ELEXON

P264 'Two-thirds majority requirement for Panel recommendations on licence originated Modifications' Consultation Responses

What stage is this document in the process?

01 Initial Written Assessment

02 Definition Procedure

03 Assessment Procedure

04 Report Phase

Consultation issued on 18 May 2011

We received responses from the following Parties

Company	No BSC Parties / Non-Parties Represented	Role of Parties/non-Parties represented
SmartestEnergy Limited	1/0	Supplier/ trader/ consolidator
Wyre Power	0/3	Wyre Power – developing a 900MW gas fired generator Nevis Power – developing a 49MW biomass plant Leven Power – a STOR plant
EDF Energy	10/0	Supplier/ Generator/ Trader/ Consolidator/ Exemptable Generator/ Party Agent
Scottish and Southern Energy	9/0	Supplier/ Generator/ Trader/ Consolidator/ Exemptible Generator
IBM (UK) Ltd. (for and on behalf of ScottishPower)	7/0	Supplier/ Generator/ Trader/ Consolidator/ Exemptible Generator/ Distributor
E.ON UK	6/0	Supplier/ Generator/ Trader/ Consolidator/ Exemptable Generator
Centrica	11/0	Supplier/Generator/Trade
Drax Power Limited	1/0	Generator

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Question 1: Do you agree with the Panel's view that neither the Proposed nor Alternative Modification should be approved?

Summary

Yes	No	Neutral/Other
0	8	0

Responses

Respondent	Response	Rationale
SmartestEnergy Limited	No	Whilst it is true that this modification will not make a massive difference it is still a step in the right direction. If nothing else this modification should be approved to highlight the concerns the industry has for the "judge, jury and executioner" role which Ofgem has.
Wyre Power	No	The SI on appeals was put in place to ensure that companies could appeal modification decisions. At the time Government consulted on their proposals there were no such things as SCRs and the focus of the consultation run by Government was about keeping regulatory decisions robust and focussed. In a world where the regulator can effectively raise and then implement a code modification the need for the appeals route to be held open becomes more important. We do not believe that the modifications makes appeals more likely (as they remain costly and onerous on parties), but it should incentivise robust decision making by Ofgem not only on modifications, but through the SCR process. The Panel should help parties reduce regulatory risk by holding open the appeal route on as many controversial modifications as possible. It would appear that raising the hurdle for the appeals route to stay open protects the interests of all parties. For example, where an SCR modification results in a tied panel then the chair will have the casting vote. For all of the expertise the chair may have, he/she may not be aware of many finer points discussed in meetings. One could argue that the Chair should always vote to maintain the status quo, thus keeping appeals open, but there is no firm obligation on the chair to do that. We understand that there has been a concern that there could be some form of voting that blocks smaller parties rights of appeal under this modification. We do not believe that in the case of SCR type of changes that the Panel would tactically

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Respondent	Response	Rationale
		vote to try and stop appeals, but they may have very legitimate reasons for having different views on an SCR modification. This modification would help maintain the right of appeal more often than not, thus providing more incentive on Ofgem to make robust, transparent decisions to the benefit of all parties. The modification would therefore be an improvement over the baseline. As a small party we have become increasingly concerned that it is difficult for us to judge the impact of modifications until towards the end of the development process and we do not envisage being well enough resourced to attend all the meetings involved in an SCR. This does not mean that we would not be significantly impacted by for example, a change in cash-out or transmission charging. We would therefore be more comfortable if we were more likely to be able to appeal decisions as a last resort if necessary. We appreciate that there is no reason why two-thirds majority should not apply to all modifications and this was discussed in the group. However, our key concern is the SCR process as the policy development, unlike other modifications, is driven by Ofgem. While the SI appears (according to the legal advice) allow more appeals than we believe Government had originally intended, there is a balance to be struck between appeals on everything and some protection of parties rights in relation to binding contract they are forced to operate under. The modification and the alternative both aim to protect the right of appeal in limited circumstances, which seems a sensible, evolutionary improvement in light of the SCR policy developing. Wyre Power did support the attempt by the group to get DECC to alter the SI as this we agree is the best route. However, as DECC said they did not currently have the resources to address this issue we believe that the industry is being responsible in its own moves to protect parties rights. We note that in the case of the CUSC, DECC's view appeared to be the industry should sort out the problems via its own governance processes. As the SI simply sets appeal rights into law, firming up the rights seems in line with the intent of the SI. We can see no reason why DECC would object to such a move, and in fact did not do so in responding to the letter sent to them asking for an SI change.

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Respondent	Response	Rationale
		We recognise that the issue has arisen outside the code, but disagree that the code should not change to accommodate external issues. The SCR process was raised by Ofgem, and the codes must respond to issues raised by regulators, as well other codes and regulations. This has been seen in changes on reporting generator output (in response to the LCPD), changes to accommodate new interconnectors, inter-trip changes, etc… The Panel member who suggested that Ofgem may reject a modification arising from an SCR, along with the Panel recommending rejection due to P264, seems like a very unlikely scenario. The whole point of the SCR process is to allow Ofgem to promote changes it supports. If it ends up rejecting a modification that it designs then its SCR process will have been a waste of resource. As a market participant we believe such a risk is low, where the risk of losing the right of appeal on SCR issues is a more material risk. We also disagree that Ofgem does not gain from the outcome of an SCR. Ofgem has a history, notably in gas, of forcing through changes that the market does not want for its own intellectual reasons. It also has an incentive to create a regime that "needs" a regulator. The ability to undertake SCRs in the first place looks like an Ofgem job creation scheme, as parties wanting changes to say cash-out can raise cash-out modifications, they do not need a SCR to implement change. Ofgem's recent positions on the EDCM charging methodologies also suggests a general unwillingness to change their minds, so can push forward changes because they originally said they would even when analysis suggests the original preposition was wrong. The ever expanding and tinkering nature of Ofgem makes parties rights of appeal more important now than ever. Even if the modification makes only some Ofgem decisions more robust that will be an improvement. The Panel is right to express concerns about reports being one-sided or not reflecting the range of views that may exist between industry members. However, in the case of the working group there was little said that was against the proposal. This was a reflection of the modification simply protecting rights of appeal rather than making any substantive changes to the BSC. For all parties changes that incentivise robust, transparent decisions will help them manage regulatory risks. Ofgem had also made it clear in its

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Respondent	Response	Rationale
		SCR consultations that it saw no problem with raising the voting threshold if that was to offer comfort to parties. In terms of the applicable objectives, we believe that (c) is enhanced by the modification as it protects the rights to appeal notably of parties who may not have been able to participate in the SCR process. Thinking of NETA go-live where only the big companies participated in the design of new trading systems (single vs dual notification) the ability of small parties to appeal may have encourage smaller parties, less able to manage notification risks, to challenge that decision. We do not know if similar issues may arise under SCRs, but we suspect that they might. The fact that such powers are used irregularly seems irrelevant, as the Panel only has to decide that the modification is better than the baseline, not the best solution available. Competition is also enhanced if all parties understand the regulator's thinking because all decisions are clear and robust. If Ofgem is incentivised to make robust decisions small parties do not have to be concerned that bigger players are meeting Ofgem staff, CEO, etc. at dinners, conferences and private meetings to get a better grip on what the regulator is up to. A well argued and debated position is in some ways of greater value to small players than larger ones. Ofgem is a big fan of incentives. This modification places an incentive on Ofgem to regulate well. The better they regulate the more efficient the development of the market will be. Administration of the SCR implementation process should also be more efficient if Ofgem are striving towards delivering workable modifications that implement the intent of the SCR outcome, having clearly explained to parties what the SCR modifications are trying to achieve. We therefore believe that the modification is an improvement over the base-line when considering the objective (d). Finally, experience in gas is that Ofgem has used licences to push forward policy. If the transmission company is to be obligated to raise modifications as a result of an SCR then it will be more likely to raise well considered, robust changes if it knows they can be appealed. This would meet objective (a). The transmission company would be more inclined to work with the market to define modifications, etc. if it stood to have to participate in an appeal if the modification

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Respondent	Response	Rationale
		was not as the market had envisaged from the SCR.
EDF Energy	No	EDF energy continues to believe that both the Proposed and the Alternative Modification better meet the applicable BSC objectives compared to the baseline. Both proposals would better facilitate Objective (c) as they would deliver enhanced checks & balances within the governance process in respect of modifications that are proposed following a direction by the Authority. The proposals will potentially keep the appeals route open to parties in respect of modification proposals that might be complex and potentially contentious resulting from a Significant Code Review (SCR). These proposals should promote regulatory scrutiny and thereby increase market and investor confidence in the governance process. Furthermore, the proposals may better facilitate the achievement of Objective (d). 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. We do not support the view of some Panel Members regarding the quality of the assessment of the proposal. Greater checks and balances in the governance process in respect of modification proposals imposed on the industry from the regulator was a significant issue that was identified during the development of the significant code review process. In fact Ofgem itself had identified that a change to the voting arrangements could allay fears in respect of Ofgem imposing the raising of modifications and ultimately determining upon them. We accept that changes to the statutory instrument would be the ideal method of resolving the defect identified. However, it is clear that there is currently no appetite from DECC to address this issue in the short term. Consequently, we see no reason why a modification to the BSC should not proceed on the basis that it better meets the BSC objectives compared to the baseline. Furthermore, it may be that this proposal is not the optimum solution, however, the assessment by the Panel should be based on whether the proposal and its alternative are an improvement to the governance process and better than the code baseline.
Scottish and Southern Energy	No	We note the comments on pages 12- 17 regarding the Panel's initial discussions.

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Respondent	Response	Rationale
		With respect to **Interaction with the Statutory Instrument** whilst we appreciate the desirability of changing the statutory instrument it is clear, from the Code Administrators engagement with DECC, that they will not be forthcoming on this matter in the near term. In this regard we are also mindful of the comments from DECC that, if possible, this matter should be addressed by way of a change to the code itself (as P264 would do) rather than via a change to the SI. Given this unequivocal guidance from DECC on this matter we are content that P264 is the correct way to proceed (rather than allowing the defect to reside in the BSC until such time as DECC have the time to address it) as the BSC community has the clear ability to address this defect (via P264) in a timely manner. With respect to **Due consideration** and the *robustness* of P264 we consider it to be both proportionate and robust. It is not, in our view, a rushed response, but rather a pragmatic solution to a clearly established defect which has been clearly shown not just by the proposer and the workgroup but also by the learned contribution from the QC. With respect to the *perceived defect*, we beg to differ with the Panel member in question. We believe there is a clear defect which arises with an SCR and this could include the perception of a 'conflict of interest' (and this was accepted by Ofgem in the Code Governance Review documentation – as noted in the P264 original proposal form). P264 provides a 'check & balance' on the body (Ofgem) that has determined, perhaps contrary to the majority of stakeholders, that a change should be directed in that it increases the possibility of an appeal being lodged in that SCR situation. However, P264 does not guarantee that an appeal (a) will be lodged or (b) be successful and it is important to reflect that the cost (for a BSC Party) to make a Competition Commission appeal is substantial and they are not certain that the Commission will, in fact, accept their appeal or will 'adjudicate' in their 'favour' given the remedy options available to the Commission. As an aside on the matter of a *conflict of interest'* we are mindful of the guidance provided to Parliament by the Standards Commission as regards 'perception' – the guidance being that its not that there is (or is not) an actual 'conflict of interest' but rather that a person

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Respondent	Response	Rationale
		might reasonably perceive there to be one. Given the substantial responses (by BSC Parties and others) to Ofgem's Code Governance Review on this matter it is clear that there is a significant number of BSC Parties who (correctly or not) perceive there to be a 'conflict of interest' where Ofgem gives rise to the SCR, decides upon the conclusion of that SCR, directs that a (BSC Modification) code change be raised and then decides on that code change proposal – this was summarised by some of those CGR responses as Ofgem acting as 'judge, jury and executioner'. With respect to **Interaction with other Codes** we agree with Ofgem on the merit of having consistency across the Codes and note that the issue delaying the equivalent CUSC change is not to do with the merits or otherwise of that equivalent change (CAP190) but rather the matter of the possible confusion over what is or is not the 'recommendation' of the CUSC Panel (which only came to light with the legal advice from the QC on P264 and CAP190). With respect to the **Concerns over the Group** discussions we note the comments regarding the Workgroup debate being one sided. However, we are mindful that if there was a lack of counter arguments / views provided by the Workgroup that this was also echoed in the consultation responses by BSC Parties. This could suggest that there were, in the view of Workgroup and BSC Parties, no credible counter arguments / views to P264. If this was the case then we would not wish the Workgroup to 'invent' counter arguments / views just in order to put 'something' into their report. We note the comments regarding 'majority' and 'minority' industry views and agree that all comments (irrespective of where they come from) should be considered by the Workgroup and the Panel, and the case for change judged on its merits. However, we are also mindful that the BSC is a multilateral commercial contract between industry alone – only BSC Parties are parties to this contract and thus their views should, in our view, be paramount as they are directly affected by the proposed change. With respect to the **Views against the Applicable Objectives** we have the following observations against the comments provided:-

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Respondent	Response	Rationale
		the majority of the Panel did not believe that sufficiently robust arguments had been made demonstrating that this Modification (Proposed or Alternative) better facilitated the Applicable Objectives when compared to the current baseline. We hope that the arguments we have put forward in this response are robust enough to demonstrate to the satisfaction of the Panel that P264 would better facilitate the applicable objectives. *The substantive defect lies outside of the BSC and as such there is no reason to amend the current arrangements* The defect can be rectified within the BSC and the party able to rectify the fault out with of the BSC; namely DECC; has clearly expressed a desire for it to be rectified by way of changing the BSC, rather than the SI, if that is possible (which it is via P264). As an aside it could perhaps reflect poorly on the BSC community as a whole if DECC came to the view; because the change is not taken through via the BSC code change process; that the BSC community is unable to perform the task (of code changes) as well as the Department and it predecessors envisaged. This perception of a deficiency in the ability of the BSC community with DECC would, if it came to pass, be, in our view, a sad state of affairs. *P264 is not the best solution, it does not fully address the issue identified. In order to do so you need to amend the SI not the BSC.* As noted above, and supported by DECC, you do not need to amend the SI as you can achieve a solution to the defect via the BSC. *It is anticipated that there will not be a large number of SCRs, so the impact of P264 would be small. Even if SCRs were more frequent occurrences than envisaged, the majority of Panel members do not see how this slight amendment would make a material difference. So any potential benefit is too marginal.* We fundamentally disagree with this on three grounds. Firstly, we do not accept that the impact would be small on BSC Parties as the subject matter of the SCR (that would give rise to the SCR Modification(s)) is, as Ofgem has acknowledged, substantive. For example, Ofgem has indicated that a possible future SCR could be on the matter of 'cashout'.

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Respondent	Response	Rationale
		Given the impact / implications of even a single (cashout?) SCR modification on BSC Parties we believe that whilst the occasion on which it might apply may well be few in number the impact that P264 would provide could be substantial. Secondly, we do not accept the sentiment of this comment, namely that because the impact would be small it should not be made as the potential benefit is too marginal. Given that the cost of this proposed change, according to section 6 of the report, is only £1,200 this seems a very small price to pay to clarify an area of the BSC (and code governance) which the responses to the earlier Workgroup consultation (as well as those to the Ofgem Code Governance Review) bear witness to is of clear interest to BSC Parties. Thirdly, this argument appears to be based on a false prospectus, namely the analysis on pages 15-17 ("Does P264 make a difference") in that it assumes that P264 would apply to all (40) Modifications; from 'trivial' housekeeping type changes to wholesale reform (such as 'cashout'?). The analysis on pages 15-17 is interesting but misses the fundamental point that P264 only applies to SCR related Modifications (depending on whether the original or alternative is implemented) and SCR matters are, by there very nature, on matters of substance (hence why few are anticipated each year). *P264 is second guessing where a Party would raise an appeal. Appeals are expensive and its 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.* In our view P264 is no more second guessing where a Party might appeal than the SI itself does. Both 'permit' the raising of an appeal to the Competition Commission, but that does not mean they will be forthcoming. In this regard we are certain that Elexon can provide the Panel with the number of times, since the appeal right came into effect, that it could have been used by BSC Parties, noting that it has never actually been used, yet, for a BSC Modification (although one appeal was submitted and subsequently withdrawn). It is correct to say that the cost of appeals are expensive (and will not therefore be entered into lightly – noting also that trivial / vexatious appeals can

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Respondent	Response	Rationale
		be rejected out of hand by the Competition Commission anyway). However, it is equally correct to note that the subject matter of an SCR will be, by its very nature, substantive and could have profound commercial implications for BSC Parties (such as a radical change in the cashout arrangements?). Given this BSC Parties are more likely to appeal an SCR Modification decision than a 'standard' Modification decision. *A minority of the Panel believed that P264 would be **detrimental** to **Applicable BSC Objective (c)** as they believed that introducing this threshold could potentially lead to Panel recommendations not being based on merit decisions, but on whether or not to keep the right of appeal open* We do not accept this argument. However, if we take it on its merit then it equally applies today (without P264) where any Modification is before the Panel and the Panel recommendation were not be based on the merit decision but on whether or not to keep the right of appeal open (vis a vis the greater than half majority threshold in the BSC today). If this risk exists (which we doubt) then P264 does not 'create it' (as it exists today) and therefore we do not believe this would be detrimental to Applicable Objective (c). For the avoidance of doubt we wish to import; into our answer to this Question 1; the (Panel) Arguments for the Proposed and Alternative as set out at the bottom of page 14 and top half of page 15 (see below*) as we agree wholeheartedly with them. In conclusion, based on the arguments set out in our response to this Question 1, we do not agree with the Panel's view that neither the Proposed nor Alternative Modification should be approved. In our view both are worthy of being approved. * **Arguments for the Proposed and Alternative** The minority of the Panel believed that P264 introduced the appropriate checks and balances, and that both Proposed and Alternative **would better** facilitate **Applicable BSC Objectives (a), (c) and (d)**. **Applicable BSC Objective (a)** as:

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Respondent	Response	Rationale
		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, P264 Draft Mod Report 18 May 2011 Version v1.0 Page 15 of 17 © ELEXON Limited 2011 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 its obligation in the most efficient way. **Applicable BSC Objective (c)** as: 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; and Ensuring that sufficient checks and balances exist results in a more robust governance process and therefore encourages greater investor strength within the market by providing regulatory certainty. **Applicable BSC Objective (d)** as: The appeals route to the Competition Commission is 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.
IBM (UK) Ltd. (for and on behalf of ScottishPower)	No	We continue to agree with the group that both the Proposed and Alternative Modifications are better than the baseline, and both would aid achievement of the following objectives: Objective a) ensuring that the process is open, clear and transparent to all will help National Grid better achieve Objective a. By setting a higher standard in cases where a contentious decision is to be made, the likelihood of appeal is reduced, ensuring a more efficient operation of the Licence. Objective c) Parties, especially smaller Parties, will be reassured that their right to Appeal has been

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Respondent	Response	Rationale
		reinforced. New entrants, likewise, can be reassured that large and contentious changes will not be sprung on them without more consideration and work being done in the analysis and decision making phases. This is one of the factors key to ensuring that investment can be safely made and maintaining stability.
E.ON UK	No	The importance of modification appeal rights has long been acknowledged by government and the Authority and this suggestion to help safeguard such rights by changing the Panel voting threshold even made by Ofgem themselves. While we see the Alternative as preferable to the Proposed, we agree with the Workgroup and respondents to the Assessment Consultation that approving P264 Proposed or Alternative would help safeguard appeal rights for the most contentious modifications. Where modifications have been directed by Ofgem, not voluntarily brought forward by a Party, it is vital that Parties' rights to appeal such modifications are protected as much as possible. P264 would thus aid transparency, efficiency and accountability, supporting BSC Objectives (a), (c) and (d), and at low cost. Hence we believe it should be approved. The recent changes to enable SCRs effectively place the Authority in the role of "judge, jury and executioner"; it would be good governance to introduce checks and balances to ensure that any such body could not raise and decide upon a change without the right to appeal being maintained. Ensuring that a proposal only received the Panel's recommendation if supported by 2/3 of voting members would maintain Parties' right to appeal the implementation of any such directed modification that had not achieved this level of Panel support. The knowledge that Panel recommendations would only be made and thus appeals only disallowed if a proposal had strong support from the Panel would reduce regulatory risk and the perception thereof. Though the cost of making an appeal is always likely to deter Parties from doing so, it is desirable to keep this option open particularly for proposals such as those resulting from SCRs where a resultant modification proposal "is likely to have significant impact" (Code Governance Review - Final Proposals March 2010 p13). The fact that a Party could raise an appeal to the Competition Commission should also provide further impetus for robust reasoning and decision-making by the Authority. Such reassurance would reduce risk and increase confidence in the market,

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Respondent	Response	Rationale
		reassuring smaller parties and potential new entrants that the Authority would not force a particular solution on industry that they might not have been able to engage in with no possibility of this being appealed by any Party. Thus we see P264 as having clear benefits under Objective (c). Though we see the primary benefits being under Objective (c), ensuring that a higher threshold of Panel support is required to recommend such contentious proposals, as well as giving more certainty to Parties of the appeal route, may reduce the likelihood of such legal challenges to modifications. By encouraging robust decision-making by the Authority P264 may also increase the quality of code modification decisions when Ofgem are the effective originator of a proposal. This would be a more efficient operation of the Licence and efficiency in the implementation and administration of the BSC will be improved as fewer such decisions will have to be revisited. Thus P264 also supports Objectives (a) and (d). It has been noted that moving to 2/3 majority voting would still mean that one vote could determine whether the Panel made a recommendation to the Authority to approve a proposal; this would still be the case, but it would seem much fairer that the right to appeal implementation of a proposal directed by the Authority would only be removed by achievement of a 66% not a 51% Panel majority. This is particularly so when under the current arrangements a recommendation can be made on the basis of the Chair's vote where the Panel is equally divided on the merits of a solution. Even when the Chair may not be Ofgem-appointed, avoiding a 1% difference of opinion prohibiting an appeal remains desirable. We note that to address concerns about the particular need for appropriate checks and balances to ensure appeal rights for SCR modification proposals, changing the panel recommendation threshold was suggested by Ofgem themselves in their Code Governance Review Final Proposals (p58). QC advice obtained for the P264 Workgroup as summarised in Q3, p7 of the Draft Mod Report, agreed that changing the BSC Panel majority threshold is possible, and would enable implementation of a proposal to be appealed where for instance a 51% majority was achieved resulting in the Panel not recommending said proposal when a 2/3 threshold was required. They also advised that the P264 amendments would be robust to challenge

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Respondent	Response	Rationale
		at the Competition Commission. While changes to the SI are desirable, that is more important to ensure appeal rights under the CUSC and even without SI changes, advice suggests that P264 would help to keep the appeal route open under the BSC.
Centrica	No	As per our response to the assessment phase, we believe that where, in order to get changes proposed (in particular those resulting from an SCR where significant concerns have been raised), Ofgem has needed to compel or obligate a proposer to step forward, then it is essential to take reasonable steps to ensure that all relevant appeal rights are maintained and/or enhanced as appropriate. Centrica therefore supports the Modification Group views on P264 (original) in relation to BSC Objectives (a), (c) and (d).
Drax Power Limited	No	Drax believes that both the Proposed and the Alternative Modification would provide an improvement over the current baseline. **Panel Concerns** A number of concerns were discussed by Panel Members at Panel Meeting 183. This section seeks to provide a response to these issues, along with some additional related arguments. <u>Does the Modification provide the ability to form "blocking minorities" against change / evolution of the code?</u> The Panel (both under the baseline and in a P264 world) cannot "block" any Modification as the Panel makes no decision on the outcome of Modifications; this is the Authority's role. The Panel only provides a recommendation on the approval of a Modification, based upon whether it better facilitates the Applicable BSC Objectives. The intention of the proposal is to ensure that SCR directed Modifications, which are effectively raised by the regulator to address potentially contentious / high impact issues, are subject to a robust governance process. It is the proposer's belief that finely balanced Panel recommendations should not provide an automatic "green light" for a change away from the baseline with no provision for BSC Parties (or other entitled parties) to appeal the decision on the merits of the case via the Competition Commission. This proposal aims to better protect the appeal route. It does not aim to, and in fact cannot, "block" change.

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Respondent	Response	Rationale

		Nor does it aim to encourage a greater number of Competition Commission appeals. The key aim is to ensure that BSC Parties are more confident that the appeal route will be maintained in situations where the result of the Panel recommendation vote is very marginal or "split" for significant code changes.
		
		Why would increasing the threshold by one extra vote make any difference?
		
		It is true that P264 increases the threshold to recommend "approval" by a single additional vote, although it also changes the nature of the threshold by requiring twice as many votes "for" than those "against". This creates a greater signal of support where the threshold is met. This is illustrated below:
		
		- Majority threshold under the baseline:
		  o 6 votes for and 4 votes against would mean a recommendation of "approval": two more Panel Members voting "for" than those "against";
		  OR
		  o 6 votes for and 5 votes against would mean a recommendation of "approval": one more vote "for" than those "against" (i.e. the Panel Chair);
		- Majority threshold under P264:
		  o 7 votes for and 3 votes against would mean a recommendation of "approval": four more Panel Members voting "for" than those "against".
		
		However, as illustrated above, the current baseline could deliver a recommendation of approval where there is only a one vote difference between votes "for" and "against" the approval of a given Modification (covered further in the next section). This means that a single vote (that of the Panel Chair) could close the appeal route for a significant code change should the Authority approve a move from the current baseline.
		
		For the avoidance of doubt, the issue here is not that the Panel Chair is able to vote; the issue is that a significant code change (with the potential to have a high commercial impact on BSC Parties or a class of parties) may be approved with no option to appeal due to the appeal route being closed by a very marginal Panel Recommendation vote.
		
		How would a "split" vote situation be handled?
		
		A further benefit of this proposal is that a Panel recommendation on potentially contentious / high

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Respondent	Response	Rationale

		impact SCR directed Modifications will never result in a "split" Panel recommendation. Under the current baseline, it is possible for the Panel to recommend either approval or rejection when there are an equal number of Panel Member votes for each option. The outcome will depend upon the action of the Panel Chair.
		
		Ofgem's Code *Governance Review – Final Proposals* document noted the following:
		
		"We have noted the concern that the independent chair's casting vote should not be able to determine whether or not an SCR proposal is subject to appeal. We note that a casting vote is only relevant where there would otherwise be deadlock and the panel is required to make a determination. We do not consider that a casting vote is necessary in the case of a recommendation, which can legitimately reflect a split vote without hindering the ongoing progress of a proposal; it will simply be recorded as such in the modification report to the Authority." (paragraph 3.35)
		
		P264 would deliver a consistent result when the Panel is split. The appeal route would always remain open when the regulator approves a change to the baseline and the Panel (as a whole) could see no overwhelming justification for the change. This is illustrated below:
		
		- Split decision under the baseline:
		  ○ 5 votes for and 5 votes against would mean the Panel Chair may cast a deciding vote, which means either:
		  ▪ 6 votes for and 5 votes against, resulting in a recommendation of "approval": one more vote "for" than those "against";
		  OR
		  ▪ 5 votes for and 6 votes against, resulting in a recommendation of "rejection": one more vote "against" than those "for";
		- Split decision under P264:
		  ○ 5 votes for and 5 votes against would mean a recommendation of "rejection": the "two-thirds" threshold has not been met.
		
		Again, for the avoidance of doubt, the issue here is not that the Panel Chair is able to vote; the issue is that a significant code change (with the potential to have a high commercial impact on BSC Parties or a class of parties) may be approved with no option to

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Respondent	Response	Rationale
		appeal due to the appeal route being closed by a very marginal Panel Recommendation vote. <u>Is the code being manipulated to get around the intention of the SI?</u> P264 does not attempt to manipulate the intension of the SI. The SI is higher in the hierarchy of the governance structure; whilst it takes precedence over the codes, it does not set out the detail of the governance process. The role of the licences and the codes is to provide a more detailed governance framework beneath Primary Legislation and the SIs. The QC's advice indicated that the emphasis in the SI is on the alignment between the Panel recommendation and the regulator's final decision. The appeal route is made available to relevant parties when there is no alignment between the two. This would still be the case if P264 were implemented. Drax agrees that the most ideal situation would have been for DECC to have engaged with the Workgroup in order to consider an amendment to the SI that recognises the introduction of the SCR process. Unfortunately, whilst DECC have been contacted to discuss this issue, their response indicated that they would prefer the industry to address these concerns via code processes. The Workgroup has followed this course of action. <u>Does the substantive defect lie outside the BSC?</u> The defect does not lie outside of the BSC. SCRs only exist in industry licences and codes; as such, this is the only section of the governance arrangements that the industry can address the defect. As Ofgem stated in their Code Governance Review – Final Proposals document: *"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." (paragraph 1.65)* <u>Why not keep the appeal process open for all SCR related Modifications?</u> Drax agrees that, in principle, the most ideal situation would be to ensure the appeal process remains open for all SCR related Modifications, given the high

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Respondent	Response	Rationale
		potential for them to be contentious in nature. Unfortunately, the SI stipulates (taking into account the QC's advice on intent) that the appeal process should only be open where the Panel recommendation and the Authority's decision do not align. As a result, only an amendment to the SI could deliver this change, which is outside the scope of the BSC. <u>Wouldn't the impact of P264 be small, even if the number of SCRs was higher than currently anticipated?</u> The key issue is not that P264 would lead to more Competition Commission appeals; this is not the intended aim of P264. The key issue is that BSC Parties are more confident that the appeal route will be maintained in situations where the result of the Panel recommendation vote is only marginal or split, and the Authority approves a change to the current baseline. It should be noted that BSC Parties must still assess whether they have a case for appeal, the chance of success and the potential cost of raising an appeal. No business (large or small) will take these decisions lightly. However, it is more likely that an appeal will be raised against contentious / high impact Modifications that have the potential to cause winners and losers, than those that do not. If a decision is appealed, it would be more cost efficient (for the industry as a whole) for a BSC Party to raise an appeal via the Competition Commission (if the route is available) rather than via a Judicial Review. A Competition Commission appeal is conducted on the merits of the case, as opposed to a Judicial Review that would be based upon a process issue. The advantage of the Competition Commission appeal is that the determination will either reconsider the Authority's decision (either uphold the decision or replace it) or force the Authority to reconsider its original decision; in either case, the Modification does not simply cease to continue through the Modification process. With a Judicial Review, a result in favour of the appellant tends to result in the Modification ceasing to continue through the process. This means the Modification may be raised again and, if the analysis from the original Modification is time sensitive (again, this is more likely for high impact Modifications), a rerun of the original Modification process may take place. This is an inefficient process.

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Respondent	Response	Rationale
		Analysis of recent Modifications to assess P264 It must be noted that Modifications that arise from SCR Directions are likely to be more contentious than those identified in the analysis on pages 15 and 16 of the report. As indicated in Ofgem's Code Governance Review consultations, the SCR process will allow the regulator to initiate work-streams in areas that BSC Parties (and other interested parties) have previously found difficult to agree and/or resolve. The latest Project Transmit document has indicated that the next SCR is most likely to tackle locational transmission charging signals (i.e. how TNUoS is set). Whilst this issue does not fall under the BSC, it is clear to see that a potential restructure of TNUoS charging will be a contentious issue that will create winners and losers across the industry. It is reasonable to suggest that the industry would find it difficult to reach a consensus on a subject such as this; it is also reasonable to suggest the views of Panel Members may also be mixed. On such issues, where the implementation of the proposal would have far reaching changes the economics of existing investment (whether it be a generator that has built plant / is in the process of building plant, or a supplier that has entered contracts with customers) and only a very marginal majority can be reached by the Panel recommendation vote, it would seem appropriate to preserve the appeal process should the Authority approve a change from the current baseline. The above example is for illustration purposes; as it currently stands, this SCR is unlikely to fall within the scope of the BSC. However, it is easy to spot other areas of contention that do fall within the BSC that could easily be the subject of future SCRs (e.g. cash-out, how imbalance is charged for differing types of generators, transmission losses, etc.). These issues could be equally contentious; it would (again) seem appropriate to preserve the appeal process where the Panel's recommendation vote is only marginally in favour of approval (i.e. to change from the current baseline). Last, but certainly not least, is good governance It seems wholly appropriate to introduce an additional check into a regime that effectively allows the regulator to act as the proposer and the decision maker of change to market arrangements.

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Respondent	Response	Rationale
		This Modification only seeks to make a change to the governance arrangements in one situation: where the regulator decides to make a change to the code, specifies the parameters for the associated Modification and then determines the outcome. In this situation, P264 ensures that the appeal route remains open where the regulator determines a change from the baseline should be approved and the Panel were unable to reach a position where they could provide a strong recommendation for approval. This Modification does not seek to bypass the SI; it seeks to strengthen the route of appeal for potentially contentious / high impact change in the spirit of the process set out in the SI. This Modification does not seek to create "blocking minorities"; it is not the gift of the Panel to block change, nor should it be. This Modification seeks to promote strong governance by addressing an area of concern for industry participants that was flagged during the Code Governance Review process. **Applicable BSC Objectives** Drax believes that both the Proposed and the Alternative Modification would provide an improvement over the current baseline. The reasons for this view are summarised against the Applicable BSC Objectives below. <u>Applicable BSC Objective (a):</u> - By setting a higher threshold for significant code changes, P264 places an emphasis on (a) the regulator to deliver high quality SCR directed Modifications and (b) National Grid to present a robust solution that covers the defect(s) identified by the SCR process. This will promote the efficient discharge of the obligations imposed on the Transmission Company via the Transmission Licence. <u>Applicable BSC Objective (c):</u> - SCRs are expected to cover contentious issues that have the potential to create winners and losers, i.e. change the economics of existing investment, regardless of whether such investment is made by a generator that has built plant / is in the process of building plant, or a supplier that has entered contracts with customers. P264 better protects parties existing contractual positions within both the BSC processes and other contracts where changes to the BSC charging structure may result

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Respondent	Response	Rationale
		in costs that cannot be recovered. This is achieved by ensuring the appeals route remains open for significant code changes raised by the regulator where Panel Members (with a range of expertise and backgrounds) are unable to reach a strong recommendation for a change from the baseline. - In addition, ensuring sufficient checks and balances are in place where the regulator wishes to initiate change to the trading arrangements provides a more robust governance process. The robustness of the governance regime and the ability to hold the regulator accountable for its decisions are important considerations for investors (new and existing). <u>Applicable BSC Objective (d):</u> - Ensuring sufficient checks and balances are in place where the regulator wishes to initiate change to the trading arrangements provides a more robust governance process. By setting a higher threshold for significant code changes, P264 promotes the delivery of high quality SCR outcomes / directions along with well considered determinations by the Authority, making the processing of SCR related Modifications more efficient (i.e. P264 aims to discourage appeals). - The Modification promotes a consistent approach in the event of "split" Panel recommendation vote. Under the current baseline, a split Panel recommendation vote can result in a recommendation of approval or a recommendation of rejection being provided to the Authority, depending upon the views of the Panel Chair. P264 provides the additional benefit of ensuring a consistent approach when the Panel is unable to agree a decisive recommendation. - If the Panel is unable to reach a strong recommendation on a SCR related Modification, then the Competition Commission appeal route would remain available. The Competition Commission is the most efficient route for such appeals from a code administration perspective, as there is a much higher probability that the work carried out under the Modification work-stream would remain valid and a judgement would be provided based upon the merits of the case. If the outcome of a Judicial Review is found in favour of the appellant, the Modification would have a high

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Respondent	Response	Rationale
		probability of being halted and a new Modification may be raised, inefficiently duplicating the process. - If the Panel reaches the higher threshold to deliver a recommendation of approval, the signal of greater support may discourage legal challenge, leading to greater efficiency in implementing changes to the BSC.

Question 2: Do you agree with the Panel's view that the Alternative is better than Proposed?

Summary

Yes	No	Neutral/Other
7	1	0

Responses

Respondent	Response	Rationale
SmartestEnergy Limited	Yes	-
Wyre Power	Yes	The points made above also all apply to the alternative modification, but it does have the benefit of treating all modifications on the same subject under the same rules. This is particularly relevant where Ofgem announces a SCR and then parties rush to raise a whole variety of modifications all along similar lines. By raising modifications in this way parties will be able to get their particular take on an issue onto the SCR agenda, if not adopted, at least likely to be considered. Ofgem may then not have to obligate any SCR modifications as one of those already raised was loosely enough defined to meet Ofgem's criteria. This may have been the intent of the proposer, but may also be a sort of modification hijack!
EDF Energy	Yes	We see merit in treating all modification proposals consistently (including those raised after an SCR is initiated and which are linked to the SCR topic). We also accept that modifications that are raised prior to an SCR being initiated but which are clearly linked to a subsequent SCR and have been suspended should also be treated the same as any related directed modification proposal. Consequently, we believe the

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Respondent	Response	Rationale
		alternative is better than the Proposed.
Scottish and Southern Energy	Yes	The P264 Alternative, with its additions covering Subsumed and Suspended Modifications is more comprehensive. In addition it does remove the potential discrimination against National Grid where they have been directed to raise an SCR Modification.
IBM (UK) Ltd. (for and on behalf of ScottishPower)	Yes	By expanding the criteria for considering a Modification under the P264 method, the Alternative ensures that SCR-related modifications raised by any Party can be held to the same stringent and rigorous assessment and decision making process as those raised by National Grid. This gives further signals to the market on stability, while at the same time further avoiding unnecessary licence administration.
E.ON UK	Yes	We agree with the Group that as subsumed or suspended Modifications will be seeking to address the same issue as the original proposal raised by a Licensee, these should be included so that the same higher voting threshold to achieve a Panel recommendation to the Authority to implement applies to all proposals raised on the same issue around the same time.
Centrica	No	The rationale for supporting the original modification is as stated above, we do not believe that where a modification has been raised in the normal course of events, that the alternative is necessary
Drax Power Limited	Yes	The Alternative is the better solution as it delivers an additional benefit under Applicable BSC Objective (d): - All Modifications that have been identified as being related to the SCR directed Modification (by way of being subsumed or suspended) would be treated equally with regards to the Panel recommendation vote. This removes any perceived discrimination from the process in respect to Modifications raised by different parties or classes of party.

Question 3: Do you agree with the Panel's suggested Implementation approach?

Summary

Yes	No	Not Responded
7	0	1

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Responses

Respondent	Response	Rationale
Wyre Power	Yes	-
EDF Energy	Yes	10 working days for implementation is appropriate. We also support the recommendation that if approved P264 should only apply to modifications raised after the implementation date.
Scottish and Southern Energy	Yes	We agree with the implementation approach set out in section 7 of the report.
IBM (UK) Ltd. (for and on behalf of ScottishPower)	Yes	-
E.ON UK	Yes	Maintaining appeal rights is critical, particularly for Authority-directed proposals. Now that the first electricity SCR has been proposed, P264 should be implemented as soon as possible.
Centrica	Yes	-
Drax Power Limited	Yes	The proposed implementation approach appears sensible.

Question 4: Do you agree that the legal text delivers the intention of P264?

Summary

Yes	No	Not Responded
7	0	1

Responses

Respondent	Response	Rationale
Wyre Power	Yes	-
EDF Energy	Yes	-
Scottish and Southern Energy	Yes	We agree that the legal text (both Proposed and Alternative) delivers the intention of P264
IBM (UK) Ltd. (for and on behalf of ScottishPower)	Yes	-
E.ON UK	Yes	The final iterations appear satisfactory.
Centrica	Yes	-
Drax Power Limited	Yes	The legal text appears to match the intention of the Modification.

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Question 5: Do you have any further comments on P264?

Summary

Yes	No
4	4

Responses

Respondent	Response	Rationale
SmartestEnergy Limited	Yes	If there is industry support for this change to be made it will be interesting to see if the Panel decides to stick with its provisional view in the face of both the working group and the industry!
Wyre Power	No	-
EDF Energy	No	-
Scottish and Southern Energy	No	We have nothing further to add.
IBM (UK) Ltd. (for and on behalf of ScottishPower)	Yes	We remain of the opinion that this change is a worthy one. While it may be true that the ELEXON analysis shows that these provisions would not have been widely used if in force over recent modifications, it remains a worthwhile, additional (virtually zero-cost) safety net. This change has no detrimental effect on efficiency and can clearly be seen as showing that a higher standard should apply to changes whose philosophy originates from central government, and not generally from within the industry.
E.ON UK	Yes	The feedback from the May Panel meeting suggested that a number of Panel members were not convinced by the arguments in support of P264. We believe this is due to the fact that respondents are reluctant to identify the real issue, namely **how best to ensure the quality and transparency of Ofgem code modification decisions.** The possibility of an appeal focuses the mind of the decision maker on the quality of their decisions. In the case of an SCR or other proposals arising from licence changes that oblige the Transmission Company to bring forward a proposal, Ofgem is effectively the originator of the modification proposal. Without appropriate safeguards there is an increased chance of inappropriate regulatory interventions, increasing regulatory risk and/or perceptions of regulatory risk. It is this increased risk that will tend to reduce the willingness of parties to enter the market, thereby damaging the effectiveness of future competition. In addition, better quality decisions

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Respondent	Response	Rationale
		need revisiting less often thereby avoiding waste not only in terms of nugatory modification business but also in unnecessary changes to central processes and systems. Ordinarily one might not expect Ofgem to approve a proposal that appears to question the quality of their decisions but we strongly believe that in a democratic society, public bodies must be open to proper scrutiny. This is a perspective reflected in the Government's conclusions of its review of Ofgem dated 19 May 2011: ***"Accountability plays an important role in establishing the legitimacy of decision makers and depends on transparency, a requirement to explain decision making, exposure to scrutiny and the right to challenge decisions."*** ***"An important safeguard is the ability of those affected by Ofgem's actions to be able to challenge their decisions. Regulated companies and Consumer Focus, acting on behalf of Consumers, can appeal to the Competition Commission on certain types of decision, while any interested party can take Ofgem to judicial review."*** The original rationale for the appeals process was set out in the April 2003 DTI consultation *"Strengthening the accountability and transparency of the gas and electricity code modification process"*. Both the proposal and the Alternative seek to maintain the effectiveness of the Industry Code modification appeals process also envisaged by Parliament in the Energy Act 2004. The goal posts have changed as a result of a recent implementation of the Ofgem Governance Review Modifications (P262 & P263), and it is in this context that we believe the new safeguards set out in P264 are required. In considering P264 we would urge Ofgem to consider how it is viewed whenever it decides to implement a modification proposal that it has effectively originated. In its judgment on E.ON UK plc v GEMA on Energy Code Modification UNC116 (a modification proposal that was originally brought forward as a result of licence obligation placed on National Grid Gas), the Competition Commission stated in paragraph 6.192 and 6.193: *"However, it is less clear that the system of checks and balances established in the code modification procedures works if GEMA is, to use GEMA's words,*

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Respondent	Response	Rationale
		the 'effective progenitor' of a proposal (or at least if it is perceived as such). The existing system envisages that GEMA will express a firm view as to what (if any) reform ought to take place at the conclusion of the process, rather than at the start of the process. If GEMA is the effective progenitor of a proposal, there may be a perception that it cannot fulfil its intended role under the UNC modification procedures without having prejudged, or at least appeared to prejudge, the matter. *Given that EA04 now provides for the right of appeal to the CC, the problem we perceive is less acute than it once was. Further, E.ON did not argue that GEMA should never seek to influence the content of code modification proposals. Given GEMA's various statutory duties, we consider that an argument in those absolute terms would face some difficulty."* Approval of P264 would therefore seem to enable Ofgem to better defend itself against future challenges to modification decisions that allege pre-judgement. By agreeing to a higher voting threshold for a Panel to recommend approval of an Ofgem-originated proposal it will have demonstrated that its newly acquired powers to formally direct proposals will have been balanced by P264. We are concerned at some of the draft Modification Report wording, apparently reporting on questions from a number of Panel members, in the section 'Concerns over Group discussion', p13. This appears to speculate on the operation of the Workgroup, and criticise it for being "heavily in favour of the proposal"? Going on to say: "without much consideration for whether or not this was the correct solution. . . . . The Panel noted that it appeared as though the Group had agreed their view and built the arguments around that. The Panel reminded all Workgroups that their final views should be constructed on the arguments put forward against the Applicable Objectives, and not the other way round". Whether there is a 'correct' solution for any defect is debatable, but the P264 Workgroup like any other followed due process in assessing the proposal as put forward, with plenty of debate across the last ten months. Exploration of potential Alternatives for any proposal is limited by the scope of the defect as identified by the Proposer. In this instance the proposal stipulated 'Two-thirds majority requirement

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Respondent	Response	Rationale
		for Panel recommendations on licence originated Modifications' and the defect description concerned setting an appropriate bar, aiming "to ensure a suitable check is implemented within the BSC to protect the appeal route for those that stand to be commercially affected by licence originated Modifications". While the Workgroup's investigations uncovered the desirability of also changing the Statutory Instrument to make the appeal process clearer for all Industry Codes, as the option of appealing is dependent upon the Panel recommendation it is hard to see what other check could be implemented within the BSC. The consultation attachment B details the potential Alternatives that were explored; the Workgroup assessed the Alternatives and proposal as brought forward by the Proposer on merits against the BSC Objectives. The majority Group view that the Proposed would better meet the Objectives, and unanimous view that the Alternative would do so, are on the basis of those views against the Applicable Objectives and any inference that this was not the case seems unfounded speculation.
Centrica	No	-

Drax Power Limited	Yes	The following section aims to illustrate (for clarity) the difference in a range of voting outcomes between the current baseline and P264 (Proposed and Alternative).
		
		<u>SIMPLE MAJORITY REQUIREMENT</u> (the current baseline) where all Panel Members cast a vote:
		
		- 7 votes for and 3 votes against would mean a recommendation of "approval" (a four vote difference);
		- 6 votes for and 4 votes against would mean a recommendation of "approval" (a two vote difference);
		- 5 votes for and 5 votes against could mean a recommendation of "approval" or a recommendation of "rejection", depending upon the action of the Panel Chair:
		  ○ 6 votes for and 5 votes against where the Panel Chair votes for a recommendation of "approval" (a one vote difference);
		  ○ 5 votes for and 6 votes against where the Panel Chair votes for a recommendation of "rejection" (a one vote difference);
		- 4 votes for and 6 votes against would mean a recommendation of "rejection" (a two vote difference);

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Respondent	Response	Rationale
		- 3 votes for and 7 votes against would mean a recommendation of "rejection" (a four vote difference). TWO THIRDS MAJORITY REQUIREMENT (as proposed under P264) where all Panel Members cast a vote: - 7 votes for and 3 votes against would mean a recommendation of "approval" (a four vote difference); - 6 votes for and 4 votes against would mean a recommendation of "rejection" (a two vote difference); - 5 votes for and 5 votes against would mean a recommendation of "rejection" (no difference); - 4 votes for and 6 votes against would mean a recommendation of "rejection" (a two vote difference); - 3 votes for and 7 votes against would mean a recommendation of "rejection" (a four vote difference).

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