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Direct Dial: 020-7901-7355

22 December 2005

The National Grid Electricity Transmission Company,
CUSC Signatories and
Other Interested Parties

Our Ref:
IND/COD/CUSC/CAP100/101

Dear Colleague,

Amendment to the Connection and Use of System Code (“CUSC”) - Decision and Notice in relation to Proposed Amendment CAP100/101: “Revision of CUSC Provisions to ensure that Amendment Reports contain collective CUSC Panel Recommendation, Removal of the Amendments Panel Chairman’s Casting Vote – In the context of Amendments Panel Recommendation Vote”.

The Gas and Electricity Markets Authority (the “Authority”¹) has considered the issues raised in the Amendment Report² in respect of Proposed Amendment CAP100/101 “Revision of CUSC Provisions to ensure that Amendment Reports contain collective CUSC Panel Recommendation, Removal of the Amendments Panel Chairman’s Casting Vote – In the context of Amendments Panel Recommendation Vote”.

The National Grid Electricity Transmission Company plc (“NGET”) recommended to the Authority that the original Amendment Proposal for CAP100/101 be approved with an implementation date of 10 Business days after the Authority’s decision.

Having considered the Amendment Report and NGET’s recommendation and having regard to the Applicable CUSC Objectives³ and Ofgem’s wider statutory duties,⁴ the Authority has

¹ Ofgem is the office of the Authority. The terms “Ofgem” and “the Authority” are used interchangeably in this letter.

² CAP100/101 Amendment Report dated 17 November 2005.

³ The Applicable CUSC Objectives are contained in Standard Condition C10 of the licence to transmit electricity treated as granted to NGC under Section 6 of the Electricity Act 1989 (the “Transmission Licence”) and are:

- (a) the efficient discharge by the licensee of the obligations imposed upon it under the Act and by this licence; and
- (b) facilitating effective competition in the generation and supply of electricity, and (so far as consistent therewith) facilitating such competition in the sale, distribution and purchase of electricity.

⁴ Ofgem’s statutory duties are wider than the matters that the Panel must take into consideration and include amongst other things a duty to have regard to social and environmental guidance provided to Ofgem by the government.

decided to direct an Amendment to the CUSC in line with the original Amendment Proposal CAP100/101.

This letter explains the background to CAP100/101, and sets out the Authority's reasons for its decision. This letter constitutes notice by the Authority under section 49A of the Electricity Act 1989 in relation to the direction.

Background

On 14 July 2005, a new right of appeal came into effect.⁵ As a consequence, persons whose interests have been materially affected by an Authority decision on a CUSC Amendment Proposal can appeal the decision to the Competition Commission.⁶ The Order designating this right provided that certain decisions would be excluded from the right of appeal. One such instance is where the Authority's decision is in conformity with the majority recommendation of the Panel.⁷

The proposer believed a defect existed in the CUSC in that the current baseline does not provide an opportunity to record the Panel's collective recommendation on an Amendment Proposal based against the Applicable CUSC Objectives.

Other terms of the CUSC enable the Panel to vote on motions put before it. These procedures provide that in the event of a tie in the voting, the Panel Chairman may cast a deciding vote. The Proposer considered that in the context of recommendation decisions, the use of this casting vote to decide a recommendation may not result in the most accurate reflection of the Panel's view, which in reality would be a tied vote. A tied vote would also mean any decision the Authority made could be appealed, so long as the decision did not fall under one or more of the other exclusions.

CAP100 and CAP101 were raised by NGET and submitted for consideration at the CUSC Amendments Panel Meeting on 29 July 2005. At the meeting the Panel determined that the Governance Standing Group acting as a Working Group (the Group) should consider the Amendment Proposals. The Group recommended that the proposals should be amalgamated and this was approved by the Panel at their meeting on 25 August 2005. The Group was unable to reach agreement as to whether all aspects of the amalgamated Amendment Proposal better facilitated achievement of the Applicable CUSC Objectives. The Group formulated a Working Group Alternative Amendment (WGAA) which it considered better facilitated achievement of the Applicable CUSC Objectives as compared with the original Amendment Proposal. The Working Group submitted its report for consideration at the Panel Meeting on 23 September 2005. The Panel endorsed the Working Group report and determined that the Amendment Proposal should proceed to wider consultation by NGET. A consultation paper was issued on 30

⁵ Under SI 2005 No 1646 The Electricity and Gas Appeals (Designation and Exclusions) Order 2005

⁶ S 173 Energy Act 2004

⁷ Article 6(1)

September 2005 with responses invited by 14 October 2005. Two Consultation Alternative Amendments were proposed and therefore as required under the CUSC a consultation alternative consultation was issued on 20 October 2005 with responses invited by 3 November 2005. The Final Amendment Report was submitted to the Authority on 17 November 2005.

The Proposed Amendment

Amalgamated Amendment Proposal CAP100/101 would introduce a new stage to the amendment process. Amendment Reports would no longer be sent to the Authority following the consultation process, but instead be tabled for discussion at the next Panel meeting. The Panel would then make their recommendation on the Amendment Proposal and this would be recorded in the final Amendment Report, prior to it being sent to the Authority. The proposal would also alter the Panel's voting process on recommendation decisions by providing that the chairman would not have a casting vote, allowing for a tied result to be recorded as such in the Amendment Report.

The proposer considered that the introduction of this additional stage would enable NGET to properly discharge its functions under the Act and Licences by ensuring proper facilitation of the Appeals mechanism in the CUSC. Furthermore NGET considered that enabling such a recommendation to be recorded would enhance the quality of Amendment Reports and provide the Authority with further useful information on which to base its decision.

Alternative Amendment

The Group agreed with the proposer that a defect existed within the CUSC. They also agreed with the introduction of an additional step within the amendment process as outlined in the original Amendment Proposal. The group did raise concerns that this would increase the overall amendment timeline, but a majority of the members considered this a necessary step and therefore this consequence was unavoidable. The group also agreed with the removal of the Chairman's casting vote as they considered this removed any concerns regarding two votes being cast by NGET employees.

The Group were divided over the issue of Panel Members having more than one vote whilst acting as an alternate when making a collective recommendation. The current CUSC baseline allows Panel Members to act as alternates and exercise more than one vote on motions before the Panel. Some group members were comfortable with this applying to Panel recommendation decisions, others considered that when considering recommendations the Panel should apply the concept of one member one vote, since only members present could fully participate in the debate and arrive at an informed decision.

For this reason, the Group proposed a Working Group Alternative Amendment (WGAA) which provided that Panel Members would not be allowed to cast votes on behalf of other Panel Members in relation to decisions to recommend the approval or rejection of an Amendment. All other aspects of the Amendment would be the same as the original Amendment Proposal.

Respondents' views

NGET issued a consultation paper on 30 September 2005 inviting responses from CUSC Parties and interested parties.

NGET received 5 responses to the consultation in respect of CAP100/101, of which 3 expressed support for the original Amendment Proposal, 1 expressed support for the WGAA and 1 expressed opposition to both the original Amendment Proposal the WGAA.

All respondents indicated that, in their opinion, a defect did exist.

The respondent which supported the WGAA considered a completely informed decision could only be made by members present at the meeting and therefore supported the one member one vote concept advocated by this proposal.

Other members considered that application of the one member one vote concept could lead to difficulties fulfilling quorum requirements and may also undermine the concept of having alternates.

One respondent pointed out a potential inaccuracy in the legal text for the WGAA, in that it potentially prevented an alternate from having any vote at a Panel meeting even if they were there solely as an alternate and not as an alternate in addition to being a panel member, which they considered was not the intention of the WGAA.

The respondent that did not support the original Amendment Proposal or the WGAA considered it may not be appropriate to extend the amendment process and that it may be more appropriate to increase the frequency of Panel meetings and/or consider the time allowed for earlier activities. The respondent also considered the legal drafting referencing electronic mails was confusing and requested clarification as to how Amendments currently with Ofgem would be handled if any of the proposals under CAP100/101 were approved. This respondent did not consider it the remit of the Panel to facilitate the application of the Appeals mechanism, and suggested the Panel should only be concerned with facilitating the achievement of the Applicable CUSC Objectives.

The respondents' views are summarised and contained in the Amendment Report in respect of CAP100/101.

Consultation Alternative Amendments (CAA)

NGET received two CAA's to the initial consultation:

Consultation Alternative A

This was proposed by NGET and seeks to address an error in the legal text proposed in the WGAA. NGET considered that the text for the WGAA would prevent Alternate Panel Members

present at a Panel meeting from being able to vote on recommendation decisions. This was not considered to be the intention of the WGAA.

Consultation Alternative B

This CAA, proposed by Centrica, suggested that the Panel should factor into their considerations the need to make a recommendation decision on Amendment Proposals when considering the timetable for new Amendment Proposals. They would then schedule ad-hoc meetings to make this decision if it was considered appropriate to do so. In the proposer's view this would mean that the overall timeline for the consideration of modification decisions may not have to be extended considerably as would be the case with arrangements under the other options. The proposal also suggested that NGET should prepare the final Amendment Report following a Panel vote within one business day, which should be circulated for three business days for comment and sent to the Authority one business day after that.

Consultation Alternative Amendment consultation

In accordance with the CUSC, NGET issued a consultation alternative consultation on 20 October 2005 inviting responses by 3 November 2005.

NGET received two responses to this consultation. One expressed support for CAA (B) and one expressed support for the original Amendment Proposal.

The supporter of CAA (B) was the proposer, who reiterated their desire to have minimal extension to the overall timeline for the consideration of modification decisions. Centrica also stated that they would be willing to accept a change to allow two business days for NGET to produce the final Amendment Report and a further two business days within which to send this on to the Authority after its circulation in draft form.

The other respondent commented that they considered CAA (B) may in fact make the Amendment Process less efficient because it may not always be possible to convene ad-hoc meetings because of the demands on Panel Members' time. They also stated that CAA (A) may lead to difficulties in fulfilling quoracy requirements and also undermined the concept of having alternates.

Amendments Panel Members' views

No Amendment Panel Members responded in their capacity as Panel Members to either of the CAP100/101 consultations.

NGET's recommendation

NGET recommended to the Authority that that the original Amendment Proposal would better facilitate the Applicable CUSC Objectives with an Implementation Date of 10 Business Days after the Authority decision.

Ofgem's view

Having considered the Amendment Report, Ofgem considers, having regard to its statutory duties and the Applicable CUSC Objectives, that the original Amendment Proposal for CAP100/101 would better facilitate the achievement of the Applicable CUSC Objectives.

Paragraph 8.2.3.2 of the CUSC provides that;

“the Amendments Panel shall endeavour at all times to operate:

(b) with a view to ensuring that the CUSC facilitates achievement of the Applicable CUSC Objectives.”

Ofgem considers an important function of the Panel is the consideration of change proposals, and ensuring their proper evaluation before they are submitted to the Authority for decision. The CUSC currently provides for the Panel to consider and debate Amendment Proposals prior to them proceeding to wider industry consultation. After that stage however the Panel does not have the opportunity to consider the proposal again, in light of consultation responses and indeed any consultation alternatives. Ofgem considers therefore that providing an opportunity for the Panel to make a collective recommendation on Amendment Proposals against the Applicable CUSC Objectives, and for this to be recorded in the final Amendment Report, facilitates the discharge of the obligation placed on the Panel by paragraph 8.2.3.2. and thereby better facilitates Applicable CUSC Objective (a). Ofgem considers this will allow the Panel to make clear its view as to whether a potential Amendment better facilitates the Applicable CUSC Objectives or not.

Ofgem recognises that there may be circumstances where the voting on a recommendation decision results in a tie. Ofgem consider it would be more beneficial to record such a decision as a tie, rather than for the motion to be decided by the Chairman's casting vote, as this would record a more accurate reflection of the Panel's view. Ofgem therefore approves of the removal of the Chairman's casting vote on recommendation decisions and considers doing so also better facilitates Applicable CUSC Objective (a).

All four options in the Amendment Report enable the Panel to achieve the intentions outlined in the paragraphs above. Therefore, it is Ofgem's view that all four options are capable of better facilitating the achievement of the Applicable CUSC Objectives. Whilst this is the case, Ofgem does not consider the time limits suggested under CAA (B) are reasonable. Nor does Ofgem consider it would be possible to decide firmly at the beginning of the Amendment process the date on which the Panel would eventually vote to either recommend to approve or reject a change. For these reasons Ofgem considers CAA (B) to be least suitable option of the four.

Ofgem notes that CAA (A) is essentially the same as the WGAA and was in fact raised to correct an error in the legal text of the WGAA. Ofgem agrees that the correction of this error ensures that CAA (A) better facilitates the Applicable CUSC Objectives when compared to the WGAA.

The essential difference between the original Amendment Proposal and CAA (A) centres around whether or not, when considering a recommendation decision, it is appropriate to prevent Panel members from exercising more than one vote in circumstances when they have also been appointed as an Alternate Panel Member. Under the current provisions of the CUSC, such Panel Members would be able to exercise their own vote as well as one vote for every alternate they represented. Ofgem can see no reason why in the case of recommendation decisions the requirements should be different. When a Panel Member appoints an alternate, the alternate is under their own personal duty under paragraph 8.2.4.1 to;

(b)not be representative of, and shall act without undue regard to the particular interests of:

- (i) the persons or body of persons by whom he was appointed as Panel Member....

This being the case, once an alternate is appointed, he can not take undue regard of the views of the Users that appointed him as an alternate, but he is not prevented from casting his alternate vote based on his interpretation of what another Panel Member's view would be. Ofgem considers the fundamental principle of having a pool of alternates is that they are elected by Users because they have sufficient knowledge and experience of matters likely to arise under the CUSC and they are able to appreciate the views of Panel Members appointing them and exercise their votes accordingly. Furthermore, Ofgem does not consider it would be consistent for an Alternate Panel Member to have the capacity to vote on behalf of more than one Panel Member, but to prevent a Panel Member from acting as the alternate for another Panel Member, as the legal text for CAA (A) would allow. For these reasons Ofgem considers the original Amendment Proposal better facilitates the achievement of Applicable CUSC Objective (a) when compared to CAA (A) and any of the other alternatives put forward under CAA100/101.

Ofgem agrees with the respondent which stated that the legal drafting referencing electronic mails is confusing, and considers this may benefit from clarification. This respondent sought clarification as to how Amendments currently with Ofgem would be handled, should one of the options under CAP100/101 be approved. Ofgem considers that such Amendments would not be capable of recording the Panel's view and the Amendment Report would remain deficient to that extent.

Furthermore, Ofgem agrees that implementation of the original Amendment Proposal would facilitate the operation of the appeals mechanism brought in under the Energy Act 2004 and the Statutory Instrument referenced above. Ofgem considers this to be in line with its statutory duties.

Ofgem acknowledges that the original Amendment Proposal potentially increases the overall modification timeline for the consideration of an Amendment. Whilst this is the case, Ofgem considers this is outweighed by the benefits it introduces in terms of enabling the Panel to better perform its obligations under the CUSC, and its positive impact on the facilitation of Ofgem's statutory duties.

The Authority's Direction

The Authority has decided to direct that the original Amendment Proposal for CAP100 – 101, as set out in the Amendment Report, should be made and implemented.

Having regard to the above, the Authority, in accordance with Condition C10.7(a) of the licence to transmit electricity granted to NGET under section 6 of the Electricity Act 1989 (the "Transmission Licence"), hereby directs NGET to modify the CUSC in accordance with the original Amendment Proposal for CAP100 – 101 as set out in the Amendment Report.

The modification is to be implemented and take effect on 10 January 2006.

In accordance with Condition C10.7(c) of NGET's Transmission Licence, NGET shall modify the CUSC in accordance with this direction of the Authority.

If you have any queries in relation to the issues raised in this letter, please feel free to contact me on the above number.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'N. Simpson', written over a horizontal line.

Nick Simpson
Director, Modifications

Signed on behalf of the Authority and authorised for that purpose by the Authority