



COMPANY CONSULTATION VOLUME 1

CUSC Amendment Proposal CAP179

Prevention of Timing Out of Authority Decisions on Amendment Proposals

**The purpose of this document is to consult on Amendment Proposal
CAP179 with CUSC Parties and other interested industry members**

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**Please send responses to this consultation to cusc.team@uk.ngrid.com by
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1.0 SUMMARY AND RECOMMENDATIONS

Executive Summary

- 1.1 CAP179 "Prevention of "Timing Out" of Authority Decisions on Amendment Proposals" was raised by National Grid and submitted to the Amendments Panel for consideration at their meeting on 29th January 2010. CAP179 seeks to amend the CUSC to introduce new processes such that Implementation Dates for Amendment Proposals cannot cause timing out of Authority decisions. CAP179 contains three parts which are summarised below and are described in more detail in section 3 of this report.
- 1.2 Part 1 of CAP179 proposes that Implementation Dates for the majority of Amendment Proposals continue to use the normal CUSC working practice, wherever possible, of "XX business days or XX months after receipt of an Authority decision", which would prevent timing out occurring because there is no fixed Implementation Date.
- 1.3 Part 2 recognises that "fixed" Implementation Dates are sometimes preferable, for example to accommodate system development requirements, so seeks to introduce a process to allow the Authority to notify the Panel that it will be unable to make a decision in time for the "fixed" Implementation Date, taking into account associated lead times, and to request new dates from the Panel. The Panel would then consult with the industry on the proposed revised Implementation Date(s), as well as requesting any views on other time-related issues, such as the ongoing relevance of any supporting analysis. The Panel could then highlight any such issues to the Authority when providing the revised date(s). The original CAP179 proposal does not contain a process for the Panel to revise out-of-date analysis or its recommendation on the Amendment Proposal concerned. The Proposer's intention is that, if the Panel flagged concerns over out-of-date analysis associated with a particular Amendment Proposal, the Authority could then separately use its wider 'send back' powers (introduced as part of the Code Governance Review) to direct the Panel to revise the analysis. At this point the Panel could remake its recommendation as part of the 'send back' process. However, a majority of the Working Group believed this additional process step should form part of CAP179 itself, and subsequently developed this as Working Group Alternative Amendment 1 (see below).
- 1.4 Part 3 proposes a further process to give a mandate for the Panel Secretary to write to the Authority, on behalf of the Amendments Panel, to request a likely decision date, where an Amendment Report has been sent to the Authority but a decision has not yet been received. This seeks to address the issue of timely decision making, as raised by industry participants in response to previous consultations on the subject of "timing out".
- 1.5 A Working Group for CAP179 was established and the first meeting held on 26th March 2010. Following discussions at that meeting, the Working Group agreed to proceed to Working Group Consultation. A potential Working Group Alternative Amendment (WGAA) had been suggested at the first meeting. This WGAA would extend Part 2 of CAP179 so that, if the analysis upon which the Panel's original recommendation was made is considered out of date, the Authority can direct the Panel to revise the analysis and the Panel can then remake its recommendation in light of the changed circumstances. The Working Group decided to get views from the industry before considering the suggested WGAA further.

- 1.6 The Working Group Consultation was issued on 16th April 2010 and closed for responses on 29th April 2010. Six responses were received from the industry, summarised in paragraphs 1.11 to 1.13 of this report. The majority of the responses from the Consultation were in support of the potential WGAA.
- 1.7 The second Working Group meeting was held on 4th May 2010 where the Working Group discussed the consultation responses and the potential WGAA. The Working Group agreed to obtain legal advice from both Ofgem and National Grid on the interaction between the WGAA, the existing Transmission Licence provisions, and Ofgem's proposed 'send back' process (proposed to be introduced as part of the Code Governance Review) before developing the WGAA further. Both Ofgem and National Grid indicated that a further licence change was not needed in order to progress the WGAA.
- 1.8 The Working Group discussed this legal advice and its final views at two further teleconferences on 21st and 25th May 2010. At these meetings, the Working Group agreed by majority to formally progress the WGAA (hereafter referred to as WGAA1). WGAA1 seeks to extend Part 2 of CAP179 and is set out in detail in section 5 of this Consultation document.

Initial Working Group Recommendation

- 1.9 At the Working Group meeting on 25th May 2010, five members of the Working Group initially voted as follows:

View against Applicable CUSC Objectives	Better than baseline	Better than original*	Better than WGAA1*	Best
Original	1	NA	1	1
WGAA1	3	3	NA	2
Baseline	NA	4	2	2

*One member did not wish to give a preference between the original and the WGAA, since they did not believe either option to be better than the baseline.

- 1.10 From these votes, the initial majority recommendation of the Working Group was that neither the original nor WGAA1 should be made. This is because, although three members believed WGAA1 to be better than the baseline, one of these members (the Proposer) supported the original as the best option overall. Although three members believed WGAA1 to be better than the original, only two of these members also believed it to be better than the baseline. Please see paragraph 1.20 below for the Working Group's final vote and recommendation.

Summary of first Working Group Consultation Responses

- 1.11 Six responses were received to the first Working Group Consultation; these are summarised in section 12 of this Consultation document. In response to the specific questions posed by the Working Group, one respondent suggested that a defect did exist within the CUSC, while four others disagreed. Five of the six respondents supported the Working Group developing the proposed WGAA1 further, although one of those respondents noted they would be unlikely to support it, compared to the existing CUSC baseline. One respondent did not support further development on the

grounds that it considered that CAP179 represented "insurance" against a situation that was unlikely ever to occur and the costs of developing such insurance were therefore not warranted. One respondent considered that, on balance, CAP179 better facilitates the objectives than the CUSC baseline, but four respondents disagreed and responded that CAP179 was not preferable to the CUSC baseline.

- 1.12 All six respondents agreed with the proposed implementation approach, with three respondents specifically stating that CAP179 should not be applied retrospectively, if it is implemented.
- 1.13 Five responses supported WGAA1 and there were no further requests for other Alternatives from the industry. Further detail on the content of the responses to the Working Group Consultation is included in Section 12 of this Consultation document.

Further Working Group Discussions and Consultation

- 1.14 Following the meeting in May 2010 at which the Working Group vote was undertaken, National Grid produced a draft of the Working Group Report for comment and circulated the first draft of the legal text for the original Amendment Proposal. This was followed shortly after by an updated draft of the illustrative text for the original CAP179 Amendment Proposal and a first draft of the legal text for WGAA1. The first draft of the Working Group report received substantial comments from Working Group members and a subsequent draft was produced and circulated. On reviewing the first draft of the legal text, Ofgem expressed its view that the legal text did not address the defect which the original CAP179 Amendment Proposal sought to address, namely timing out of Authority decisions.
- 1.15 The Working Group held a further teleconference on 18th August 2010 to finalise the Working Group report, during which Ofgem's comments were discussed. The majority of Working Group members disagreed with Ofgem's interpretation of the legal text and did not consider that an issue existed which needed to be addressed. Furthermore, the majority of the Working Group did not wish any changes to be made to the "original" CAP179 Amendment Proposal solution nor WGAA1. However, National Grid, as Proposer of CAP179, expressed a concern that the issues raised by Ofgem over the legal text were valid and could lead to the solution proposed for CAP179 not addressing the defect.
- 1.16 National Grid, as code administrator, confirmed that a previous precedent had been set for "proposer ownership"¹ and therefore, on the basis of the precedent, "proposer ownership" did not apply to the original CAP179 Amendment Proposal and therefore it was unable, as Proposer, to amend the solution agreed by the Working Group. National Grid informed the Working Group that, as Proposer, it wished to submit a further WGAA to address the issue raised over the legal text. The majority of the Working Group did not agree with this approach and did not consider that a further WGAA was necessary. The Working Group chairman², noting the precedent set by the

¹ Please see paragraph 4.5 of this document for further detail; the precedent referred to is CAP168: Transmission Access Under-use and reallocation of TEC.

² It should be noted that, for a number of the WG meetings, the WG chairman was unavailable and a stand-in chairman was provided by National Grid. This is highlighted as National Grid is also the Proposer of CAP179. Please see paragraph 4.5 for further detail and Annex 7 for the Working Group Attendance Register.

CAP168 Working Group, informed the Working Group that he intended to allow the additional WGAA to be progressed as an option. This is discussed in more detail in paragraph 4.5 of this Consultation document. The Working Group agreed that a further Working Group Consultation should be undertaken to allow the industry visibility of further discussions and an opportunity to respond to them. Neither the Amendments Panel nor the Authority objected to a further consultation or an extension to the Working Group timetable.

- 1.17 The second Working Group Consultation, which specifically asked for views on the proposed additional Working Group Alternative Amendment, closed on 11th October 2010 and received four responses. Two of the responses did not comment on the additional proposed WGAA. Of the other two responses, one supported progressing the additional WGAA and the other did not.

Final Working Group Vote

- 1.18 At the final Working Group meeting on 18th October 2010, the Working Group chairman³ used her powers under the CUSC to progress the proposed additional WGAA (hereafter referred to as WGAA2) on the grounds of efficiency and that, in her opinion, WGAA2 better facilitates the Applicable CUSC Objectives than the original CAP179 Amendment Proposal. Full detail of the reasoning for this decision is provided in section 5 of this Consultation document.
- 1.19 At the final meeting, the Working Group undertook its final vote against the Applicable CUSC Objectives for the original CAP179 Amendment Proposal and WGAAs1 and 2. A table summarising the key differences between each proposal can be found below:

Original CAP179	WGAA1 (Proposed by Working Group)	WGAA2 (Proposed by NGET)
Part 1 CUSC requires, where possible, use of "open ended" implementation dates, e.g. XX business days/months after receipt of an Authority decision.	As per original.	As per original.
Part 2 Where a "fixed" implementation date is used, the Authority may request revised dates from the Panel where it becomes aware that it cannot meet the decision by date associated with the Implementation date. The Panel could refuse Ofgem's request if it believed it had reasonable grounds to do so. The Panel may consult with the industry on the revised dates; the industry may raise	As per original. In addition, the Panel may request that analysis undertaken to support the proposal be updated or additional analysis be undertaken without a further Authority request. Where this occurs, the Panel would have the right to make an additional recommendation on the	As per original, except WGAA2 clarifies that the Authority will "direct" the Panel to provide revised implementation dates, rather than "request" revised dates (i.e. the Panel cannot refuse).

³ The Working Group Chairman for the final meeting was the originally appointed Working Group Chairman and not the National Grid stand-in

Original CAP179	WGAA1 (Proposed by Working Group)	WGAA2 (Proposed by NGET)
other time-bound issues. However, the ability to redo analysis and remake the Panel's recommendation falls outside the scope of the solution for the Original Amendment, and could be dealt with under Ofgem's wider 'send back' powers.	proposal or remake its original recommendation and submit a revised Amendment Report to the Authority.	
<p>Part 3</p> <p>The Panel Secretary may write to the Authority, requesting a likely decision date, where:</p> <ul style="list-style-type: none"> the Authority has received a final Amendment Report; and four months have elapsed since the Authority received the report; or the Panel is concerned that the circumstances concerning the Amendment have materially changed. 	As per original.	As per original.

1.20 The final Working Group vote, undertaken on 18th October 2010 was as follows:

View against Applicable CUSC Objectives	Better than baseline	Better than original*	Better than WGAA1*	Better than WGAA2*	Best
CAP179 original	1	N/A	1	3	0
WGAA1	3	3	N/A	3	2
WGAA2	1	1	1	N/A	1
Baseline	N/A	4	2	4	2

There were five Working Group members eligible to vote. Two of the members considered that none of the options available were better than the CUSC baseline. One member did not wish to give a preference between the original and the WGAA's, since they did not believe any of the options to be better than the baseline.

From these votes, the final majority recommendation of the Working Group was that none of the three CAP179 solution options (original, WGAA1 or WGAA2) should be made. This is because, although three members believed WGAA1 to be better than the baseline, one of these members (the Proposer) supported WGAA2 as the best option overall. Although three members believed WGAA1 to be better than the original and WGAA2, only two of these members also believed WGAA1 to be better than the baseline.

Amendments Panel's View

- 1.21 At the meeting of the Amendments Panel on 29th October 2010, the Panel agreed that the CAP179 Working Group had fulfilled its terms of reference and that CAP179 should proceed to Company Consultation for a period of two weeks.

National Grid's Initial View

- 1.22 National Grid is the Proposer of both the CAP179 original Amendment Proposal and WGAA2 and considers that implementation of both of these options would better facilitate Applicable CUSC Objective (a) than the CUSC baseline. However, National Grid prefers WGAA2 over the original solution, as under the original solution, uncertainty remains over whether the Panel would provide revised dates or whether an Amendment Proposal which was subject to a request for revised dates would still be able to time out. National Grid's view is set out in more detail in Section 11 of this document.

2.0 PURPOSE AND INTRODUCTION

- 2.1 This Consultation document describes the CAP179 Amendment Proposal and the Working Group Alternative Amendments, the deliberations of the Working Group and summarises responses to the two Working Group Consultations.
- 2.2 CAP179 was proposed by National Grid and submitted to the Amendments Panel for its consideration on 29th January 2010. The Amendments Panel determined that the proposal should be considered by a Working Group and that the Group should report back to the Amendments Panel within 3 months, (including a two week period of Working Group Consultation). This period was subsequently extended, with the agreement of the Amendments Panel, to take account of the delay in holding the first Working Group meeting (due to lack of availability of Working Group members).
- 2.3 The first Working Group meeting was held on 26th March 2010 and the members accepted the Terms of Reference for CAP179. A copy of the Terms of Reference is provided in Annex 2. The Working Group considered the issues raised by the Amendment Proposal, including whether a defect currently exists within the CUSC, and considered whether the Proposal better facilitates the Applicable CUSC Objectives. The Working Group agreed to proceed to Working Group Consultation.
- 2.4 The second Working Group meeting was held on 4th May 2010. At this meeting WGAA1 was formally developed and the Working Group Consultation responses were taken into consideration. The Working Group members voted regarding the Applicable CUSC Objectives on the original proposal, WGAA1 and the baseline. The majority believed that WGAA1 was preferable to the original, but were not certain on whether WGAA1 would be valid without a supporting Transmission Licence change or whether it would be considered as duplicating the proposed 'send back' process that the Authority had consulted on in the Code Governance Review.
- 2.5 Legal advice from Ofgem and National Grid was requested by the Working Group members in order to inform their vote. Legal advice from both Ofgem and National Grid confirmed that the requested powers for the Authority to

direct the Panel to revise out-of-date analysis, and any accompanying ability for the Panel to remake its recommendation, could be covered under the 'send back' process of Ofgem's proposed Code Governance Review changes.

- 2.6 Despite the out of date analysis being covered in the 'send back' process, the majority of the Working Group still preferred to have WGAA1 in place, as it may take some time to make the necessary code changes to deliver the proposed Code Governance Review licence changes and there is a possibility that CAP179 will be implemented before the wider 'send back' powers are introduced in the CUSC. A majority of members felt strongly that it would be inappropriate to introduce a process for revising Implementation Dates without the ability to revise any out-of-date analysis and obtain a revised Panel recommendation where necessary.
- 2.7 This consultation document has been prepared in accordance with the terms of the CUSC. An electronic copy can be found on the National Grid Website at www.nationalgrid.com/uk/Electricity/Codes/. **This document seeks views from industry members on whether CAP179 or either of the Working Group Alternative Amendments better facilitate the Applicable CUSC Objectives. It also seeks views on the proposed implementation approach.** Representations will be included in National Grid's Amendment Report which will be furnished to the Authority for its decision. Views are invited by **5pm on Monday, 15th November 2010.**

3.0 PROPOSED AMENDMENT

- 3.1 CAP179 consists of three parts. Parts 1 and 2 relate to the prevention of "timing out" of Authority decisions on Amendment Proposals and Part 3 deals with issues relating to timely decision making.
- 3.2 The "timing out" of an industry code change proposal has occurred within the electricity industry, for example, in 2007 when the Authority was unable to provide its decision on Balancing and Settlement Code (BSC) Modification Proposals P198, P200, P203 and P204 ("the Losses Modifications") before the final date allotted for such a decision in the Final Modification Report. A subsequent Judicial Review in July 2008 resulted in a judgement that when the Authority did not make its decision by the latest date included in the Final Modification Reports, it lost the ability to make any decision on those Proposals.
- 3.3 Ofgem has previously consulted on draft licence changes to resolve the issue of "timing out". However, National Grid as Proposer considers that it is preferable for the industry to develop the most appropriate solution through the code change processes, and has therefore raised changes to the CUSC⁴, the Balancing and Settlement Code⁵ (BSC) and Uniform Network Code⁶ (UNC).
- 3.4 Part 1 of CAP179 seeks to require the Amendments Panel, wherever possible, to propose Implementation Dates in line with the existing CUSC working practice. The practice is to construct a date with reference to "XX

⁴ This Amendment Proposal CAP179

⁵ Modification Proposal P250

⁶ Code Modification Proposal P281

business days or XX months after receipt of an Authority decision" and this construct is usually referred to as an "open-ended" date as it does not place any constraints on the timing of the Authority's decision. This construct prevents "timing out" of a decision occurring as a result of the Implementation Date, while continuing to recognise the need for a lead time between an Authority decision and a change "going live".

- 3.5 Part 2 of the Proposal recognises that there may be occasions when a "fixed" Implementation Date is preferable, for example, to accommodate system development requirements. A hypothetical example of a "fixed" Implementation Date would be "an Implementation Date of 1st April 2012 if an Authority decision is received by 31st March 2011". Where this is the case, CAP179 proposes that the Amendments Panel should be mindful of the potential for "timing out" to occur when setting proposed "fixed" Implementation Dates (i.e. the potential that the Authority could be unable to make a decision by these dates).
- 3.6 Furthermore, Part 2 specifies that where a fixed Implementation Date is proposed, a process should be formalised within the CUSC whereby the Authority, upon identifying that it will be unable to make a decision in time for the fixed Implementation Date, and taking into account specified lead times, writes to the Amendments Panel setting out its reasons for not meeting such a date and requesting a revised set of dates. Once the Authority's notification is received, CAP179 proposes that the Panel would consult with the industry on a number of issues:
- a) a revised set of Implementation Dates (which may be "fixed" or "open-ended" as appropriate); and
 - b) whether the industry considers there to be any other relevant time-bound issues arising; which could include any issues relating to the "expiry" of supporting analysis that was undertaken to support the original Amendment Report sent to the Authority.
- 3.7 Subsequent to the Judicial Review described in paragraph 3.2 above, both the BSC Panel and Ofgem ran industry consultations seeking views on the issues raised by "timing out". Part 3 of CAP179 seeks to address some of the issues regarding timely decision making raised by industry participants in response to those consultations. Specifically, Part 3 seeks to introduce a new formal process to the CUSC whereby, following receipt by the Authority of a final Amendment Report, the Panel Secretary, at the request and on behalf of the Amendments Panel, may write to the Authority to request the Authority to give an indication of the likely date by which the Authority's decision on an Amendment Proposal shall be made. This process could be triggered either by a set period of time elapsing or by the Amendments Panel raising a reasonable concern related to the pending Amendment Proposal, for example that the analysis, upon which the Panel's recommendation was based, may soon become out of date.

4.0 SUMMARY OF WORKING GROUP DISCUSSIONS

4.1 Presentation of Amendment Proposal

- 4.1.1 At the first Working Group meeting held on 26th March 2010, the Working Group chairman invited National Grid, as Proposer of CAP179, to give a brief

presentation of the Amendment Proposal. The Working Group noted that National Grid raised CAP179 after BSC Modification Proposal P250: "Prevention of Timing Out of Authority Decisions on Modification Proposals" (also raised by National Grid), had been through the (BSC) Modification Group development stage, and that the solution proposed in CAP179 reflected the Alternative Modification developed by that group for P250.⁷ With this in mind, the Ofgem representative asked why CAP179 refers to the Authority "requesting" a revised set of Implementation Dates, while the legal text provided for the P250 Alternative Modification refers to the Authority "directing" the Panel to provide revised Implementation Dates⁸. The Ofgem representative noted that paragraph 8.23.1⁹ of the CUSC, which deals with implementation of Amendment Proposals, refers to a "direction" by the Authority. One Working Group member commented that a "direction" from the Authority (as set out in paragraph 8.23.1) in relation to the modification of the CUSC is usually made to "The Company" (National Grid Electricity Transmission plc) and not to the Amendments Panel.

- 4.1.2 The National Grid representative responded that the difference in terminology was not intentional and that National Grid had not anticipated that the Amendments Panel, on receiving such a request from the Authority for a revised set of Implementation Dates, would refuse such a request. This issue was debated on a number of further occasions during Working Group meetings and in Working Group correspondence to discuss the draft legal text. In drafting the legal text (please see Annex 6 of this report), National Grid has used the term "request" rather than "direct" when referring to the Authority's communication with the Panel when it asks for revised Implementation Dates. National Grid has adopted this approach as it feels that it a) best reflects the majority view of the Working Group while not conflicting with the view expressed by the Ofgem representative and; b) accords with the wording used in the Amendment Proposal. In light of the intention of the Proposer, expressed above, and comments made by the Ofgem representative, National Grid has caveated that the "request" should not be unreasonably refused.
- 4.1.3 The Ofgem representative suggested that the Authority would find it helpful to have consistency between the solutions proposed for the BSC and the CUSC, unless there was something within the CUSC that made a different solution more suitable. One Working Group member commented that as the CUSC provisions allow for multiple alternative solutions to be proposed, it was possible, at this stage, that a third alternative could be raised as a Working Group Alternative Amendment (WGAA); either by the Working Group itself or via a Working Group Consultation Alternative Request; which would again be different from the BSC Proposed Modification or the Alternative Modification.
- 4.1.4 The National Grid representative confirmed that the only difference between CAP179 and the P250 Alternative Modification was that Part 3 of CAP179, which gives a mandate for the Panel Secretary to write to the Authority to request a likely decision date for an Amendment Proposal, was included to allow the CUSC Working Group to consider the merits of this element of the

⁷ The P250 Alternative Modification has since been approved by the Authority.

⁸ Please see Elexon's website for the proposed P250 legal text at:
http://www.elexon.co.uk/documents/change_and_implementation/modifications/250/p250_assessment_report.zip

⁹ For the latest version of section 8 of the CUSC, please see National Grid's website at:
www.nationalgrid.com/uk/Electricity/Codes/systemcode

solution. Although this formed part of the P250 Proposed Modification, the P250 group had decided not to include this in its Alternative Modification as the BSC Panel already has this ability informally, and the group felt that its formalisation was therefore unnecessary.

- 4.1.5 The Ofgem representative queried why CAP179 did not contain an equivalent option to the P250 Proposed Modification, which would require the BSC Panel to always set Implementation Dates for every change in such a way that they could not allow the Authority to "time out". The National Grid representative clarified that the P250 Proposed Modification had not been supported by the BSC Modification Group or the wider industry, and that CAP179 was therefore based on the more-supported P250 Alternative.¹⁰ The chairman noted that it was open to the CAP179 Working Group to develop a WGAA which was equivalent to P250 Proposed, if members wished to do so, either because an Alternative was suggested by the Working Group itself or via a Working Group Consultation Alternative Request as part of the Working Group Consultation.
- 4.1.6 One Working Group member noted that the justification for the proposed Amendment with reference to the Applicable CUSC Objectives within the Amendment Proposal was flawed, as the reference¹¹ used to the Transmission Licence relates, specifically, to the extension to the timetable for the implementation of an approved change, not for the extension to the implementation timetable for a change on which a decision has yet to be made by the Authority. The National Grid representative acknowledged this point, and responded with the revised justification against the Applicable CUSC Objectives, as discussed at the January 2010 Amendments Panel meeting. In summary, National Grid considers that CAP179 better meets Applicable CUSC Objective (a) as the proposed processes for setting Implementation Dates to avoid "timing out" would result in the more efficient discharge of the requirement to operate procedures for the modification of the CUSC, as set out in the Transmission Licence. Setting Implementation Dates which cannot allow an Amendment Proposal to "time out" will mean that the work associated with the development of such an Amendment Proposal and the underlying resource requirements and associated costs would not be wasted. A full revised justification against the Applicable CUSC Objectives is contained within Annex 1 of this report.
- 4.1.7 In summary, the Working Group noted Ofgem's desire for consistency between the proposals for the different industry codes (BSC, CUSC and the gas UNC), but highlighted that the various industry codes are all different and that the UNC solution, in particular, is likely to differ due to its different existing practices for setting Implementation Dates.

4.2 Discussion of issues raised by CAP179

- 4.2.1 The Working Group chairman suggested that prior to considering the proposed solution within CAP179 and any other potential WGAA's, it would be helpful if the Working Group first debated the principles, issues and history around "timing out" in order to help the Group progress through the terms of

¹⁰ For copies of the P250 group's report, and the associated industry consultation responses, please see ELEXON's website at:

http://www.elexon.co.uk/changeimplementation/findachange/modproposal_details.aspx?propID=278

¹¹ Condition C10 paragraph 6 (c).

reference. The following paragraphs summarise the Working Group's debate.

Identification of a defect within the CUSC

- 4.2.2 The Working Group proceeded to debate the first element of the terms of reference, namely whether a defect exists in the CUSC to be remedied. One Working Group member noted that "timing out" had never occurred for any of the preceding CUSC Amendment Proposals and also considered that "timing out" had never been close to occurring, due to the usual practice within the CUSC of setting "open-ended" Implementation Dates which were linked to the notification of an Authority decision, rather than being a "fixed" date, even if, as in the case of CAP148¹², the Authority had taken over two years to decide upon an Amendment Proposal. This view was supported by a second Working Group member who stated that it was very rare that a fixed Implementation Date was used in the CUSC and that the Amendments Panel is very mindful of not putting in a fixed "decide by" date for the sake of it. The Working Group member confirmed that the usual working practice for the CUSC is to propose an Implementation Date of 10 working days after an Authority decision.
- 4.2.3 The National Grid representative accepted that "timing out" had not occurred to date for the CUSC, but considered that it could arise in future, where for example future Amendment Proposals required systems changes which may trigger the use of a fixed Implementation Date and an associated fixed "decide by" date. Therefore she considered that a defect exists, although to date it has not manifested itself in practice. CAP179 is therefore to an extent 'future-proofing' against this possibility.
- 4.2.4 In response to whether a defect exists, the Ofgem representative referred to paragraph 8.20.1.2(f) within the CUSC which states that an Amendment Report to be submitted to the Authority shall include the proposed Implementation Date. He noted that the requirement to include an Implementation Date means that any "fixed" date set by the Panel (and, by implication, a fixed "decide by" date for an Authority decision) would be able to time out and therefore a defect does exist. A Working Group member noted that, in all cases, the risk of "timing out" would always exist (irrespective of whether CAP179 was implemented) as there was a requirement, in law, for the Authority to act reasonably. Therefore, if the Authority took an unreasonably long period to decide upon an Amendment Proposal then it would "time out". Thus, in the view of the Working Group member, if a "timing out" defect did exist in the CUSC it could not be overcome by way of an Amendment Proposal. The chairman suggested that the defect identified by CAP179 was that the construction of Implementation Dates in itself should not cause the Authority to "time out".
- 4.2.5 Another Working Group member stated that there did not seem to be a defect to be addressed within the CUSC, as there is nothing currently to stop Implementation Dates from being constructed in such a way as to prevent "timing out" occurring. The Working Group member indicated that the proposed Amendment may be better than the CUSC baseline, but did not consider there was a defect to be remedied.
- 4.2.6 Another Working Group member did not agree that "timing out" necessarily resulted in wasted work for the industry, since the change could be raised

¹² CAP148, raised April 2007, final Amendment Report submitted to the Authority 14th December 2007.

again and its progression could be expedited on the basis of the previous work. The National Grid representative noted the cost involved in progressing BSC Modification Proposal P229 (based on previous "timed out" proposal P203).

4.2.7 In summary, three Working Group members did not believe that there was a defect to address within the CUSC, whereas the National Grid Working Group member and the Ofgem representative considered that a defect did exist which CAP179 seeks to remedy.

4.2.8 In the Working Group Consultation the industry was asked if they believed there was a defect within the CUSC that needed to be addressed. Out of the six responses only one response agreed that there was a defect, one response was neutral and the other four agreed with the majority of the Working Group that there was no defect to be addressed in the CUSC.

Reasonable time to make a decision

4.2.9 The Working Group discussed what it considered to be a reasonable period of time for the Authority to make a decision, given that the open ended Implementation Dates used as standard practice under the CUSC do not put time constraints on the Authority's decision making process. One Working Group member reminded the Working Group of the comments of the Judge in the Judicial Review case (referred to in paragraph 3.2 above) at paragraphs 62 and, in particular, 66, that the Authority should have a reasonable time period, in light of the circumstances that had arisen following receipt of the Amendment Report, in which to make a decision but does not have until infinity to make a decision nor can it change the date without justification. The Ofgem representative agreed and stated that a limitation exists in public law, but that the Authority must ensure that it makes a robust decision on a reasonable basis, taking into account its wider statutory duties.

4.2.10 A Working Group member asked what Ofgem considered to be a reasonable period of time in which to make a decision. The Ofgem representative referred to Ofgem's self-imposed Key Performance Indicator (KPI) to provide a decision on 70% of industry code modification proposals within 25 working days and noted that in most cases, this KPI had been met. Working Group members noted that whilst this was generally the case across all the industry codes that this was not the case, at the time of the meeting, with the CUSC where all ten of the Amendments that were with the Authority at that time were well outside the 25 day KPI. The 'longest' one of these ten Amendment Proposals had been with the Authority for 833 days (CAP148) and the 'shortest' for 310 days (CAP168). The Ofgem representative suggested that exceptional circumstances do arise, for example an Impact Assessment bringing up further issues to be addressed, but that the Authority has to follow due process and that "reasonable" with reference to timescales was when the due process has been exhausted or completed.

4.2.11 One Working Group member suggested that where there is uncertainty surrounding when the Authority might make a decision on an Amendment Proposal, that uncertainty is detrimental to attracting investment to the UK at a time when such investment is critical. Members noted that, for existing entrants, uncertainty over likely Implementation Dates makes it difficult to plan implementation activities and co-ordinate these with other work (particularly where IT system changes are involved). Required lead times (and associated costs) can also change over time, so a significant delay in

decision-making could mean that the original information on which the Implementation Date was based may no longer be valid.

4.2.12 In this regard the Working Group member noted the Authority's position when a similar change was proposed to the BSC with P93, when the Authority stated¹³ that:

"The rationale behind submitting an Implementation Date is to provide certainty to Parties as to when a change to the Code will take effect. Ofgem considers that the addition of yet another mechanism to alter Implementation Dates would introduce unnecessary regulatory uncertainty to the market with no corresponding gains in efficiency. This would not better facilitate achievement of the Applicable BSC Objectives..."

4.2.13 The Ofgem representative commented that events had moved on since the P93 decision, since the High Court's Judgement on P198/P200/P203/P204 had clarified the Authority's abilities with respect to Implementation Dates and highlighted the issue and risk of "timing out". However, the Working Group member did not believe that any subsequent events undermined the Authority's rationale for rejecting P93.

4.2.14 The Ofgem representative questioned whether any extra uncertainty created by CAP179 would be significant, given that the CUSC already uses "open-ended" dates for most changes and the CAP179 provisions would only be used in a very small number of cases where unforeseen events may arise during the Authority's decision-making process. However, other members commented that the possibility of "timing out" was most likely to occur for the more significant and contentious changes where additional uncertainty was least desirable.

4.2.15 The chairman noted that there was no desire to force the Authority to make a decision in an unreasonably short period of time. However, Parties had previously expressed concerns that open-ended decision timetables could allow decisions to be taken in what the industry might perceive to be an unreasonably long window. The chairman suggested that this raised 2 questions:

- Who should decide what a 'reasonable' period of time is? Should it be the code Panels and wider industry (in setting proposed Implementation Dates) or the Authority itself in accordance with its wider public law considerations (and unconstrained by the construction of Implementation Dates)?
- To what extent does CAP179 achieve the Proposer's intention to remove the risk that the Authority has too short a time for a decision (and therefore "times out"), while mitigating industry concerns that Authority decisions could then take too long (leading to concerns over the ongoing validity of the Final Amendment Report)?

Sterilisation of subject matter

4.2.16 One Working Group member identified a further potential issue relating to a long Authority decision period, which is that the subject matter of that Amendment Proposal could be "sterilised" in terms of new Amendment Proposals being raised. This is due to the provisions within paragraph 8.15.4

¹³ in their (BSC) P93 decision letter of 21st November 2002

of the CUSC which requires the Amendments Panel to direct the Panel Secretary to reject a new Amendment Proposal which “has, in the opinion of the Amendment Panel, substantially the same effect as” a Pending Amendment Proposal¹⁴. The Amendments Panel is also able (but not required) to direct the rejection of a new proposal which has substantially the same effect as an Amendment Proposal which has been rejected by the Authority within the previous 2 months. Additionally, Parties may be put off raising other changes in the same subject area until they know the outcome of the pending decision, and therefore what baseline they would be working to.

4.3 Solutions

4.3.1 Having debated the issues relating to CAP179, the Working Group proceeded to discuss the proposed solutions and any alternative solutions to the perceived defect.

4.3.2 National Grid's representative described the proposed solutions under Parts 1 and 2 of CAP179, as set out in the Amendment Proposal. A Working Group member questioned whether, under Part 2, National Grid expected Ofgem to fully disclose its reasons for requesting revised Implementation Dates. The National Grid representative confirmed that it did expect Ofgem to provide a full explanation and that this had been reflected by Ofgem's own proposed licence drafting which was included in its May 2009 consultation document regarding the introduction of licence changes to address the “timing out” issue. A second Working Group member noted that paragraph 66 of the Judicial Review Judgment (see paragraph 3.2 above) stated that whilst the Authority should have a reasonable time period, in light of the circumstances that had arisen following receipt of the Amendment Report, in which to make a decision nevertheless the Authority could not alter the date for policy reasons or sit upon a Modification Report for years and then seek to restart the exercise by a purported variation of the timetable set in the Amendment Report. As the Judge noted, the power to vary the date “would not be a wide ranging one, so as to enable the Authority to vary the Panel's timetable set in the [Amendment] Report for any reason that seemed appropriate to the Authority.” This, in the Working Group member's view meant that the Authority must set out its reasons why it could not make the original date when requesting a revised Implementation Date from the Panel. If the Authority justification was considered unreasonable then this could be subjected to Judicial Review.

4.3.3 One Working Group member asked whether the Panel consultation process envisaged under Part 2 of CAP179 would ask the industry whether, if the analysis upon which the original Panel decision was made was considered out of date, the Panel should remake its decision in light of the changed circumstances. The National Grid representative responded that CAP179 Original does not seek to give the Amendments Panel the right to make an additional recommendation on the same Amendment Proposal or to remake the original recommendation. She also clarified that CAP179 Original does not seek to allow analysis undertaken for the Amendment Proposal to be rerun, it simply allows for any industry concerns over the ongoing validity of

¹⁴ A “Pending Amendment Proposal” is defined in the CUSC as “an **Amendment Proposal** in respect of which, at the relevant time, the **Authority** has not yet made a decision as to whether to direct such **Proposed Amendment** to be made pursuant to the **Transmission Licence** (whether or not an **Amendment Report** or **Housekeeping Amendment Report** has been submitted in respect of such **Amendment Proposal**)”.

the analysis to be flagged to the Authority at the same time as providing the additional Implementation Date(s). It would then be for the Authority to decide how to act on that information. The National Grid representative noted that, as described in the CAP179 Amendment Proposal, the industry had been anticipating publication of Ofgem's Code Governance Review Final Proposals in January 2010, which had included a proposal for a "send back" mechanism to allow the Authority to return a final report to the relevant Panel where it felt that elements of the proposal, for example the supporting analysis, were deficient. CAP179 had therefore not sought to try and duplicate the "send back" powers; however, the Code Governance Review Final Proposals had not been published and therefore one anticipated element of the solution was missing¹⁵.

- 4.3.4 A Working Group member noted that there would be the potential for a successful Judicial Review if, following the Panel consultation on revised Implementation Dates, the Panel were to flag the issue of expiry of the shelf-life of any analysis undertaken for an Amendment Proposal and the Authority were not to take account of that information in making a decision on the Amendment Proposal concerned. In the view of the Working Group member if the original analysis (which the member called analysis 'X') goes past its 'use by date' then if the Authority undertakes some form of additional analysis (which the member called analysis 'Y') as part of a Regulatory Impact Assessment¹⁶ this cannot, in some way, 'update' the out of date original analysis ('X') such that it becomes 'usable' by the Authority.
- 4.3.5 If this were the case, it seemed, to the Working Group member, to miss a fundamental element of the Judge's comments (see paragraph 3.2 above) namely that the Panel recommendation (to accept or reject) would have been made on the basis of analysis 'X' only. As the Judge stated "The justification for a Proposed Modification put forward by the Panel might be dependent upon a very time sensitive analysis ['X'] of costs and benefits, and the Panel timetable for implementation might accordingly be tailored to that time sensitive analysis ['X']."
- 4.3.6 If the Authority then uses analysis 'Y' (rather than analysis 'X' used by the Panel) then, as the Judge stated, "a question might arise whether the Authority was in substance and reality considering the same modification as had been submitted by the Panel, or was considering an altogether different modification, putatively predicated on a cost benefit analysis ['Y'] that the Panel did not, and could not have, evaluated. In such circumstances a power to remit the matter to the Panel for complete reconsideration, rather than a power in the Authority to change the timetable for implementation of what had in substance become by lapse of time a different modification, might better preserve the institutional balance between the Panel and the Authority and better serve the objectives of the BSC."
- 4.3.7 In the view of the Working Group member, if the original analysis 'X' was not updated by the Panel - to become analysis 'Y' - (and consulted and then

¹⁵ Ofgem's Code Governance Review Final Proposals, including the "send back" powers, were subsequently published on 31st March 2010.

¹⁶ The Authority may undertake a Regulatory Impact Assessment of a proposal in accordance with the statutory duty set out in Section 5A of the Utilities Act 2000 where that proposal is "important". The criteria against which the Authority judges a proposal to be "important" is set out in Section 5A (2) of the Act. The statutory duties of the Authority against which it assesses CUSC change proposals are wider than the Applicable CUSC Objectives against which the CUSC Amendments Panel makes its recommendation.

voted upon by the Panel) it would seem that the Authority would be inferring what the Panel would have recommended (in the final Amendment Report) if it (the Panel) had seen analysis 'Y', rather than on what the Panel actually recommended in the final Amendment Report based on analysis 'X'. Not only would this appear to be directly at odds with the Judgement this could, in the view of the Working Group member, effectively, prevent any successful appeals to the Competition Commission as it would permit the Authority to argue before the Commission that its decision was based on the up to date analysis 'Y' and the Panel's recommendation on an out of date (flawed?) analysis 'X'.

4.3.8 Another Working Group member expressed a similar concern that the Panel, upon receiving consultation responses that suggested that analysis used to inform a Panel recommendation had "expired", would not be able to rerun its original recommendation vote. It was agreed that this was not within the scope of the CAP179 original Amendment Proposal and would therefore have to be included in a WGAA if it were to be pursued. Such a WGAA could be identical to CAP179, but could include a "bring back" mechanism, whereby the Amendments Panel could update the Amendment Report with any revised analysis and a new recommendation vote. It was noted that the production of a revised Report (with revised analysis and updated Panel recommendation) would only be triggered by the Authority seeking an extension to the Implementation Dates and only if it was believed the original analysis had or would shortly become out of date.

4.3.9 The chairman noted that the P250 group had considered this possible solution, but had decided not to progress it as:

- It appeared to go further than the defect identified by P250 (which related to the "timing out" of Implementation Dates, rather than the Panel's recommendation);
- It might duplicate the "send back" process which Ofgem is already proposing to introduce; and
- It is not obvious that the industry codes could give the Panel a power to 'recall' a change from the Authority without accompanying changes to the Transmission Licence.

4.3.10 The Working Group did not develop this option as a formal WGAA at that stage, but decided to seek industry views through the Working Group Consultation before reconsidering it at the second Working Group meeting. The Working Group also agreed to seek legal advice from National Grid and Ofgem on whether the WGAA option was within the scope of the CUSC or whether it would require further licence changes. The Working Group also agreed to seek legal advice from National Grid and Ofgem on whether out-of-date analysis could be covered by the wider "send back" powers being introduced by Ofgem's proposed Code Governance Review.

4.3.11 The Working Group discussed the solution proposed in Part 3 of CAP179, which describes a process for the Panel Secretary to write to the Authority requesting a likely decision date for an Amendment Proposal, where a final Amendment Report has been submitted to the Authority for a decision. The National Grid representative confirmed that there is nothing to stop this from happening currently, but suggested that having a process set out within the CUSC would offer visibility of such an option to those less familiar with the amendment process and therefore may be beneficial. One Working Group

member responded that as long as it was made clear that this could be done now, there was no reason not to include it within the Amendment Proposal.

4.3.12 In contrast, another Working Group member believed that the proposed process would not be an improvement and that the similar process which exists within the UNC was considered to be "toothless" as it does not oblige the Authority to provide a response. The National Grid representative acknowledged that the CUSC cannot force the Authority to do anything. Another Working Group member suggested that, if a response were not forthcoming, the Panel could write more than once to the Authority, which might cause sufficient embarrassment to encourage a response. A further suggestion was that if a response were not received from the Authority then this could be highlighted to the House of Lords Select Committee on Regulators.

4.4 Summary of Working Group Consultation questions

4.4.1 The Working Group identified the following specific questions which were posed in the Working Group Consultation:

- Q1. Do you believe there is a defect within the CUSC to be addressed?
- Q2. Do you have any views on the proposed Implementation Date for CAP179?
- Q3. Do you have any views on whether the Working Group should develop the potential Working Group Alternative Amendment further?

4.4.2 Six responses were received to the first Working Group Consultation; these are summarised in section 12 of this document. In response to the specific questions posed by the Working Group, one respondent agreed that a defect existed within the CUSC, while four others disagreed. Five of the six respondents supported the Working Group developing the proposed WGAA1 further, although one of those respondents noted they would be unlikely to support it, compared to the existing CUSC baseline. One respondent did not support further development on the grounds that it considered that CAP179 represented "insurance" against a situation that was unlikely ever to occur and the costs of developing such insurance were therefore not warranted. One respondent considered that, on balance, CAP179 better facilitates the objectives than the CUSC baseline, but four respondents disagreed and responded that CAP179 was not preferable to the CUSC baseline.

4.4.3 All six respondents agreed with the proposed implementation approach, with three respondents specifically stating that CAP179 should not be applied retrospectively, if it is implemented.

4.4.4 Five responses supported the proposed WGAA (WGAA1) and there were no further requests for other Alternatives from the industry. Further detail on the full content of the responses to the Working Group Consultation is included in section 12 of this Consultation document.

4.4.5 At the Working Group meeting held to review the first Working Group Consultation responses, the Working Group agreed to formally progress the proposed WGAA as WGAA1. WGAA1 is summarised in section 5 of this Consultation document.

4.5 Further Working Group Discussion and Consultation

- 4.5.1 Following the meeting in May at which the Working Group vote was undertaken, National Grid produced a draft of the Working Group report for comment and circulated a first draft of the legal text for the original Amendment Proposal. This was followed shortly after by an updated draft of the illustrative text for the original CAP179 Amendment Proposal and a first draft of the legal text for WGAA1. The Working Group provided numerous comments on the report and the drafts of the legal text, which necessitated a further consolidated draft of the Report and revised legal text to be provided. In light of the additional drafting, a further Working Group teleconference was scheduled for 18th August 2010, to agree a finalised Working Group report and legal text to send to the August 2010 Amendments Panel meeting (rescheduled to 3rd September 2010). In response to the updated draft Working Group report and legal text, Ofgem expressed its view that the legal text did not address the defect which the original CAP179 Amendment Proposal sought to address, namely timing out of Authority decisions.
- 4.5.2 Ofgem's concerns were that the legal text created uncertainty and unanswered questions around the process to be followed, which had not been discussed by the Working Group, nor consulted upon with the industry, given that no legal text had been available when the Working Group consulted in April 2010. Ofgem suggested that questions arose over what criteria the Panel would use to support its decision to refuse an Authority request, whether the Panel has the vires to refuse a request and, if it did refuse a request, what would happen to the affected Amendment Proposal. Ofgem noted that such a refusal could lead to the Amendment Proposal which was subject to the request "timing out". Ofgem also noted that it was clear in paragraph 4.1.2 of the Working Group Consultation report (and in this report) that the Proposer had not intended that the Panel would refuse such an Authority request. Furthermore, if the Panel were to refuse the request, the legal text contains the requirement that it should not do so "unreasonably". Ofgem asked who would determine if the Panel had acted unreasonably and how and by whom the situation would ultimately be resolved.
- 4.5.3 The Working Group discussed Ofgem's comments at the teleconference on 18th August 2010. The majority of Working Group members disagreed with Ofgem's interpretation of the legal text and did not consider that an issue existed which needed to be addressed. Working Group members noted that the issue of using the term "request" versus the term "direct" in the legal text was one which had been discussed at almost every CAP179 Working Group meeting and had been consulted upon with the industry through references to the debate in the Working Group Consultation report in April 2010 and, as such, should not be discussed further. One Working Group member suggested that, if it were deemed necessary, the CUSC Governance Standing Group could be tasked with drafting criteria under which the Panel could refuse a request from the Authority for revised Implementation Dates.
- 4.5.4 The majority of the Working Group felt strongly that no changes were required to be made to the "original" CAP179 Amendment Proposal solution, nor to WGAA1. However, National Grid, as Proposer of CAP179, expressed a concern that the issues raised by Ofgem over the legal text were valid and could lead to the solution proposed for CAP179 not addressing the defect of "timing out". The Proposer also noted that the Working Group had not envisaged circumstances whereby the Panel would refuse an Authority

request for revised Implementation Dates and therefore had given no consideration to any processes surrounding such a refusal. Should the Amendments Panel refuse a request, it may need to be decided whether that refusal had been reasonable or unreasonable and the Panel's refusal could be subject to a legal challenge. It is not clear how such a challenge would be resolved or the timescales for resolution. Where a refusal occurred, particularly if such a refusal were subsequently challenged, it is possible through the passage of time during the refusal and challenge processes (not yet established), that a proposal may "time out", which would mean that the defect identified by CAP179 original Amendment Proposal had not been remedied.

- 4.5.5 The Working Group discussed whether National Grid, as Proposer, was able to change the "original" solution, agreed by the Working Group. The Working Group was uncertain that a Proposer retained "Proposer Ownership" once an Amendment Proposal had been submitted to a Working Group for consideration and development. The Working Group accepted that the issue of Proposer Ownership needed to be resolved prior to finalising the Working Group report and National Grid, as Code Administrator, took an action to provide legal advice on the matter and report back to a further teleconference on 27th August 2010.
- 4.5.6 The teleconference on 27th August was not quorate and was postponed until after the Amendments Panel meeting on 3rd September 2010. At that meeting, National Grid confirmed that, although it was not clear within the CUSC that "proposer ownership" did not apply, a precedent had been set by the CAP168¹⁷ Working Group and, as such, National Grid was unable, as Proposer, to amend the original solution for CAP179 agreed by the Working Group. National Grid informed the Working Group that, as Proposer, it wished to submit a further WGAA to address the issues highlighted at the August Working Group meeting, described above. Details of the proposed WGAA (WGAA2) were circulated to the Working Group and are contained in Annex 5 of this Consultation document.
- 4.5.7 The majority of the Working Group did not agree with National Grid's proposed approach and did not consider that a further WGAA was necessary. The Working Group chairman, noting the precedent set by the CAP168 Working Group, informed the Working Group that he intended to allow the additional WGAA (WGAA2) to be progressed as an option. The Working Group agreed that a further Working Group Consultation should be undertaken to allow the industry visibility of further discussions and an opportunity to respond to them. It should be noted that the Working Group chairman for the meeting referred to in this paragraph was provided by National Grid, the same organisation as the Proposer of CAP179, as the elected CAP179 Working Group chairman was unable to attend the meeting. This issue is highlighted to the industry in line with the best practice identified in the CAP179 Working Group terms of reference (attached in Appendix 1 to this document). Please also see Annex 7 for the Working Group Attendance Register which records the chairman for each meeting.
- 4.5.8 On behalf of the Working Group, National Grid sought permission from the Amendments Panel to extend the Working Group timetable, such that the

¹⁷ CAP168: Transmission Access Under-use and reallocation of TEC, please see Working Group report on National Grid's website at:
<http://www.nationalgrid.com/uk/Electricity/Codes/systemcode/workingstandinggroups/wg/wg168/index.htm>

Working Group report would be presented to the October 2010 Amendments Panel meeting, and to conduct a further Working Group consultation. Neither the Amendments Panel nor the Authority objected to such an approach.

Second Working Group Consultation Responses

- 4.5.9 The second Working Group Consultation sought views on the additional Working Group Alternative Amendment (WGAA2) proposed by National Grid, as set out in Annex 5, with regard to the issues raised by the legal text proposed for the original CAP179 Amendment Proposal, as set out in Annex 6 of this report. The consultation closed on 11th October 2010 and received four responses. Two of the responses did not comment on the additional proposed WGAA (WGAA2). Of the other two responses, one supported progressing WGAA2 and the other did not. A summary of the responses is contained in section 12 of this report; full copies of the responses can be found in Volume 2 of this Consultation document.

5.0 WORKING GROUP ALTERNATIVE AMENDMENTS (WGAAs)

Working Group Alternative Amendment 1

- 5.1 The first Working Group Alternative Amendment (WGAA1) was proposed for CAP179 by the Working Group (by majority). National Grid prepared WGAA1 on behalf of the Working Group, as set out in paragraph 5.2 below. No other Alternatives were requested by Industry parties following the first Working Group Consultation.
- 5.2 WGAA1 seeks to extend Part 2 of the original CAP179 Amendment Proposal, by allowing the Panel to request that analysis undertaken to support an Amendment Proposal be updated or additional analysis be undertaken. Where analysis is updated or additional analysis undertaken, the Panel would have the right to make an additional recommendation on the same Amendment Proposal or to remake its original recommendation. These additional Panel options would only be triggered by the Authority requesting the Panel to provide additional Implementation Date(s) and would not require a further Authority request/direction to this effect.
- 5.3 One of the first Working Group Consultation questions was whether the Industry was in support of WGAA1. Out of the six responses from the Consultation five were in favour of WGAA1 with one response being against it.
- 5.4 As discussed in section 4.3 above, the Working Group sought legal advice from both National Grid and Ofgem regarding WGAA1, specifically:
- whether WGAA1 would require a licence change in order to allow the Panel to make a further recommendation;
 - whether, if such a licence change were deemed to be required, it could be covered by the indicative licence drafting proposed by Ofgem for the "send back" process as part of the code Governance Review proposals; and
 - if a licence change were deemed to be required, whether the WGAA could be considered "valid" and allowed to progress.

- 5.5 The legal advice from National Grid and Ofgem suggested that, whilst both the proposed “send back” licence drafting and the process intended under Part 2 of CAP179 provide for the Authority to “direct” (and the Panel to provide) revised Implementation Dates, the right under the proposed “send back” licence drafting is only available where the Authority’s view is that they cannot form an opinion from the report and so need something “more” in order to do so. However, if the Authority requests revised Implementation Date(s) as part of CAP179, the Panel may inform the Authority that the analysis is out of date and, on this basis, lead the Authority to require “more” analysis from the Panel under the “send back” process in order to form an opinion. The “send back” licence drafting does not then preclude the Panel from remaking its recommendation, and this step could be included in the code changes to deliver the “send back” process in the CUSC.
- 5.6 Two other points were raised in the legal advice:
- National Grid’s legal advice was that a process for the Panel to remake its recommendation would require a supporting “hook” in the Transmission Licence to have practical effect, as the licence only currently envisages the submission of a single (final) Amendment Report. If the proposed “send back” licence provisions are used as this hook, then it would be for the Authority to direct the Panel to revise the analysis following the Panel having highlighted concerns over the analysis when providing revised Implementation Dates.
 - Ofgem’s legal advice noted that this was one scenario in which the “send back” powers could be used, and which would be triggered by the Authority directing the Panel to provide revised Implementation Dates. However, the Code Governance Review “send back” powers are wider than this and cover any scenario where the Authority is unable to properly form an opinion on the Amendment Proposal from the contents of the Amendment Report. The Working Group noted that a process to deal with these wider “send back” powers would need to be drafted into the CUSC regardless of the outcome of CAP179.
- 5.7 The Legal advice from both Ofgem and National Grid is attached in Annex 4.
- 5.8 The Working Group discussed the legal advice and whether to progress WGAA1. The Proposer believed that WGAA1 would be unnecessary duplication of the Code Governance Review “send back” process which would need to be introduced to the CUSC regardless of whether CAP179 was approved. The Proposer considered that it could therefore be inefficient to draft two similar processes – a “bring back” process for CAP179 and a process to support the wider “send back” powers. However, a majority of Working Group members disagreed. These members noted that there is a possibility that CAP179 will be implemented before the wider “send back” powers are introduced in the CUSC. These members believed that it would be inappropriate to introduce a process for revising Implementation Dates without the ability to revise any out-of-date analysis and obtain a revised Panel recommendation where necessary.
- 5.9 In support of this majority view, some members referred to the High Court’s judgement on P198/P200/P203/P204 (see paragraph 3.2 above). In particular, members referred to the Judge’s comments that:

"a question might arise whether the Authority was in substance and reality considering the same modification as had been submitted by the Panel, or was considering an altogether different modification, putatively predicated on a cost benefit analysis [...] that the Panel did not, and could not have, evaluated. In such circumstances a power to remit the matter to the Panel for complete reconsideration, rather than a power in the Authority to change the timetable for implementation of what had in substance become by lapse of time a different modification, might better preserve the institutional balance between the Panel and the Authority and better serve the objectives of the BSC".

Members noted that the Panel's recommendation had a direct bearing on whether or not an Authority decision was appealable.

- 5.10 The consultation responses did not suggest any other Alternative Amendment proposals. From the Working Group votes, the Working Group chairman concluded; based on the definition of "Working Group Alternative Amendment" in Section 11 of the CUSC; that WGAA1 ought to go forward as an option to the Panel and the Authority. The CUSC requires a majority of Working Group members to believe that the WGAA is better than either the baseline or the Original. 3 out of 5 members believed WGAA1 was better than the Original, and 3 out of 5 believed it to be better than the baseline. Although only 2 members believed WGAA1 to be the best optional overall (and the majority Group recommendation is to reject), it therefore met the CUSC's criteria for progression.

Working Group Alternative Amendment 2

- 5.11 The second WGAA (WGAA2) was proposed by National Grid, as discussed in paragraph 4.5 above. WGAA2 is identical to the original CAP179 Amendment Proposal, except that, in Part 2 of the solution, instead of the Authority "requesting" the Panel to provide revised implementation dates, the Authority would "direct" the Panel to provide revised implementation dates.
- 5.12 Views were invited on WGAA2 as part of the second Working Group Consultation in September/October 2010. Two respondents commented specifically on the proposed WGAA2. One respondent supported the WGAA2 being allowed to progress to the Working Group Vote, while not commenting on its merits; the other respondent did not support WGAA2 and expressed disappointment that it should be allowed to progress, given the strong opposition to it from the majority of Working Group members.
- 5.13 At the final Working Group meeting on 18th October 2010, the Working Group chairman used the powers available to her in the CUSC to progress WGAA2 to the Working Group Vote and the Panel. Before providing her decision, the chairman highlighted the difficult position that she was placed in by the CUSC's requirement to make a decision on whether or not to progress the potential WGAA.
- 5.14 The CUSC requires a Working Group chairman to act as an impartial facilitator. With that impartiality in mind, the CAP179 Working Group chairman questioned whether it is appropriate that the chairman should have the power to allow or halt progress of a WGAA, particularly when it requires the chair to give views on the Applicable Objectives. Furthermore, the CAP179 Working Group chairman suggested that it is hard for any Working Group chairman to legitimately halt progress of a WGAA that has been

proposed on the grounds that (in at least one consultation respondent or Working Group member's view) the WGAA better facilitates the Applicable CUSC Objectives. If the chairman allowed the WGAA to proceed, and if it were approved by the Authority against the recommendation of the Group and the Panel, then there would be a clearly defined and transparent appeal route available. If the chairman decided not to progress a solution, then this would not be open to challenge.

- 5.15 The CAP179 Working Group chairman noted that the chairman of the Working Groups for the Transmission Access Review Amendment Proposals had found himself in a similarly difficult position for CAP168. The CAP168 Working Group chairman had decided to allow the Proposer of that Amendment Proposal to progress their additional WGAA, so that there would be an option on the table that delivered their intention. This removed the risk that the Proposer might feel they had to withdraw their proposal. The CAP179 Working Group chairman noted that this had some similarities with the situation that had arisen with CAP179. She noted that it would not be in the interests of efficiency if CAP179 was withdrawn and re-raised as a new Amendment Proposal, given the amount of time and effort the industry had already spent discussing the subject of "timing out" and given Parties' clear desire for certainty. Ultimately, the outcome of any new Amendment was likely to be the same two solution options preferred by the Group and the Proposer (WGAA1 and WGAA2 respectively).
- 5.16 The Chairman noted the interaction with the wider principle of "proposer ownership" under the Code Governance Review, previous discussions by the Governance Standing Group regarding the role of Working Group chairmen, and the GSG's forthcoming work to support the Code Governance Review implementation. The chairman advised that she therefore intended to ask the Panel if, as part of this work, the GSG could consider whether the existing CUSC provisions in this area remain appropriate.
- 5.17 The CAP179 Working Group chairman explained her reasons for progressing WGAA2. She noted that she had reviewed WGAA2 against the definition of a Working Group Alternative Amendment in Section 11 of the CUSC, which requires a WGAA to better facilitate the Applicable CUSC Objectives than either the original Amendment Proposal or the baseline in the view of either a majority of Working Group members or the chairman. The Working Group chairman did not feel, as an impartial chairman, it was appropriate for her to give views on whether WGAA2 was ultimately better than the CUSC baseline or which option was best overall. However, on balance, she did believe that WGAA2 better facilitated Applicable CUSC Objective (a) than the Original Amendment Proposal. If arrangements are to be put in place to stop Amendment Proposals "timing out" as a result of their Implementation Dates, then the Original Amendment would not always achieve this intention. It could create uncertainty over the circumstances in which the Panel could "reasonably" refuse a request for extra implementation dates, whether the Panel's decision could be challenged, and whether or not a particular Amendment Proposal might therefore "time out". This would not promote efficiency, or the certainty which the CAP179 Working Group and consultation respondents had highlighted as being desirable.

6.0 ASSESSMENT AGAINST APPLICABLE CUSC OBJECTIVES

Assessment of original CAP179 Amendment Proposal

- 6.1 The majority of the Working Group and the responses from the Working Group Consultations did not believe that the original CAP179 better facilitates either of the Applicable CUSC Objectives of:
- a) The efficient discharge by the Licensee of the obligations imposed upon it by the Act and the Transmission Licence; and
 - b) Facilitating effective competition in generation and supply of electricity and facilitating such competition in the sale, distribution and purchase of electricity.
- 6.2 Working Group members' reasons for this view were:
- The original CAP179 is detrimental to Objective (a) as it reduces efficiency of the operation of the CUSC by increasing uncertainty and by allowing the Authority an unlimited time in which to make a decision;
 - The original CAP179 is detrimental to Objective (b) as it increases risk, has a potential negative impact on costs and reduces the industry's ability to plan their resource requirements ahead. Any increase in uncertainty leads to reduced competition and security of supply;
 - It has not been proven that there is a defect in the CUSC to address with respect to "timing out"; and
 - Allowing the Authority to direct the Panel to revise Implementation Dates without allowing the Panel to revise any out-of-date analysis and remake its recommendation would go against the High Court's judgement on P198/P200/P203/P204. It would give rise to the risk that the Authority is deciding on a different change to that assessed by the Panel.
- 6.3 In contrast, the minority view of the Proposer was that original CAP179 better facilitated the relevant objectives, as follows:
- CAP179 original better facilitates Objective (a) by ensuring that development work for an Amendment Proposal and associated resources and resource costs are not wasted by that proposal being "timed out"; and
 - CAP179 original has a minor benefit under objective (b) of improving the visibility of the existing process (by giving a mandate for the Panel to write to the Authority requesting a likely decision date).

Assessment of CAP179 Working Group Alternative Amendment 1

- 6.4 Opinions were divided amongst Working Group members as to whether the implementation of WGAA1 would better facilitate the Applicable CUSC Objectives.
- 6.5 The majority Working Group views are summarised in the points below:
- Three out of five of the voting Working Group members believed that WGAA1 better facilitates Objective (a) than the original as the WGAA creates less uncertainty and better preserves the institutional balance of

the Panel and the Authority by allowing the Panel to revise any analysis which may be out of date and remake its recommendation. These members also believed that the WGAA better facilitates Objective (b) than the original by reducing the risk of the Authority making decisions on out of date analysis. However, one of these three members (while believing WGAA1 to be 'less worse' than the original) still did not believe it to be better than the baseline for the reasons outlined for CAP179 original above.

- Three out of the five voting Working Group members believed that WGAA1 better facilitates Objectives (a) and (b) when compared with the baseline. Two of these members believe that the risk of "timing out" under the CUSC is low (and any defect therefore questionable), but the WGAA deals with any such risk in a proportionate way which on balance overcomes their objections to the original. The other member (the Proposer) believes that the WGAA facilitates Objectives (a) and (b) for the same reasons as they support the original and WGAA2, but to a lesser extent as they believe the additional step for the Panel to revise analysis/remake its recommendation is unnecessary duplication of the Authority's planned "send back" powers. This member prefers WGAA2 overall.

Assessment of CAP179 Working Group Alternative Amendment 2

- 6.6 Four of the five Working Group members did not believe that WGAA2 better facilitated either of the Applicable CUSC Objectives compared with the existing baseline. Three of these members also believed that WGAA2 did not better facilitate either of the Applicable CUSC Objectives than the original Amendment Proposal or WGAA1, and was the worst option overall, because:
- Like the original Amendment Proposal on which it is based, WGAA2 would not allow the Panel to revise analysis or its original recommendation when providing Ofgem with new Implementation Dates (see members' views on the original above);
 - WGAA2 would additionally not allow the Panel to refuse a request for extra Implementation Dates on reasonable grounds; and
 - WGAA2 would therefore decrease efficiency, would increase risk, and would not better preserve the institutional balance of the Panel and the Authority – going against the High Court's judgement on BSC Modification Proposals P198/P200/P203/P204.
- 6.7 The fourth member who did not support WGAA2 did not wish to give a preference between any of the 3 solution options, believing them all to be worse than the baseline. This member believed that there was no defect to address. Another of the four members supported this view, also believing there was no defect, but added that she believed WGAA2 to be worse than the Original and WGAA1. Overall, two of the four members continued to support WGAA1 as the best option and two continued to support the baseline as best.
- 6.8 The fifth member of the Working Group (the Proposer) believed that WGAA2 better facilitated the achievement of Applicable CUSC Objective (a) compared with both the original and WGAA1. She also believed that WGAA2 better facilitated both Applicable Objectives (a) and (b) when compared with

the baseline. This member therefore believed WGAA2 to be the best option overall. For further details of the rationale for this member's views, see Sections 4.5 and 11.

- 6.9 One Working Group member stated that she shared the Chairman's concerns as to whether it was appropriate for Working Group chairmen to be put in the position of having to decide whether to allow, or suppress, particular solutions. This member therefore supported the chairman's intention to ask the GSG (via the Panel) to review the appropriateness of the CUSC provisions in this area.
- 6.10 The member commented that she also had process concerns over the extent to which Ofgem had lobbied for a particular solution within the Working Group. The Ofgem Representative responded that previous feedback from the CUSC Amendments Panel has been that they would like greater Ofgem engagement at the Working Group stage. He noted that he had raised Ofgem's concerns over the use of "request" rather than "direct" at the first Working Group meeting and in doing so considered that this was part of the process of engagement. He could not have provided Ofgem's comments on the legal text developed for the original Proposal before the Group's first consultation, as legal text had not been available at that point in the process.

7.0 PROPOSED IMPLEMENTATION

- 7.1 The Working Group proposed that CAP179 or either of the two WGAA's should be implemented 10 Business Days after an Authority decision in line with the usual custom and practice for the CUSC. In accordance with CUSC custom and practice¹⁸ if CAP179 is implemented it will not apply retrospectively. Thus any Amendment Proposal that is 'in process', that is, it has been raised (prior to CAP179 being implemented) and not yet implemented, will not be subject to the proposed CAP179 approach.
- 7.2 All the responses to the first Working Group Consultation agreed with the proposed implementation approach for CAP179. Of those that commented on it, the responses to the second Working Group Consultation also supported this approach.
- 7.3 **Views are invited on the implementation approach set in paragraph 7.1 above.**

8.0 IMPACT ON THE CUSC

- 8.1 CAP179 requires amendments to Section 8 of the CUSC. The draft legal text for the original and the two Working Group Alternative Amendments is attached in Annex 6.

9.0 IMPACT ON INDUSTRY DOCUMENTS

Impact on Core Industry Documents

¹⁸ see, for example, CAP160

- 9.1 Neither the Proposer, nor the Working Group or Working Group Consultation respondents identified any impacts on Core Industry Documents.

Impact on other Industry Documents

- 9.2 Neither the Proposer, nor the Working Group or Working Group Consultation Respondents identified any impacts on other Industry Documents, although National Grid raised similar modification proposals to both the BSC and the UNC, as follows:

- BSC Modification Proposal P250: Prevention of Timing Out of Authority Decisions on Modification Proposals. BSC P250 Alternative Modification was approved by the Authority on 19th May and implemented on 3rd June 2010;
- UNC Modification Proposal 0281: Prevention of Timing Out of Authority Decisions on Modification Proposals.

10.0 WORKING GROUP VIEW / RECOMMENDATION

- 10.1 As described in section 6 above, the Working Group voted as follows:

View against Applicable CUSC Objectives	Better than baseline	Better than original*	Better than WGAA1*	Better than WGAA2*	Best
CAP179 original	1	N/A	1	3	0
WGAA1	3	3	N/A	3	2
WGAA2	1	1	1	N/A	1
Baseline	N/A	4	2	4	2

There were five Working Group members eligible to vote. Two of the members considered that none of the options available were better than the CUSC baseline. One member did not wish to give a preference between the original and the WGAA's, since they did not believe any of the options to be better than the baseline.

- 10.2 The Working Group vote gives a majority group recommendation to the Panel that neither the original nor the WGAA's should be made. This is because, although two members believe WGAA1 to be better than the original and three members support WGAA1 over the original CAP179 proposal, only two members support WGAA1 as the best option overall. WGAA1 goes forward as an option to the Panel and the Authority because a majority of the Working Group believe it is better than either the baseline or the Original. WGAA2 goes forward as an option to the Panel and the Authority due to the Working Group chairman exercising her powers under the CUSC, as set out in more detail in section 5 above.

11.0 NATIONAL GRID INITIAL VIEW

- 11.1 National Grid is the Proposer of both CAP179 original and WGAA2. National Grid's preferred option is implementation of WGAA2 for the reasons set out below.

- 11.2 National Grid considers that implementation of CAP179 would better facilitate Applicable CUSC Objective (a): *"the efficient discharge by the licensee of the obligations imposed upon it under the Act and by this licence"*, specifically with regard to the obligation under standard condition C10 of the licence, as follows:
- "6. The licensee shall establish and operate procedures for the modification of the CUSC (including procedures for modification of the modification procedures themselves), so as to better facilitate achievement of the applicable CUSC objectives [...]"*
- 11.2 National Grid considers that the processes described within CAP179 for setting Implementation Dates would result in the more efficient discharge for the requirement to operate procedures for the modification of the CUSC, given that Implementation Dates which cannot cause an Amendment Proposal to "time out" will mean that the work associated with the development of such an Amendment Proposal and the underlying resource requirements and associated costs, would not be wasted.
- 11.3 CAP179 has a minor benefit under objective (b) of improving the visibility of the existing process (by giving a mandate for the Panel to write to the Authority requesting a likely decision date).
- 11.4 However, National Grid considers that implementation of WGAA2 would better facilitate Applicable CUSC Objective (a) than the original solution, as under the original solution, uncertainty remains over whether the Panel would provide revised dates or whether an Amendment Proposal which was subject to a request for revised dates would still be able to time out.
- 11.5 National Grid considers that WGAA1 does not better facilitate the Applicable CUSC Objectives compared with the original CAP179 Amendment Proposal or WGAA2. National Grid considers that the extension of Part 2 of CAP179 original to allow the Panel to require updated analysis and to remake its recommendation to the Authority is covered by the proposed "send back" provisions included in the Code Governance Review final proposals and therefore it is not essential that this be included within the CAP179 proposal at this time. Implementation of the Code Governance Review final proposals, including the "send back" provisions, is mandated through modifications to National Grid's Transmission Licence, therefore we are required to raise CUSC Amendment Proposals to implement the new licence obligations¹⁹. Furthermore, WGAA1 is based on the original proposal and therefore retains the uncertainty described in paragraph 11.4 above.

12.0 INDUSTRY VIEWS AND REPRESENTATIONS

Responses to the first Working Group Consultation (April 2010)

- 12.1 The following table provides an overview of the representations received from the Industry in response to the first CAP179 Working Group consultation in April 2010. No Working Group Consultation Alternative Requests were received in response to the first consultation.

¹⁹ Please see CAP186: Code Governance Review: Send Back Process, raised on 2nd July 2010

Reference	Company	Supportive	Comments
CAP179 WGC-01	Centrica	No	<p>CAP179 would increase regulatory uncertainty by creating a process in which an Amendment can never time out. This would be detrimental to competition (objective (b)) and the efficient discharge of the Transmission Licence obligations (objective (a)).</p> <p>Centrica believes there are scenarios in which it would be appropriate for Amendments to time out. This could be when the validity of the analysis and/or the recommendations of the Working Group and Panel have decayed to such a point that the Authority would not be able to make a robust decision.</p> <p>If Amendments must always be subject to a process that could have a 'pending decision' status in perpetuity, this presents significant uncertainty as it is virtually impossible for a Party to plan for potentially open ended risks. Such uncertainty does not facilitate investment. Additionally, the validity of impact assessments, analysis and recommendations can be expected to decay over time and it would be questionable for the Authority to make robust decisions based on these. Centrica believes that the suggested benefits of the modification in terms of reducing wasted industry resource are negligible and there are in fact reasons in which additional resource would be required under CAP179. For example, this could occur:</p> <ul style="list-style-type: none"> • When Parties engage consultants to support subject areas. These consultants would need to be kept on a retainer (or at least available) until such time as an Authority decision is made and the implications can be worked through. This could be expensive without a clear end date and could especially impact smaller players; • Where a decision has had a substantial delay, resource must be continually applied to the subject area to ensure relevant knowledge and the ability to implement is retained and adequate continuity planning is achieved; • When a new modification is raised that impacts the same systems as the pending modification. This uncertainty would lead to additional costs to evaluate modification

Reference	Company	Supportive	Comments
			<p>impacts and possibly greater costs to implement; and</p> <ul style="list-style-type: none"> Because this period is more likely to involve personnel changes which would lead to duplication of work. <p>Centrica believes that the costs of CAP179 would significantly exceed the benefits. As identified above, there would be real costs in terms of uncertainty and retaining knowledge of subject matter and readiness to implement across the industry. In order to estimate positive benefits of CAP179, a view would have to be taken as to how often timing out would occur under the current arrangements. Arguably a reasonable estimate based on CUSC history could be zero. However, even if this did occur occasionally, Centrica believes that the benefits of saved industry resource under CAP179 would be outweighed by the increased ongoing costs.</p> <p>Finally, it is not clear that there would be any efficiency gain by including a formal process by which the Panel can communicate with the Authority.</p>
CAP179 WGC-02	EDF	No	<p>We note that the majority of the Working Group at its one meeting so far, believed that CAP179 does not better facilitate either of the Applicable CUSC Objectives. EDF Energy supports this view.</p> <p>The processing of CUSC amendment proposals does not involve setting implementation dates which would allow an Amendment Proposal to "time out" as CUSC implementation dates are relative to the timing of an Ofgem decision. Indeed, "timing out" has never occurred for CUSC amendment proposals. It is our view that it would be inappropriate to add to the body of the code and its perceived complexity needlessly; this is inefficient, and makes it still more daunting for new entrants.</p>
CAP179 WGC-03	Drax	No	<p>Drax agrees with the majority of the Working Group that the proposed Amendment would not better facilitate Applicable CUSC Objectives (a) and (b) when compared to the current baseline.</p> <p>The Amendment does not ensure that future Working Group analysis will stand the test of time above and beyond that provided under the current baseline. The Amendment fails to address the validity of analysis over time and the potential implications (to both CUSC Parties and</p>

Reference	Company	Supportive	Comments
			<p>consumers) if a final decision was reached based upon “out of date” analysis. If the Authority were to make decisions that were based upon “out of date” analysis, subsequent Amendments may be required to rectify anomalies caused by such action. CAP179, in its current form, will result in greater uncertainty due to the fact that Amendments can still be left “open ended” if the Authority were to make repeated requests for modified “decision by” dates. This could have a material impact on CUSC Parties and prove detrimental to competition, particularly where a given Amendment results in industry “winners and losers”.</p> <p>Finally, the Amendment does not introduce any new date constructions over those currently available to the CUSC Panel. The CUSC Panel and the Working Groups currently use their experience and best judgement to determine the most appropriate date constructions for Amendments on a case-by-case basis; they would continue to do this should CAP179 be approved.</p> <p>Under the current arrangements, the majority of CUSC Amendments do not contain “decision by” dates. Those Amendments that are considered to create little uncertainty or are perceived to have no / little material impact on participants tend to have open ended date constructions; Drax believes such Amendments should continue to have open ended date constructions. However, those Amendments that are considered likely to cause greater uncertainty or perceived to have a greater material impact on industry participants tend to contain “decision by” dates in order to limit the life of such uncertainty for both new and current investors.</p> <p>It is important that the Amendment process promotes timely decision making by the Authority, particularly where the analysis associated with a given Amendment has a finite life. CAP179 would increase costs to investors associated with the added burden of regulatory uncertainty caused by decisions that are not determined by the Authority in a timely fashion.</p> <p>Whilst Drax does not believe there to be a CUSC defect surrounding “decision by” dates, the CAP179 Amendment may be</p>

Reference	Company	Supportive	Comments
			<p>more useful if it were worded to provide a <i>single</i> extension to decision timing in order to take account of unforeseen circumstances that the Authority may encounter during the decision making process. In order to ensure that the CUSC continues to provide certainty of decision dates, CAP179 must ensure that the Authority could not effectively make the decision timetable open ended by making repeated requests for additional “decision by” dates over a prolonged period of time.</p> <p>Further to this, it should be clear that a request by the Authority to revise the “decision by” date can only be made <i>prior</i> to the final “decision by” date contained within the original Amendment proposal; i.e. to ensure that requests are not made retrospectively. Inaction by the Authority <i>prior</i> to the “decision by” date should result in the modification timing out, in order to ensure that the Authority continues to make timely decisions and that the “decision by” date construct does not, in essence, become completely defunct. This would not require a new Alternative Amendment; it could be a simple alteration to the current CAP179 wording.</p> <p>Drax notes the comments of one Working Group member regarding the sterilisation of subject matters (paragraph 4.2.15). This is an area that should be discussed further, particularly given the potential for repeated requests to revise “decision by” dates and the length of time that a subject matter could effectively remain ‘out of bounds’ due to indecision on the part of the Authority.</p> <p>Finally, Drax does not see any harm in including Part 3 of CAP179 with regards to requesting the Authority to provide a likely decision date for a given Amendment. However, Drax agrees with the Working Group that as the CUSC could not oblige the Authority to reply, the provision may be very limited in its usefulness.</p>
CAP179 WGC-04	SSE	No	<p>CAP179 has three elements. We comment on these in turn.</p> <p>In respect of Part 1, we support the continuation of the CUSC working practice of setting implementation dates; where practical; as being XX business days / months etc., after an Authority Decision. For the avoidance of doubt, this should be, in all cases, a minimum of ten business</p>

Reference	Company	Supportive	Comments
			<p>days.</p> <p>In respect of Part 2, notwithstanding our comments under Part 1, it must be recognised that fixed dates maybe necessary. For example, undertaking a particular change to coincide with another change (perhaps linked to a date imminent event like an IT system release date) could offer significant cost benefits. However, undertaking that same change at another time might offer little, if any, benefits. Given this then a fixed date is required. Allowing (as Part 2 proposes) the Authority to write to the Panel setting out its (the Authority's) reason as to why a decision cannot be made by the fixed date is a welcomed step forward. This is an important element in the 'checks & balances' by which good regulatory practice operates.</p> <p>In respect of Part 3, we support the notion that the Panel write to the Authority when it (the Panel) becomes aware that analysis etc., upon which its recommendation is based could soon become out of date. It is beholden upon all public authorities to act reasonably when carrying out their duties. If they become aware of an issue (such as the risk that a decision might be flawed because its based upon inaccurate / out of date / wrong / defective information or analysis) then, in our view, they are duty bound to act to address this. Part 3 is, therefore, a welcomed step forward.</p> <p>However, Part 3, on its own, would not, in our view, be sufficient as having identified a deficiency (namely out of date analysis / information etc.) there would not be a way to rectify this. This would mean that the work undertaken to date would have to lapse. A "Part 4", as outlined in the suggested Working Group Alternative (see below), whereby the out of date analysis / information etc., is updated, CUSC Parties consulted, a new Panel recommendation vote undertaken (based on the most up to date analysis / information etc.) and a new Amendment Report submitted to the Authority is, in our view, the best way forward.</p>
CAP179 WGC-05	E.ON	No	<p>We do not believe there is a defect in the CUSC. Normal CUSC working practice already utilises an implementation date construct of n days after Authority decision, where appropriate, though fixed implementation dates are sometimes preferable e.g. to accommodate system changes. No date format can itself</p>

Reference	Company	Supportive	Comments
			<p>'prevent' timing-out; implementation dates should continue to be constructed to suit the amendment in question. The Authority has input to determination of decide-by and implementation dates during the modification process and this should be sufficient to produce reasonable and achievable dates. Formalising a mechanism for the Authority to request revised dates would disincentivise timely decision-making, increase uncertainty for existing Parties and deter new entrants.</p> <p>As identified by the Working Group, CAP179 could only be read to support Applicable objective (a) in that it would clarify the process for extending an implementation timetable as per clause 6c) of Standard condition C10 of the licence. However this clause refers only to the timescale for implementation of a modification that has been approved, not for a potential implementation to be deferred through extending the time that can be taken to make a decision whether or not to implement a proposal. Such a prospect would be less efficient, increasing uncertainty, risk and cost to Parties. The Panel and industry members have to meet deadlines for responding to consultations and providing Final Reports to the Authority; the Authority should also be able to make a decision within the timescales agreed for a modification. It is not efficient to disincentivise prompt decision-making and facilitate unlimited modification timescales. The potential for a new set of dates to be requested, once or repeatedly, would significantly increase uncertainty for the industry. The longer the Authority takes to make a decision is proportional to the increased risk to industry members and enabling the potential for an open-ended loop of requests for new dates would not improve the efficiency of the procedures to modify the CUSC. 'Send-back' powers have been suggested in Ofgem's Code Governance Review Final Proposals for those modifications where Ofgem believes that analysis is lacking. It should not be necessary to request revised dates for other modifications where it is internal procedures not the quality of the Final Modification Report delaying a decision.</p> <p>CAP179 would also be detrimental to Applicable objective (b) as the uncertainty that may arise through the potential for</p>

Reference	Company	Supportive	Comments
			<p>occasional 'timing out' of proposals is less than CAP179 would create for all proposals. The Authority acknowledged this in its rejection of P93. This would be unhelpful for existing Parties and also anticompetitive being a deterrent to any new entrants considering investing in the UK market. It could be further detrimental to competition as the potential for prolonged decision-making timescales might well deter Parties from raising new modifications.</p> <p>Neither the proposed or potential Working Group Amendment would be better than the baseline unless it is clear that the Panel retain the right to refuse a request for further dates where they view this as unreasonable.</p>
CAP179 WGC-06	Consumer Focus	Yes	<p>We think the case is ambiguous on objective (b) but is more obviously positive on objective (a). On balance, we think the proposal marginally better facilitates the code objectives.</p> <p>Were a modification timed out – and it must be noted that this is currently highly unlikely - the current arrangements may result in the process starting again from scratch (indeed, this is what happened on the BSC transmission loss proposals). This could result in duplication of effort and loss of time. This would help to facilitate Objective (a) the efficient discharge by the licensee of the obligations imposed upon it under the Act and by this licence.</p> <p>The case on the competition objective can easily be argued either way. CAP179 may reduce regulatory accountability through a dilution of pressure on the regulator to make prompt decisions. By extension, this may have an adverse effect on competition by increasing the perceived 'riskiness' of participating in the market. This could also increase the costs that consumers face, i.e. as the costs of industry risk are eventually backed off through bills This detrimental effect on competition may be counterbalanced by the reduced risk that a reform proposal that is in consumers' interests will be timed out. Both of those arguments are theoretical – much as the defect itself is on this code. As such, it is hard to give either any credible weighting; we therefore consider that the case on objective (b) is neutral.</p> <p>We understand, and share, the industry's desire for prompt, robust, decisions from</p>

Reference	Company	Supportive	Comments
			<p>the regulator – it should not be assumed that this is an industry-only concern; we are similarly frustrated by slow decision timescales. Deadlines are a good way of focussing minds and we understand the anxiety that open-ended ‘decide-by’ dates may have a dilatory effect on the accountability of the regulator.</p> <p>That said, we think there are strong natural disincentives on the regulator not to ‘sit on’ modifications indefinitely – not least of which is the dilatory effect that such behaviour has on the quality of the decision making process, and the amplifying effect that it has on the risk of successful legal challenge.</p> <p>Across the codes, open-ended ‘decide-by’ dates are already prevalent – indeed, they are the norm on the UNC – and this has not stopped the majority of decisions from being made promptly. Ironically, the most obvious recent example of tardy decision making timescales relates to the suspended Transmission Access Reform proposals – which were brought forward under existing CUSC rules.</p> <p>We agree with the working group that there is a risk that evidence will be ‘sterilised’ by events; such as changes to legislation or other market arrangements. We think this risk could be best mitigated by the regulator making appropriate use of the ‘send back’ powers proposed by the Code Governance Review. These would give an opportunity to refresh the evidence (if/as needed) at the same time as refreshing the decide-by date.</p>

Views of Panel Members

- 12.2 No Panel Members responded to the Working Group Consultation in that capacity.

Views of Core Industry Document Owners

- 12.3 No responses were received from Core Industry Document Owners.

Responses to the second Working Group Consultation (Sept/Oct 2010)

- 12.4 The following table provides an overview of the representations received from the Industry in response to the second CAP179 Working Group consultation in September/October 2010.

Reference	Company	Comments
CAP179	EDF Energy	<ul style="list-style-type: none"> EDF does not support CAP179 original

Reference	Company	Comments
WGC2-01		<ul style="list-style-type: none"> • Does support WGAA1 against the baseline • Notes timing out under CUSC is unlikely • WGAA2 should be allowed to progress to Working Group and Panel vote • Agree with non-retrospective implementation approach
CAP179 WGC2-02	E.ON UK plc	<ul style="list-style-type: none"> • E.ON does not believe there is a default in the CUSC to address • E.ON would prefer WGAA1 to either the original or WGAA2, which it deems unacceptable • Supports implementation approach • E.ON is disappointed that WGAA2 was supported by the Working Group chairman, in the face of strong opposition by the Working Group.
CAP179 WGC2-03	Accenture on behalf of ScottishPower	<ul style="list-style-type: none"> • ScottishPower recognises that CAP179 would bring the CUSC in line with the BSC, however, it does not support CAP179 as it would increase uncertainty and costs, particularly to smaller parties, which would act as a barrier to entry. • Supports implementation approach • ScottishPower notes that the BSC equivalent P250A was approved by the Authority despite a recommendation for rejection by both the BSC Modification Group and Panel.
CAP179 WGC2-04	SSE	<ul style="list-style-type: none"> • SSE considers that there may be some exceptional circumstances where a proposal "timing out" may be the Panel's preferred way forward; • SSE notes that the requirement to act "reasonably" is placed upon all parties (the Panel and the Authority) • Supports non-retrospective implementation approach; • Refers to views against Applicable CUSC Objectives set out in response to first Working Group consultation

Views of Panel Members

12.5 No Panel Members responded to the second Working Group Consultation in that capacity.

Views of Core Industry Document Owners

12.6 No responses were received from Core Industry Document Owners.

13.0 VIEWS INVITED

- 13.1 National Grid is seeking the views of interested parties in relation to the issues raised by Amendment Proposal CAP179 and the two Working Group Alternative Amendments.
- 13.2 In particular, we would welcome your views on whether and how the proposed Amendments would better facilitate the Applicable CUSC Objectives and whether you have a preferred option. We also welcome e views on the proposed implementation timescales and approach as set out in paragraph 7 of this consultation document.
- 13.3 Please send responses to cusc.team@uk.ngrid.com by 5pm on 15th November 2010.**

ANNEX 1 – REVISED JUSTIFICATION AGAINST THE APPLICABLE CUSC OBJECTIVES

As Proposer, National Grid considers that implementation of CAP179 would better facilitate Applicable CUSC Objective (a): *"the efficient discharge by the licensee of the obligations imposed upon it under the Act and by this licence"*, specifically with regard to the obligation under standard condition C10 of the licence, as follows:

"6. The licensee shall establish and operate procedures for the modification of the CUSC (including procedures for modification of the modification procedures themselves), so as to better facilitate achievement of the applicable CUSC objectives [...]"

National Grid considers that the processes described within CAP179 for setting Implementation Dates would result in the more efficient discharge of the requirement to operate procedures for the modification of the CUSC, given that Implementation Dates which cannot cause an Amendment Proposal to "time out" will mean that the work associated with the development of such an Amendment Proposal and the underlying resource requirements and associated costs, would not be wasted.

ANNEX 2 – WORKING GROUP TERMS OF REFERENCE AND MEMBERSHIP

TERMS OF REFERENCE FOR CAP179 WORKING GROUP

RESPONSIBILITIES

1. The Working Group is responsible for assisting the CUSC Amendments Panel in the evaluation of CUSC Amendment Proposal CAP179, "Timing Out of Authority decisions on Amendment Proposals", tabled by National Grid at the Amendments Panel meeting on 29th January 2010.
2. The proposal must be evaluated to consider whether it better facilitates achievement of the Applicable CUSC Objectives. These can be summarised as follows:
 - (a) the efficient discharge by the Licensee of the obligations imposed on it by the Act and the Transmission 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.
3. It should be noted that additional provisions apply where it is proposed to modify the CUSC amendment provisions, and generally reference should be made to the Transmission Licence for the full definition of the term.

SCOPE OF WORK

4. The Working Group must consider the issues raised by the Amendment Proposal and consider if the proposal identified better facilitates achievement of the Applicable CUSC Objectives.
5. In addition to the overriding requirement of paragraph 4, the Working Group shall consider and report on the following specific issues:
 - a) Identify the defect to be addressed within the CUSC;
 - b) Agree transitional implementation arrangements for CAP179, taking into account the precedent used for implementation of CAP160;
 - c) Be mindful of previous decisions on related issues, such as the Authority's decision on BSC Modification Proposal P93 (Introduction of a Process for Amendment of Proposed Implementation Dates) and the Judgment resulting from the Judicial Review for BSC Modification Proposals P198, P200, P203 and P204²⁰.
6. The Working Group is responsible for the formulation and evaluation of any Working Group Alternative Amendments (WGAAs) arising from Group discussions which would, as compared with the Amendment Proposal, better facilitate achieving the Applicable CUSC Objectives in relation to the issue or defect identified.

²⁰ Relevant documentation will be provided to the Working Group

7. The Working Group should become conversant with the definition of Working Group Alternative Amendments which appears in Section 11 (Interpretation and Definitions) of the CUSC. The definition entitles the Group and/or an individual member of the Working Group to put forward a Working Group Alternative Amendment if the member(s) genuinely believes the Alternative would better facilitate the achievement of the Applicable CUSC Objectives. The extent of the support for the Amendment Proposal or any Working Group Alternative Amendment arising from the Working Group's discussions should be clearly described in the final Working Group report to the CUSC Amendments Panel.
8. There is an obligation on Working Group members to propose the minimum number of Working Group Alternative Amendments where possible.
9. All proposed Working Group Alternative Amendments should include the proposer(s)'s details within the final Working Group report, for the avoidance of doubt this includes Alternative(s) which are proposed by the entire Working Group or subset of members.
10. There is an obligation on the Working Group to undertake a period of Consultation in accordance with CUSC 8.17. The Working Group Consultation period shall be for a period of 10 Business Days as determined by the Amendments Panel.
11. Following the Consultation period the Working Group is required to consider all responses including any WG Consultation Alternative Requests. As appropriate the Working Group will be required to undertake any further analysis and update the original Amendment Proposal and/or Working Group Alternative Amendments. All responses, including any WG Consultation Alternative Requests, shall be included within the final report including a summary of the Working Group's deliberations and conclusions.
12. The Working Group is to submit its final report to the CUSC Panel Secretary on 21st October 2010 for circulation to Panel Members. The conclusions will be presented to the Amendments Panel meeting on 29th October 2010.

MEMBERSHIP

13. The Working Group has the following members.

Role	Name	Organisation
Working Group Chair	Kathryn Coffin	Elexon
National Grid representative*	Alex Thomason	National Grid (Proposer)
Industry representatives*	Garth Graham	Scottish & Southern Energy
	Paul Mott	EDF Energy
	Esther Sutton	E.ON UK
	Barbara Vest	Association of Electricity Producers (nominated by EDF Energy)
Authority representative	Abid Sheikh	Ofgem
Technical Secretary	Susan Mwape	National Grid
Observer	Camilla McCorkell	EDF Energy

NB: A Working Group must comprise at least 5 Members (who may be Panel Members). The roles identified with an asterisk in the table above contribute toward the required quorum, determined in accordance with paragraph 14 below.

14. The Chair of the Working Group and the Amendments Panel Chairman must agree a number that will be quorum for each Working Group meeting. The agreed figure for CAP179 is that at least 4 Working Group members must participate in a meeting for quorum to be met.
15. A vote is to take place by all eligible Working Group members on the proposal and each Working Group Alternative Amendment, as appropriate, as to whether it better facilitates the Applicable CUSC Objectives and indicate which option is considered the BEST with regard to the Applicable CUSC Objectives. The results from the vote shall be recorded in the Working Group Report.
16. Working Group members (or their appointed alternate) are required to attend a minimum of 50% of the Working Group meetings to be eligible to participate in the Working Group vote.
17. The Technical Secretary will keep an attendance record for the Working Group meetings and circulate the attendance record with the action notes after each meeting. The attendance record will be attached to the final Working Group report.
18. The membership can be amended from time to time by the CUSC Amendments Panel.

RELATIONSHIP WITH AMENDMENTS PANEL

19. The Working Group shall seek the views of the Amendments Panel before taking on any significant amount of work. In this event the Working Group Chairman should contact the CUSC Panel Secretary.
20. The Working Group shall seek the Amendments Panel advice if a significant issue is raised during the Consultation process which would require a second period of Consultation in accordance with 8.17.17.
21. Where the Working Group requires instruction, clarification or guidance from the Amendments Panel, particularly in relation to their Scope of Work, the Working Group Chairman should contact the CUSC Panel Secretary.

MEETINGS

22. The Working Group shall, unless determined otherwise by the Amendments Panel, develop and adopt its own internal working procedures and provide a copy to the Panel Secretary for each of its Amendment Proposals.

REPORTING

23. The Working Group Chairman shall prepare a final report to the October 2010 Amendments Panel, responding to the matter set out in the Terms of Reference including all Working Group Consultation responses and Consultation Alternative Requests.

24. A draft Working Group Report must be circulated to Working Group members with not less than five business days given for comments.
25. Any unresolved comments within the Working Group must be reflected in the final Working Group Report.
26. The Chairman (or another member nominated by him) will present the Working Group report to the Amendments Panel as required.

Appendix 1: Indicative Working Group timeline

Activity	Deadline/Date	Notes
Agree revised Working Group terms of reference	22 nd March 2010	Panel Members to approve
First Working Group meeting	26 th March 2010	
Draft Working Group consultation document & circulate for comment	1 st April 2010	Circulate to Working Group members for comment
Deadline for comments on consultation document	5pm on 13 th April 2010	<i>Takes account of Easter bank holidays</i>
Issue Working Group consultation document	16 th April 2010	2 week consultation
Deadline for responses to Working Group consultation	5pm on 29 th April 2010	
Second Working Group meeting	4 th May 2010	To discuss consultation responses and any WG Consultation Alternative Requests
Third Working Group meeting	21 st May 2010	To discuss Working Group voting
Fourth Working Group meeting	25 th May 2010	
Circulate draft Working Group report for comment	28 th May 2010	Circulate to Working Group members for comment
Deadline for comments on draft Working Group report	5pm on 7 th June 2010	
Issue revised final draft Working Group	10 th August 2010	To be updated to include final draft legal text
Deadline for comments on updated draft Working Group report	17 th August 2010	
Working Group teleconference to agree final report	18 th August 2010	
2 nd Draft Working Group consultation Further WG meeting to discuss responses document & circulate for comment	13 th September 2010*	
Deadline for comments on consultation document	17 th September 2010	

Activity	Deadline/Date	Notes
Issue Working Group consultation document	20 th September 2010	2 week consultation
Deadline for responses to Working Group consultation	4 th October 2010	
Sixth WG meeting	w/c 4 th October 2010	To discuss consultation responses and any WG Consultation Alternative Request
Finalise Working Group Report	w/c 11 th October 2010	
Publish Working Group Report with Panel Papers	20 th October 2010	
Present Working Group report to Amendments Panel	29 th October 2010*	Working Group Chair to present

Note 1: At the January 2010 Amendments Panel meeting, the Panel agreed that the CAP179 Working Group should report back to the April 2010 Amendments Panel meeting. However, due to the first Working Group meeting being delayed until 26th March, the April deadline could not be met. The Amendments Panel agreed to an extension to the timetable for the Working Group report to be delivered to the June 2010 Amendments Panel meeting.

Note 2: The timetable was further revised following the cancellation of the June 2010 Amendments Panel meeting at which the Working Group report was due to be presented. A further delay to the finalisation of the Working Group report led to a request for an extension to the August 2010 Amendments Panel meeting. The Proposer raised a further Working Group Alternative Amendment at the August Panel meeting and as a consequence a further WG Consultation will be undertaken, with the WG report being presented at the October 2010 Panel meeting.

ANNEX 3 – AMENDMENT PROPOSAL FORM

CUSC Amendment Proposal Form	CAP:179
Title of Amendment Proposal: Prevention of "Timing Out" of Authority decisions on Amendment Proposals	
Description of the Proposed Amendment (<i>mandatory by proposer</i>): <p>This Amendment Proposal seeks to remove the potential for an Authority decision on an Amendment Proposal to "time out". "Timing out" occurred within the industry in 2007 when the Authority was unable to provide its decision on BSC Modification Proposals P198, P200, P203 and P204 before the final date allotted for such a decision in the Final Modification Report. A subsequent Judicial Review ruled that when the Authority did not make its decision by the latest date included in the Final Modification Reports, it lost the ability to make any decision on those Proposals.</p> <p>Following the Judgement, Ofgem issued a number of industry consultations, the most recent of which, in May 2009, included indicative modifications to National Grid's Transmission/Transporter licences to try and prevent "timing out" reoccurring. The indicative drafting required changes to be raised to the BSC, CUSC and UNC modification processes.</p> <p>National Grid recognises the issues raised by respondents during the industry consultations related to timing out. While we acknowledge that "timing out" has not been an issue to date for the CUSC, we consider that raising an Amendment Proposal is an efficient way for the industry to address the issues raised. Following the proposals we have already raised to modify the BSC and UNC, National Grid proposes the following amendment to the CUSC.</p> <ol style="list-style-type: none">1) In line with current working practice for the CUSC, the Amendments Panel should, wherever possible, propose Implementation Dates using the construction "XX business days or XX months after receipt of an Authority decision", which would prevent "timing out" occurring.2) In recognition that, for some proposals, a "fixed" implementation date (with an associated decision by date) may be preferable, for example where there are system development requirements, we propose that the Panel should be mindful of the potential for "timing out" when setting proposed Implementation Dates. Where a "fixed" Implementation Date is proposed, we consider that a process should be formalised within the CUSC whereby the Authority, upon identifying that it will be unable to meet a "decision by"/Implementation Date, writes to the Panel setting out its reasons for not meeting such a date and requesting a revised set of dates. Upon receipt of such a notification, we propose that the Panel would consult with the industry on the following:<ol style="list-style-type: none">a) a revised set of implementation dates;b) whether the industry considers there to be any other relevant time-bound issues arising, for example, any issues relating to the "expiry" of any supporting analysis that was undertaken to support the original Amendment Report sent to the Authority.3) Finally, to address the issue of timely decision making raised by industry participants, we propose that a new process be introduced whereby, following receipt by the Authority of a final Amendment Report, the Panel Secretary, at the request and on behalf of the Amendments Panel, may write to the Authority to request the Authority to give an indication of the likely date by which the Authority's decision on an Amendment Proposal shall be made. This process could be triggered either by a set period of time elapsing or by the Amendments Panel raising a reasonable concern related to the pending Amendment Proposal, for example that the analysis may soon become out of date.	

Parts 2 and 3 above are similar to the process that exists within the UNC modification procedures, which is reproduced for reference in the attachment to this Amendment Proposal. National Grid also draws the industry's attention to the "send back" powers proposed by Ofgem in its Code Governance Review Initial Proposals. Our interpretation of these powers are that the Authority would have the ability to request additional analysis, information or a revised timetable where it is unable to make a decision on an Amendment Proposal against the relevant objectives, and to request a revised final Amendment Report which could include a revised Amendments Panel Recommendation Vote based upon the updated information produced.

Description of Issue or Defect that Proposed Amendment seeks to Address (*mandatory by proposer*):

This Amendment Proposal seeks to address three issues:

1) "Timing Out" of Authority decisions on Amendment Proposals.

A description of the circumstances which can cause "timing out" is included in the section above. The result of "timing out" is to cause uncertainty among the industry as to the future of an Amendment Proposal, as well as the timescales surrounding that proposal. It also has the potential to waste resources in terms of the costs incurred by industry participants in raising and considering an Amendment Proposal which may then "time out".

2) Concerns over timely decision making.

During Ofgem's consultations on "timing out", industry participants raised concerns over timely decision making. National Grid seeks to address this by formalising a process whereby the Amendments Panel may write to the Authority to highlight where a decision has not been provided, either within a given timeframe or where certain conditions are met.

3) Ongoing validity of industry analysis supporting a Panel recommendation.

A further concern raised by industry participants was that, where a significant period of time has elapsed between a recommendation being provided to the Authority and the Authority making a decision, the underlying circumstances will have changed and any supporting analysis may be out of date. The proposal provides a mechanism for the Panel to consult industry participants on time-related concerns which could include the validity of analysis where a period of time has passed since its completion.

Impact on the CUSC (*this should be given where possible*):

Amendments will be required to section 8 of the CUSC.

Impact on Core Industry Documentation (*this should be given where possible*):

None identified.

Impact on Computer Systems and Processes used by CUSC Parties (*this should be given where possible*):

There should be minimal impact on systems and processes used by CUSC Parties, given that it is anticipated that in the majority of cases, the existing Implementation Date structure of "XX days after an Authority decision" will be used, therefore this represents no change to the status quo.

Details of any Related Modifications to Other Industry Codes (*where known*):

BSC P250: Prevention of "Timing Out" of Authority decisions on Modification Proposals

UNC 0281: Prevention of "Timing Out" of Authority decisions on Modification Proposals

Justification for Proposed Amendment with Reference to Applicable CUSC Objectives**

(mandatory by proposer):

National Grid considers that implementation of this Amendment Proposal would better facilitate Applicable CUSC Objective (a): *"the efficient discharge by the licensee of the obligations imposed upon it under the Act and by this licence"*, specifically with regard to the obligation under standard condition C10 of the licence, as follows:

6. *The licensee shall establish and operate procedures for the modification of the CUSC (including procedures for modification of the modification procedures themselves), so as to better facilitate achievement of the applicable CUSC objectives, which procedures shall provide [...]:*

[...]

- (c) *for the timetable (referred to in sub-paragraph (b)(v)) for implementation of any modification to be such as will enable the modification to take effect as soon as practicable after the Authority has directed such modification to be made, account being taken of the complexity, importance and urgency of the modification, and for that timetable to be extended with the consent of or as required by the Authority.*

This Amendment Proposal seeks to clarify and formalise the arrangements by which an implementation timetable could be extended as described above and therefore better meets Applicable CUSC Objective (a).

Details of Proposer: Organisation's Name:	National Grid Electricity Transmission plc
Capacity in which the Amendment is being proposed: (i.e. CUSC Party, BSC Party or "National Consumer Council")	CUSC Party
Details of Proposer's Representative: Name: Organisation: Telephone Number: Email Address:	Alex Thomason National Grid Electricity Transmission plc 01926 656379 Alex.thomason@uk.ngrid.com
Details of Representative's Alternate: Name: Organisation: Telephone Number: Email Address:	Bushra Akhtar National Grid Electricity Transmission plc 01926 655223 Bushra.akhtar@uk.ngrid.com
Attachments (Yes): If Yes, Title and No. of pages of each Attachment:	Paragraph 9.5 of the UNC Modification Rules, version 3.04, dated 17 April 2009 (1 page)

Notes:

- Those wishing to propose an Amendment to the CUSC should do so by filling in this "Amendment Proposal Form" that is based on the provisions contained in Section 8.15 of the CUSC. The form seeks to ascertain details about the Amendment Proposal so that the Amendments Panel can determine more clearly whether the proposal should be considered by a Working Group or go straight to wider National Grid Consultation.

2. The Panel Secretary will check that the form has been completed, in accordance with the requirements of the CUSC, prior to submitting it to the Panel. If the Panel Secretary accepts the Amendment Proposal form as complete, then he will write back to the Proposer informing him of the reference number for the Amendment Proposal and the date on which the Proposal will be considered by the Panel. If, in the opinion of the Panel Secretary, the form fails to provide the information required in the CUSC, then he may reject the Proposal. The Panel Secretary will inform the Proposer of the rejection and report the matter to the Panel at their next meeting. The Panel can reverse the Panel Secretary's decision and if this happens the Panel Secretary will inform the Proposer.

The completed form should be returned to:

Bali Virk
Commercial
National Grid
National Grid House
Warwick Technology Park
Gallows Hill
Warwick
CV34 6DA

Or via e-mail to: Bali.Virk@uk.ngrid.com

(Participants submitting this form by email will need to send a statement to the effect that the proposer acknowledges that on acceptance of the proposal for consideration by the Amendments Panel, a proposer which is not a CUSC Party shall grant a licence in accordance with Paragraph 8.15.7 of the CUSC. A Proposer that is a CUSC Party shall be deemed to have granted this Licence).

3. Applicable CUSC Objectives** - These are defined within the National Grid Electricity Transmission plc Licence under Standard Condition C10, paragraph 1. Reference should be made to this section when considering a proposed amendment.

ANNEX 4 – LEGAL ADVICE FROM OFGEM AND NATIONAL GRID

OFGEM LEGAL ADVICE (dated 17th May 2010)

Send back powers are invoked when the Authority considers that it cannot form an opinion that a modification in the FMR better facilitates the applicable objectives as compared to baseline or alternative modification. The Authority can then direct the Panel to provide the analysis and/or information that it requires amongst other things (note: those other things include direction to revise the timetable).

In its CGR Final Proposals (paragraph 3.44) Ofgem makes clear that there may be "occasions where new issues come to light which could not reasonably have been foreseen by the panel or Ofgem, but are later identified as having a bearing on the decision. We anticipate that this should also be a rare event, but that this seems to be preferable to otherwise having to reject a proposal on the basis that its assessment, if not the proposal itself, has been superseded". We think this covers situations where original analysis has become deficient through passage of time. We believe the proposed licence drafting on send back accommodates this. It is open to the Panel to revise its recommendation, if required, in light of new assessment. We note that there is nothing in our proposals that stipulates whether or not the panel can re-make its recommendation, we think that is a matter for the code rules. It would however seem reasonable for the Panel to have discretion to re-visit that recommendation if it was based in part on analysis which is subsequently revised.

We understand, under CAP 179, the Authority could request the Panel to consult on revised implementation dates and whether analysis is out of date. The Alternative provides that the Panel can revise analysis and its recommendation without further direction. There may be some overlap in terms of out of date analysis and revising the recommendation however, the trigger is different:

- under CAP 179 the trigger is the request by the Authority to the Panel to consult on revised implementation dates and whether analysis is out of date;
- under send back the trigger is where the Authority considers that it cannot form an opinion that a modification in the FMR better facilitates the applicable objectives as compared to baseline or alternative modification. The Authority can then direct the Panel to provide the analysis and/or information that it requires and the Panel is open to revise its recommendation in light of new analysis.

NATIONAL GRID LEGAL ADVICE (dated 18th May 2010)

Q1: Can the proposed WGAA be effected through changes to the CUSC, or does it require a licence change?

The NGET Transmission licence (SC 10 para 6 (v)) and the CUSC (8.20) (Section 8 sets out the detail of the process required by the licence) only envisages the preparation and submission of one report to the Authority and consideration by that Authority of that one report without scope for it to be revised.

It seems correct therefore that both the licence and CUSC would require changes (although the nature and extent of the changes would depend on the detail of the proposal) to expressly provide for the preparation and submission of a revised report and supporting analysis to the Authority and, as envisaged by WGAA, a "rerun" of certain part of the modification process, so making clear the status of that new info etc and the ability of the Authority to consider and make a decision taking account of this.

This view would align with the approach taken to introduce changes to the licence (and CUSC) to expressly provide for "send back" as set out in the licence drafting recently consulted upon.

Q2: If it requires a licence change, could the proposed licence drafting for the “send back” powers under Ofgem’s Code Governance Review cover the WGAA or would it require a stand-alone licence change?

In terms of the changes proposed in the licence drafting circulated on 6 May, this (SC 10 7.aa) gives the Authority a right (but not an obligation) to issue a direction to the panel where it determines that the existing report "is such that it cannot properly form an opinion" (presumably) as to whether the modification better facilitatesetc. In these circumstances the Authority may make a direction to the panel "specifying the additional steps (including drafting or amending existing drafting of the amendment to the CUSC), revision (including revision to the timetable), analysis or information that it requires in order to form such opinion" and the licence specifically provides for the report to be revised and resubmitted.

As drafted it is for the Authority to specify what additional steps, revision, analysis or information it requires, over and above what is in the original report, to form an opinion and their decision as whether to issue a direction or not.

The interpretation as given by Ofgem at the working group meeting is that SC 10.7aa is not intended to be the process by which, as envisaged under CAP 179, the Authority, having identified that it would be unable to make the decision by the time required to meet the "fixed" Implementation Date, would "direct" the Panel and request revised dates.

Whilst both the licence condition and the process intended under part 2 of CAP 179 provide for the Authority to "direct" and the panel to provide revised dates, the right under this licence condition is only available where the Authority's view is that they cannot form an opinion from the report and so need something "more" in order to do so. The consequence of needing "more" has the potential to impact on dates and so the need for a revised timetable but it will not generally be the case that the timetable alone is the reason why an opinion cannot be formed. This right therefore seems framed as addressing something different from and more wide ranging than the specific defect identified as Part 2 in CAP 179 and the resulting process in the CUSC. The Authority could choose to use SC 10.7 to achieve the same effect as the proposed provisions in WGAA i.e. require further analysis and additional steps by specific direction where SC 10.7 is available and as a result allow for a revised report etc. This condition cannot however be relied on generally to support including processes in CUSC allowing preparation and submission of revised reports/analysis and revised recommendations.

Q3: If it requires a licence change, can it be considered a “valid” Working Group Alternative Amendment?

There have been a number of modifications where as a consequence changes to licence, charging statements or other codes are required. The need for this wouldn't seem to preclude a proposal or alternative from being valid but the ability to achieve this and so the effect of implementation would be a factor to consider, particularly so in the context of the licence, in assessing the merits of the proposal and any recommendation.

ADDITIONAL NATIONAL GRID LEGAL ADVICE (dated 19th May 2010)

We have given further thought on whether the proposed licence drafting for the "send back" powers under Ofgem's Code Governance Review cover the WGAA. As stated in our email dated 18 May (attached), whilst both the licence condition and the process intended under part 2 of CAP 179 provide for the Authority to "direct" and the Panel to provide revised dates, it is our view that the right under this licence condition is only available where the Authority's view is that they cannot form an opinion from the report and so need something "more" in order to do so. However, in the Authority requesting revised implementation date(s) as part of CAP179, the Panel may inform the Authority that the analysis is out of date and, on this basis, lead the Authority to require "more" analysis in order to form an opinion.

On the basis of the legal advice from National Grid and Ofgem it would appear that the working group alternative is valid and that the proposed licence drafting for the "send back" powers under Ofgem's Code Governance Review could cover the WGAA.

ANNEX 5 – PROPOSED ADDITIONAL WORKING GROUP ALTERNATIVE AMENDMENT

CAP179: Prevention of "Timing Out" of Authority decisions on Amendment Proposals

Proposed Working Group Alternative Amendment

Raised by National Grid Electricity Transmission plc

Background and rationale

Following development of the "original" CAP179 solution by the CAP179 Working Group (and the WGAA), National Grid wishes to raise a WGAA.

National Grid's proposed WGAA has the same three parts set out in the "original" CAP179 Amendment Proposal, but in Part 2, where the Authority writes to the Panel to say it is unable to meet a "decision by" or Implementation Date, the WGAA would state that the Authority would direct the Panel to provide revised dates, instead of requesting the Panel to provide revised dates.

National Grid seeks to make this change for the following reasons:

- It reflects the Proposer's original intent, as stated during the CAP179 Working Group meetings, that a "request" by the Authority for revised Implementation Dates would not be refused;
- It removes the potential for an Amendment Proposal to still "time out" which exists under the "original" solution developed by the Working Group, whereby the Panel could refuse to provide revised Implementation Dates on what it felt were reasonable grounds, which could then be challenged;
- It brings the CAP179 solution in line with the equivalent BSC Modification P250 Alternative solution on which the CAP179 original Amendment Proposal was based.

National Grid's proposed Working Group Alternative Amendment

Our WGAA is based on the wording from our original CAP179 Amendment Proposal, with the text highlighted in bold font representing the changes from the original.

National Grid proposes the following amendment to the CUSC.

1. In line with current working practice for the CUSC, the Amendments Panel should, wherever possible, propose Implementation Dates using the construction "XX business days or XX months after receipt of an Authority decision", which would prevent "timing out" occurring.
2. In recognition that, for some proposals, a "fixed" implementation date (with an associated decision by date) may be preferable, for example where there are system development requirements, we propose that the Panel should be mindful of the potential for "timing out" when setting proposed Implementation Dates.

Where a "fixed" Implementation Date is proposed, we consider that a process should be formalised within the CUSC whereby the Authority, upon identifying that it will be unable to meet a "decision by"/Implementation Date,

writes to the Panel setting out its reasons for not meeting such a date and directs the Panel to provide a revised set of dates. The Panel would not be able to refuse such a direction. Upon receipt of such a direction, we propose that the Panel would consult with the industry on the following:

- a) a revised set of implementation dates;
 - b) whether the industry considers there to be any other relevant time-bound issues arising, for example, any issues relating to the "expiry" of any supporting analysis that was undertaken to support the original Amendment Report sent to the Authority.
3. Finally, to address the issue of timely decision making raised by industry participants, we propose that a new process be introduced whereby, following receipt by the Authority of a final Amendment Report, the Panel Secretary, at the request and on behalf of the Amendments Panel, may write to the Authority to request the Authority to give an indication of the likely date by which the Authority's decision on an Amendment Proposal shall be made. This process could be triggered either by a set period of time elapsing or by the Amendments Panel raising a reasonable concern related to the pending Amendment Proposal, for example that the analysis may soon become out of date.

ANNEX 6 – PROPOSED LEGAL TEXT

Draft Legal Text for CAP179 original

Amend CUSC 8.17.11(c) as follows:

- (c) The dates proposed by **The Company** as the **Proposed Implementation Date** ~~for the implementation of the Amendment Proposal and draft Working Group Alternative Amendment(s).~~

Amend CUSC 8.19.4(b) as follows:

- (b) the date proposed by **The Company** as the **Proposed Implementation Date** ~~for the implementation of the Amendment Proposal and any Working Group Alternative Amendment~~ and, where the **Working Group** terms of reference require and the dates proposed by the **Working Group** are different from those proposed by **The Company**, those proposed by the **Working Group**. Views will be invited on these dates.

Amend CUSC 8.19.10(b) as follows:

- (b) the date proposed by **The Company** as the **Proposed Implementation Date** ~~for the implementation of the Amendment Proposal~~. Views will be invited on this date.

Amend CUSC Para 8.20.2(f) as follows:

- (f) the ~~proposed date for the implementation of the Proposed Amendment or any Working Group Alternative Amendment~~ **Proposed Implementation Date** taking into account the views put forward during the process described at Paragraph 8.19.4(b) such date to be determined by the **Amendments Panel** in the event of any disparity between such views and those of **The Company**;

Add the following as new Paragraph 8.20.9:

8.20.9 Revised Fixed Proposed Implementation Date

- 8.20.9.1 Where the **Proposed Implementation Date** included in an **Amendment Report** is a **Fixed Proposed Implementation Date** and the **Authority** considers that the **Fixed Proposed implementation Date** is or may no longer be appropriate or might otherwise prevent

the **Authority** from making such decision by reason of the effluxion of time, the **Authority** may request the **Amendments Panel** (such request not to be unreasonably refused) to recommend a revised **Proposed Implementation Date**.

8.20.9.2 Such request may:

- (a) specify that the revised **Proposed Implementation Date** shall not be prior to a specified date;
- (b) specify a reasonable period (taking into account a reasonable period for consultation) within which the **Amendments Panel** shall be requested to submit its recommendation; and
- (c) provide such reasons as the **Authority** deems appropriate for such request (and in respect of those matters referred to in Paragraphs 8.20.9.2(a) and (b) above).

8.20.9.3 Before making a recommendation to the **Authority**, the **Amendments Panel** will consult on the revised **Proposed Implementation Date**, and may in addition consult on any matters relating to the **Amendment Report** which in the **Amendments Panel's** opinion have materially changed since the **Amendment Report** was submitted to the **Authority** and where it does so the **Amendments Panel** shall report on such matters as part of its recommendation under **CUSC** Paragraph 8.20.9.4, with:

- (a) **CUSC Parties**; and
- (b) such other persons who may properly be considered to have an appropriate interest in it.

Such consultation will be undertaken in accordance with **CUSC** Paragraphs 8.19.3 and 8.19.6.

8.20.9.4 Following the completion of the consultation held pursuant to **CUSC** Paragraph 8.20.9.3 the **Amendments Panel** shall report to the

Authority with copies of all the consultation responses and recommending a **revised Proposed Implementation Date**.

8.20.9.5 The **Authority** shall notify the **Amendments Panel** as to whether or not it intends to accept the **Revised Proposed Implementation Date** and where the **Authority** notifies the **Amendments Panel** that it intends to accept the **Revised Proposed Implementation Date**, the **Revised Proposed Implementation Date** shall be deemed to be the **Proposed Implementation Date** as specified in the **Amendment Report**.

8.20.10 **Authority Approval**

If:

- (a) the **Authority** has not given notice of its decision in respect of an **Amendment Report** within two (2) calendar months (in the case of an **Urgent Amendment Proposal**), or four (4) calendar months (in the case of all other **Amendment Proposals**) from the date upon which the **Amendment Report** was submitted to it; or
- (b) the **Amendments Panel** is of the reasonable opinion that the circumstances relating to the **Proposed Amendment** and/or **Working Group Alternative Amendment** which is the subject of an **Amendment Report** have materially changed,

the **Amendments Panel** may request the **Panel Secretary** to write to the **Authority** requesting the **Authority** to give an indication of the likely date by which the **Authority's** decision on the **Proposed Amendment** will be made.

8.20.11 **CUSC** Paragraphs 8.20.9 and 8.20.10 shall only apply in respect of any **Amendment Proposals** submitted after the **CAP 179 Implementation Date**.

Add the following as new definitions at CUSC Section 11:

“CAP 179 Implementation Date” shall mean the date specified as the

“Fixed Proposed Implementation Date”	<p>Implementation Date in the direction issued by the Authority approving Proposed Amendment 179 (Prevention of Timing Out of Authority Decisions on Amendment Proposals);</p> <p>the proposed date(s) for the implementation of a Proposed Amendment or Working Group Alternative Amendment such date to be a specific date by reference to an assumed date by which a direction from the Authority approving the Proposed Amendment or Working Group Alternative Amendment is required in order for the Proposed Amendment or any Working Group Alternative Amendment, if it were approved, to be implemented by the proposed date;</p>
“Proposed Implementation Date”	<p>the proposed date(s) for the implementation of a Proposed Amendment or Working Group Alternative Amendment such date(s) to be either (i) described by reference to a specified period after a direction from the Authority approving the Proposed Amendment or Working Group Alternative Amendment or (ii) a Fixed Proposed Implementation Date;</p>
“Revised Proposed Implementation Date”	<p>the revision to a Fixed Proposed Implementation Date recommended to the Authority by the Amendments Panel pursuant to CUSC Paragraph 8.20.9.4;</p>

Draft Legal Text for CAP179 Working Group Alternative Amendment 1

Amend CUSC 8.17.11(c) as follows:

- (c) The dates proposed by **The Company as the Proposed Implementation Date** ~~for the implementation of the Amendment Proposal and draft Working Group Alternative Amendment(s).~~

Amend CUSC 8.19.4(b) as follows:

- (b) the date proposed by **The Company as the Proposed Implementation Date** ~~for the implementation of the Amendment Proposal and any Working Group Alternative Amendment~~ and, where the **Working Group** terms of reference require and the dates proposed by the **Working Group** are different from those proposed by **The Company**, those proposed by the **Working Group**. Views will be invited on these dates.

Amend CUSC 8.19.10(b) as follows:

- (b) the date proposed by **The Company as the Proposed Implementation Date** ~~for the implementation of the Amendment Proposal~~. Views will be invited on this date.

Amend CUSC Para 8.20.2(f) as follows:

- (f) the ~~proposed date for the implementation of the Proposed Amendment or any Working Group Alternative Amendment~~ **Proposed Implementation Date** taking into account the views put forward during the process described at Paragraph 8.19.4(b) such date to be determined by the **Amendments Panel** in the event of any disparity between such views and those of **The Company**;

Add the following as new Paragraphs 8.20.9, 8.20.10, 8.20.11 and 8.20.12

8.20.9 Revised Fixed Proposed Implementation Date

- 8.20.9.1 Where the **Proposed Implementation Date** included in an **Amendment Report** is a **Fixed Proposed Implementation Date** and the **Authority** considers that the **Fixed Proposed implementation Date** is or may no longer be appropriate or might otherwise prevent the **Authority** from making such decision by reason of the effluxion of time the **Authority** may request the **Amendments Panel** (such

request not to be unreasonably refused) to recommend a revised **Proposed Implementation Date**.

8.20.9.2 Such request may:

- (a) specify that the revised **Proposed Implementation Date** shall not be prior to a specified date;
- (b) specify a reasonable period (taking into account a reasonable period for consultation) within which the **Amendments Panel** shall be requested to submit its recommendation; and
- (c) provide such reasons as the **Authority** deems appropriate for such request (and in respect of those matters referred to in Paragraphs 8.20.9.2(a) and (b) above).

8.20.9.3 Before making a recommendation to the **Authority**, the **Amendments Panel** will consult on the revised **Proposed Implementation Date**, and may in addition consult on any matters relating to the **Amendment Report** which in the **Amendments Panel's** opinion have materially changed since the **Amendment Report** was submitted to the **Authority** and where it does so the **Amendments Panel** shall report on such matters as part of its recommendation under **CUSC** Paragraph 8.20.9.4, with:

- (a) **CUSC Parties**; and
- (b) such other persons who may properly be considered to have an appropriate interest in it.

Such consultation will be undertaken in accordance with **CUSC** Paragraphs 8.19.3 and 8.19.6.

8.20.9.4 Following the completion of the consultation held pursuant to **CUSC** Paragraph 8.20.9.3 the **Amendments Panel** shall report to the **Authority** with copies of all the consultation responses and recommending a revised **Proposed Implementation Date**.

8.20.9.5 The **Authority** shall notify the **Amendments Panel** as to whether or not it intends to accept the **Revised Proposed Implementation Date** and where the **Authority** notifies the **Amendments Panel** that it intends to accept the **Revised Proposed Implementation Date**, the **Revised Proposed Implementation Date** shall be deemed to be the **Proposed Implementation Date** as specified in the **Amendment Report**.

8.20.11 **Authority Approval**

If:

(a) the **Authority** has not given notice of its decision in respect of an **Amendment Report** within two (2) calendar months (in the case of an **Urgent Amendment Proposal**), or four (4) calendar months (in the case of all other **Amendment Proposals**) from the date upon which the **Amendment Report** was submitted to it; or

(b) the **Amendments Panel** is of the reasonable opinion that the circumstances relating to the **Proposed Amendment** and/or **Working Group Alternative Amendment** which is the subject of an **Amendment Report** have materially changed,

the **Amendments Panel** may request the **Panel Secretary** to write to the **Authority** requesting the **Authority** to give an indication of the likely date by which the **Authority's** decision on the **Proposed Amendment** will be made.

8.20.12 **Revised Amendment Report**

8.20.12.1 Where, the **Amendments Panel** concludes in any report submitted to the **Authority** under Paragraphs 8.20.9.4, that the analysis undertaken in respect of the **Amendment Proposal** and/or any **Working Group Alternative Amendment** as set out in the **Amendment Report** is out of date the **Amendments Panel** may (and shall, where directed by the **Authority** to do so) update or undertake additional analysis and revise and resubmit the **Amendment Report** to the **Authority** in accordance with the following provisions.

8.20.12.2 Where the **Amendments Panel** so determines in accordance with Paragraph 8.20.11.1 (or the **Amendments Panel** is directed by the **Authority** to do so);

- (a) **The Company** and the **Amendments Panel** shall together establish a timetable for the update and undertaking of additional analysis and the revision of the **Amendment Report** and its resubmission by **The Company**. The timetable shall be such so that the revised **Amendment Report** may be submitted to the **Authority** as soon after the **Amendments Panel's** determination and taking due account of the complexity, importance and urgency of the **Proposed Amendment**;
- (b) The **Amendments Panel** shall establish a **Working Group** to update and undertake the additional analysis and the provisions of **CUSC** Paragraphs 8.17.19 and 8.17.20 (but not **CUSC** Paragraphs 8.17.21 and 8.19.1) shall apply;
- (c) **The Company** shall prepare a draft of the revised **Amendment Report** taking into account the report of the **Working Group** and shall circulate it in to **CUSC Parties** and **Panel Members** in the manner set out in **CUSC** Paragraph 8.20.3.
- (d) Prior to submission by **The Company** of the revised **Amendment Report** to the **Authority** the draft of the revised **Amendment Report** shall be tabled at a meeting of the **Amendments Panel** at which the **Panel Chairman** will undertake the **Amendments Panel Revised Recommendation Vote**.
- (e) Following the **Amendments Panel Revised Recommendation Vote** **The Company** will circulate a draft of the revised **Amendment Report** to **Panel Members** (and electronic emails 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 Revised Recommendation Vote**. Any unresolved comments made shall be reflected in the final revised **Amendment Report**.

(f) **The Company** shall submit the revised **Amendment Report** to the **Authority**;

8.20.13 **CUSC** Paragraphs 8.20.9 and 8.20.10 and 8.20.11 shall only apply in respect of any **Amendment Proposals** submitted after the **CAP 179 Implementation Date**.

Add the following as new definitions at CUSC Section 11:

“Amendments Panel Revised Recommendation Vote”

the vote of **Panel Members** undertaken by the **Panel Chairman** in accordance with Paragraph 8.20.11.2(d) as to whether, in light of the updated or additional analysis, they believe the **Proposed Amendment** or **Working Group Alternative Amendment** would better facilitate achievement of the **Applicable CUSC Objective(s)**;

“CAP 179 Implementation Date”

shall mean the date specified as the **Implementation Date** in the direction issued by the **Authority** approving **Proposed Amendment 179** (Prevention of Timing Out of Authority Decisions on Amendment Proposals);

“Fixed Proposed Implementation Date”

the proposed date(s) for the implementation of a **Proposed Amendment** or **Working Group Alternative Amendment** such date to be a specific date by reference to an assumed date by which a direction from the **Authority** approving the **Proposed**

Amendment or Working Group Alternative Amendment is required in order for the **Proposed Amendment** or any **Working Group Alternative Amendment**, if it were approved, to be implemented by the proposed date;

“Proposed Implementation Date”

the proposed date(s) for the implementation of a **Proposed Amendment or Working Group Alternative Amendment** such date(s) to be either (i) described by reference to a specified period after a direction from the **Authority** approving the **Proposed Amendment or Working Group Alternative Amendment** or (ii) a **Fixed Proposed Implementation Date**;

“Revised Proposed Implementation Date”

the revision to a **Fixed Proposed Implementation Date** recommended to the **Authority** by the **Amendments Panel** pursuant to **CUSC** Paragraph 8.20.9.4;

Draft Legal Text for CAP179 Working Group Alternative Amendment 2

Amend CUSC 8.17.11(c) as follows:

- (c) The dates proposed by **The Company as the Proposed Implementation Date** ~~for the implementation of the Amendment Proposal and draft Working Group Alternative Amendment(s).~~

Amend CUSC 8.19.4(b) as follows:

- (b) the date proposed by **The Company as the Proposed Implementation Date** ~~for the implementation of the Amendment Proposal and any Working Group Alternative Amendment~~ and, where the **Working Group** terms of reference require and the dates proposed by the **Working Group** are different from those proposed by **The Company**, those proposed by the **Working Group**. Views will be invited on these dates.

Amend CUSC 8.19.10(b) as follows:

- (b) the date proposed by **The Company as the Proposed Implementation Date** ~~for the implementation of the Amendment Proposal~~. Views will be invited on this date.

Amend CUSC Para 8.20.2(f) as follows:

- (f) the ~~proposed date for the implementation of the Proposed Amendment or any Working Group Alternative Amendment~~ **Proposed Implementation Date** taking into account the views put forward during the process described at Paragraph 8.19.4(b) such date to be determined by the **Amendments Panel** in the event of any disparity between such views and those of **The Company**;

Add the following as new Paragraph 8.20.9:

8.20.9 Revised Fixed Proposed Implementation Date

- 8.20.9.1 Where the **Proposed Implementation Date** included in an **Amendment Report** is a **Fixed Proposed Implementation Date** and the **Authority** considers that the **Fixed Proposed implementation Date** is or may no longer be appropriate or might otherwise prevent the **Authority** from making such decision by reason of the effluxion of

time the **Authority** may direct the **Amendments Panel** to recommend a revised **Proposed Implementation Date**.

8.20.9.2 Such direction may:

- (a) specify that the revised **Proposed Implementation Date** shall not be prior to a specified date;
- (b) specify a reasonable period (taking into account a reasonable period for consultation) within which the **Amendments Panel** shall be requested to submit its recommendation; and
- (c) provide such reasons as the **Authority** deems appropriate for such request (and in respect of those matters referred to in Paragraphs 8.20.9.2(a) and (b) above).

8.20.9.3 Before making a recommendation to the **Authority**, the **Amendments Panel** will consult on the revised **Proposed Implementation Date**, and may in addition consult on any matters relating to the **Amendment Report** which in the **Amendments Panel's** opinion have materially changed since the **Amendment Report** was submitted to the **Authority** and where it does so the **Amendments Panel** shall report on such matters as part of its recommendation under **CUSC** Paragraph 8.20.9.4, with:

- (a) **CUSC Parties**; and
- (b) such other persons who may properly be considered to have an appropriate interest in it.

Such consultation will be undertaken in accordance with **CUSC** Paragraphs 8.19.3 and 8.19.6.

8.20.9.4 Following the completion of the consultation held pursuant to **CUSC** Paragraph 8.20.9.3 the **Amendments Panel** shall report to the **Authority** with copies of all the consultation responses and recommending a **revised Proposed Implementation Date**.

8.20.9.5 The **Authority** shall notify the **Amendments Panel** as to whether or not it intends to accept the **Revised Proposed Implementation Date** and where the **Authority** notifies the **Amendments Panel** that it intends to accept the **Revised Proposed Implementation Date**, the **Revised Proposed Implementation Date** shall be deemed to be the **Proposed Implementation Date** as specified in the **Amendment Report**.

8.20.10 **Authority Approval**

If:

(a) the **Authority** has not given notice of its decision in respect of an **Amendment Report** within two (2) calendar months (in the case of an **Urgent Amendment Proposal**), or four (4) calendar months (in the case of all other **Amendment Proposals**) from the date upon which the **Amendment Report** was submitted to it; or

(b) the **Amendments Panel** is of the reasonable opinion that the circumstances relating to the **Proposed Amendment** and/or **Working Group Alternative Amendment** which is the subject of an **Amendment Report** have materially changed,

the **Amendments Panel** may request the **Panel Secretary** to write to the **Authority** requesting the **Authority** to give an indication of the likely date by which the **Authority's** decision on the **Proposed Amendment** will be made.

8.20.11 **CUSC** Paragraphs 8.20.9 and 8.20.10 shall only apply in respect of any **Amendment Proposals** submitted after the **CAP 179 Implementation Date**.

Add the following as new definitions at CUSC Section 11:

“CAP 179 Implementation Date” shall mean the date specified as the **Implementation Date** in the direction issued by the **Authority** approving **Proposed Amendment 179** (Prevention

“Fixed Proposed Implementation Date”	of Timing Out of Authority Decisions on Amendment Proposals); the proposed date(s) for the implementation of a Proposed Amendment or Working Group Alternative Amendment such date to be a specific date by reference to an assumed date by which a direction from the Authority approving the Proposed Amendment or Working Group Alternative Amendment is required in order for the Proposed Amendment or any Working Group Alternative Amendment , if it were approved, to be implemented by the proposed date;
“Proposed Implementation Date”	the proposed date(s) for the implementation of a Proposed Amendment or Working Group Alternative Amendment such date(s) to be either (i) described by reference to a specified period after a direction from the Authority approving the Proposed Amendment or Working Group Alternative Amendment or (ii) a Fixed Proposed Implementation Date ;
“Revised Proposed Implementation Date”	the revision to a Fixed Proposed Implementation Date recommended to the Authority by the Amendments Panel pursuant to CUSC Paragraph 8.20.9.4;

ANNEX 7 – WORKING GROUP ATTENDANCE REGISTER

Name	Organisation	Role	26/03/10	04/05/10	21/05/10 (Telecon)	25/05/10 (Telecon)	18/08/10 (Telecon)	27/08/10 (Telecon – not quorate)	03/09/10 (Telecon)	18/10/10 (Telecon)
Kathryn Coffin	ELEXON	Working Group chairman	Yes	Yes	Yes	Yes	No (David Smith acted as chairman)	No (David Smith acted as chairman)	No (David Smith acted as chairman)	Yes
Susan Mwape	National Grid	Technical Secretary	Yes	Yes	Yes	Yes	No	No	No	No
Alex Thomason	National Grid	National Grid Representative	Yes	Yes	No (David Smith represented National Grid)	Yes	Yes	Yes	Yes	Yes
Barbara Vest	AEP	Working Group member	Yes	Yes	Yes	No	Yes	No	Yes	Yes
Garth Graham	SSE	Working Group member	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Esther Sutton	E.ON UK	Working Group member	Yes	Yes	No	Yes	Yes	Yes (end of meeting only)	Yes	Yes
Paul Mott	EDF Energy	Working Group member	No	Yes	Yes	Yes	No	No	Yes	Yes
Abid Sheikh	Ofgem	Authority representative	Yes (via telecon)	Yes (via telecon)	Yes	Yes	Yes	Yes	No (Jon Dixon represented Ofgem)	Yes
<i>David Smith</i>	<i>National Grid</i>	<i>Stand-in – see details for each meeting</i>	<i>No</i>	<i>No</i>	<i>Yes, as stand-in National Grid rep</i>	<i>No</i>	<i>Yes, as stand-in WG chairman</i>	<i>Yes, as stand-in WG chairman</i>	<i>Yes, as stand-in WG chairman</i>	<i>No</i>