

Modification proposal:	<b>Connection and Use of System Code (CUSC): Revisions to "recommendations" in the final CUSC Modification Report (CMP196)</b>		
Decision:	The Authority <sup>1</sup> directs that this proposal be made <sup>2</sup>		
Target audience:	National Grid Electricity Transmission PLC (NGET), Parties to the CUSC and other interested parties		
Date of publication:	15 September 2011	Implementation Date:	29 September 2011

## Background to the modification proposal

The CUSC modification rules<sup>3</sup> currently make reference to more than one type of 'recommendation' which may appear in a CUSC Final Modification Report (FMR). The types of 'recommendation' are as follows:

- the recommendation of the Company (NGET) as the transmission licensee that is obliged to establish and maintain the CUSC<sup>4</sup>,
- the recommendation of the Workgroup which assesses a Modification Proposal, and
- the recommendation of the CUSC Panel<sup>5</sup> members as expressed through the Panel's Recommendation Vote on a Modification Proposal.

Each of these recommendations is made against the Applicable CUSC Objectives.

The right of appeal to the Competition Commission (CC) against an Authority decision on a CUSC industry code modification is set out in the Electricity and Gas Appeals (Designation and Exclusion) Order 2005 (the "Order")<sup>6</sup>. Article 6 of the Order states that an appeal is excluded if the Authority's decision consists in the "giving of a consent to a majority recommendation" of CUSC Panel members in a FMR<sup>7</sup>. A 'majority recommendation' is defined as "a recommendation that is supported by the majority of those views of Panel Members which, in the reasonable opinion of [the Authority], are clearly expressed in the Amendment Report".

In the course of assessing a different modification proposal (CUSC modification CAP190<sup>8</sup>), the CAP190 Workgroup was provided with legal advice that the multiple use of 'recommendations' in the CUSC modification rules could create ambiguity in understanding the correct meaning of 'majority recommendation' as applied to the right of appeal in the Order. The advice suggested amending references to 'recommendation'

<sup>1</sup> The terms 'the Authority', 'Ofgem' and 'we' are used interchangeably in this document. Ofgem is the Office of the Gas and Electricity Markets Authority (GEMA).

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

<sup>3</sup> The Modification Rules are contained in section 8 of the CUSC.

<sup>4</sup> NGET's licence obligation is set out in Standard Licence Condition (SLC) C10 of the Transmission Licence.

<sup>5</sup> The CUSC Panel is established and constituted from time to time pursuant to and in accordance with section 8 of the CUSC.

<sup>6</sup> Statutory Instrument (SI) 2005 No. 1646 "The Electricity and Gas Appeals (Designation and Exclusion) Order 2005" which is available here: <http://www.competition-commission.org.uk/appeals/energy/>

<sup>7</sup> An aggrieved party that wishes to challenge an Authority decision that accords with the Panel's recommendation may only do so by way of judicial review.

<sup>8</sup> CAP190 (2/3 Majority Voting requirement for CUSC Panel recommendations on Licence obligated Amendments) was raised in September 2010. Details about CAP190 are available on NGET's website (see footnote 7). Instructions to Counsel and Counsel's advice are at Annexes 2 & 3 of NGET's consultation on CAP190 at the following link: <http://www.nationalgrid.com/NR/rdonlyres/3650B935-1B33-4714-923E-225BDD63D78B/48889/CAP190CAConsultationFinal.pdf>

except where it applies to the CUSC Panel members' recommendation to help clarify when the right of appeal arises.

### **The modification proposal**

NGET raised CMP196 in March 2011. The proposal would remove references to 'recommendation' as they apply to the Company and Workgroup's recommendations and replace these terms with the Company's 'opinion' and the Workgroup's 'conclusion'. In the proposer's view, ensuring that 'recommendation' only refers to the CUSC Panel members' recommendation in the CUSC modification rules, as determined through the Panel members' Recommendation Vote, would assist in clarifying when the right of appeal to the CC applies. This additional clarity would promote effective competition and better facilitate Applicable CUSC Objective (b) as a result.

### **CUSC Panel recommendation**

At its meeting on 29 July 2011, the CUSC Panel voted unanimously that the proposal better facilitates both Applicable CUSC Objectives (a) and (b). The views of Panel members are set out in full in the Final Modification Report (FMR)<sup>9</sup>.

### **The Authority's decision**

The Authority has considered the issues raised by the modification proposal and the final Modification Report (FMR) dated 10 August 2011. The Authority has considered and taken into account the responses to the Workgroup and Code Administrator consultations on the modification proposal which are attached to the FMR. The Authority has concluded that:

1. implementation of the modification proposal will better facilitate the achievement of the applicable objectives of the CUSC<sup>10</sup>; and
2. directing that the modification be made is consistent with the Authority's principal objective and statutory duties<sup>11</sup>.

### **Reasons for the Authority's decision**

We agree that ensuring greater consistency between the wording in the CUSC modification rules and the Order should assist CUSC parties who may wish to make an appeal to understand when the right of appeal applies.

*Applicable CUSC Objective (a) 'the efficient discharge by the licensee of the obligations imposed upon it under the Act and by the licence'*

We note the views of Panel members that this Applicable Objective is met. We also note that the multiple use of the word 'recommendation' in the CUSC modification rules could lead to confusion when interpreting the meaning of the term 'majority recommendation' in the Order. Improving the consistency of the wording between the Order and the CUSC should ensure that there is clarity about its use and that it refers solely to the Panel

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<sup>9</sup> CUSC modification proposals, modification reports and representations can be viewed on NGET's website at <http://www.nationalgrid.com/uk/Electricity/Codes/systemcode/amendments/>

<sup>10</sup> As set out in Standard Condition C10(1) of NGET's Transmission Licence, see: [http://epr.ofgem.gov.uk/document\\_fetch.php?documentid=5327](http://epr.ofgem.gov.uk/document_fetch.php?documentid=5327)

<sup>11</sup> 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.

members' recommendation in the FMR in this instance. The introduction of alternative terms referring to the Company's and the Workgroup's 'views' as opposed to their 'recommendation' would also help the understanding of stakeholders.

We therefore agree that the modification better facilitates Applicable Objective (a).

*Applicable CUSC 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'*

We note the unanimous views of Panel members and respondents that clarity around the use of 'recommendation' in the CUSC modification rules additionally improves parties' understanding of when a right of appeal to the CC exists and provides more certainty to them about their appeal rights as a result.

We agree that the meaning of 'majority recommendation' in relation to the right of appeal against Authority decisions on CUSC modifications in the Order refers to the Panel members' recommendation. In Article 6 of the Order a 'majority recommendation' is defined as "a recommendation that is supported by the majority of those views of Panel Members which, in the reasonable opinion of [the Authority], are clearly expressed in the Amendment Report". The words "Panel Members" and the "Amendment Report" have the same meaning as in the CUSC; the "Panel Members" being the CUSC panel members as set out in paragraph 8.3.1(b) of the CUSC and the "Amendment Report" being the FMR.

To the extent that the CUSC modification rules may be ambiguous, it is worth clarifying the terminology. As well as avoiding confusion, there would be a better understanding and more certainty for parties about which 'recommendation' counts in terms of their appeal rights, namely, against which 'recommendation' the Authority's decision is compared to determine whether an appeal to the CC is available. We generally consider that improving the transparency and clarity of industry arrangements will assist existing and potential market participant's understanding of those arrangements. We therefore agree that this modification will further facilitate Applicable Objective (b), albeit marginally.

## **Decision notice**

In accordance with Standard Condition C10 of NGET's Transmission Licence, the Authority, hereby directs that modification proposal CMP196 *'Revisions to recommendations'* in the final CUSC Modification Report be made.

**Declan Tomany**

**Associate Partner Legal - Smarter Grids and Governance**

Signed on behalf of the Authority and authorised for that purpose