

Amendment proposal:	Connection and Use of System Code (CUSC) - Prevention of Timing Out of Authority Decisions on Amendment Proposals (CAP179)		
Decision:	The Authority ¹ directs that the alternative proposal WGAA2 be made ²		
Target audience:	National Grid Electricity Transmission PLC (NGET), Parties to the CUSC and other interested parties		
Date of publication:	17 January 2011	Implementation Date:	10 Working Days after this decision

Background to the amendment proposal

The CUSC states which information³ is to be provided in a Final Amendment Report⁴ (FAR) to the Authority when it is to make a decision on a CUSC Amendment Proposal (CAP). This information includes the recommendation of the CUSC Modifications Panel regarding the proposed Implementation Date to implement a CAP or any Workgroup Alternative Amendment (WGAA).

The proposed Implementation Date is not determined by a prescribed formula. The Panel may choose to set either an open ended date linked to the Authority's decision, e.g. 'x' days after an Authority decision, or a fixed calendar date, e.g. 1 April 2011. The Panel may choose to set a fixed date based on its view of the likely time required, for instance to make changes to the systems of CUSC parties to provide them with certainty about implementation. Where the proposed Implementation Date is fixed, the date by which the Authority needs to make its decision to ensure timely implementation (the 'decide by' date) also becomes fixed.

The issue of modification proposals timing out pending an Authority decision arose in the case of a number of modifications raised to modify the calculation of transmission losses⁵ under the Balancing and Settlement Code (BSC). The Authority was unable to make a decision on these modifications before the last 'decide by' date set out in the final report, in part due to the need to carry out a revised assessment of the original proposals owing to uncertainty over some of the original analysis. The Authority subsequently indicated its intention to defer a decision, taking it beyond the 'decide by' date set out within the final report. This decision to defer was subsequently challenged in court by a number of parties. The judge ruled that the Authority has no power to make a decision about a proposed BSC Modification if the implementation date or 'decide by' date, has passed. This ruling highlighted a risk that the Authority may be 'timed out' of its ability to take a decision.

Following the legal challenge, we consulted twice⁶ on how to address the risk of timing out. Each consultation proposed options to modify the licences of the code owners of the CUSC, the BSC and the Uniform Network Code (UNC) in order, in our view, to remove the risk of timing out. We identified the CUSC, BSC and UNC as the industry codes with the

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

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

³ As provided in Section 8.23 of the CUSC.

⁴ The defined terms CUSC Amendment Proposal, Final Amendment Report and Working Group Alternative Amendment have been replaced in the latest version of the CUSC as a result of the implementation of Code Governance Review-related proposals on 30 December 2010.

⁵ BSC transmission losses modifications P198, P200, P203 and P204 are available on the Elexon website.

⁶ Both consultations (Ref. 152/08, November 2008 and Ref. 51/09, May 2009) appear on the Ofgem website.

greatest commercial impact. We considered that the removal of the risk of timing out would be beneficial in two ways:

- preventing wasteful loss and duplication of resources if the timing out of an otherwise valid proposal resulted in it being re-raised and work having to be done again; and
- preventing loss or delay of consumer and industry benefits that would have arisen from the timely, potentially earlier, implementation of the proposal.

The court judgement also highlighted these issues as reasons to avoid 'timing out'.

In the second consultation, we presented an option of a licence change allowing the Authority to require code panels to revise a proposed implementation date for a pending modification where there was a risk of timing out. Panels would undertake a consultation with all interested stakeholders and present a revised proposed implementation date(s). The Authority could also require panels to update any analysis submitted in the final modification report (also after consultation) if this was out of date.

Most respondents to the consultations did not support Ofgem's proposed licence changes for a variety of reasons. The main concerns were that:

- There would be a reduced incentive on the Authority to make timely decisions on pending modifications if all proposed implementation dates were open ended.
- The use of licence powers was disproportionate to the problem of timing out.
- The lack of an Authority decision over an extended period would increase regulatory uncertainty and risks to market participants and consumers.

National Grid (NG), in its responses to our consultations, noted its preference to deal with the issue of timing out through appropriate modifications to the industry codes rather than through licence changes. It subsequently raised proposals to modify the BSC, the CUSC and the UNC⁷. On 19 May 2010, the Authority accepted the alternative to BSC modification P250⁸, which was subsequently implemented on 3 June 2010.

The amendment proposals

NG (the proposer) raised CAP179 in January 2010. The original proposal seeks to address the issue of timing out by formally introducing three processes to the CUSC:

- Part 1 - wherever possible, open ended dates would be used for implementation of a CUSC modification, i.e. 'x' days after the Authority has made its decision. This would ensure that parties have the required amount of notice of implementation, while not restricting the Authority in its decision making timetable.
- Part 2 - where a fixed implementation date is recommended as appropriate, the Authority would notify the Panel when it could not make the 'decide by' date to meet the fixed implementation date and *request* revised implementation dates from the Panel. The proposer did not envisage that the Authority's *request* would be refused. The Panel would consult with the industry on the revised implementation dates and on any other time-related issues, such as the ongoing relevance of supporting analysis, before re-submitting a recommended date to the Authority and notifying the Authority of any time-related issues. It would be a matter for the Authority whether to seek revision of the supporting analysis.

⁷ The proposals are BSC modification P250, this CUSC amendment proposal and UNC modification UNC281.

⁸ www.ofgem.gov.uk/Pages/MoreInformation.aspx?file=P250D.pdf&refer=Licensing/ElecCodes/BSCode/BSC

- Part 3 - the Panel could request the Panel secretary to write to the Authority requesting a likely decision date from the Authority where four months have lapsed since the Authority's receipt of the final modification report (two months in the case of urgent proposals). This could also be triggered by the Panel becoming concerned that the circumstances concerning a proposal have materially changed.

In the course of assessing CAP179, the Working Group further developed Part 2 of the original proposal so that a request from the Authority for revised implementation dates could be refused by the Panel if the refusal was not 'unreasonable'. The ability of the Panel to refuse an Authority request came to light when the legal text accompanying the proposal was produced after initial industry consultation.

The Working Group also developed (by a majority) a Working Group Alternative Amendment (WGAA1). WGAA1 would retain all elements of the further developed original proposal and, under Part 2, would also allow the Panel to instigate further analysis of a proposal in the event that the Authority requested revised implementation dates. The Panel could also potentially remake its recommendation and submit a revised final report to the Authority. This could be done without a further Authority request.

After further discussion at the Working Group regarding the intent of the original proposal, specifically, whether an Authority request for revised implementation dates could be reasonably refused by the Panel, a second Working Group Alternative Amendment (WGAA2) was raised by the proposer. While the majority of the Working Group felt that the Panel should be able to refuse a request of the Authority, this had not been the proposer's intention. WGAA2 replicates the original proposal but specifies, under Part 2, that the Authority may *direct* the Panel, rather than *request* it to provide revised implementation dates. WGAA2 was permitted by the Working Group chairman on the basis that it better met the CUSC Applicable Objectives compared with the baseline.

When assessing the different proposals against the CUSC Applicable Objectives, the Working Group was split. Two Working Group members considered that the baseline was best overall; two members considered that WGAA1 was best overall; and one considered that WGAA2 was best overall.

CUSC Panel⁹ recommendation

At its meeting of 26 November 2010, the CUSC Panel voted by a majority (8:1) that none of the proposals better facilitated the Applicable Objectives compared with the baseline, and therefore recommended that CAP179 and its alternatives should be rejected. The views of Panel members are set out in full in the CAP179 final Amendment Report (AR).

The Authority's decision

The Authority has considered the issues raised by CAP179 and the WGAAs in the final AR dated 13 December 2010. The Authority has considered and taken into account the responses to the consultations undertaken by the Working Group and NGET which are attached to the AR¹⁰. The Authority has concluded that:

⁹ The CUSC Panel is established and constituted from time to time pursuant to and in accordance with section 8 of the CUSC.

¹⁰ CUSC amendment proposals, amendment reports and representations can be viewed on NGET's website at <http://www.nationalgrid.com/uk/Electricity/Codes/systemcode/amendments/>

1. implementation of WGAA2 will better facilitate the achievement of the applicable objectives of the CUSC¹¹; and
2. directing that WGAA2 be made is consistent with the Authority's principal objective and statutory duties¹².

Reasons for the Authority's decision

We consider that many of the arguments made against CAP179 and the alternatives are contradictory and do not bear up to close scrutiny. We agree with those Working Group members and consultation respondents who noted that the risk of proposals timing out is not as prevalent in the CUSC as it is in the BSC. This is generally due to the common practice of using open ended implementation dates, i.e. 'x' days following the Authority's decision in CUSC Panel recommendations. Nevertheless, the CUSC Panel can still recommend a fixed implementation date. Indeed, the majority of comments opposing implementation of CAP179 and its alternatives on the grounds of potential uncertainty can only be relevant when the Panel recommends a fixed implementation date which cannot subsequently be met. The proposal addresses a residual risk of timing out in those limited circumstances. It would have no impact in other circumstances.

We consider that there may be certain circumstances where a recommendation for a fixed implementation date is entirely appropriate. We note that the intent of CAP179 is not to remove this option, but simply to ensure that it does not have the unintended consequence of making a proposal untenable in those circumstances.

Applicable Objective (a): the efficient discharge by the licensee of the obligations imposed upon it by the Act and the Transmission Licence

We note the arguments against CAP179 and the two WGAAAs that 'open ended' implementation dates invite the Authority to take an unreasonable period of time to decide on code changes, thereby increasing regulatory uncertainty and creating a more inefficient process. We do not support this argument, not least because the CUSC already predominantly uses open ended implementation dates and so timing out generally would not arise. Furthermore, the Authority is committed to producing decisions in a timely manner by operating under a self-imposed Key Performance Indicator¹³ (KPI). We have recently proposed to tighten this KPI further¹⁴.

We do recognise that there are instances where we are unable to make a decision within the recommended timescales, irrespective of whether this expectation was enshrined in an implementation date. This is generally due to externalities which the Authority must or may have to take into account when performing its statutory functions, or issues that could not reasonably have been foreseen earlier in the process. When doing so the Authority must adhere to key concepts of public law, such as acting in a reasonable manner.

We consider that each of CAP179 and its alternatives could better facilitate Applicable Objective (a), bringing greater consistency with Standard licence condition ("SLC") C10.

¹¹ As set out in Standard Condition C10(1) of NGET's Transmission Licence, see:

http://epr.ofgem.gov.uk/document_fetch.php?documentid=5327

¹² The Authority's statutory duties are wider than matters which the Panel must take into consideration and are detailed mainly in the Electricity Act 1989 as amended.

¹³ We aim to make at least 70% of code change decisions within 25 Working Days of receiving the final report.

¹⁴ Our proposal is included in Ofgem's Proposed Corporate Strategy and Plan 2011-16:

[http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?file=Proposed Corporate Strategy and Plan 2011-16.pdf&refer=About us/CorpPlan](http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?file=Proposed%20Corporate%20Strategy%20and%20Plan%202011-16.pdf&refer=About%20us/CorpPlan).

We consider that the creation of a transparent formal code-based process to remove the risk of timing out and improve the efficiency of the current CUSC modification procedures would better facilitate compliance with SLC 10 generally. We consider that WGAA2 does so to a greater extent as it does not leave open the risk of timing out occurring through a refusal by the Panel of an Authority request to provide revised implementation dates.

Applicable Objective (b): facilitate effective competition in the generation and supply of electricity

We note that respondents generally considered that the implementation of CAP179 or its alternatives would be detrimental to, or have a neutral impact on this objective. Those respondents who thought there would be a detrimental impact suggested that potential uncertainty about when a decision is made would hinder competition and create a possible barrier to entry, with a particular impact on small parties.

We agree that uncertainty can be detrimental to competition, particularly where a greater perception of risk leads to increased costs. However, allowing a proposal to lapse through timing out, leading to the loss of previous work and of the potential benefit a proposal may bring to consumers and industry may also be disproportionate. We consider that it better facilitates competition if an efficient and transparent process is set out to extend an existing proposal on a revised, clearly defined timetable so that specific pieces of additional work are completed. Calling a halt to a proposal would be both inefficient and create greater uncertainty, not least if a proposal needs to be re-raised.

CAP179 and its alternatives do address a real risk where the Panel recommends a fixed implementation date. We consider that WGAA2 provides the greatest certainty, as it would involve a clear direction to the Panel setting out our reasons why a decision cannot be made by the anticipated date, together with an alternative timetable. We would expect such a direction to be issued no later than the prevailing KPI deadline for an Authority decision. By contrast, under the original proposal and WGAA1 whether the Panel would consult on a revised implementation date would depend on its view of an Authority request and whether to refuse the request, increasing the risk of uncertainty. WGAA2 would go furthest in addressing the CUSC defect identified which allows valid proposals to 'time out', whilst providing the greatest degree of certainty to stakeholders.

Decision notice

In accordance with Standard Condition C10 of NGET's Transmission Licence, the Authority hereby directs that WGAA2 to the amendment proposal CAP179: '*Prevention of Timing Out of Authority Decisions on Amendment Proposals*' be made.

Mark Cox

Associate Partner, Smarter Grids and Governance

Signed on behalf of the Authority and authorised for that purpose