member felt P264 was neutral against the Applicable Objectives; as it was not better than the current arrangements, but equally was not detrimental to them.

### **Is P264 Alternative better than the current arrangements?**

The Group **unanimously** believed that P264 Alternative is better than the current arrangements for the same reasons as outlined above.

The Group noted that the intent of P264 had been to capture 'Licence originated' Modifications. However, including those Modifications that have been suspended or subsumed (and therefore proven to relate to a SCR) would be a sensible addition to the proposal. It would mean that all Modifications relating to a SCR would be treated equally and would therefore remove any perceived discrimination against proposals raised by National Grid. Many of the Group felt that the Alternative proposal was a more logical solution and was more efficient way of protecting Parties' rights of appeal.

Overall the Group noted that it would be beneficial to include subsumed and suspended Modifications as:

1. Subsumed or Suspended Modifications will be seeking to address the same issue and defect as the Licensee raised Modification following the SCR Phase. Since the Modifications will be seeking to address the same issue they should all be treated consistently, to treat them differently would not be an efficient or fair process;
2. There is a potential that Ofgem could request National Grid or another Party to raise a Proposal to tackle the SCR issue before the end of the SCR Phase in order to avoid coming under the provisions of P264. Similarly another Party, on their own accord, could raise a change before National Grid had a chance to raise their SCR Modification simply to avoid the two-thirds majority vote at the Panel

### **Proposed vs. Alternative**

The Group **unanimously agreed** that P264 **Alternative better facilitated the Applicable Objectives** when compared to the Proposed.

In addition to those views against the Applicable Objectives stated under the P264 Proposed Modification above, the Group believed that P264 Alternative would better facilitate **Applicable BSC Objective (d)** as:

- It is the most efficient method of ensuring that Parties right of appeal are open when licence related Modifications are progressed.

## 9 Recommendations

The P264 Modification Group invites the Panel to:

- AGREE an initial recommendation that P264 Alternative Modification should be made;
- AGREE an Implementation approach of 10 Working Days following an Authority Decision, and that P264 should only apply to Modifications raised after the implementation date;
- AGREE the draft legal text;
- AGREE that Modification Proposal P264 be submitted to the Report Phase; and
- AGREE that ELEXON should issue P264 draft Modification Report for consultation and submit results to the Panel to consider at its meeting on 12 May 2011.

## 10 Further Information

Attachment **A**: Legal Advice from the QC.

Attachment **B**: Discarded Potential Alternatives

Attachment **C**: Proposed Modification Legal Text

Attachment **D**: Alternative Modification Legal Text

All related documents can be downloaded from the [P264 page](#) of the ELEXON website.

**BSC MODIFICATION PROPOSAL P264**  
**CUSC AMENDMENT PROPOSAL CAP190**

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**ADVICE**

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**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.

Ofgem Code Governance Review

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 Panel<sup>1</sup>, 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

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<sup>1</sup> 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. They 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**

What stage is this document in the process?

01 Initial Written Assessment

02 Definition Procedure

03 Assessment Procedure

04 Report Phase

## Attachment B: P264 Discarded Potential Alternatives

This is Attachment B to the Assessment Report. This attachment provides additional details on the potential alternative solutions which were discussed by the P264 Group, but later discarded.

To help simplify the requirements of the alternatives not taken forward, the following table highlights where a two-thirds majority Panel vote would be required.

		P264	P264 Alt	Alt 1	Alt 2	Alt 3
Transmission	Before SCR Phase			X	X	X
Licensee	During SCR Phase		X	X	X	X
Modifications	Post SCR Phase	X	X	X	X	X
Raised:	Anytime					X
All Parties	Before SCR Phase				X	X
Modifications	During SCR Phase		X		X	X
Raised:	Post SCR Phase		X		X	X
	Anytime					X

### 1 Potential Alternative 1

#### Potential alternative 1 - All Modifications raised by the Licensee before, during and after an SCR

As noted in the main body of the assessment report, P264 Proposed solution includes only those Licensee Modifications raised at the end of an SCR Phase. Potential alternative 1 would have expanded this to include any Modifications raised by the Licensee that are Subsumed or suspended during a SCR Phase.

Furthermore, for any Transmission Licensee Modification raised before an SCR phase, that has not yet been subject to a final Panel recommendation, the BSC Panel shall decide whether or not such a Modification relates to an ongoing SCR. If the Panel decides that it does relate to an ongoing SCR then the Modification Proposal will be subject to a two-thirds majority vote. If the Panel decides that it is not related then the usual simple majority vote shall apply. This Panel decision may take place at any time up until its final recommendation.

#### Group's initial view

The majority of the Group thought that extending the provisions of P264 to cover all Licensee raised Modifications relating to an SCR would be beneficial as:

- P264 would cover the situation where the Licensee has raised a Modification as a result of an SCR conclusion. However, it would not cover any Modifications raised by the Licensee before or during an SCR which could potentially tackle the same issue. For completeness a two-thirds majority vote should apply to any Modifications raised by the Licensee relating to an SCR not just those raised at the end of the SCR Process.
- The Licensee is the most likely Party to be asked or directed by Ofgem to raise a Modification Proposal. Expanding the P264 arrangements would ensure that if Ofgem or the Licensee wish to short cut the SCR process, by raising a Modification before the SCR conclusion, then such a Modification would also be subject to a two-thirds majority Panel vote.

A minority of the Group felt that this was not a suitable alternative as it could prove potentially discriminatory against any changes raised by National Grid during an SCR.

Concern was also raised that the SCR process had been developed such that Modifications raised before an SCR would follow the normal Modification process and not be automatically affected by an SCR. The reason for this being that amending the process a Modification would follow after it had been raised, was not a transparent process. As such changing the voting arrangements for pre SCR Modifications would appear to run counter to the principle of not amending the process to be followed by a Modification after it has been raised.

### Group's Conclusion

The Group agreed not to progress Alternative 1 as they felt that including Modifications raised prior to an SCR would be retrospectively applying Modification rules to a Proposal that was already in the Process, i.e. to raise a Proposal under one set of rules and assumptions and then to change these rules and assumptions once the Proposal has been raised.. This was not only poor governance in terms of consistency and certainty of approach, but it was counter to the principles discussed under the introduction of SCRs during the Code Governance review. Some Group members also felt this was discriminating against National grid Modification Proposals.



#### Pending Modifications

Pending Modifications are those Modifications which the Authority has not yet made a decision to approve or reject.

It includes all Modifications in assessment, in Report Phase or awaiting decision with the Authority.



## 2 Potential Alternative 2

### **Potential Alternative 2 – All Modifications, whether raised inside or outside of an SCR Phase, that seek to address the same defect as an SCR**

In addition to any Modification that has been subsumed or suspended potential alternative 2 would also include those Modifications that relate to the SCR but which have been raised outside of an SCR phase; albeit before or after.

For any Modification raised before an SCR phase, that has not yet been subject to a final Panel recommendation, the BSC Panel shall decide if as to whether or not such a Modification relates to an ongoing SCR. If the Panel decides that it does relate to an ongoing SCR then the Modification Proposal will be subject to a two-thirds majority vote. If the Panel decides that it is not then a normal majority vote shall apply. This Panel decision may happen at any time up until their final recommendation.

Any Modification that is Subsumed or suspended will automatically require a two-thirds majority Panel vote.

For any Modification raised after an SCR Phase the BSC Panel shall decide whether or not such a Modification relates to a Pending SCR Modification (i.e. any Modification raised by the Licensee as a result of an SCR conclusion). If the Panel decides that it does relate to an ongoing SCR Modification then the Modification Proposal will be subject to a two-thirds majority vote. If the Panel decides that it is not, then a normal majority vote shall apply. This Panel decision may happen at any time up until their final recommendation.

### **Group's initial view**

The majority of the Group thought that it would be beneficial to include these additional requirements as:

- It is not just National Grid that may 'jump the gun' during or before an SCR Phase. Including all Parties would ensure that no such changes could be progressed without being subject to a two-thirds majority vote.
- Ofgem may ask or direct other Parties apart from National Grid to raise Modification Proposals in order to get SCR changes in place quickly. These provisions would ensure such changes were subject to a two-thirds majority vote.

Some of the Group questioned the benefits of including these requirements. An argument was raised that this was potentially catching all Parties; adding additional frustration and complexity to the change process for those who were raising changes that had nothing to do with Ofgem direction. Other Group members felt that such an inclusion was outside the scope of the Modification. They believed that P264 was seeking to address License obligated Modifications raised by the Licensee. Adding additional constraint on all Parties could unintentionally slow down the process when it should be about trying to maintain the rights of appeal.

### **Group's Conclusion**

The Group agreed not to progress Alternative 2 as they felt that, similar to potential alternative 1, a solution which included Modifications raised prior to an SCR would be retrospectively applying Modification rules to a Modification proposal.

This solution would also rely on the BSC Panel, and ultimately Ofgem, making a decision on which Modifications would relate to an SCR; therefore the Panel would be deciding (by

a majority) vote which proposals would undergo a two-thirds majority vote at the end of the process. This did not seem a robust approach.

### 3 Potential Alternative 3

#### **Potential alternative 3 – Requirement to state where all Modifications originate**

Potential alternative 3 would place a requirement on Parties to state if they have been requested by Ofgem to raise a Proposal. It would also obligate Ofgem to state in an open forum where they have requested a Party to raise a Proposal.

The Modification Proposal Form would be updated to include a section which requires Parties to state if Ofgem had directed, instructed or requested them to raise the Proposal. This would be mandatory to complete.

Additionally, an obligation would be placed on the Panel to ask Ofgem, at the Panel meeting where the Modification Proposal is first presented, if they had directed, instructed or requested the raising Party to raise the change.

#### **Group's initial views**

A minority of the Group felt that it was not only the Transmission Company who may be directed, instructed or requested by Ofgem to raise change, and that there was potential for Ofgem to approach other Parties. Therefore, they believed that this potential Alternative had merit as it would cover off all Parties who had the ability to raise changes to the BSC, not just National Grid. They also believed that having both Parties and Ofgem publicly stating the reasons to why a change has been raised, and the level of Ofgem involvement, would ensure honesty. Such a public statement could also be used as evidence in court if it became necessary to do so.

The majority of the Group believed that such a process would be very hard to 'police' and that it would be difficult to prove if a Party had been requested or instructed by Ofgem to raise a change. Some Group members also felt that under such a solution it would place those Parties who had had conversations with Ofgem, when forming their Modification, in a difficult position. A Party who had spoken to Ofgem when drafting a Proposal to seek their views might be seen as colluding with Ofgem, when in fact it was an innocent conversation asking for the input of Ofgem.

Some Group members also felt that this would be out of scope of P264. This potential alternative solution would not focus on License obligated Modifications, but would instead encompass all Modification Proposals raised by all Parties. This was not the intention of P264 and it was felt by many to not address the defect identified.

#### **Group's Conclusion**

The Group agreed not to progress Alternative 3 as they felt that it included all Modifications, even those that did not relate to Licence obligated changes and therefore was out of scope.

Even if it only applied to those Modifications that were related to a license obligated Modification the Group again raised the issues of retrospectively changing arrangements and that it may cause Ofgem to disengage with the process.