

**BSC MODIFICATION PROPOSAL P264**

**CUSC AMENDMENT PROPOSAL CAP190**

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**ADVICE**

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**A. INTRODUCTION**

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

**B. BACKGROUND**

The BSC

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

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

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

“The Panel shall comprise the following members:

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

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

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

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

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

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

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

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

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

[...]"

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

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

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

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

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

### The CUSC

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

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

“The Amendments Panel shall comprise the following members:

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

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

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

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

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

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

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

#### **“8.20 AMENDMENT REPORT**

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

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

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

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

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

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

[...]

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

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

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

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

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

The right to appeal against GEMA determinations

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

**“173 Appeals to the Competition Commission**

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

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

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

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

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

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

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

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

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

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

[...]

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

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

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



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

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

(9) In this section—

“consent” includes an approval or direction;

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

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

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

31. By article 4 of the 2005 Order:

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

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

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

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

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

32. Articles 5-7 provide:

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

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

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

(2) In this article--

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

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

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

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

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

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

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

#### Ofgem Code Governance Review

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

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

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

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

Proposals P264 and CAP190

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

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

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

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

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

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

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

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

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

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

## C. ANALYSIS

### P264

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

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

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

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

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

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



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

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

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

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

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

- 55. It might be said that the analysis set out above renders the word "majority" in article 5(1) nugatory. The analysis, it might be said, proceeds as if article 5(1) removes the right of appeal where GEMA's decision consists in the "giving of a consent to a [...] recommendation made by the Panel". There would be no need, on this view, for article 5(1) to contain the word "majority" since: (a) any recommendation made by the Panel requires at least a majority of voting members; and (b) on the analysis set out above, even if a majority of voting members were to vote in favour of a modification, that would not suffice to remove the right of appeal unless the relevant threshold were met (i.e., under P264, two-thirds of voting members).
- 56. However, it is in our view arguable that the word "majority" is not nugatory, and that it is instead designed to ensure that if GEMA were to consent to a modification recommended by the Panel without the support of the majority of voting members, that decision would be appealable. This appears to be what was intended by the drafters of the Order; DTI's June 2005 Response to the Consultation on the Draft Order stated at page 20 that:

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

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

#### CAP190

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

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

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

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

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

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

#### Other potential amendments to the CUSC

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

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

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

#### **D. CONCLUSION**

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

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

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

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

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

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

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

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

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

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

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



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

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

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

83. Yes, for reasons set out above.

**Monica Carss-Frisk QC**

**Tristan Jones**

**Blackstone Chambers**

**4 February 2011**