

Amendment proposal:	Connection and Use of System Code (CUSC) - Code Governance Review: Role of Code Administrator and Code Administration Code of Practice (CAP185)		
Decision:	The Authority ¹ directs that the alternative proposal be made ²		
Target audience:	National Grid Electricity Transmission PLC (NGET), Parties to the CUSC and other interested parties		
Date of publication:	14 December 2010	Implementation Date:	30 December 2010

Background to the amendment proposal

In November 2007 the Authority launched a review of the arrangements for governing the main gas and electricity industry codes, including the Connection and Use of System Code³. The aim of the review was to ensure that those industry codes remain fit for purpose given the wide range of changes that have occurred since the introduction of the codes and given the scale of challenge the industry faces over the coming decade.

The Code Governance Review (CGR) Final Proposals⁴ published in March 2010 pulled together various initiatives that had previously been consulted upon through various CGR work strands. Those initiatives seek to make the industry code governance processes more transparent and accessible, particularly to small participants and consumer groups. The CGR also redefined a role for Ofgem with respect to significant changes to the industry codes, while also allowing us to step back from those parts of the governance arrangements that have minimal impact upon consumers or our wider statutory duties.

The Authority subsequently modified the Standard Conditions of the Electricity Transmission licence, amongst others, in order to give effect to the CGR Final Proposals. These modifications were made on 5 July 2010, but come into effect 31 December 2010, allowing licensees opportunity to bring the codes for which they are responsible into line with the modified licence requirements by that time.

The amendment proposal

The proposer (NGET) raised CAP185 in July 2010. CAP185 would introduce a number of changes to the CUSC:

- the CUSC would establish NGET in the role of CUSC 'Code Administrator'. In this role, the Code Administrator would be required to act as 'critical friend' to all code parties, but in particular to small participants, customer representatives and materially affected parties (in the case of charging methodology change proposals⁸). This would mean providing practical assistance to them, to include (but not be limited to)
 - the drafting of change proposals

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 The open letter initiating the Code Governance Review (Doc Ref. 284/07) appears on the Ofgem website: <http://www.ofgem.gov.uk/Licensing/IndCodes/CGR/Documents1/Open%20letter%20announcing%20governance%20review.pdf>.

⁴ <http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=297&refer=Licensing/IndCodes/CGR>

⁸ CAP188 proposes to bring the governance of the network charging methodologies within the governance of the CUSC amendments process.

- understanding the operation of the CUSC
 - their involvement and representation in the CUSC change process and
 - their accessing of information on CUSC and charging methodology change proposals
- the recognition within the CUSC of the CACoP which is binding on the CUSC Code Administrator and the ability, reflected through working practice, for the Code Administrator to discuss changes it would propose to the CACoP with the CUSC Panel before it raises them. The CACoP can only be amended with the approval of the Authority
 - the appointment of an independent CUSC Panel chairman from 1 October 2011 approved by the Authority. No process for the appointment of the Panel chairman would be codified in the CUSC. The independent chairman would retain the casting vote of the current Panel chairman for matters other than a vote by the Panel on a CUSC amendment and, additionally, have a casting vote on any proposals which follow the self-governance route⁹ introduced by the CGR final proposals
 - further clarity on when a proposer can withdraw a CUSC amendment proposal, namely, at any time before the Panel makes its recommendation on the proposal; and
 - improvements to the consistency of terminology in the CUSC in line with the relevant principle in the CACoP. 'CUSC Amendment Proposal' would be replaced by 'CUSC Modification Proposal' and 'Working Group' by 'Workgroup'.

During the working group's assessment of CAP185, a number of additional questions were asked as part of the industry consultation and views sought on:

- the appointment process for an independent Panel chairman
- the appointment of a deputy Panel chairman
- whether, in the case of a split Panel decision vote on a self-governance proposal, the independent Panel chairman ought to always exercise the casting vote in favour of the status quo (so that the proposal would not be implemented)
- whether the Code Administrator should only be able to raise changes to the CACoP after explicit Panel approval.

As a result of the consultation responses and the views of a majority of the working group, the working group chairman 'clarified' the CAP185 proposal in two ways:

- the CUSC would provide that the Code Administrator would require the explicit approval of the Panel before it could propose changes to the CACoP; and
- the use of the casting vote by the independent Panel chairman when there is a split Panel vote on a self-governance proposal would always be in favour of the status quo.

A working group alternative amendment (WGAA) was raised which is the same in all respects as the clarified original except that the independent Panel chairman would be able to vote freely in the case of a split Panel vote on a self-governance proposal but must not abstain. The working group chairman agreed to allow the WGAA to go forward,

⁹ CAP184 proposes to introduce the self-governance amendment route into the CUSC amendments process..

even though it was supported by only a minority of the working group, as in his view it did better facilitate the applicable CUSC objectives compared to the baseline.

The working group agreed that both the clarified original and WGAA would better facilitate applicable CUSC objective (a) (efficient discharge by the licensee of its obligations under the Transmission Licence) compared to the baseline. A majority (four out of six) of the working group considered the original was the best option while a minority (two out of six) considered the WGAA was the best option.

In the proposer's view, it is under a mandatory requirement to implement the relevant licence changes in the CUSC to align the licence and the code. By doing so, in its view, the WGAA would best facilitate applicable CUSC objective (a).

CUSC Panel¹⁰ recommendation

On 29 October 2010, the CUSC Panel voted by a majority (6:2) in favour of the CAP185 original as the best option. All panel members considered that the original would better facilitate applicable objective (a) and a majority (5:3) considered that the WGAA would also better facilitate applicable objective (a). All panel members felt that the original and the WGAA would be neutral with regard to applicable objective (b). The views of panel members appear in full in the final Amendment Report (AR).

The Authority's decision

The Authority has considered the issues raised by the CAP185, the WGAA, and the final AR dated 9 November 2010. The Authority has considered and taken into account the responses to the consultations by the working group and NGET on CAP185 and the WGAA which are attached to the AR¹¹. The Authority has concluded that:

1. implementation of the alternative amendment proposal will better facilitate the achievement of the applicable objectives of the CUSC¹²; and
2. directing that the alternative amendment be made is consistent with the Authority's principal objective and statutory duties¹³.

Reasons for the Authority's decision

We note the views expressed by the Panel, the working group and consultation respondents regarding both the original proposal and the WGAA. We also note that the original proposal was clarified in two respects by the working group. This led to the raising of a WGAA, which was closer to the proposer's intention when it raised the original, regarding use of the casting vote by the independent Panel chairman on a self-governance proposal where the Panel's decision vote is split.

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

¹⁰ The CUSC Panel is established and constituted from time to time pursuant to and in accordance with the section 8 of the CUSC.

¹¹ CUSC amendment proposals, amendment reports and representations can be viewed on NGET's website at <http://www.nationalgrid.com/uk/Electricity/Codes/systemcode/amendments/>

¹² As set out in Standard Condition C10(1) of NGET's Transmission Licence, see: http://epr.ofgem.gov.uk/document_fetch.php?documentid=5327

¹³ 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.

We agree that both the original proposal and the WGAA better facilitate this objective. However, we consider that the WGAA best facilitates this objective. NGET is obliged by its licence to ensure that the CUSC amendment processes comply with the relevant licence requirements¹⁴. Both the original proposal and the WGAA are seeking to align the CUSC with the recent CGR licence changes to ensure the code change process is consistent with those changes. We consider that both the original proposal and the WGAA improve consistency of the code change process with the licence requirements. Therefore, both the original and the WGAA better facilitates efficient discharge of NGET's licence obligations as compared to the baseline.

The only difference between the clarified original proposal and the WGAA is that the latter allows the independent chairman of the CUSC Panel to have free use of a casting vote on proposals which follow the self-governance route. Those proposals will have a non-material impact. For instance, they may be housekeeping changes which the Panel has determined are self-governance proposals and on which the Panel must decide. There is an appeals process to the Authority should a party disagree with the Panel decision and its reasons for appeal meet the self-governance appeal criteria.

The independent chairman will only exercise a casting vote where the Panel vote is equally split on a self-governance proposal. The opportunity to cast a vote will therefore be limited to those circumstances. Furthermore, the chairman would be appointed as an independent, in the same way that other Panel members who are elected to the Panel are also independent. In this respect, the ability of the Panel chairman to act independently should not be qualified. We do not agree with the view of some Panel members and respondents that custom and practice supports the view that an independent chairman must always exercise a casting vote in favour of the status quo. The Panel chairman should be allowed to reach a positive independent judgement, like other Panel members, on whether a self-governance proposal meets the applicable CUSC objectives. If the casting vote tilts the proposal in favour of implementation or non-implementation, the right of parties to appeal that Panel decision to the Authority remains unaffected.

It is more efficient that the Panel reaches a decisive view on a self-governance proposal, particularly when this does not affect or create a risk to the rights of any party able to appeal a Panel decision on a CUSC self-governance proposal. The appeal to the Authority is a sufficient check and balance against the independent Panel chairman using the casting vote in an inappropriate way or one that adversely affects the rights of parties under the CUSC.

We consider that the WGAA, therefore, improves efficiency and better facilitates applicable objective (a) in two ways:

- by ensuring that discharge of NGET's licence obligations are better facilitated as compared against the original and baseline by improving alignment of the licence and code and
- by ensuring that the independent Panel chairman can act independently and positively when casting a vote on a self-governance proposal when the Panel vote is otherwise split without affecting appeal rights of parties.

Applicable Objective (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.

¹⁴ In particular, Standard Licence Condition C10 14A obliges NGET to use best endeavours to ensure compliance by 31 December 2010.

We note the unanimous CUSC Panel view that both CAP185 and the WGAA are neutral in respect of applicable objective (b). However, we consider that the implementation of either the original or WGAA would further this applicable objective when compared to the current baseline. In particular, we consider that the additional assistance that is now required to be provided to code parties will encourage a greater degree of participation than has historically been the case. This will be an immediate and tangible benefit to the modification procedures. Our views on these benefits were set out in further detail in our CGR Final proposals.

Given the minimal difference between the original proposal and WGAA, we consider that there is no discernible difference in the extent to which either would better facilitate competition.

Legal text

We note that we raised a number of issues with the CGR CUSC legal text which could not be resolved at the Company Consultation stage of the process. We also note NGET's letter of 9 November 2010¹⁶ which sets out a process for dealing with the outstanding legal text issues through a further amendment proposal. We understand that a review of the CUSC legal text will be undertaken by the CUSC Governance Standing Group. We agree that this is an appropriate way forward and that work on the eight significant concerns in particular that we have highlighted should take precedence. We intend to engage with the Governance Standing Group's review once this begins.

Decision notice

In accordance with Standard Condition C10 of NGET's Transmission Licence, the Authority, hereby directs that the alternative to amendment proposal CAP185: '*Code Governance Review: Role of Code Administrator and Code Administration Code of Practice*' be made.

Mark Cox

Associate Partner, Smarter Grids and Governance

Signed on behalf of the Authority and authorised for that purpose

¹⁶ The letter appears at: <http://www.nationalgrid.com/NR/rdonlyres/54A69C00-7CE9-49C2-8231-6AECD9B4614D/44036/OfgemCodeGovernanceReviewlegalcommentsletterfinal.pdf>.