



National Grid

WORKING GROUP REPORT

CUSC Amendment Proposal CAP077

Revision to CUSC Amendment Implementation Dates where an Authority Decision is referred to Appeal or Judicial Review

Prepared by the CAP077 Working Group
for submission to the Amendments Panel

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Prepared by	S Drummond/R Dunn

I DOCUMENT CONTROL

a National Grid Document Control

Version	Date	Author	Change Reference
0.1	7/12.04	S Drummond	Initial draft for WG comment
0.2	21/12/04	S Drummond	Second draft for WG comment
0.3	22/12/04	S Drummond	Final draft for WG comment
1.0	6/1/05	S Drummond/R Dunn	Report submitted to CUSC Panel

b Distribution

Name	Organisation
The Gas and Electricity Markets Authority	Ofgem
CUSC Parties	Various
Panel Members	Various
National Grid Industry Information Website	

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1.0 SUMMARY AND RECOMMENDATIONS

Executive Summary

- 1.1 CAP077 'Revision to CUSC Amendment implementation dates, where an Authority decision is referred to Appeal or Judicial Review' was raised by National Grid Transco ('the Proposer') on 21st October 2004. This proposal aims to introduce the ability for CUSC Implementation dates to be reviewed and revised if necessary, where an Authority CUSC Amendment decision is subsequently referred to Appeal or Judicial review.
- 1.2 CAP077 was referred by the CUSC Panel at its meeting on 29th October 2004 to the Governance Standing Group (GSG) and for them to act as a Working Group to consider CAP077.
- 1.3 Subsequent to that Panel meeting it was further agreed that the Working Group Report should be prepared in timescales that were appropriate for the delivery of the Amendment Report to the Authority by 1st March 2005, the date by which the Authority had indicated to NGC that it required the Amendment Report. This was incorporated within the group's Terms of Reference.
- 1.4 This Report is the result of the deliberations of the Working Group, which met on three occasions, on 17th November, 2nd December and 16th December 2004. During that time the Working Group fully considered the instances when CAP077 might need to apply and, following which, the majority of the group agreed to an Amendment that they believed would address the perceived CUSC defect. A minority of the group, the Proposer, believed that an Alternative Amendment better addressed the defect and therefore the CUSC Objectives. The difference between the two being that the Alternative Amendment excludes the requirement for industry consultation prior to an alternative Implementation Date being presented to the Authority for approval.
- 1.5 The solution is one that enables NGC to review the Proposed Implementation Date within an Amendment Report, following a legal challenge to an Authority decision on the CUSC Amendment Proposal, and if necessary to propose a revised date to the Authority for them to approve.

Working Group Recommendations

- 1.6 The Working Group invites the Panel to consider the report and the arguments and discussions relating to the issue. The Panel is also asked to consider whether the Working Group has met its Terms of Reference and whether the report can be prepared to be sent out for industry consultation.
- 1.7 The Working Group believes that CAP077 and the Working Group Alternative Amendment has been fully considered and recommends to the CUSC Panel that:
 - a) the CAP077 Terms of Reference have been met;
 - b) CAP077 should proceed to industry Consultation;
 - c) the Consultation Report should be issued as soon as possible and by 14th January 2004; and that
 - d) the agreed CAP077 Assessment Timeline (Annex 6) continues to be adhered to.

Chairman's Comments

- 1.8 The issues raised by CAP077 proved to be quite complex and difficult to clarify and resolve. It is with thanks to the members of the Working Group that clarity was eventually achieved and a solution found within the scope and aims of CAP077.

2.0 INTRODUCTION

- 2.1 CAP077 was proposed by National Grid and submitted to the Amendments Panel for consideration at their meeting on 29th October 2004. The Amendments Panel determined that the Governance Standing Group should act as a Working Group to consider CAP077 and that the Group should report back to the Panel meeting scheduled for 25th February 2005.
- 2.2 At the 26th November Panel Meeting it was agreed the Governance Standing Group should deliver their Working Group Report in good time to allow the final Amendment Report to be sent to the Authority by 1st March 2005. A revised timeline (see Annex 6) was prepared to deliver this, which would require a special Panel meeting to be convened on 12th January in order to consider the Working Group Report prior to industry consultation.
- 2.3 CAP077 is very similar to the BSC Modification Proposal P180 and the relevant Working Groups considered the arguments made for each. It should be noted that separate governance was observed at all times for both CAP077 and P180.
- 2.4 The Governance Standing Group (GSG) had considered the issue of Implementation Dates in the summer of 2004. This consideration, however, was from the standpoint of a possible inconsistency between the Balancing and Settlement Code (BSC) and the transmission license and whether this extended to the CUSC. CAP077 has been raised to address a specific perceived defect in CUSC that at present doesn't allow NGC sufficient flexibility to propose revisions to the proposed implementation dates within an Amendment Report. The Working Group therefore believed this to be a separate issue requiring specific determination.

3.0 PURPOSE AND SCOPE OF WORKING GROUP

- 3.1 The Panel agreed that the Governance Standing Group should meet as a working group to discuss CAP077 with a view to reporting back to the CUSC Panel to give sufficient time to deliver the Amendment Report to the Authority by 1st March 2005.
- 3.2 After one meeting of the Governance Standing Group and the subsequent discussion at the Panel meeting on the 26th November 2004, the Terms of Reference for the GSG acting as the CAP077 Working Group were agreed.
- 3.3 The terms of reference are given in Appendix 1 and they include the following key considerations to be undertaken by the Working Group:
 - the specific nature of the defect or issue identified in CAP077 and the circumstances in which it could present difficulties,
 - the initial action NGC should take in the event that an Authority Decision on an Amendment Proposal is referred for Appeal/Judicial Review,
 - possible guidelines that NGC could employ to identify a revised provisional Implementation Date in the event of Appeal/Judicial Review,
 - in the event of lengthy Appeal/Judicial Review process the arrangements to allow NGC to revise further the provisional Implementation Date, and
 - appropriate legal drafting to implement CAP077 or any WGAA.

4.0 WORKING GROUP DISCUSSIONS

- 4.1 The Working Group examined each of its terms of reference in turn and considered whether CAP077 better facilitates achievement of the Applicable CUSC

Objectives. As the discussions proceeded it became clear that a Working Group Alternative Amendment should also be offered for consultation. Both the Amendment and the Alternative Amendment would address the defect, but the majority of the Working Group considered the main Amendment Proposal as better facilitating the CUSC Objectives, whereas a minority of the WG considered that the Alternative Amendment Proposal was more efficient. The Working Group though were unanimous that both the proposed Amendment and the Alternative Amendment were better than the current baseline CUSC.

Description of Defect and Proposed Amendment

- 4.2 The Transmission Licence requires NGC to propose a viable implementation date within an Amendment Report. Circumstances can arise which require the date to be changed. The defect being addressed by CAP077 is that the CUSC provisions in relation to changing Implementation Dates are not sufficiently complete should an Authority Decision be legally challenged.
- 4.3 Currently CUSC 8.2.3.3 only applies to extending Implementation Dates in the case of Approved Amendments. 8.2.3.3 does not apply in the case of rejected Amendments or quashed decisions and there is no other mechanism to set revised Implementation Dates in such cases.
- 4.4 This proposal seeks to address this potential defect, by providing scope for NGC to provide revised proposed implementation dates to the Authority when Authority CUSC modification decisions have been referred to Appeal or Judicial Review. Furthermore, CAP077 will apply to 'rejected' amendments, as well as 'approved' amendments. It is not envisaged that this proposed Amendment covers any other scenarios beyond those relating to Judicial Reviews and Appeals.
- 4.5 The risk of continuing without CAP077 is that if, as a result of a legal challenge, the outcome is to overturn the Authority Decision or to order a rerun of the Authority decision making process, the Amendment could in effect have been "timed out" during this period and hence been incapable of being implemented. This would be because of the Proposed Implementation Dates in the Amendment Report might have passed or were too near for the Authority to properly review their decision and for subsequent implementation. Equally, no provisions exist at present to deal with Amendments that are initially rejected by the Authority and subsequently are approved on Appeal or are ordered to be reconsidered. This is considered by the Working Group to be potentially inefficient since the only recourse would be to submit another subsequent Amendment Proposal.
- 4.6 It was appreciated that this situation could arise now should a Judicial Review be granted with reference to an Authority decision and post 1st April 2005 in the context of appeals against an approved Amendment Proposal under the provisions of the Energy Act 2004. However, in the case of the latter it is still not certain that the CUSC will be included in the designated Codes (although the DTI is clearly minded to include the CUSC) and the nature of the appeals process is still to be finally determined. As such, it was felt by the group that there was a strong argument for the CUSC to cater for the appeals process as and when it is agreed by the DTI.
- 4.7 The counter views to having an amendment at all to the CUSC were twofold:
 - 4.7.1 That the Amendment Report could have alternative dates inserted at the time of writing which could be used in the event of a legal challenge. This was considered to be inappropriate as it required determination of an alternative date or dates when there was no need

and it could not take into account any special circumstances pertaining to the particular Amendment and the nature of the legal challenge.

4.7.2 That the legal challenge(s) may highlight new arguments or issues for consideration by Parties and so it would be better for the Amendment Proposal to time out and be considered again in due course. The Working Group considered this to be unnecessarily inefficient.

4.8 In developing a possible solution to the defect as described, the Working Group were mindful that any new proposal should not introduce the ability to frustrate the CUSC governance arrangements.

Circumstances in which Issue Arises

4.9 In considering the circumstances in which there might be a need to change the proposed implementation Dates within an Amendment Report, the Working Group drew up a matrix to illustrate when the change envisaged by CAP077 would be applied:

Authority Decision on AP	Injunction to Stop Clock	Orig ID remains in AR	Apply mechanism if there is a Legal Challenge	New date maybe needed if Decision is to be		
				Upheld	Overtured	Rerun
Approved	Yes	No	Yes	Yes	No	Yes
	No	Yes	No	N/a	N/a*	No*
Rejected	N/a	Yes	Yes	No	Yes	Yes
	N/a	Yes	Yes	No	Yes	Yes

***Any changes may need to be removed by a subsequent CAP if ID already passed.**

4.10 This enabled the Working Group to clarify that the solution to CAP077 would be to seek to change the Proposed Implementation Date within an Amendment Report prior to the outcome of any challenge being known. It had been thought that the solution might be to propose only an 'additional' date for use once the outcome of the legal challenge was known, but this was found to be unworkable due to the difficulty of changing the Amendment Report at that stage.

Proposed Processes

4.11 The Working Group considered in some detail how the process of determining and applying for a revision to the Proposed Implementation Date contained within a previous Amendment Report might be undertaken. This included the initial action NGC should take in the event that an Authority Decision on an Amendment Proposal is referred for Appeal/Judicial Review, as well as, in the event of lengthy Appeal/Judicial Review process, the arrangements to allow NGC to revise further the additional Implementation Date.

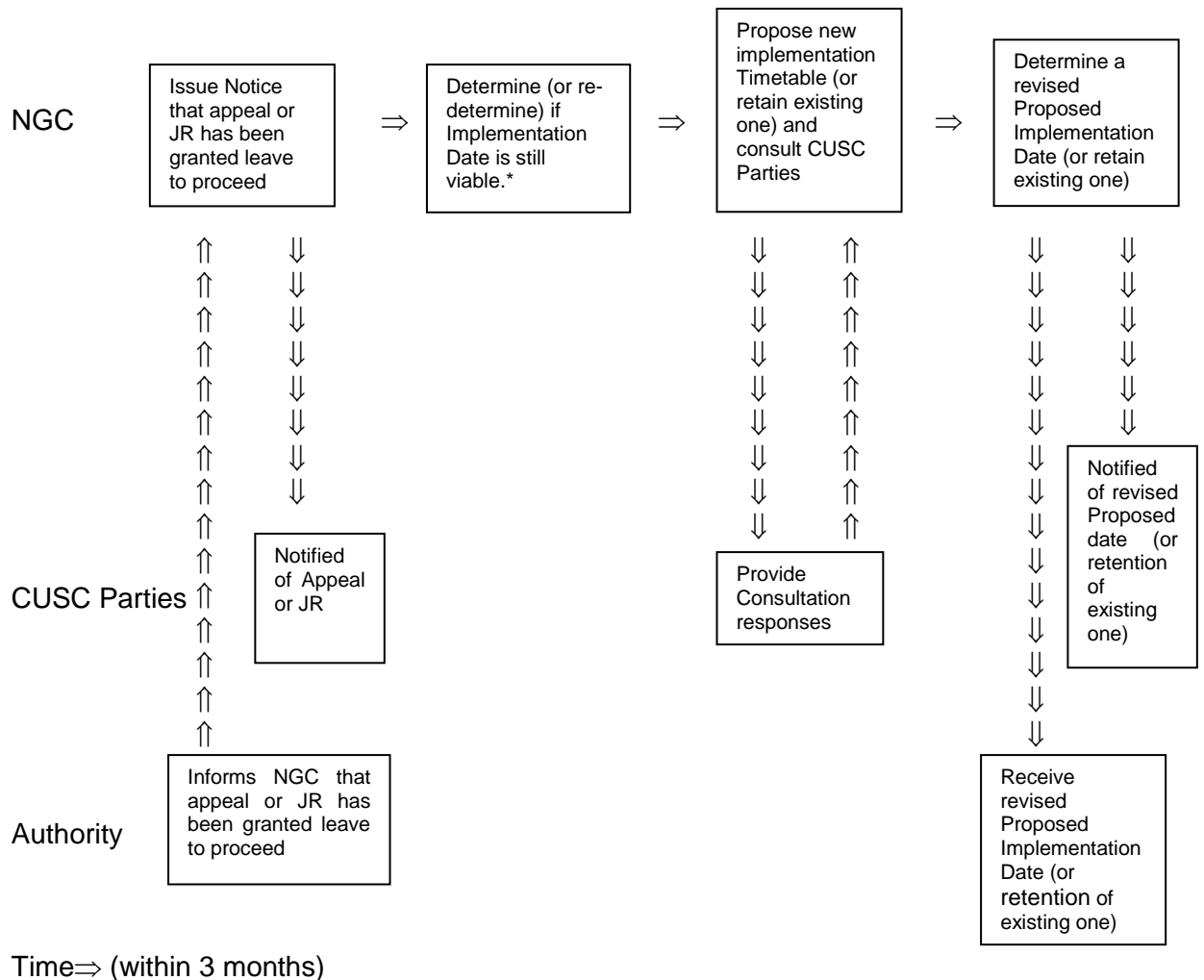
4.12 The Working Group agreed that it was unlikely that either the Authority or NGC would not be made aware of a legal challenge being raised or granted leave to proceed and that, as such, there was no need for CUSC parties themselves to be obliged specifically to inform NGC directly through the CUSC. It was also felt that had this aspect been included this may have gone outside the scope of CAP077.

4.13 The Working Group considered two approaches that could be taken, one that involved consulting CUSC Parties on the proposed revision, whilst the second did

not include a consultation. The first is considered in this report as the Amendment proposal, because it had the support of the majority of the group, and the second as the Alternative Amendment.

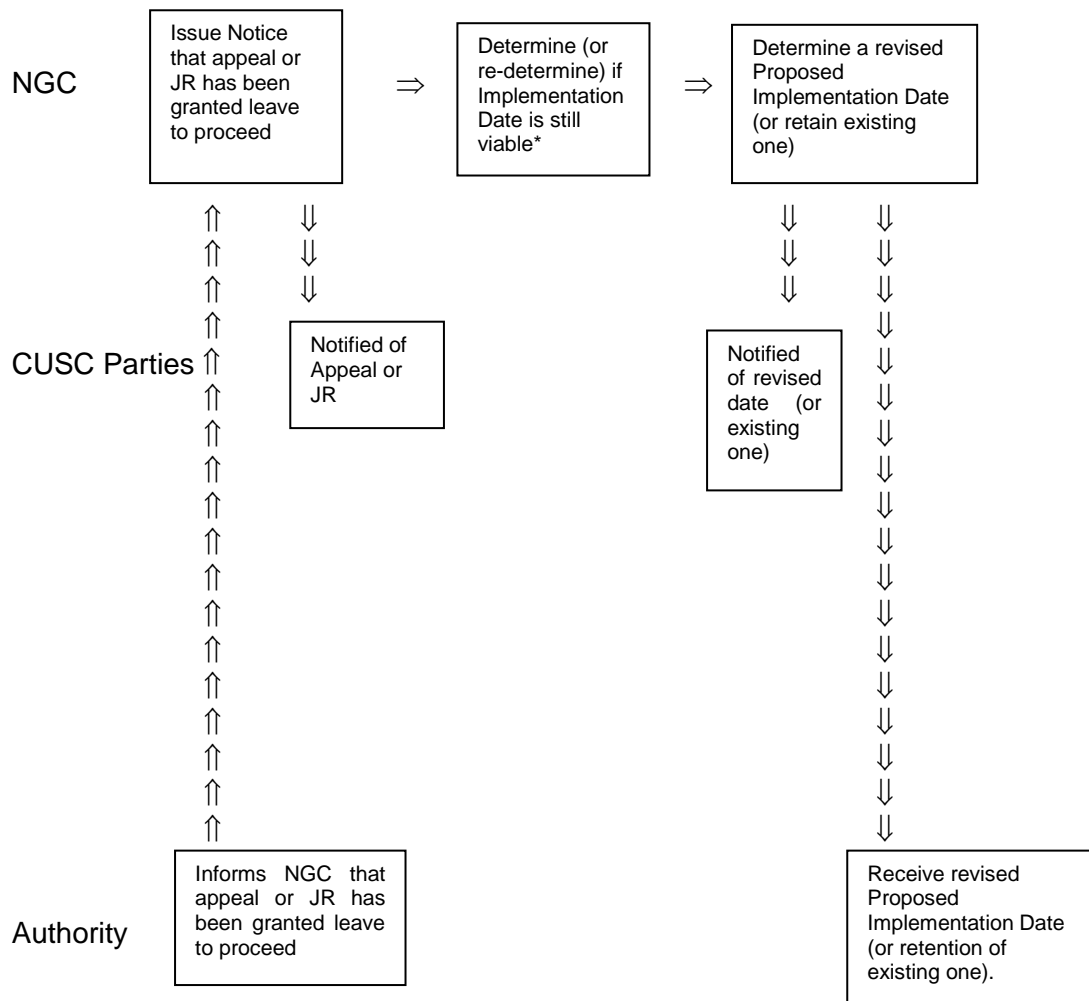
- 4.14 The majority of the Working Group favoured the proposal to include a round of consultation with the CUSC parties, prior to the submission to the Authority of the a revised date or dates, to ensure that any impact on CUSC Parties could be sought and duly considered. The majority of the WG also considered that it was sufficiently important for it to be a requirement under the CUSC and, as such, should be hard-wired into the text.
- 4.15 The Alternative Amendment to this arrangement, as supported by a minority of the Working Group (only NGC), simplifies the process to one that excludes the consultation loop with CUSC Parties after a revised Proposed Implementation Date has been determined by NGC. This was considered to be more in line with existing arrangements and avoids what was thought to be an inefficient and unnecessary element of the process. Currently there is no need to consult CUSC Parties on Proposed Implementation Dates that appear in the Amendment Report.
- 4.16 The two possible Process Diagrams below show the proposed tasks which the Working Group considered could be undertaken within a 3 month period.

4.16.1 Proposal 1 for CAP077 Process, as favoured by the majority of the Working Group



* The process shows that, should the revised proposed Implementation date still not be viable where the JR or Appeal process has failed to reach a conclusion within the purview of the revised proposed implementation date, it is possible for NGC to re-determine the proposed date.

4.16.2 Proposal 2 for CAP077 WGAA Process, as favoured by a minority of the WG



Time⇒ (within 3 months)

* The process shows that, should the revised proposed Implementation date still not be viable where the JR or Appeal process has failed to be concluded within the purview of the revised proposed implementation date, it is possible for NGC to re-determine the proposed date.

- 4.17 The Working Group also considered another suggested approach that would establish the Authority setting revised implementation dates in the event of JR or appeal. This approach had no support from Members of the Working Group and the Proposer agreed with the Group that this constituted a very different approach to remedy the defect, as it implied a change of governance. The Working Group were of the unanimous opinion that the work process envisaged as underpinning CAP077 should maintain existing Governance principles in that NGC would continue to propose and determine implementation dates and the Authority would approve these or not as the case may be. There was also concern that this would put the Authority in a difficult situation as it would be its decision that was being legally challenged.

Proposed Guidelines

- 4.18 The Working Group briefly discussed what guidelines NGC should work to in order to identify a revised provisional Implementation Date in the event of Appeal/Judicial Review.
- 4.19 It concluded that it should be similar to that proposed under BSC P180. It would need to take into account the substance and nature of the legal challenge and the perceived longevity of the judicial review or appeal process, the amount of time that might be required to come to a new decision following the legal outcome and the amount of time that would be required to implement the Modification Proposal.
- 4.20 It was not considered possible to be too prescriptive and, hence, it would not be necessary for the guidelines or indeed the process to be specifically hard-wired into the CUSC. These would nevertheless be initially adopted by NGC and reviewed as necessary by NGC and the CUSC Panel.

Specific Reference to Judicial Review and Appeals?

- 4.21 The Working Group agreed that it would have been ideal to ensure that the appeals process due to be introduced in April 2005 had been taken fully into account by awaiting the outcome of the current DTI consultation. However, the Working Group agreed that a generic approach to describing the legal challenge (Judicial Review and Appeals under the Energy Act 2004) could be usefully adopted in the context of legal drafting for CAP077. The legal drafting would then be sufficiently general to include appeals but would not need to await the detailed outcome of the DTI consultation on the appeals process.
- 4.22 The Group also considered that it was important to be clear on the status of a rejected or quashed AP in the event of JR or appeal and to what extent Paragraph 8.2.3.3 could cover the situation should a rejected AP be subject to JR or appeal. Annex 5 describes in detail the JR/AP process and the possible outcomes.
- 4.23 It was established though that any Authority decision remained, whether or not it is being subjected to legal challenge, until such time as either the legal challenge (including an injunction) has changed the status of the decision or until such time as the Authority itself has reviewed and changed its decision (should this be the outcome).

Consideration of how legal challenges may affect CAP077

- 4.24 It is an assumption of the Working Group that the Secretary of State will choose to designate the Connection and Use of System Code as one of the industry codes to which the Competition Commission appeals mechanism will apply. This is regarded as a reasonable assumption for two reasons: because the draft order being consulted

upon by the DTI suggests that the Code will be designated; and because even were the Secretary of State not to designate the Code immediately after gaining the right to do so on 1 April 2005 she/he would retain the right to do so at any future juncture. The Group is therefore minded that the development of CAP077 must cater for the prospective appeals process as well as the ongoing judicial review process (either explicitly or through use of generic terms).

- 4.25 The Group has considered a specific concern that CAP077 might introduce inefficiencies into the Code as a result of Competition Commission powers to refuse to hear appeals that are considered to be vexatious or trivial. This had prompted questions on whether a process to put forward revised Implementation Dates that was triggered immediately upon an application for judicial review or appeal might prove to be inefficient were the appeal to be rapidly dismissed as invalid.
- 4.26 Advice on this issue from ELEXON in the context of P180 to the BSC Modification Group is that: The Competition Commission powers are to refuse permission to bring an appeal if it is vexatious or trivial (i.e. this determination takes place before the application can become an appeal, not after it). As such, the trigger for requesting revised Implementation Dates should fall after this filtering process under P180. This same position will exist for CAP077 and is included within the process as described.
- 4.27 The Group is provisionally minded that whilst judicial reviews and appeals may have different characteristics and powers, for the purposes of CAP077 and the CUSC they share a commonality as 'trigger events' and no differential treatment is perceived to be required in how the CAP077 process caters for each.

Legal Text for CAP077 and the Alternative Amendment

- 4.28 The legal text (Annex 2) to give effect to both CAP077 and the Alternative Amendment was substantially agreed by the Working Group at its final meeting on 16th December 2004.

5.0 ASSESSMENT AGAINST APPLICABLE CUSC OBJECTIVES

- 5.1 The terms of the Transmission Licence require National Grid to establish and operate procedures for the modification of the CUSC, including the modification procedures themselves, so as to better facilitate achievement of the Applicable CUSC Objectives. These can be summarized 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.
- 5.2 The Working Group agreed that, as CAP077 (both the main Amendment and the Alternative Amendment) will ensure that Approved Amendments and Rejected Amendments that become subject to a Judicial Review or Appeal do not potentially "time out", it will enable NGC to more easily and efficiently discharge its obligations under the Electricity Act and the Transmission Licence. It is also the case that ensuring that Amendments do not time out reduces the risk of potential improvements to the existing contractual framework being lost or unduly delayed. In this way CAP077 will better facilitate competition in generation and supply of electricity.
- 5.3 Thus it enables the Transmission Licensee to more efficiently discharge the obligations placed upon it by the Electricity Act and the Transmission Licence. This

proposal is therefore consistent with the applicable CUSC objective described by Condition C7F, Paragraph 1 (a) and Paragraph 1 (b) of the Electricity Transmission Licence held by NGC.

- 5.4 The majority of the Working Group favoured the adoption of the main Amendment proposal and considered that it better met the CUSC Objectives. The minority (NGC, the Proposer) view was that the inclusion of a round of consultation did not add any useful purpose to the proceedings and as such incurred extra resource needlessly; therefore it was NGC's view that the Alternative Amendment better met the CUSC Objectives.
- 5.5 However there was a unanimous view of the Working Group that both the Amendment Proposal and the Alternative Amendment were better than the current baseline and therefore one or the other should be adopted.

6.0 PROPOSED IMPLEMENTATION AND TIMESCALES

- 6.1 The Working Group believe that CAP077 i.e. either the Amendment Proposal or the Alternative Amendment Proposal, should be implemented as soon as possible should the Authority make the decision to approve CAP077.

7.0 IMPACT ON CUSC

- 7.1 Should CAP077 or the Working Group Alternative Amendment be approved changes to Section 8 (CUSC Amendments) and Section 11 (Definitions) will be required.

8.0 IMPACT ON INDUSTRY DOCUMENTS

Impact on Core Industry Documents

- 8.1 There is no impact on Core Industry documents arising from CAP077 or the Working Group Alternative Amendment, although the similarity of approach to that for P180 should be noted.

Impact on other Industry Documents

- 8.2 There is no impact on other industry documents arising from CAP077 or the Working Group Alternative Amendment.

Annex 1 – Working Group Terms of Reference and Membership

Working Group Terms of Reference and Membership

TERMS OF REFERENCE FOR CAP077 WORKING GROUP

RESPONSIBILITIES

1. The Working Group is responsible for assisting the CUSC Amendments Panel in the evaluation of CUSC Amendment Proposal CAP077 tabled by National Grid at the Amendments Panel meeting on 29th October 2004.
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, clarify and report on the following specific issues:
 - a these Terms of Reference and submit them or any revised TORs as agreed by the Working Group to the Panel for approval at its November 2004 meeting
 - b the specific nature of the defect or issue identified in CAP077 and the circumstances in which it could present difficulties, in order to define the issue clearly and provide interim advice on this and on the proposed timetable to the Panel for consideration at its November 2004 meeting
 - c the initial action NGC should take in the event that an Authority Decision on an Amendment Proposal is referred for Appeal/Judicial Review
 - d possible guidelines that NGC could employ to identify a revised provisional Implementation Date in the event of Appeal/Judicial Review
 - e in the event of lengthy Appeal/Judicial Review process the arrangements to allow NGC to revise further the provisional Implementation Date
 - f appropriate legal drafting to implement CAP077 or any WGAA
6. The Working Group is responsible for the formulation and evaluation of any Working Group Alternative Amendments (WGAA) 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.
7. The Working Group shall co-ordinate as appropriate with the BSC Modification Group which is considering P180.

8. 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.
9. The Working Group is to submit their final report to the CUSC Panel consistent with the timetable established by the Chairman and the National Grid Representative following notification from the Authority at the CUSC Panel meeting on 26th November that it would require NGC to submit the Amendment Report for CAP077 to the Authority by 1st March 2005.

MEMBERSHIP

10. It is recommended that the Working Group has the following members:

Chair	Steve Drummond
National Grid	Ben Graff
Industry Representatives	Mark Manley
	David Lane
	Malcolm Taylor
	Steven Eyre
	Neil Smith
	Bob Brown
	Steve Moore

Authority Representative	David Edward
Technical Secretary	Richard Dunn

[NB: Working Group must comprise at least 5 Members (who may be Panel Members) and will be selected by the Panel with regard to WG List held by the Secretary]

11. The membership can be amended from time to time by the CUSC Amendments Panel.

RELATIONSHIP WITH AMENDMENTS PANEL

12. 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.
13. 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

14. 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

15. The Working Group Chairman shall prepare a final report to the Panel responding to the matters set out in paragraph 5 of these Terms of Reference consistent with the timetable identified in Paragraph 9 and an interim report to the November 2004 Amendments Panel responding to items a & b set out in paragraph 5 of these Terms of Reference.
16. Any unresolved comments within the Working Group must be reflected in the final Working Group Report.
17. The Chairman (or another member nominated by him) will present the Working Group report to the Amendments Panel as required.

Annex 2 – Proposed Text to modify CUSC

Part A - Text to give effect to the Proposed Amendment

Amend existing Paragraph 8.2.3.3 as follows:

8.2.3.3 **NGC** shall be responsible for implementing or supervising the implementation of **Approved Amendments** in accordance with the provisions of the **CUSC** which shall reflect the production of the revised **CUSC** and any amendments to **NGC's** systems and processes necessary for the implementation of the **Approved Amendment**. However, it will not include the implementation of **Users'** systems and processes. **NGC** will carry out its role in an efficient, economical and expeditious manner and (subject to any extension granted by the **Authority** where **NGC** has applied for one ~~having become aware of any circumstance which is likely to cause a delay in the implementation of an Approved Amendment~~) in accordance with the ~~date specified by the Authority in its approval~~ **Implementation Date**.

Add new paragraphs 8.2.3.4, 8.2.3.5 and 8.2.3.6

8.2.3.4 Subject to notifying **Users**, **NGC** will, with the **Authority's** approval, apply to the **Authority** for a revision or revisions to the **Implementation Date** where **NGC** becomes aware of any circumstance which is likely to mean that the **Implementation Date** is unachievable, which shall include as a result of a **Legal Challenge**, at any point following the approval of the **Amendment Proposal**.

8.2.3.5 In the event that the Authority's decision to approve or not to approve an **Amendment Proposal** is the subject of **Legal Challenge** (and the party raising such **Legal Challenge** has received from the relevant authority the necessary permission to proceed) then **NGC** will, with the **Authority's** approval, apply to the **Authority** for a revision or revisions to the **Proposed Implementation Date** in the **Amendment Report** in respect of such **Amendment Proposal** as necessary such that if such **Amendment Proposal** were to be approved following such **Legal Challenge** the **Proposed Implementation Date** would be achievable.

8.2.3.6 Prior to making any request to the **Authority** for any revision pursuant to Paragraphs 8.2.3.4 (where it is necessary as a result of a **Legal Challenge**) or 8.2.3.5 **NGC** shall consult on the revision with **CUSC Parties** and such other persons who may properly be considered to have an appropriate interest in it in accordance with Paragraphs 8.19.2 and 8.19.5. The request to the **Authority** shall contain copies of (and a summary of) all written representations or objections made by consultees during the consultation period.

Insert new definitions in Section 11:

"**Implementation Date**" is the date and time for implementation of an **Approved Amendment** as specified in accordance with Paragraph 8.23.3;

"**Legal Challenge**" an appeal to the Competition Commission or a judicial review in respect of the **Authority's** decision to approve or not to approve an **Amendment Proposal**;

"**Proposed Implementation Date**" the implementation date proposed by **NGC** in its **Amendment Report**

Part B - Text to give effect to the Working Group Alternative Amendment

Amend existing Paragraph 8.2.3.3 as follows:

8.2.3.3 **NGC** shall be responsible for implementing or supervising the implementation of **Approved Amendments** in accordance with the provisions of the **CUSC** which shall reflect the production of the revised **CUSC** and any amendments to **NGC's** systems and processes necessary for the implementation of the **Approved Amendment**. However, it will not include the implementation of **Users'** systems and processes. **NGC** will carry out its role in an efficient, economical and expeditious manner and (subject to any extension granted by the **Authority** where **NGC** has applied for one ~~having become aware of any circumstance which is likely to cause a delay in the implementation of an Approved Amendment~~) in accordance with the ~~date specified by the Authority in its approval~~ **Implementation Date**.

Add new paragraphs 8.2.3.4 and 8.2.3.5

~~8.2.3.4 Subject to notifying **Users**, **NGC** will, with the **Authority's** approval, apply to the **Authority** a revision or revisions to the **Implementation Date** where **NGC** becomes aware of any circumstance which is likely to mean that the **Implementation Date** is unachievable, which shall include as a result of a **Legal Challenge**, at any point following the approval of the **Amendment Proposal**.~~

~~8.2.3.5 In the event that the Authority's decision to approve or reject an **Amendment Proposal** is the subject of **Legal Challenge** (and the party raising such **Legal Challenge** has received from the relevant authority the necessary permission to proceed) then **NGC** will, with the **Authority's** approval, apply to the **Authority** for a revision or revisions to the **Proposed Implementation Date** in the **Amendment Report** in respect of such **Amendment Proposal** as necessary such that if such **Amendment Proposal** were to be approved following such **Legal Challenge** the **Proposed Implementation Date** would be achievable.~~

Insert new definitions in Section 11:

~~"**Implementation Date**" is the date and time for implementation of an **Approved Amendment** as specified in accordance with Paragraph 8.23.3;~~

~~"**Legal Challenge**" an appeal to the Competition Commission or a judicial review in respect of the **Authority's** decision to approve or not to approve an **Amendment Proposal**;~~

~~"**Proposed Implementation Date**" the implementation date proposed by **NGC** in its **Amendment Report**~~

Annex 3 – Amendment Proposal Form

CUSC Amendment Proposal Form	CAP:077
<p>Title of Amendment Proposal:</p> <p>Revision to CUSC Amendment implementation dates, where an Authority decision is referred to Appeal or Judicial Review.</p>	
<p>Description of the Proposed Amendment (<i>mandatory by proposer</i>):</p> <p>This proposal aims to introduce the ability for CUSC Implementation dates to be revised, where an Authority CUSC Amendment decision is referred to Appeal or Judicial review.</p> <p>(NB The DTI are currently consulting as to whether Amendments that are subject to an Appeal might be capable of being implemented whilst the Appeal process is ongoing. Were the DTI ultimately to conclude that any Amendments could be implemented in these circumstances, they would fall outside the scope of this Amendment.)</p> <p>NGC believe that the precise mechanisms for giving effect to this proposal could be further explored by a Working Group. However, our initial proposal is for NGC to write to Ofgem and CUSC Panel signatories (electronically) at the time that the Authority CUSC Amendment decision has been formally referred. This communication will advise that the Appeal/ Judicial Review means that the original implementation date may no longer be valid and put forward a revised provisional implementation date. This will be based on an estimation of the likely timescales that the Appeal/ Judicial Review is expected to take, and the amount of time that will be needed following this for the Amendment to be implemented. If the Appeal or Judicial Review action takes longer than NGC had originally anticipated, NGC will be entitled to follow this procedure again during the course of a Judicial Review or Appeal as appropriate, to further revise the provisional implementation date.</p> <p>These provisions will apply equally irrespective of whether or not an original Authority decision is ultimately fully upheld or partially upheld but the Authority have given a direction to implement a revised Amendment in some form.</p> <p>No new provisions are proposed in relation to revising the implementation date of Amendments in the period after an Appeal or Judicial Review has run its course, where the original Authority decision has been formally upheld either in whole or in part. This is because in such circumstances the Amendment will revert to being an Approved Amendment and will, as now, be capable of being subject to a revised implementation date in accordance with 8.2.3.3.</p> <p>This proposal does not cover any other scenarios beyond those relating to Appeals and Judicial Review.</p>	

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

A concern has been expressed that the existing Code and Licence based provisions in relation to implementation dates are not sufficient in circumstances that relate to Authority CUSC Amendment decisions that are referred to Appeal or Judicial Review. This proposal addresses this potential defect, by providing scope for NGC to provide further implementation dates to the Authority when Authority CUSC modification decisions have been referred to Appeal or Judicial Review, and hence are no longer approved amendments.

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

This Amendment is likely to require revision to Section 8 of the CUSC and /or Section 11.

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

None

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

None

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

NGC will be proposing a similar modification to the BSC.

Justification for Proposed Amendment with Reference to Applicable CUSC Objectives** **(mandatory by proposer):**

We believe that by ensuring that Approved Amendments that become subject to a Judicial Review or Appeal do not potentially “time out,” we are enabling NGC to more easily and efficiently discharge its obligations under the Electricity Act and the Transmission Licence.

It is also the case that ensuring that Amendments do not time out reduces the risk of potential improvements to the existing contractual framework being lost. In this way CAP077 will better facilitate competition in generation and supply of electricity.

Details of Proposer: Organisation's Name:	NGC
Capacity in which the Amendment is being proposed: (i.e. CUSC Party, BSC Party or "energywatch")	CUSC party
Details of Proposer's Representative: Name: Organisation: Telephone Number: Email Address:	Ben Graff NGC 01926 656312 ben.graff@uk.ngrid.com
Details of Representative's Alternate: Name: Organisation: Telephone Number: Email Address:	Mark Duffield NGC 01926 654971 Mark.Duffield@uk.ngrid.com
Attachments (Yes/No): If Yes, Title and No. of pages of each Attachment: No	

Notes:

1. 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:

Richard Dunn
Panel Secretary
Commercial Frameworks
National Grid Company plc

NGT House
Warwick Technology Park
Gallows Hill
Warwick, CV34 6DA
Or via e-mail to: CUSC.Team@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 Company Transmission Licence under Section C10, paragraph 1. Reference should be made to this section when considering a proposed amendment.

Annex 4 – Internal Working Group Procedure

CAP077 Working Group
Implementation Dates where an Authority Decision is Referred to Appeal or Judicial Review

INTERNAL WORKING PROCEDURES

1. Notes and actions from each meeting will be produced by the Technical Secretary (provided by National Grid) and circulated to the Chairman and Working Group members for review.
2. The Meeting notes and actions will be published on the National Grid CUSC Website after they have been agreed at the next meeting or sooner on agreement by Working Group members.
3. The Chairman of the Working Group will provide an update of progress and issues to the Amendments Panel each month as appropriate.
4. Working Group meetings will be arranged for a date acceptable to the majority of members and will be held as often as required as agreed by the Working Group in order to respond to the requirements of the Terms of Reference set by the Amendments Panel.
5. If within half an hour after the time for which the Working Group meeting has been convened the Chairman of the group is not in attendance, the meeting will take place with those present.
6. A meeting of the Working Group shall not be invalidated by any member(s) of the group not being present at the meeting.

Annex 5 – Description of JR/Appeals

DESCRIPTION OF JR/APPEALS

Scope and applicability of judicial review or appeal

1. The Amendment Proposal identifies that one of two events may trigger the CAP077 and P180 scenario: a judicial review, or an appeal to the Competition Commission, of an Authority Code Modification decision. These events differ in current applicability and possible outcomes.

Judicial review

Judicial review process

2. The judicial review process is a pre-existing legal remedy that is not directly affected by the Energy Act in terms of its grounds, timetable and outcomes. It should however be noted that one of the most common grounds on which permission to apply for judicial review is refused is that the applicant has failed to pursue a more appropriate method of pursuing the grievance. There may therefore be some indirect impact on the availability of judicial review as a remedy from the introduction of an appeals process under the Energy Act.
3. Only one Approved Modification or Rejected Modification Proposal has been subject to judicial review since NETA went live in March 2001, this being the BSC's P82, 'Introduction of Zonal Transmission Losses on an Average basis'.

Grounds for judicial review

4. Judicial review is concerned with the legality of how the decision was reached rather than its merits, and can only compel the decision maker to look at its decision again rather than reverse it.

Timetable

5. Where an application has been made to obtain a judicial review of an Authority decision, the court will not consider whether to grant permission for the application to be judicially reviewed before 21 days has expired from the lodging of the claim.
6. The duration of a judicial review is not capped in the manner that an appeal to the Competition Commission is and therefore one may last for many months or even years.

Outcomes

7. If a judicial review is allowed, a court can take any of the following actions:
 - quash the Authority's decision;
 - order the Authority to act in a particular way (for example: to look again at its decision);
 - make a prohibition order (for example: prohibit implementation);
 - make a declaration clarifying the legal position;

- order an injunction (for example: order an injunction to prevent implementation);
- award damages (only in combination with another remedy).

Appeal to the Competition Commission

Introduction of right of appeal

8. The Energy Act 2004 ('the Act') provides for a right of appeal to the Competition Commission against Authority decisions on modifications to certain gas and electricity industry codes.
9. The Act provides for an Order by the Secretary of State to designate which codes are subject to this right of appeal. The Act also provides for an Order to designate which types of decisions will be excluded from appeals. The Secretary of State will be able to designate the codes under which Authority decisions may be appealed from 1 April 2005. The Secretary of State may not choose to exercise this right immediately it becomes available. It is expected that the CUSC and the Balancing and Settlement Code will be designated as subject to appeal, although this is not mandated by the Act.
10. Under Section 173 and Schedule 22 of the Act, an application to appeal may be made by either a person materially affected by the Authority's decision or by a body whose functions include or are representing a person materially affected by that decision. Although the Act is untested, legal opinion suggests that this right is not restricted purely to licensees¹. Leave to appeal will not be granted where the reasons for raising the appeal are trivial or vexatious or there is no reasonable prospect of the appeal being successful.

Grounds for appeal

11. The grounds on which an appeal may be allowed are that the Authority failed to:
 - properly have regard to the matters mentioned in subsection (2) [of the Energy Act] (these are its objectives and duties under Section 3A of the Electricity Act 1989);
 - have regard to the purposes for which the relevant condition has effect;
 - give the appropriate weight to one or more of those matters of purposes;
 - that the decision was based, wholly or partly, on an error of fact;
 - that the decision was wrong in law.
12. It should be noted that DTI has issued an (ongoing) consultation on whether additional criteria should be applied.

Timetable

13. An appeal of an Authority decision may be made no later than 15 working days after its publication. Other persons may apply to become parties to this appeal within 20 working days or such longer period as an authorised member of the Competition Commission may allow.

¹ For example, a body such as Energywatch could bring an appeal on behalf of a Customer.

14. Upon the Competition Commission being notified that a person wishes to appeal an Authority decision, it will make a determination on whether to hear the application within 10 working days following the day on which the application was received.
15. The Authority can make representations or observations within 15 working days following the day on which the application was received.
16. The Competition Commission group functioning to determine the appeal must do so within 30 working days of the Authority making its representations or observations, although if it is satisfied that there are good reasons for departing from the normal requirements this may be extended by not more than ten more working days on a one-off basis.
17. The overall appeal process is to take approximately 12 weeks, and a maximum of 14 weeks.

Outcomes

18. Where the Competition Commission does not allow the appeal, it must confirm the decision appealed against.
19. Where the Competition Commission does allow the appeal, it must do one or more of the following:
 - Quash the decision appealed against;
 - Remit the matter to the Authority for reconsideration and determination in accordance with the directions given by the Competition Commission;
 - Where it quashes the refusal of a consent, give directions to the Authority and to such other persons as it considers appropriate, for securing that the relevant condition has effect as if the consent had been given.
20. In addition it should be noted that the Competition Commission has the power to suspend the Authority's decision whilst the appeal is being considered.

Annex 6 - Proposed CAP077 Assessment Timeline

Date	Action
2 nd Dec '04	- 2 nd Meeting of the CAP077 WG meeting
6 th Dec '04	- Draft Outline WG Report
16 th Dec '04	- 3 rd and final CAP077 WG meeting
17 th Dec '04	- CUSC Panel Meeting – verbal report from WG Chairman
20 th Dec '04	- Redraft WG Report
22 nd Dec '04	- Send WG Report to WG members, responses by cop 5 th Jan '05
6/7 th Jan '05	- Send WG Report to CUSC Panel Members
12 th Jan '05	- Special Meeting of CUSC Panel to discuss WG Report
14 th Jan '05	- Make final adjustments and send Consultation Report to CUSC Parties for 2 week consultation.
28 th Jan '05	- Receive responses
31 st Jan '05	- NGC to collate responses and consider any Alternatives Prepare (if req'd) Alternative Amendment Consultation Report
4 th Feb '05	- Send Alternative Amendment Consultation Report to CUSC Parties for 1 week consultation.
11 th Feb '05	- Receive responses
14 th Feb '05	- NGC to prepare Amendment Report
18 th Feb '05	- Send to CUSC Parties to ensure correctness
24 th Feb '05	- Receive any responses
25 th Feb '05	- CUSC Panel meeting, NGC to give verbal update
28 th Feb '05	- Finalise Amendment Report and send to Authority
1 st March '05	- Authority receives the Amendment Report

NB If there are no Alternative Amendments from the Consultation round then the Amendment Report can be prepared up to 2 weeks earlier