

Modification proposal:	System Operator (SO) – Transmission Owner (TO) Code (STC) CM063 – Modify the definition of Force Majeure (Section J: Interpretation and Definitions)		
Decision:	The Authority ¹ has decided ² to reject this modification		
Target audience:	National Grid ESO; Parties to the STC; bidders and prospective bidders to the offshore transmission tender process; and other interested parties		
Date of publication:	16 December 2019	Implementation date:	n/a

Background

Section J of the STC defines Force Majeure as *“In relation to any Party, an event or circumstance which is beyond the reasonable control of such Party and which results in or causes the failure of that Party to perform any of its obligations under the Code including...fault or failure of Plant and Apparatus (which could not have been prevented by Good Industry Practice)...provided that lack of funds or performance or non-performance by an Other Code Party shall not be interpreted as a cause beyond the reasonable control of that Party...”*.

The STC CM063 modification proposal (the **Proposal**) considers that the current wording of the Force Majeure definition lacks clarity and is therefore open to misinterpretation. The Proposal seeks to “clarify the intention of the existing definition”.

The Proposal

The Proposal was raised by Balfour Beatty Investments Limited (the **Proposer**) in March 2018. The purpose of the Proposal is to amend the existing definition of Force Majeure within the STC to ensure a common understanding of the definition. The Proposer intends that the proposed modification will clarify that the current owner of the relevant Plant or Apparatus can only be responsible for Good Industry Practice that it can reasonably be said to be able to control.

The Proposer considers that the Proposal facilitates each of the STC objectives better than the current baseline.³ The Workgroup by majority agreed the Proposal would better

¹ References to the “Authority”, “Ofgem”, “we” and “our” are used interchangeably in this document. The Authority refers to GEMA, the Gas and Electricity Markets Authority. The Office of Gas and Electricity Markets (Ofgem) supports GEMA in its day to day work. This decision is made by or on behalf of GEMA.

² This document is notice of the reasons for this decision as required by section 49A of the Electricity Act 1989.

³ Final STC Modification Report, *CM063: Modify the definition of Force Majeure (Section J: Interpretation and Definitions)* page 8

facilitate STC objectives (a)⁴, (c)⁵ and (e)⁶ by providing clarity over what is meant by the phrase “*which could not have been prevented by good industry practice*”.⁷

STC Modification Panel⁸ recommendation

The STC Modification Panel considered the draft Final Modification Report (**FMR**) at its meeting on 26 June 2019. The Panel considered by majority that CM063 would better facilitate the STC objectives and the Panel therefore recommended its approval.

Our decision

We have considered the issues raised by the Proposal and the FMR. We have considered and taken into account the responses of the STC Parties included in the FMR. We have concluded that implementation of the Proposal would not better facilitate the achievement of the applicable STC objectives.⁹

Reasons for our decision

Specifically, we consider the Proposal would not better facilitate STC objectives (a) and (e).

Our reasons for this conclusion are set out below.

(a) efficient discharge of the obligations imposed upon transmission licensees by transmission licences and the Act

The FMR states that the impact of the Proposal on objective (a) is that “*the proposed additional wording will improve the situation for any party which has to make reference to Force Majeure*”.

We do not consider that the proposal does in fact better facilitate this objective.

The Proposal fails to clarify the extent to which ‘reasonable control’ is intended to apply. This absence is particularly significant given the role of sub-contractors in the operation and maintenance of assets. In addition, the Proposal appears to conflict with other parts of the Force Majeure definition, as well as other sections of the STC.

⁴ STC Objective (a): *Efficient discharge of the obligations imposed upon transmission licensees by transmission licences and the Act*

⁵ STC Objective (c): *Facilitating effective competition in the generation and supply of electricity, and (so far as consistent therewith) facilitating such competition in the distribution of electricity*

⁶ STC Objective (e): *Promotion of good industry practice and efficiency in the implementation and administration of the arrangements described in the STC.*

⁷ Final STC Modification Report, *CM063: Modify the definition of Force Majeure (Section J: Interpretation and Definitions)* page 10.

⁸ The STC Modification Panel is established and constituted from time to time pursuant to and in accordance with section B6 of the STC.

⁹ The Applicable STC Objectives are set out in Standard Licence Condition B12 (3) (a) to (f) of the Transmission Licence.

Specific concerns include:

I. Lack of clarity as to the extent to which an STC Party can be held responsible for Good Industry Practice:

The aim of the Proposal is to clarify the wording of the term Force Majeure, to ensure that the “*current owner*” of a transmission asset can only be held responsible for “*Good Industry Practice that they can reasonably be said to be able to control.*”¹⁰ However, the Proposal fails to provide clarity as to what in fact would be considered to be within the reasonable ‘control’ of a ‘current owner’.

The STC does not define ‘current owner’. We have assumed that ‘current owner’ refers to an STC “Party”¹¹ or a “Transmission Licensee”.¹² For simplicity we use the term ‘Transmission Licensee’.

We note that the Proposal intends to exclude actions of the manufacturer from a Transmission Licensee’s reasonable control (albeit the proposed textual amendments to the STC do not achieve this aim). However, the Proposal does not address how it intends to treat other third parties. It instead creates uncertainty as to whether the actions of a third party can be considered to be ‘within the reasonable control’ of a Transmission Licensee (for example, a sub-contractor undertaking works on behalf of the Transmission Licensee), and, if so, in what circumstances.

For example, the Proposal might allow a Transmission Licensee to claim that a failure of Plant and/or Apparatus¹³ could not have been prevented by Good Industry Practice where the failure was, in full or in part, the result of the actions of a sub-contractor undertaking works on behalf of the Transmission Licensee (for example, in the design, installation or repair of the Plant and/or Apparatus), and thus relieve the Transmission Licensee of its obligations under the Force Majeure provisions.

A further concern is the unintended consequences the Proposal may have on how a Party is treated by the STC. Transmission Licensees can choose whether to sub-contract their operation and maintenance works, or undertake some or all of these works using in-house resources. The Authority considers that Transmission Licensees should be responsible for the performance of their assets in the same way, regardless of whether they carry out works in-house or sub-contract a third party to do so on their behalf, and we are concerned the proposal introduces a lack of clarity in respect of this.

II. A conflict between the proposed modification and the following words of the Force Majeure definition:-

¹⁰ Good Industry Practice is defined as in relation to any undertaking and any circumstances, the exercise of that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced operator engaged in the same type of undertaking under the same or similar circumstances

¹¹ “Party” is defined in section J of the STC as “a person who is, for the time being, bound by the Code by virtue of being a Party to the Framework Agreement.”

¹² Transmission owner is defined as “An Onshore Transmission Owner or an Offshore Transmission Owner which could include a Type 1 Transmission Owner or Type 2 Transmission Owner.”

¹³ Plant and Apparatus are defined in section J of the STC.

- a) *"any event or circumstance which is beyond the reasonable control of such Party and which results in or causes the failure of that Party"; and*
 - b) *"performance or non-performance by an Other Code Party shall not be interpreted as a cause beyond the reasonable control of that Party".*
- III. A conflict between the proposed modification and section G-6.3 of the STC, which deems the relevant Transmission Licensee to be responsible for the transmission system assets as designed, planned, installed and commissioned by the generator (wind farm developer).
- IV. A consequential misalignment with other codes:

The same definition of force majeure is contained in the Connection and Use of System Code (**CUSC**). At the Workgroup stage, a representative of NGET and NGESO advocated the baseline as its preference given concerns of 'unforeseen interpretation issues if it is applied outside STC'. Then, at the Code Administrator Consultation stage, the NGESO response reiterated this position and noted that the revised text 'could cause unintended consequences in establishing a misalignment with other codes'. We agree with NGESO that the revised text could cause a misalignment with other codes. We note the view of the Workgroup that the System Operator can only rely on one definition of force majeure and that these definitions should therefore align. This view was also supported by legal advice provided to the Workgroup. There is no evidence provided to the Authority to show that the Proposal has been highlighted to the CUSC Panel or that these views have been taken into account.

Such conflicts will mean that the modification will cause further uncertainty in the interpretation of the Force Majeure definition rather than achieving the Proposer's aim of providing clarity to the definition.

Given this, we do not consider that the Proposal will better facilitate the ability of Transmission Licensees to efficiently discharge the obligations imposed on them by Licences and the Act.

(e) promotion of good industry practice and efficiency in the implementation and administration of the arrangements described in the STC

The FMR states that the impact of the Proposal on objective (e) is that *"the proposed additional wording will improve the situation for any party which has to make reference to Force Majeure"*. We, however, do not consider that the Proposal better facilitates this objective.

As set out in our consideration of the previous STC objectives, there are a number of inconsistencies and conflicts that will arise should the proposed modification be implemented. We consider that the existence of such conflicts will impact the efficiency in the implementation and administration of STC arrangements, and as such that the Proposal does not better facilitate this objective (e).

Decision notice

In accordance with Standard Condition B12 of the Electricity Transmission Licence, the Authority has decided that modification proposal CM063 "*Modify the definition of Force Majeure (Section J: Interpretation and Definitions)*" should not be made.

Jourdan Edwards
Head of the OFTO Regime
Systems and Networks

Signed on behalf of the Authority and authorised for that purpose