



Direct Dial: 020-7901-7040

16 December 2003

The National Grid Company, CUSC Signatories and
Other Interested Parties

Your Ref: CAP049
Our Ref: IND/COD/CUSC/CAP049

Dear Colleague,

Amendment to the Connection and Use of System Code (“CUSC”) - Decision and Direction in relation to Proposed Amendment CAP049: “Alternative Amendments”.

The Gas and Electricity Markets Authority (the “Authority”¹) has carefully considered the issues raised in the Amendment Report² in respect of Proposed Amendment CAP049 “Alternative Amendments”.

The National Grid Company plc (“NGC”) recommended to the Authority that Alternative Amendment (A) should be approved with an implementation date of 10 days after the Authority’s decision.

The Authority has decided to direct a modification to the CUSC.

This letter explains the background to Proposed Amendment CAP049, as set out in the Amendment Report, and sets out the Authority’s reasons for its decision. In addition, this letter contains a direction to NGC to modify the CUSC in respect of Proposed Amendment CAP049.

This letter constitutes the notice by the Authority under Section 49A of the Electricity Act 1989 in relation to the direction.

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

² CAP049 Amendment Report dated 25 September 2003.

Background

Paragraph 8.20.2(e) of the CUSC requires an Amendment Report to include:

*“a full description and analysis of any alternative proposed amendment developed during the consultation (“**Alternative Amendment**”) which, as compared with the **Proposed Amendment**, may better facilitate achievement of the **Applicable CUSC Objective(s)** and the views and rationale thereof”*

The Proposer of CAP049 believes that the definition of “Alternative Amendment”, as defined in Paragraph 8.20.2(e) of the CUSC, is incorrect as it implies that an Alternative Amendment may only be developed during the consultation stage and not raised or developed by a Working Group. However, in contrast to this, the Proposer is of the opinion that Paragraph 8.17.1 of the CUSC indicates that the key role of a Working Group is to assist the Panel to better facilitate achievement of the Applicable CUSC Objectives and this would include developing alternative proposals.

Proposed Amendment CAP049 was raised by NGC on 8 May 2003 and was submitted for consideration at the CUSC Amendments Panel Meeting on 16 May 2003. At the meeting, the Amendments Panel determined that Proposed Amendment CAP049 should be considered by the Governance Standing Group acting as a Working Group. The Working Group provided their report to the Amendments Panel on 25 July 2003. The Amendments Panel determined that Proposed Amendment CAP049 should proceed to wider consultation. A consultation paper was issued on 7 August 2003 with responses invited by 12 September 2003. The final Amendment Report was submitted to the Authority on 25 September 2003.

The Proposed Amendment

Proposed Amendment CAP049 proposes two changes to the CUSC regarding Alternative Amendments.

The first of these seeks to amend the definition of Alternative Amendments contained in the CUSC to make clear that Alternative Amendments may be developed by a Working Group as well as being put forward by respondents during industry consultation. The Governance Standing Group recommended that the CUSC should be clarified to make it clear that Working Groups should be capable of developing Alternative Amendments. The CUSC Amendments Panel agreed with this recommendation.

The Proposed Amendment will add two new definitions to Section 11 of the CUSC to distinguish between two new types of Alternative Amendment, these being a “Working Group Alternative Amendment” and a “Consultation Alternative Amendment”. Furthermore, the definition of “Alternative Amendment” will be modified so that it may be used in the CUSC where appropriate to mean collectively any Working Group or Consultation Alternative Amendment Proposal. It is proposed that NGC will conduct a separate consultation on any Consultation Alternative Amendments received but further Consultation Alternative Amendments will not be accepted during this period.

The second aspect of the proposal relates to the absence of any opportunity for Alternative Amendments put forward by individual CUSC Parties at the end of the consultation period to be seen and commented on by other CUSC Parties prior to the Amendment Report stage. The intent of CAP049 is to enable CUSC Parties to consider such Consultation Alternative Amendments whilst also restricting the number of Consultation Amendment Proposals that CUSC Parties are able to put forward to the first consultation phase enabling the process not to be prolonged indefinitely. In the interests of transparency, the Proposed Amendment will also not permit Consultation Alternative Amendments to be subject to the confidentiality provisions within the CUSC.

The Proposer considered that Proposed Amendment CAP049 would better facilitate achievement of the Applicable CUSC Objective C7F.1(a) for the efficient discharge by NGC of the obligations imposed upon it under the Act and by its Transmission Licence³. The Proposer considered that Proposed amendment CAP049 would improve clarity and remove uncertainty from the CUSC documentation and in so doing enable National Grid to more easily and efficiently discharge its obligations to facilitate achievement of the Applicable CUSC Objectives. In addition, there would be greater transparency and scope for the industry to comment on an Alternative Amendment submitted during the consultation phase.

Working Group's Views

One Working Group member suggested that Paragraph 8.16.4 (c) should be modified to require NGC to identify the timetable for further consultation where necessary. It was the view of National Grid that if CAP049 were implemented, it would carry out any supplementary consultation within the two month period for consultations under Paragraph 8.16.4 (e) of the CUSC. The initial consultation period, to be set by NGC, would allow for a possible supplementary consultation period without there being any need for this to be specified in the CUSC. This was accepted by the Working Group member.

Two members of the Working Group raised concerns regarding the efficiency of the working procedures of the Group. It was felt by these two members that there had been inadequate concerted evaluation of the Amendment Proposal because evaluation had been done by E-mail correspondence and without formal meetings. As a result they could not support the Working Group Report as they were of the opinion that the Group's Terms of Reference had not been met.

³ The Applicable CUSC Objectives are contained in Standard Condition C7F of the licence to transmit electricity treated as granted to NGC under Section 6 of the Electricity Act 1989 as amended (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.

Alternative Amendment (A)

Alternative Amendment (A) was proposed by one respondent as a means to address the suggested defect in CUSC in a simpler and more efficient manner through the removal of the requirement for the identification and differentiation of two classes of Alternative Amendment as proposed in CAP049, namely a Working Group Alternative Amendment or a Consultation Alternative Amendment. This respondent was not of the opinion that Paragraph 8.20.2(e) implies that an Alternative Amendment may only be developed during the consultation stage and not raised or developed by a Working Group. However, this Respondent did agree with the Proposer of CAP049 that additional clarity would remove any further ambiguity.

In also recognising the concerns of the Proposer that Alternative Amendments raised during the consultation process have generally not been made available to the wider industry for consideration, the Proposer of Alternative Amendment (A) also believed that sufficient flexibility exists within the two month maximum consultation period for any further consultation should this prove appropriate. The Proposer of Alternative Amendment (A) therefore endorses the judicious setting of consultation periods by the Amendments Panel and NGC as per Paragraph 8.16.4 of the CUSC to facilitate this.

Respondents' views

NGC issued a consultation paper on 7 August 2003 inviting views from CUSC Parties and interested parties.

NGC received four responses to the consultation in respect of Proposed Amendment CAP049. Two respondents expressed support for the Proposed Amendment. One respondent expressed support for the Proposed Amendment to be amended slightly to the effect that Paragraph 8.19.1 should state that NGC shall consult on the Amendment Proposal and any Working Group Alternative Amendment if applicable, as opposed to this being a mandatory requirement as detailed in the original legal text. The same respondent also suggested that the legal text of the Proposed Amendment must make it clear that an Alternative Amendment seeks to better facilitate achievement of the Applicable CUSC Objectives when compared against the current version of the CUSC in addition to the Proposed Amendment. One further respondent did not support the Proposed Amendment and suggested Alternative Amendment (A) as a more suitable option to address the issue under consideration.

The two respondents supporting Proposed Amendment CAP049 argued that such an Amendment Proposal would introduce several benefits. These included increased clarity and transparency of the current arrangements that would allow NGC to more efficiently discharge its obligations and the engendering of increased confidence in the current process. Furthermore, it was also considered that this Amendment Proposal would provide greater scope for industry consultation on alternative proposals whilst safeguarding efficiency through not prolonging such discussions beyond the initial consultation phase. It was also noted that, at present, the Authority does not have the benefit of gauging industry views on Alternative Amendments submitted during the consultation phase of the process .

One additional respondent who expressed support for the Proposed Amendment also suggested a number of minor drafting changes to the original Amendment Proposal. These included extra wording in Paragraphs 8.20.2 (e) and 8.20.2 (f) and in the definitions for the Proposed amendment to make it clear that, in addition to better facilitating achievement of the Applicable CUSC Objectives, Alternative Amendments would need to better facilitate achievement of the Applicable CUSC Objectives as compared with the current version of the CUSC. NGC accepted these changes in consultation with the Respondent and incorporated these into the legal text for CAP049.

Whilst being of the opinion that there is a defect in the CUSC, the respondent proposing Alternative Amendment (A) raised issues relating to multiple "Alternatives". This respondent argued that, in order to minimise the frequency with which these multiples occur, there should be a requirement on the Panel and NGC to correctly identify whether the Amendment Proposal should initially be referred for evaluation so that the Working Group can consider alternatives and identify implementation issues prior to industry consultation. It was the view of this respondent that this would significantly reduce the risk of numerous Alternative Amendments being generated during consultation. This respondent is of the opinion that there is no requirement to differentiate between working group and consultation alternatives as prescribed in Proposed Amendment CAP049. It was the view of this respondent that Alternative Amendment (A) better facilitates achievement of the Applicable CUSC Objectives compared with the existing CUSC and Proposed Amendment CAP049.

The respondents' views are summarised and contained in the Amendment Report in respect of Proposed Amendment CAP049.

Amendments Panel Members' views

No formal responses were submitted by Amendments Panel Members to the consultation on Proposed Amendment CAP049. However, the Amendments Panel agreed with the Governance Standing Group's assessment in 2002 that an Amendment Proposal should be brought forward to clarify the position on the arrangements for Alternative Amendments.

NGC's recommendation

NGC recommended to the Authority that Proposed Amendment CAP049 should be approved with an implementation date of 10 days after the Authority's decision.

NGC considered that the proposals put forward in Alternative Amendment (A) for dealing with the issue of multiple "Alternatives" addresses a different issue than the defect identified in the context of the original Amendment Proposal. Whilst the respondent's comments on this aspect of the CUSC have been noted, NGC does not consider them to be of direct relevance to the issue of whether or not the Authority should approve CAP049.

Ofgem's view

Having had regard to its statutory duties, the Applicable CUSC Objectives and the consultation responses, Ofgem considers that the Proposed Amendment would better facilitate achievement of the Applicable CUSC Objective C7F.1(a) for the efficient discharge by NGC of the obligations imposed upon it under the Act and by its Transmission Licence as compared with Alternative Amendment (A) and the current procedures contained within the CUSC.

Ofgem considers that, in order for the Amendments Panel to be able to properly discharge its duties under the CUSC, the process for generating Alternative Amendments should be such that this is conducted as efficiently and transparently as possible. With this in mind the Authority wishes to make the following observations:

Proposed Amendment

Ofgem recognises that Proposed Amendment CAP049 offers significant benefits beyond that of the current process contained within the CUSC, principally by making it clear that Alternative Amendments may be submitted by Working Groups as well as by respondents participating in the current consultation process. Whilst the Authority considers that Paragraph 8.20.2 (e) of the CUSC does not necessarily imply that an Alternative Amendment may only be developed during the consultation stage and not raised or developed by a Working Group in its current format, the Authority welcomes any proposal that reduces the scope for potential ambiguity on this issue.

The Authority also considers that there are specific benefits relating to transparency by clearly differentiating between Working Group Alternative Amendments and Consultation Alternative Amendments. The view of the Authority is that priority should be accorded to creating governance arrangements which are transparent, open and comprehensible. Ofgem therefore considers it important that the process for the derivation and classification of Alternative Amendments is kept as simple and reasonably practicable as possible and formulated in a manner that would give parties sufficient time to comment on Alternative Amendments and to express their views and opinions on them within reasonable timescales. To properly achieve this, the Authority therefore considers it essential that NGC implement practical measures to ensure clear delineation between the periods when consultation alternatives may be submitted and the period during which no further consultation alternatives may be submitted and only perusal and comment will be required.

Ofgem therefore supports the nature and purpose of the Proposed Amendment. It is Ofgem's view that the legal text submitted would better facilitate achievement of the Applicable CUSC Objectives C7F.1(a).

Alternative Amendment (A)

Ofgem acknowledges that Alternative Amendment (A) seeks to build upon Proposed Amendment CAP049 and simplify it further by removing the need to distinguish between Alternative Amendments either raised by a Working Group or developed as a result of wider industry consultation. However, the Authority believes it to be important that any modification to the CUSC improves the transparency of the existing process and is of the opinion that it is advantageous to detail the origin of an Alternative Amendment as described in the Proposed Amendment.

It is the opinion of Ofgem that, whilst constituting an improvement upon the existing process, Alternative Amendment (A) does not better facilitate the achievement of the Applicable CUSC Objectives as compared to the Proposed Amendment. It is the view of the Authority that greater transparency and the opportunity for industry consultation on Alternative Amendments will be better achieved through the adoption of the Proposed Amendment as compared to Alternative Amendment (A).

It has been noted by Ofgem that two members of the Working Group raised concerns regarding the evaluation procedure of the Group. As a direct result, they were unable to support the Working Group's Report.

The Authority is also of the opinion that where any respondent proposes changes to the original Proposed Amendment this should be separately identified as an Alternative Amendment in accordance with Paragraph 8.20.2(e) of the CUSC. Paragraph 8.20.2(e) clearly states that an Amendment Report shall provide for:

*"a full description and analysis of any alternative proposed amendment developed during the consultation ("**Alternative Amendment**") which, as compared with the **Proposed Amendment**, may better facilitate achievement of the **Applicable CUSC Objective(s)** and the views and rationale in respect thereof"*

It is noted in the Amendment Report for CAP049 that:

"National Grid recommends that CAP049 (revised to take into account the minor comments from the respondent in CR-049-04) to be approved for implementation"

The Authority does not consider this to be wholly consistent with the provisions laid down in the CUSC for dealing with Alternative Amendments. However, upon further evaluation of the minor amendments proposed, Ofgem is of the opinion that, on this occasion, such minor amendments do not significantly alter the materiality of the Proposed Amendment to the extent that would necessitate the Proposed Amendment to be rejected. The Authority strongly recommends that for all future Proposed Amendments the procedure for including alterations to the Proposed Amendment within the Amendment Report is clearly done in strict accordance with Section 8.20 of the CUSC.

The Authority's Decision

The Authority has therefore decided to direct that the Proposed Amendment, as set out in the Amendment Report, should be made and implemented.

Direction Under Condition C7F.7(a) of NGC's Transmission Licence

Having regard to the above, the Authority, in accordance with Condition C7F.7(a) of the licence to transmit electricity treated as granted to NGC under Section 6 of the Electricity Act 1989 as amended (the "Transmission Licence"), hereby directs NGC to modify the CUSC in respect of Proposed Amendment CAP049, as set out in the Amendment Report.

The modification is to be implemented and take effect from 10 days after the Authority's decision.

In accordance with Condition C7F.7(b) of NGC's Transmission Licence, NGC 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 of Industry Codes

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