

Ofgem guidance – self-governance modification appeals process

Introduction

This guidance document sets out our approach to discharging appeals brought to Ofgem¹ against self-governance modification decisions.² It provides an overview of the procedure that such appeals will follow, however, appeals will be dealt with on a case by case basis.

What is a self-governance modification decision?

The industry codes are the contractual arrangements that underpin the electricity and gas wholesale and retail markets. The codes set out the processes for making modifications, including the circumstances in which modification proposals can be progressed under a 'self-governance' procedure. Code modification proposals can only be determined by self-governance where they have met the self-governance criteria set out in respect of that particular code. In most cases this involves a test of materiality whereby the modification proposal, if implemented, is unlikely to have a material effect on specified matters, including competition and consumers, and is unlikely to discriminate between different classes of code party.³

When a modification proposal is determined under a code's self-governance process, the relevant code panel (or in some cases, code parties) will take the final decision on whether or not that modification is made. The Authority's approval is not required.

Who is eligible to appeal a self-governance decision?

Code parties (and, where specified in the licence or code, third parties that would be allowed to raise a code modification proposal under the relevant code) are eligible to appeal a self-governance modification decision.

On what grounds can an appeal be made?

The grounds for appeal are set out in the relevant code and/or licence.

The following are, in most cases, the eligible grounds for an appeal against a self-governance modification decision:

- The appellant is, or is likely to be, unfairly prejudiced by the implementation or non-implementation of the self-governance modification proposal; or
- The appeal is raised because the appealing party reasonably believes that-

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

² Self-governance modification 'decisions' for the purpose of this document refer to self-governance determinations as described in the relevant codes and licence conditions.

³ Self-governance criteria for each code is set out in the relevant licence and/or code.

- a self-governance modification proposal which is to be implemented may not better facilitate achievement of at least one of the applicable code objectives; or
 - a self-governance modification proposal which is not to be implemented may better facilitate achievement of at least one of the applicable code objectives; and
- the appeal is not raised for reasons which are trivial or vexatious, and the appeal has a reasonable prospect of success.

How does an eligible party make an appeal?

The existing code rules may provide that the panel (or in some case, parties) can review and re-take the decision, eg through an interim forum which suspends the original decision and hears an appeal. The appellant should always exhaust any alternative appeal, complaint or dispute resolution processes within the relevant code before appealing the self-governance decision to the Authority.

To make an appeal to the Authority the appellant should complete the 'Self-Governance Decision Appeal Form'⁴ providing as much detail as possible and submitting all relevant documentary evidence with the form in support of its case.

The appellant **must** provide the following details on the form:

- the name of the appellant, including the contact details of a designated representative of the appellant for the purpose of the appeal. An alternate representative's details are also required;
- the name/reference of the self-governance modification decision against which the appellant is appealing and a copy of that decision;
- the ground(s) on which the appeal is being made, by reference to the eligible grounds for appeal;
- the reasons for the appeal in as much detail as possible along with any supporting evidence. This is important because it will inform the Authority in deciding whether the appeal should proceed;
- an explanation of the impact on the appellant of the self-governance decision and how a successful appeal would resolve the matter; and
- the date on which the form is submitted.

In signing the form, the appellant verifies that it believes that the facts stated in the form are true.

When can an eligible party make an appeal?

The appeal form and relevant documentary evidence must be submitted to the Authority by email to industrycodes@ofgem.gov.uk and copied to the relevant code administrator within the appeal window. The appeal window is set out in the applicable code.

⁴ The form is attached to this guidance and available on the websites of the code administrators.

What is the process after an appeal is made?

We aim to acknowledge the appeal and confirm whether we consider it to be valid within 10 working days of the appeal window closing. If the appeal is to proceed, Ofgem may request further information from the appellant, code panel, or any other party as may be applicable to determining the appeal.

We will decide on a case by case basis if we require further information in order to progress an appeal. We will aim to seek any further information in a timely manner, and typically expect this process to take up to 4 weeks. We will take into account the information initially submitted on the appeal form and, where appropriate, we will set out specific questions.

The timetable for the appeal process may vary depending upon the individual circumstances of the appeal. If we confirm that an appeal is to proceed, next steps and an indicative timeframe will be outlined in the acknowledgement letter.

If an appeal is refused, ie we consider that the appeal does not meet the grounds for appeal, we will explain why.

In the case that more than one appeal is made against the same decision, these appeals will initially be assessed on their own merits. If allowed to proceed, these appeals may be dealt with together as one matter.

Will the appeal form and information submitted in relation to an appeal be published?

All documents submitted in relation to an appeal will be published on the Ofgem website⁵ (unless clearly marked as confidential). The documents submitted should be relevant to the appeal and, where appropriate, respond to the specific questions raised by the Authority.

Any confidential material submitted in relation to an appeal must be clearly marked as such and a non-confidential summary also provided for publication.

When would the Authority be able to make a decision?

We will aim to issue our decision in a timely manner. The timetable will be dependent upon the circumstances of the appeal and whether further information is required. Typically we will aim to publish our decision within 25 working days of either:

- a) the date of our acknowledgement letter confirming that the appeal is considered valid, in cases where we consider that no further information is required; or,
- b) the date at which our final request for further information closes.

⁵ Electricity codes: <https://www.ofgem.gov.uk/licences-codes-and-standards/codes/electricity-codes>, Gas codes: <https://www.ofgem.gov.uk/licences-codes-and-standards/codes/gas-codes>

When a decision is made it will be issued as an open letter and state the reasons why the Authority has reached its decision and, where appropriate, direct further action to be taken.

What are the appeal outcomes?

The following outcomes may result from an Authority decision of an appeal:

1. The Authority rejects the appeal and upholds the self-governance decision:

- a) if the decision was that the proposed modification be made, the modification will proceed to implementation; or
- b) if the decision was that the proposed modification should not be made, the modification proposal lapses immediately.

As the Authority agrees with the original decision, there will be no further appeal of the Authority's decision.

2. The Authority upholds the appeal and quashes the self-governance decision

In this case the Authority may:

- a) send back the modification proposal for reconsideration and redetermination; or
- b) remove self-governance and determine that the proposed modification should be made; or
- c) remove self-governance and determine that the proposed modification should not be made.

Where the Authority quashes the self-governance decision and takes the decision itself, the Authority's decision on the proposal may be appealable to the Competition Commission where it is contrary to the original decision (as that decision is treated as a recommendation under the code modification rules) or the recommendation in any revised report.

Self-Governance Decision Appeal Form

Name and reference of the decision which you are appealing (please provide a copy of the decision with this form):

DCUSA DCP 262 - SCHEDULE 19 CREDIT/RE-INVOICE FOR HH SPECIFIC DATA

Date on which the decision was taken/published:

18 May 2016

On which ground(s) are you appealing the self-governance decision?:

DCUSA Section 1C, Clause 13.20.1 - the person making the appeal is likely to be unfairly prejudiced by the acceptance or rejection of the Change Proposal; and

DCUSA Section 1C, Clause 13.20.3 - where the Change Proposal was rejected, acceptance of the Change Proposal may have better facilitated the achievement of at least one of the DCUSA Objectives.

Please provide detailed facts and reason(s) in support of your appeal:

DCP 262 was raised by ESPE to resolve an issue which occurs regularly in regard to receiving updated credits/re-invoicing from DNOs after receiving revised HH consumption data. On a monthly basis and based on consumption data received by the LDNO, the LDNOs provides a HH Data Report to the DNO Party. Currently, LDNOs provide HH data to the DNOs by the 15th of each month to allow the DNOs to produce invoices/credit notes to LDNOs for DUoS charges. When revised HH consumption data is received from the relevant DC, in line with the billing arrangements in Clause 19 (Section 1B) and Clause 44 (Section 2B), this can result in the need for a further invoice, or a credit being required from the DNOs to the LDNOs.

In practice, the majority of DNOs process data efficiently, but in some cases we have to wait for credit notes or invoices to be raised several months later, sometimes extending out for two quarters. This is causing us, and other LDNOs, concerns as it can negatively affect cash flows within our organisation. DCUSA is silent on HH in regard to a defined timeline for receiving a credit/re-invoice once revised data is submitted. DCP 262 was solely raised to address this issue by including a timeline for the credit/re-bill process. There were no changes to systems, or no changes to processes required; the only change required was for DNOs to provide these credit/re-invoices within a specified time frame which would allow both the DNOs and LDNOs to manage it in a more consistent, predictable and efficient manner.

When this CP was raised by ESPE, it was our belief that it was a Part 1 matter which comes from DCUSA, where it discusses what types of changes should be classified as Part 1, in particular, 9.4.2 'it is likely to have a significant impact on competition in one or more of: (D) any commercial activities connected with the generation, distribution or supply of electricity'.

Whilst we understood the Panel's opinion that this could be managed as self-governance between Parties, we did not agree with this viewpoint.

As the receipt of a credit/re-invoice can substantially impact the cash flow of IDNOs, we view this as a significant issue to address. These impacts could also potentially affect competition. It is therefore our belief that the Authority should have the final say on matters which materially affect Parties. It is also our opinion that this is why commercial activities are included as Part 1 matters in the first instance.

The issue was taken to the Working Group's consultation, where a majority of respondents felt that this could be progressed as a Part 2 matter. Many DNOs felt that the CP is a self-governance issue as it would not have any significant impact on the operations of either the DNO or IDNO parties if implemented, as it only included a timeline. It was acknowledged by one DNO that if there was broad support, which was the case in the consultation responses bar one DNO, that it should be progressed as a Part 2 for efficiency means. Our continued belief was that it should be progressed as Part 1, however, since there was broad support, the Working Group agreed to change this to a Part 2, but only once the Working Group addressed all the concerns raised within the consultation. These concerns ranged from the amount of time within the timeline, to legal text changes. The Working Group agreed and amended them all so that the CP covered all eventualities that may arise, and the Working Group members agreed that nothing else was required in order to progress to the Change Report.

One DNO felt that a standardised template is a way to resolve this issue, and whilst the Working Group sympathised with this view, it was agreed by the overall majority of members that the template is out of scope, and would require a new CP. It was also acknowledged that this should be raised by a DNO as this is a DNOs' issue of how they would like to design and agree the submission template from which LDNOs should report to them. It was also highlighted that a template from a future CP may/may not be approved, and this still would leave the issue of not having a predictable timeline for DNOs to raise further invoices or credits for LDNOs.

The Working Group also agreed that it is not correct to assess DCP 262 on the basis of a solution that is out of scope. This future change, if raised, may/may not be accepted and is independent of the CP at hand and the issue it intended to address. The Working Group has a duty to consider the CP at hand and to develop and assess it. This is not the case when Parties press to consider the CP on the basis of having a solution considered first that is out of scope of that CP - this contradicts the Working Group guidelines. These guidelines state the Working Group should evaluate, develop and refine the proposed variation to the Agreement to the extent that it better facilitates the DCUSA Objectives.

Voting Outcome – DCP 262 was rejected by Parties, including one DNO Party who showed support during the working group and in the consultation. As it was progressed as a Part 2 Matter, this CP needed to get 65% approval from Parties within each Category. If this was progressed as a Part 1 as originally intended, this would have come to Ofgem for final determination. However, even though three DNOs accepted (two did not), and 3 IDNOs accepted that DCP 262 better facilitated two of the DCUSA General Objectives it did not meet the higher 65% threshold for self-governance modifications.

One Party provided no comments on the Objectives, only to say that they feel a template should come first, which again is out of scope of this CP. One Party disagreed that it better facilitated any of the Objectives and that there was already a process in the DCUSA to address this situation, and that a template should be developed – ESPE disagrees with this in principle as we struggle to get these types of situations resolved in a timely manner each month from some

DNOs and there is nothing in the DCUSA to address it.

Our Appeal

We request you remove the self-governance decision and that it be quashed. We request that the Authority treat this CP as a Part 1 matter, review all the consultation responses, Working Group materials and voting responses and make a determination.

Grounds for Appeal

DCUSA Section 1C, Clause 13.20.1 - the person making the appeal is likely to be unfairly prejudiced by the acceptance or rejection of the Change Proposal

The rejection of DCP 262 still leaves ESPE, and all LDNOs, at a disadvantage because there is not a timeline associated with the production of these credit/re-invoicing operations. It should be highlighted that all other parties have been settled from this process (DNOs and Suppliers), and it is anti-competitive to leave LDNOs waiting – at times for months – for their amounts to be settled. For small organisations, this can and does have a detrimental impact on cash flows. The solution developed for DCP 262 only sought to put a timeline of 60 days on the process, which was agreed by the Working Group to cover off any eventuality that the DNOs may face in the process of providing a credit/re-bill to the LDNO; it does not require anything else of DNOs, including no system changes/costs. This CP allows the smaller organisations in the industry to plan and forecast their revenues more predictably, whilst not impacting any other DCUSA Party member.

DCUSA Section 1C, Clause 13.20.3 - where the Change Proposal was rejected, acceptance of the Change Proposal may have better facilitated the achievement of at least one of the DCUSA Objectives.

Within the Change Declaration, 3 DNO groups and 3 IDNOs agree that DCP 262 better facilitates two DCUSA General Objectives – 2 and 4. There was one DNO Party who voted against who provided no comments on the Objectives, but indicated that they supported the general principles of DCP 262, but felt a more comprehensive and balanced solution is required, which also resolves the issues relating to standardised data submissions and templates.

One DNO Party felt that there were no changes required to address this situation, only to develop a template.

DCUSA General Objective 2 - The facilitation of effective competition in the generation and supply of electricity and (so far as is consistent therewith) the promotion of such competition in the sale, distribution and purchase of electricity

DCUSA Objective 2 is better facilitated as the introduction of this change promotes effective competition. Due to the fact that IDNOs have settled the difference in Charges with Supplier Parties, in some cases the IDNO is not being invoiced/credited for the difference by the DNO Party. This affects the IDNO's cashflow and can be considered a barrier to competition. In effect, IDNOs are supporting the DNO's cashflow.

DCUSA General Objective 4 - The promotion of efficiency in the implementation and administration of this Agreement.

DCUSA General Objective 4 will be better facilitated as the introduction of this change will

provide IDNOs and DNOs a clear timeline of how best to manage credit/re-invoicing for HH invoices. This will positively impact IDNOs by helping to better manage cash flows, and also providing DNOs a timeline of when to have this information produced and issued to the IDNOs. This efficiency will match that which is already explained within Schedule 19 for NHH invoices.

Please explain the impact on you of this decision and how a successful appeal would resolve this matter. Please indicate if you consider there to be any other persons affected by this decision.

If this appeal is successful it will allow ESPE, and all LDNOs, to be able to forecast and plan more robustly in regard to the credit/re-invoicing process. This will also help all LDNOs to more accurately forecast their cash flows and manage this entire process in a more predictable and efficient manner, without impacting any other DCUSA Party. It will also mean that the LDNO will no longer effectively be supporting a DNO's cashflow that does not send through these credits/re-invoices in a timely manner.

Details of Appellant: Organisation's Name:	ESP Electricity
Capacity in which the Appeal is raised: (eg code party, non-code party with right to raise an appeal)	DCUSA IDNO Party
Details of the Appellant's Representative: Name: Organisation: Address: Telephone Number: Email Address:	Michael Walls - Regulation and Compliance Manager ESP Electricity Hazeldean, Station Road, Leatherhead KT22 7AA 01372 225506 or 07717 799 222 michaelw@espipelines.com
Details of the Representative's Alternate: Name: Organisation: Telephone Number: Email Address:	Donna Townsend ESP Electricity Hazeldean, Station Road, Leatherhead KT22 7AA 01372 225 504 donnat@espipelines.com

Are you supplying attachments to this form? (see Notes) Yes

If 'Yes' please provide the title and number of pages of each attachment and whether it is confidential or not:

Attachment 1 – DCP 262 Change Declaration (non-confidential) – 5 Pages

Attachment 2 – DCP 262 Collated Consultation Responses with WG Comments (non-confidential) – 19 Pages

Attachment 3 – DCP 262 Working Group Minutes (non-confidential) – 2 Documents, 9 Pages Total

Statement of truth

The appellant believes that the facts stated in this form are true.

Name: Michael Walls

Position: Industry and Compliance Manager

Signature:



Date: 25 May 2016

Notes:

You should attach relevant detailed documentary evidence only for appeal purposes. If you wish to submit evidence which is confidential, please mark this accordingly and provide a non-confidential summary with it.

Completed appeal forms should be submitted to industrycodes@ofgem.gov.uk and copied to the relevant code administrator.