



## Stage 04: Draft Mod Report

What stage is this document in the process?

01 Initial Written Assessment

02 Definition Procedure

03 Assessment Procedure

▶ 04 Report Phase

# 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 that have been suspended or subsumed during an SCR Phase.



Initially the Panel recommends

**Rejection** of both the Proposed and Alternative Modifications



High Impact:  
BSC Panel and ELEXON

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### Any questions?

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Contact:  
**Adam Lattimore**



**Adam.lattimore@elexon.co.uk**

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**020 7380 4363**

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## About this document:

This document is a Draft Modification Report, which ELEXON is issuing for industry consultation. We invite your views on the Panel's initial recommendations as set out in this report. We will present all responses to the Panel on 09 June 2011, when the Panel will agree a final view on whether or not this change should be made.

This is the **main document**. It outlines the solution, impacts, costs, benefits and implementation approach for the change. It includes the Panel's initial recommendation on whether the change should be approved.

**Attachment A** provides further details of legal advice sought from a QC.

**Attachment B** contains solutions developed by the P264 Workgroup which were later discarded.

**Attachment C** contains the draft legal text for the Proposed Modification.

**Attachment D** contains the draft legal text for the Alternative Modification.

**Attachment E** is the Report Phase Consultation questions and response form. We invite you to respond to the questions in this form.

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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 vote 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 P264 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 that have been suspended or subsumed during an SCR Phase.

### 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 majority of the Panel believe that **neither** the Proposed nor Alternative Modifications would better facilitate **any** of the Applicable Objectives.

### Recommendations

The recommendation of the Panel is **rejection of both** P264 Proposed and 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 raised, which are more costly and time consuming than appeals to the Competition Commission.



#### 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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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 must 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 P264 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 also 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.

### 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 recommended an implementation approach of **10 Working Days** following an Authority decision

Furthermore, if approved, P264 should only apply to Modifications raised after the implementation date of P264 and not impact those Modification Proposals already in the process.



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.

#### Applicable BSC Objectives

The Applicable BSC Objectives are set out in paragraph 3 of Condition C3 of the Transmission Licence and are as follows:

a) The efficient discharge by the licensee of the obligation imposed upon it by this licence;

b) The efficient, economic and co-ordinated operation of the GB Transmission System;

c) Promoting effective competition in the generation and supply of electricity, and (so far as consistent therewith) promoting such competition in the sale and purchase of electricity;

d) Promoting efficiency in the implementation and administration of the balancing and settlement arrangements.

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

The following section reflects the debate that the Panel had when discussing the P264 Assessment Report.

### Is this the right solution?

A Panel member questioned why a two-thirds majority had been chosen as the threshold for votes, and asked if it wouldn't have been more robust to place a requirement in the BSC so that all SCR Modifications are automatically appealable regardless of the Panel vote. It was explained that two-thirds had been chosen as Ofgem (as part of the Code Governance Review) had suggested that such a solution should be considered to combat industry concerns over Ofgem's ability to raise and determine on change. It was noted that a solution that ensured all SCR Modifications were automatically appealable regardless of the Panel vote could not be accomplished under the BSC and would require a change to the Statutory Instrument.

### *Interaction with the Statutory Instrument*

A number of Panel members believed that a change to the Statutory Instrument would be more favourable than trying to address the issue under the BSC. A Panel member highlighted their concerns regarding the hierarchy of the legislation being dealt with i.e. the Energy Act, the Statutory Instrument, the Transmission Licence and the BSC. They were uncomfortable that lower level documentation could be undermining the higher legislation. Whilst they had no problem with the principle of P264, they felt amending the industry Codes was the wrong way to achieve its goals. Such an amendment should be delivered by the appropriate means; in this case a decision by the Secretary of State. They liked the destination, but were unconvinced by the vehicle.

The counter argument put forward was that the legal advice sought from the QC indicated that raising the voting threshold within the BSC was a legal change. The intent of P264 was not to amend the decision making process set out by the Secretary of State, but was to try and maintain the principles of the right to appeal that had been introduced into the Statutory Instrument. A Panel member agreed that amending the Statutory Instrument would be the most desirable approach but felt that DECC had indicated that this was not a priority. Therefore the only route open is a Code Modification. Another Panel member believed that the Statutory Instrument contained the rules and principles, but that the BSC was where the detailed implementation should be documented.

ELEXON noted that a lot of the P264 Workgroup's discussion focussed on the intent of the Statutory Instrument when DECC first introduced it in 2005. They felt this was a slight 'red herring' since the world had moved on since 2005 and new governance arrangements had been introduced (as part of the Code Governance Review), effectively allowing Ofgem to raise Modifications. Something that did not exist when the Statutory Instrument was first drafted. It was probably more important to consider what DECC thought now, with the new arrangements in place, than what they thought 7 years ago under a different regime.

A Panel member questioned this stating that whilst it was important to know what DECC views are now, we should still consider the original intent of the rights of appeal in the Statutory Instrument.

The Panel asked ELEXON to try and contact DECC again in order to collect their views.

### **Due consideration**

A question was raised as to whether or not P264 was the most robust solution. A Panel member commented that in the circumstance where the Panel reach a simple majority but fail to reach a two-thirds majority (therefore recommending rejection), and the Authority also reject the change. In this situation the route of appeal would be closed. This may be an unforeseen consequence of P264. Although they admitted that the chance of this happening is fairly low.

Another Panel member noted that they believed strongly in introducing the correct safeguards, but that they were not convinced P264 was sufficiently robust to achieve this. It felt like a panic reaction to rush a block into the system rather than to address the issue fully elsewhere.

A Panel member also queried the impact of the perceived defect. They believed that an appeals process was key where there was conflict of interest or where the threat of appeal would make decision makers think more. In this circumstance Ofgem are not conflicted, as they gain no benefit from amending arrangements as a result of SCR; and the potential of a Panel member voting differently from their opinion just so a Modification could go to appeal, to make others think harder, is doubtful.

### **Interaction with Other Codes**

It was noted that alongside P264 amendments were being raised across the other Industry codes to introduce similar voting requirements. The National Grid representative noted that the equivalent CUSC modification had not progressed to the same timetable as further work was required to redraft sections of the CUSC that were stopping two-thirds voting being introduced. However, it was being progressed which should allay some fears that about consistency of the BSC requirements with other Codes.

The Ofgem representative noted that consistency across the Codes was an area which consideration must be given when approving Modifications. However, they also recognised that the different constitutions of the BSC, CUSC and UNC etc meant that different provisions on how Panels vote may be more relevant in one Code than another.

### **Concerns over Group discussion**

A number of Panel members raised questions regarding the full debate and discussion that had been had by the P264 Workgroup. They noted that the report seemed very one sided and weighted heavily in favour of the proposal without much consideration for whether or not this was the correct solution. Some Panel members were in agreement with the Group regarding the principle of P264, but were disappointed that the arguments put forward against the Applicable Objectives were not very robust and could have been better. 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.

A Panel member also had concerns over the frequent reference towards the terms 'majority' and 'minority' industry views when constructing arguments in the assessment report. They reiterated that all views should be taken into account when making a decision and that it should not be solely on a majority basis. The arguments with the most merit

should be heard, and decisions should not come down to merely the numbers of respondents.

Industry views are fed into the considerations of the Workgroup and the Panel via consultations undertaken through the Modification process. However, a Panel member observed that references to majority or minority industry views 'better influencing the Panel' did not align with the constitution and governance of the BSC. All members of Workgroups and the Panel act as independent representatives regardless of whether elected by industry or appointed by the Panel Chair. These independent members should use their own knowledge and experience, in conjunction with industry opinion, to form a final decision. That decision should be based on the merits of arguments.

## Views against Applicable Objectives

Overall the majority of the Panel believes that neither the Proposed nor Alternative Modifications should be approved.

### *Arguments against the Proposed and Alternative*

Whilst having support for the principles in P264 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. These Panel members saw **no benefit** against **Applicable BSC Objectives (a), (b), (c) or (d)** as:

- The substantive defect lies outside of the BSC and as such there is no reason to amend the current arrangements
- 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.
- 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.
- P264 is second guessing where a Party would raise an appeal. Appeals are expensive and it's 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.

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.

### *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:

- 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 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.

***Proposed vs. Alternative***

Of those who expressed an opinion the majority preferred the Alternative Modification believing that it removed any potential discrimination against National Grid raised Modifications, and was the more efficient of the two solutions for capturing the relevant Modifications identified as the P264 defect.

**Does P264 make a difference?**

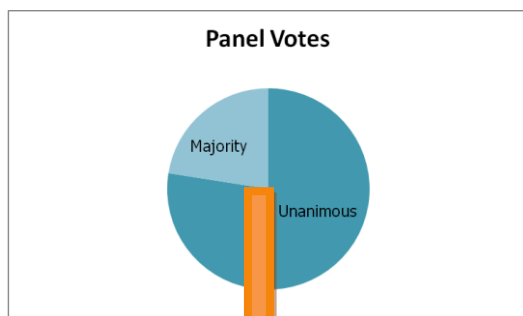
During the debate a Panel member noted that they had struggled to see how implementing P264 would make a difference in reality. Whilst the principle may be laudable, would introducing two-thirds majority actually make a difference?

In order to help form their final recommendation the Panel member requested that some data and examples were provided to show how material the impact of P264 might be. It was noted that Modifications raised off the back of SCRs had never before been subject to a Panel vote, but the Panel as a whole thought that such examples would be useful.



## Examples

We took the last 40 Modification Reports on which the Panel had made a recommendation, and which the Authority had determined, and reviewed the voting pattern and decisions taken.



Of the 40 recommendations made by the Panel, 31 have been unanimous Panel recommendations. Implementing P264 would not impact these recommendations and therefore would impact the right to appeal.

Of the 9 majority recommendations taken by the Panel, 8 were recommended with majorities higher than two-thirds. Again, P264 would not impact these recommendations and therefore would impact the right to appeal.

Mod	Area	Panel Vote	Authority Decision
P226	Data Publication	5 vs. 5 – Approve	Approve
P243	Data Publication	7 vs. 3 – Approve	Approve
P250	Timing Out	7 vs. 2 – Reject	Approve
P251	Panel Voting	8 vs. 1 – Reject	Reject
P252	Panel voting	6 vs. 2 - Reject	Reject
P260	Data Publication	7 vs. 2 – Reject	Reject
P262	Code Governance Review	6 vs. 2 - Approve	Approve
P263	Code Governance Review	6 vs. 2 - Approve	Approve
P265	Credit	8 vs. 1 - Reject	Reject

Only 1 Modification (P226) would not have met the required two-thirds vote and therefore would have been impacted if P264 was in force. P226 was recommended for approval as a result of the casting vote of the Panel Chair. If P264 had been in place then P226 would have been recommended for rejection. Since the Authority approved P226 this would have meant that those who wished to see P226 rejected could have raised an appeal.

It is worth noting that for P226 although the panel was split 5 vs. 5, each side of the vote consisted of a mixture of both Industry elected Panel members and those Panel members appointed by the Panel Chair. This is equally true for the other 8 circumstances where 2 or more Panel members are in a minority.

It is also worth noting that in the 9 circumstances where a majority vote has taken place, most of these relate to governance issues or the publication of data. With the exception of P250, P262 and P263, these issues are not highly contentious, and debate tends to be on whether the perceived benefit outweighs the cost/effort to implement the change.

### P250 – Timing Out

Although the Panel have never voted on a Modification raised by the Licensee as a result of an SCR, Modification P250 provides an extremely good example case study.

P250 was raised by National Grid as a result of a consultation where Ofgem was seeking views into amending the all Industry Codes (not just the BSC) so that the Authority could never 'time out'. This situation can be seen as similar to an SCR as it was raised by the Licensee as a result of an Ofgem consultation and impacted across the industry Codes.

As can be seen from the table above, the Panel recommended P250 be rejected by 7 votes to 2. If P264 provisions had been in place they would not have had no impact on the Panel recommendation.

## 10 Report Phase Consultation Responses

### Summary

The Report Phase Consultation received 8 responses. These responses are summarised below. Whilst this summary is a useful high level guide it is always important to view the responses in full. The full set of responses can be viewed [here](#).

Report Phase Consultation responses			
Question	Yes	No	Neutral/ other
Do you agree with the Panel's view that neither the Proposed nor Alternative Modification should be approved?	0	8	0
Do you agree with the Panel's view that the Alternative is better than Proposed?	7	1	0
Do you agree with the Panel's suggested Implementation approach?	7	0	1
Do you agree that the legal text delivers the intention of P264?	7	0	1
Do you have any other comments?	4	4	0

### Support for P264

All 8 respondent unanimously supported the implementation of P264. The length of responses indicates that the respondents were passionate about their support for P264. Many feeling that to introduce this Modification would be good governance in line with the views of the Workgroup.

After noting the Panel's concern that P264 did not meet any of the Applicable Objectives a number of respondents provided their views as to why P264 better facilitates the Applicable BSC Objectives.

One respondent wholeheartedly agreed with the views expressed by the Panel in support of P264 (captured on pages 14 and 15 of this document). Another respondent agreed verbatim with the views of support expressed by the Workgroup (captured on pages 10 to 11 of this document). These views have not been reiterated again in the summary below; for a reminder of those views please refer to the relevant page.

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

- Experience in the gas market 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. 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 was not as the market had envisaged from the SCR.
- 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 decisions are to be made, the likelihood of appeal is reduced, ensuring a more efficient operation of the Licence.
- By setting a higher threshold for significant code changes, P264 places an emphasis on the regulator to deliver high quality SCR directed Modifications and 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.

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

- It protects the rights to appeal, notably of parties who may not have been able to participate in the SCR process such as small participants.
- The implementation of P264 will incentivise Ofgem to make all decisions clear and robust. Competition will be enhanced if all parties understand the regulator's thinking because all decisions are clear and robust.
- P264 would deliver enhanced checks & balances within the governance process and 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).
- P264 should promote regulatory scrutiny and thereby increase market and investor confidence in the governance process.
- Parties, especially smaller Parties, will be reassured that their right to Appeal has been reinforced. New entrants, likewise, can be reassured that large and contentious changes will not be sprung on them without more consideration and work being done in the analysis and decision making phases. This is one of the factors key to ensuring that investment can be safely made and maintaining stability.
- 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 into 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 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.

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

- If Ofgem is 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, it will ensure better administration of the SCR Modification implementation process in the BSC.

- 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. 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, a recommendation of rejection or no firm recommendation 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 probability of being halted and a new Modification may be raised, inefficiently duplicating the process.

## Comments on Panel Discussion

Whilst discussing the Assessment Report the Panel noted a number of concerns regarding the approval of P264. This section provides a brief summary of the respondents views to those concerns.

### *Interaction with the Statutory Instrument*

A number of respondents noted the Panel’s concern that the issues in P264 lay outside the BSC and that the SI was the better place to resolve the problem. They acknowledge that amending the SI would be preferable, but with DECC indicating that it did not have the inclination or resource to address the issue, amending the Industry Codes was the next logical step. They believe that the SI simply sets appeal rights into law, firming up the rights in the BSC seems in line with the intent of the SI.

Respondents also felt that the issue did not lie outside of the BSC since the BSC contained provisions for delivering SCR Modifications and therefore these provisions could be amended under BSC governance.

### *The impact of P264*

The Panel questioned what the impact of P264 would be and asked for some examples to be provided using historical Modification data. A number of respondents commented that this analysis was not relevant as it did not include any SCR Modifications.

To help provide a better understanding of the impacts the Proposer provided this summary:

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 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 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:
  - o 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:
  - o 5 votes for and 5 votes against would mean a recommendation of “rejection”: the “two-thirds” threshold has not been met.

## 11 Recommendations

Having considered the P264 Draft Modification Report, the BSC Panel recommends:

- that Proposed and Alternative Modification P264 should not be made;
- an Implementation Date of 10 Working Days following an Authority decision for in respect of either Proposed or Alternative Modification P264;
- the proposed text for modifying the Code, as set out in Attachment C and D.



### Recommendation

The Panel initially recommends that P264 should not be approved.

## 12 Further Information

More information is available in:

Attachment **A**: Legal Advice

Attachment **B**: Discarded Alternative Solutions

Attachment **C**: Legal Text Proposed

Attachment **D**: Legal Text Alternative

Attachment **E**: Report Phase Consultation Responses

## Appendix 1 – Estimated industry progression costs

### Industry Progression Costs as estimated in the IWA

Industry Assessment Costs (Estimated)					
Workgroup support	Est #mtgs	Est # att	Est effort	Est rate	Total
	2	5	1.5	605	<b>£9,075</b>
Consultation response support	Est #con	Est # resp	Est effort	Est rate	Total
	2	6	2.5	605	<b>£18,150</b>
<b>Total</b>					<b>£27,225</b>

Workgroup support costs reflect an estimate of how many Workgroup meetings will be held and the industry effort of supporting these meetings. The calculation is based upon an average number of members (5) each putting in 1.5 man days effort per meeting. This effort is multiplied by a standard rate of £605 per day.

Consultation costs represent an approximation of industry time and effort in responding to consultations. The calculation is based upon an estimate of how many responses we will receive and assumes each response will take 2.5 man days of effort, again multiplied by a standard rate of £605 per day.

### Progression costs based on actual meetings and consultation response numbers

Industry Assessment Costs (Estimated)					
Workgroup support	Meeting #	Actual att	Est effort	Est rate	Total
	1	7	1.5	605	<b>£6,353</b>
	2	7	1.5	605	<b>£6,353</b>
	3	7	1.5	605	<b>£6,353</b>
	4	6	1.5	605	<b>£5,445</b>
Consultation response support	Consultation	Actual resp	Est effort	Est rate	Total
	Assessment	8	2.5	605	<b>£12,100</b>
	Report	8	2.5	605	<b>£12,100</b>
<b>Total</b>					<b>£48,703</b>