



National Grid

AMENDMENT REPORT

CUSC Proposed Amendment CAP077

Revision to CUSC Amendment Implementation Dates where an Authority Decision is referred to

Appeal or Judicial Review

The purpose of this report is to assist the Authority in their decision of whether to implement Amendment Proposal CAP077

Amendment Ref	CAP077
Issue	1.0
Date of Issue	10 February 2005
Prepared by	National Grid

I DOCUMENT CONTROL**a National Grid Document Control**

Version	Date	Author	Change Reference
0.1	Jan 2005	National Grid	Draft for internal comment
0.2	2 Feb 2005	National Grid	Draft for external comment
1.0	10 Feb 2005	National Grid	Formal version for submission to the Authority

b Document Location

Nation Grid Website:

<http://www.nationalgrid.com/uk/indinfo/cusc>

c Distribution

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

II CONTENTS TABLE

I DOCUMENT CONTROL	2
a National Grid Document Control	2
b Document Location.....	2
c Distribution	2
II CONTENTS TABLE	3
1.0 SUMMARY AND RECOMMENDATION.....	4
2.0 PURPOSE AND SCOPE OF THE REPORT	4
3.0 THE PROPOSED AMENDMENT AND WORKING GROUP DISCUSSIONS ..	6
4.0 IMPLEMENTATION AND TIMESCALES	12
5.0 IMPACT ON THE CUSC	12
6.0 ASSESSMENT AGAINST APPLICABLE CUSC OBJECTIVES.....	12
7.0 IMPACT ON CUSC PARTIES	13
8.0 IMPACT ON CORE INDUSTRY DOCUMENTS.....	13
9.0 WORKING GROUP ALTERNATIVE AMENDMENT	13
10.0 VIEWS AND REPRESENTATIONS	14
11.0 SUMMARY OF PANEL MEMBERS VIEWS.....	17
12.0 NATIONAL GRID RECOMMENDATION	18
13.0 COMMENTS ON DRAFT AMENDMENT REPORT	18
ANNEX 1 - AMENDMENT PROPOSAL FORM.....	19
ANNEX 2 – PROPOSED TEXT TO MODIFY CUSC	23
Part A - Text to give effect to the Proposed Amendment.....	23
Part B - Text to give effect to the Alternative Amendment	24
ANNEX 3 - DESCRIPTION OF JR/APPEALS	25
ANNEX 4 - PROPOSED CAP077 ASSESSMENT TIMELINE	28
ANNEX 5 – COPIES OF REPRESENTATIONS RECEIVED TO CONSULTATION	29
ANNEX 6 – COPIES OF COMMENTS RECEIVED ON THE DRAFT AMENDMENT	
REPORT	41

1.0 SUMMARY AND RECOMMENDATION

- 1.1 CAP077 was proposed by National Grid and seeks 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 a Legal Challenge (Appeal or Judicial Review).
- 1.2 CAP077 was submitted to the CUSC Amendments Panel for consideration at their meeting on 29th October 2004. The Amendments Panel referred CAP077 to the Governance Standing Group (GSG) to consider as a Working Group and initially requested that the CAP077 Working Group provide a final report on the issue to the February 2005 Panel meeting
- 1.3 On 30th November 2004 the Authority provided a notice to the Panel Secretary under Paragraph 8.13.3 of the CUSC requiring NGC to provide the Amendment Report for CAP077 to the Authority by 1st March 2005. The CUSC Panel subsequently agreed a revised timeline for the assessment of CAP077 that required the Working Group report to be provided to the Panel by 7th January 2005. The CAP077 Working Group was circulated to Panel Members on 6th January 2005. All Working Group Members believed the Original Amendment Proposal better facilitated the Applicable CUSC Objectives and the majority believed that on that basis it should be implemented. However, whilst NGC agreed that the Original Amendment Proposal better facilitated the Applicable Objectives, it also believed that the Alternative Amendment put forward by NGC better facilitated the relevant objectives than the Original proposal. National Grid's Alternative Amendment (WGAA) differed from CAP077 only in that there was no provision for a consultation process with CUSC Parties concerning any revised Implementation Dates in the event of an Appeal or Judicial Review of an Amendment Proposal. At a special Panel meeting held on 12th January 2005 to consider the Working Group's report, the Panel agreed that the CAP077 Working Group had met its Terms of Reference and agreed that CAP077 should proceed to wider Industry consultation.
- 1.4 The CAP077 Consultation report was issued on 12th January 2005 to CUSC Parties with a request for comments no later than 28th January 2005 in accordance with the assessment timeline agreed by the CUSC Panel. All the comments received were supportive of CAP077 original proposal.

National Grid Recommendation

- 1.5 National Grid recommends that the WGAA for CAP077 should be implemented. However, if the Authority chooses not to implement the WGAA then NGC would favour the implementation of CAP077 original proposal.
- 1.6 NGC recommends that the WGAA or CAP077 should be implemented within 10 business days of the Authority's decision.

2.0 PURPOSE AND SCOPE OF THE REPORT

- 2.1 This Amendment Report has been prepared and issued by National Grid under the rules and procedures specified in the Connection and Use of System Code (CUSC) as designated by the Secretary of State. It addresses issues relating to the current arrangements contained in the CUSC relating to Implementation Dates where an Authority Decision on an Amendment Proposal is referred to Appeal or Judicial Review as addressed in CAP077.

-
- 2.2 Further to the submission of Amendment Proposal CAP077 (see Annex 1) and the subsequent wider industry consultation that was undertaken by National Grid, this document is addressed and furnished to the Gas and Electricity Markets Authority (“the Authority”) in order to assist them in their decision whether to implement Amendment Proposal CAP077.
- 2.3 This document outlines the nature of the CUSC changes that are proposed. It incorporates National Grid’s recommendations to the Authority concerning the Amendment. Copies of all representations received in response to the consultation have been also been included and a ‘summary’ of the representations received is also provided. Copies of each of the responses to the consultation are included as Annex 3 to this document.
- 2.4 This Amendment Report has been prepared in accordance with the terms of the CUSC. An electronic copy can be found on the National Grid website, at <http://www.nationalgrid.com/uk/indinfo/cusc>

3.0 THE PROPOSED AMENDMENT AND WORKING GROUP DISCUSSIONS

- 3.1 CAP077 (Annex 1) seeks to introduce the ability for CUSC Implementation Dates to be reviewed and revised if necessary, where an Authority CUSC Amendment decision is subject to Appeal or Judicial Review. The defect in the CUSC addressed by CAP077 is the risk of an Amendment Proposal becoming “timed-out” while the result of the Appeal or Judicial Review is unknown due to the expiry or resulting inappropriate nature of the Implementation date for the Amendment Proposal contained in the Amendment Report.

Working Group Discussions

- 3.2 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

- 3.3 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 which are contained in 8.2.3.3 are not sufficiently complete should an Authority Decision be legally challenged.
- 3.4 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.
- 3.5 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 and the original implementation date in the Amendment Report is no longer viewed by NGC as being viable. Furthermore, CAP077 will apply to ‘rejected’ amendments, as well as ‘approved’ amendments. (i.e. where an Amendment proposal has been rejected, and someone raises a valid Legal Challenge in relation to this rejection, NGC will need to ensure that a viable implementation date is in place, should the original Authority decision to reject the Amendment be overturned following the Legal Challenge).
- 3.6 The risk of continuing without CAP077 is that if, the outcome of a Legal Challenge 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 either the Proposed Implementation

Dates in the Amendment Report had passed or were too close for the Authority to properly review their decision and for subsequent implementation. Equally, as highlighted above 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, and the Working Group believed that this also needed to be addressed.

- 3.7 It was agreed that Legal Challenge in one form (Judicial Review) could arise now should a Judicial Review be granted with reference to an Authority decision. Legal Challenge could also arise in another form (Appeal against an Authority decision to the Competition Commission) 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 completely 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 CAP077 to ensure that the CUSC catered for the appeals process as well as Judicial Review.
- 3.8 The counter views to having an amendment at all to the CUSC were twofold:
- 3.8.1 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.
 - 3.8.2 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.
- 3.9 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.

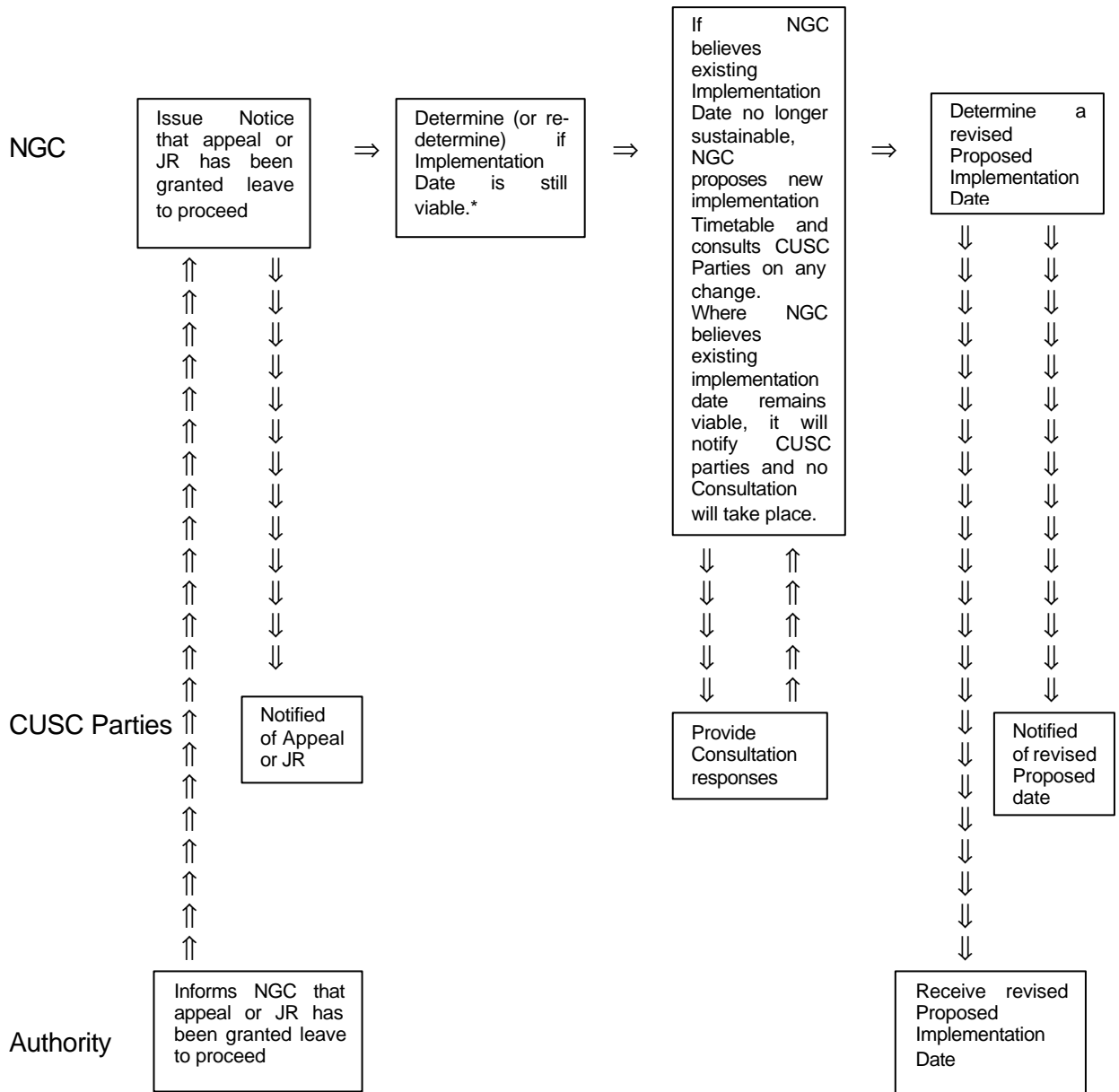
Circumstances in which Issue Arises

- 3.10 In considering the circumstances in which there might be a need to change the proposed implementation Dates within an Amendment Report, the Working Group believed that the mechanism to change an implementation date would be utilised by NGC where it believed that a legal challenge meant that the original Implementation Date was no longer sustainable in relation to an approved or rejected Amendment Proposal. However, the mechanism would not be utilised in circumstances where the clock had not been stopped and Implementation of the Amendment Proposal had continued as in these circumstances there would be nothing to delay. Although clearly the implementation of an Amendment in such circumstances might ultimately need to be unwound, the Working Group did not consider that the need to unwind Amendments in these circumstances fell directly within the remit of CAP077 itself.

Proposed Processes

- 3.11 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.
- 3.12 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.
- 3.13 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.
- 3.14 The majority of the Working Group favoured the proposal for NGC to carry out a round of consultation with the CUSC parties, prior to the submission to the Authority of 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. In the situation where NGC considers retention of the existing Implementation Date remains appropriate, however, the Working Group envisaged that this would be communicated to the CUSC Panel at regular Panel meetings and to CUSC Parties through website/e-mail communications, and no actual NGC Consultation would take place. However, should NGC at a later date consider that the original implementation date is no longer likely to be viable, the Working Group envisaged that an NGC Consultation on a revised date would take place at that time
- 3.15 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 explicitly on Proposed Implementation Dates that appear in the Amendment Report.
- 3.16 The two possible Process Diagrams below show the proposed tasks which the Working Group considered could be undertaken within a 3 month period.

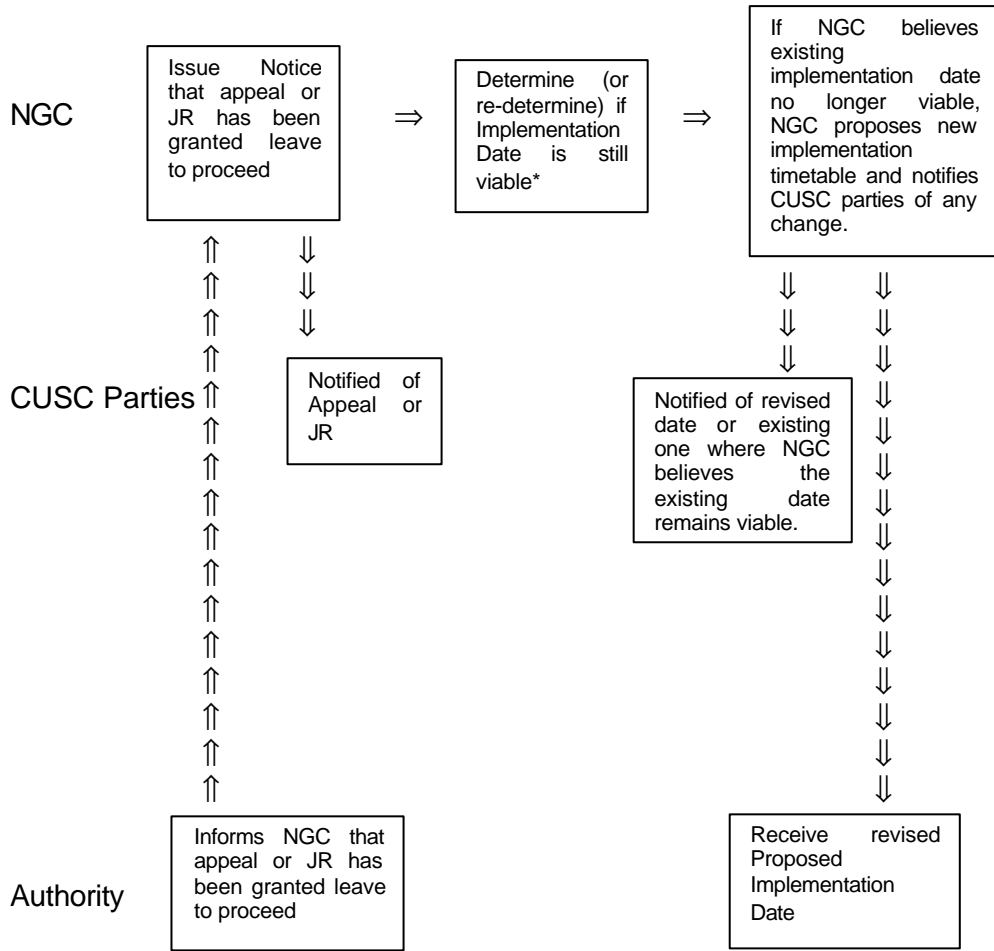
3.16.1 Proposal 1 for CAP077 Process, as favoured by the majority of the Working Group (and subsequently amended following CUSC Panel discussions to further clarify when exactly Consultations would take place.)



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 reach a conclusion within the purview of the revised proposed implementation date, it is possible for NGC to re-determine the proposed date.

3.16.2 Proposal 2 for CAP077 WGAA Process, as favoured by a minority of the Working Group



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.

- 3.17 The Working Group also considered another suggested approach that would establish the Authority as setting revised implementation dates in the event of JR or appeal. This approach had no support from Members of the Working Group and it was agreed by 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

- 3.18 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.
- 3.19 It concluded that 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.
- 3.20 It was not considered desirable 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?

- 3.21 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.
- 3.22 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 3 describes in detail the JR/AP process and the possible outcomes.
- 3.23 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

- 3.24 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).

- 3.25 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

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

4.0 IMPLEMENTATION AND TIMESCALES

- 4.1 The CAP077 Working Group considered that CAP077 or the WGAA should be implemented as soon as possible after any Authority decision to approve CAP077 or the WGAA. National Grid agrees with the view of the Working Group. Should the Authority approve CAP077 or the WGAA, National Grid would recommend that implementation should be on the basis of Paragraph 8.23.3 of the CUSC i.e. the date specified in any direction or in the absence of such a date ten business days after such direction.

5.0 IMPACT ON THE CUSC

- 5.1 CAP077 and the WGAA would require amendments to Section 8 (CUSC Amendments) and Section 11 (Definitions) of the CUSC
- 5.2 The text required to give effect to CAP077 and the WGAA is contained at Annex 2 of this document.

6.0 ASSESSMENT AGAINST APPLICABLE CUSC OBJECTIVES

- 6.1 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.
- 6.2 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.

- 6.3 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.
- 6.4 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.
- 6.5 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.

7.0 IMPACT ON CUSC PARTIES

- 7.1 The introduction of CAP077 (either Original proposal or Alternative Amendment) would mean that a mechanism was in place which would ensure that CUSC Amendments did not “time out,” and hence become incapable of being implemented, in the period in which they had become subject to Legal Challenge. The new mechanism hence impacts on CUSC parties by potentially altering what could happen to CUSC Amendments during this period.
- 7.2 Under the CAP077 original proposal, CUSC Parties could be subject to Consultations from NGC, should NGC determine that a consultation on a revision to the Implementation Date contained in the Authority's decision on an Amendment Proposal which has been subject to legal challenge is necessary. Such a consultation is not a feature of the WGAA.

8.0 IMPACT ON CORE INDUSTRY DOCUMENTS

- 8.2 Neither CAP077 or the WGAA will have an impact on core industry documents or other industry documents. However, a similar amendment to the Balancing and Settlement Code (BSC - P180) concerning Implementation Dates is also expected to be considered by the Authority in a similar timescale to CAP077.

9.0 WORKING GROUP ALTERNATIVE AMENDMENT

- 9.1 As explained elsewhere in this report, a Working Group Alternative Amendment (WGAA) was developed by the Group which differed from the Amendment Proposal in that it did not involve consultation with CUSC Parties about revised Implementation Dates for an Amendment Proposal where the Authority Decision had been subject to a legal challenge. National Grid was the only Member of the Working Group that supported the WGAA.

10.0 VIEWS AND REPRESENTATIONS

- 10.1 This Section contains a summary of the views and representations made by consultees during the consultation period in respect of the Proposed Amendment and the WGAA.
- 10.2 There were six responses to the CAP077 Consultation. Of these, all six believed that the Original proposal better facilitated the Applicable Objectives, and hence should be implemented. All respondents believed that the Working group Alternative Amendment also better facilitated the Applicable CUSC Objectives, however, all six respondents believed that the Original Proposal better facilitated the Applicable Objectives, compared to the WGAA. The only contrary view to this being that of NGC at the Working Group, who favoured the WGAA over the Original Proposal (but also saw both as better facilitating the Applicable Objectives.)

Merits of Original Proposal v WGAA

- 10.3 One respondent argued that it would be beneficial for NGC to consult with CUSC Parties as part of the process to ensure that all implications of a change of Implementation Date for an Amendment Proposal were taken into consideration. The respondent also believed such a consultation would help ensure that Applicable CUSC Objective (b) was met by allowing CUSC Parties to comment where they felt that a change of date would put them at a competitive disadvantage. The respondent therefore preferred CAP077 original proposal. One respondent agreed with NGC that the WGAA also better facilitates the Applicable CUSC Objectives compared to the current CUSC baseline but did not consider the WGAA in any way more efficient than CAP077 original proposal. The respondent indicated that he was not persuaded by the arguments put forward by NGC in favour of the WGAA.
- 10.4 One respondent considered that the inclusion of a process of consultation on a revised Implementation Date with CUSC Parties was consistent with the current arrangements for consultation contained within the CUSC. The respondent also argued that, presently, CUSC Parties have the opportunity to provide comments on Implementation Dates and timetables as both these elements are a fundamental part of any CUSC Amendment Report. Consequently, any Amendment Proposal that does not include the opportunity for CUSC Parties to comment on revised Implementation Dates is diluting the rights of CUSC Parties. In addition, the respondent noted that the duration of any legal challenge to an Authority decision is likely to be at least fourteen weeks. Therefore, any process for determining a revised Implementation Date should easily be able to accommodate a short consultation exercise with CUSC Parties. For all of these reasons the respondent supported CAP077 original proposal.

Possibility for new Amendment Proposals to be raised, rather than revising the implementation date/ Hard Wiring of Obligations

- 10.5 Another respondent (CAP077-CR-03) believed that in certain circumstances it may still be appropriate for a new Amendment Proposal to be raised rather than simply consulting on an amendment to the proposed Implementation Date of the original Amendment Proposal.
- 10.6 The respondent noted that the process diagram for the original Amendment Proposal requires NGC to notify CUSC Parties if the Implementation Date remains viable and no consultation is necessary, but the legal text does not reflect this requirement. The respondent believes that this obligation should

also be contained within the legal text and thereby hard-wired into the CUSC in order to provide CUSC Parties with certainty.

CUSC Panel Members Views Sought on new Competition Commission Guidance/ Possibility for further CUSC Amendments

- 10.7 The respondent in CAP077-CR-03 also noted that the CAP077 Working Group discussed whether the starting point of the process for reviewing the Implementation Date for an Amendment Proposal was appropriate and decided that placing an obligation on the appellant to inform CUSC Parties was outside of the scope of CAP077. The respondent noted that since the Working Group discussions, the Competition Commission (CC) had issued a consultation on the process it would employ to discharge its obligations to consider appeals. The process proposed by the CC obligates the appellant upon raising an appeal to inform all Parties affected by the decision. The respondent would like to seek the views of the CUSC Panel on the appropriateness of a new CUSC Amendment Proposal being required to capture this obligation. The respondent believes that a new Amendment Proposal which places an obligation on the appellant to inform CUSC Parties would improve the process for the delivery of the solution to the defect identified in CAP077. The process envisaged under CAP077 is dependent on Ofgem informing NGC that an appeal or JR has been granted leave to proceed but the respondent believes that the difficulty with this approach is that no firm obligation can be imposed on Ofgem via the CUSC. The respondent argues that a new Amendment Proposal placing an obligation on the appellant to notify affected Parties of the appeal or JR would ensure the CUSC is consistent with the rules being developed by the CC and make the process of notification more robust.
- 10.8 The respondent in CAP077-CR-04 supported CAP077 original proposal. The respondent believes that CAP077 original proposal is superior to the WGAA in four main areas:

i) Provision of vital information to the Authority

Assuming that the Authority will be required to revise the Implementation Date in such a way that it does not fetter their discretion or prejudice the ruling of either the Competition Commission or outcome of Judicial Review, the respondent believes that it will be necessary to consider the views of all Parties in a non-discriminatory way. The respondent asks the question, in a hypothetical scenario, whether it is appropriate for NGC to provide the only Alternative Implementation Date? The respondent believes this is clearly unsatisfactory and would not only place the Authority in an invidious position but may also give rise to subsequent appeals

ii) Consideration of CUSC Party views

The respondent believes that it is extremely important that the result of Appeal or Judicial Review is seen by the industry as final. During the appeal process it could be reasonably expected that the views/arguments of all affected Parties will be given due consideration. However, the respondent believes this could be undermined by a process running contemporaneously with the appeal which completely fails to consider the impact of implementation on CUSC Parties. In an extreme case the respondent believes this could in itself lead to a challenge against the action of NGC.

iii) Provision of Information to NGC

The respondent believes that without full consultation on a newly proposed Implementation Date NGC will be unable to ascertain the validity of their suggestion. An appeal itself may be based on the proposed Implementation Date. In such circumstances the respondent believes that it would be wholly unacceptable for NGC merely to suggest another date which, without consultation will fail to address the cause of the appeal. The respondent believes that the potential for conflict of interest (in setting a revised date) is real and could be avoided by consultation.

iv) Market Certainty

The respondent believes that a consultation process will not only provide Parties with the ability to comment on the Implementation Date but it will also act as an important “flag” to signal the current progress of the appeal and the likely timescale for resolution. The respondent believes that it is reasonable to assume that the challenge will only be raised against commercially significant amendments and that this process will, necessarily be under way at a time of great market uncertainty.

- 10.9 The respondent in CAP077-CR-04 acknowledged that the WGAA would address the defect identified by CAP077 but believed it would be a significantly inferior solution to CAP077 original proposal. The respondent believes that the omission of a consultation phase will result in the Authority having to make a decision based on a fraction of the information necessary and will force NGC in to a situation where there could be a conflict of interest.
- 10.10 The respondent in CAP077-CR-05 supported CAP077 original proposal. The respondent believes that both the solutions identified by the Working Group address the defect and would both better facilitate the achievement of the Applicable CUSC Objectives. However, CAP077 original proposal is better than the WGAA given the need for increasing transparency behind any decision making and the potential for any proposed change to an Implementation Date to have an impact on CUSC Parties other than NGC.
- 10.11 The respondent also notes that whilst the work processes intended to be followed by NGC have been included in this Amendment Report, they have not been fully encapsulated within the legal text for CAP077 original proposal and the WGAA. The respondent sees no need for the work processes to be explicitly laid down in the CUSC as it allows for such processes to evolve. However, the respondent would urge that the elements of the work process are adhered to and only changed with the agreement of the CUSC Panel.
- 10.12 The respondent in CAP077-CR-06 supported CAP077 original proposal.

National Grid comments on the responses to the consultation

- 10.13 National Grid takes the view that the inclusion of a round of consultation with CUSC Parties on a revised Implementation Date for an Amendment Proposal in the CAP077 original proposal has the potential to be inefficient. National Grid believes that the simpler approach contained in the WGAA is more in keeping with the current arrangements for consultation in the CUSC where there are no specific provisions for consultation with CUSC Parties on Implementation Dates. In addition, National Grid has Licence and Code based obligations to put forward viable Implementation Dates for Amendment Proposals and is confident that a formal Consultation loop is not necessary to allow NGC to comply with these obligations.

- 10.14 The Consultation on a revised Implementation Date for an Amendment Proposal subject to appeal or JR, though not “hard wired” into the CUSC WGAA is not entirely ruled out in the WGAA. If NGC believes such an approach to be the most appropriate in relation to the particular circumstances of an Amendment, to enable NGC to meet its Licence and Code based obligations, NGC would conduct such a consultation. Clearly, more generally, were Ofgem to decide to adopt either the Original Proposal or the WGAA, NGC would expect to work closely with the CUSC Panel to ensure that the associated work processes effectively supported the relevant Code based obligations.
- 10.15 NGC notes the point made by one respondent (CAP077-CR-03) that in the recent Competition Commission consultation on the process, the Commission favours a process which would place an obligation on the appellant upon raising an appeal to inform all Parties affected by the decision. The respondent would like to see the views of the CUSC Panel on the appropriateness of a new Amendment Proposal to capture this obligation. NGC agrees that this is something that the CUSC Panel (and perhaps the CUSC Governance Standing Group) should consider further, but do not see this issue as being of direct relevance to the remit and scope of CAP077.

View of Core Industry Document Owners

- 10.16 No responses to the CAP077 consultation document were received from core industry document owners.

Responses to Consultation

- 10.17 The following table provides an overview of the representations received. Copies of the representations are attached as Annex 5.

Reference	Company	Supportive	Comments
CAP077-CR-01	EdF Energy	Yes	Supports CAP077 original proposal
CAP077-CR-02	British Energy	Yes	Supports CAP077 original proposal
CAP077-CR-03	Centrica	Yes	Supports CAP077 original proposal. Would like to see an obligation on the appellant to inform all Parties affected by the appeal.
CAP077-CR-04	E.ON UK	Yes	Supports CAP077 original proposal
CAP077-CR-05	EdF Energy Merchants	Yes	Supports CAP077 original proposal
CAP077-CR-06	RWE	Yes	Supports CAP077 original proposal

11.0 SUMMARY OF PANEL MEMBERS VIEWS

- 11.1 Several Members of the Panel initially expressed some doubt over the timing for CAP077 at the Panel meeting on 29th October. These Panel Members

were concerned that the outcome of the DTI's consultation (issued on 4th October 2004) on a draft order on Appeals against Ofgem Code Modification decisions under the Energy Act 2004 should be known before CAP077 was taken further. However, five Members of the Panel subsequently became Members of the CAP077 Working Group and supported the Working Group's final report to the Panel. The Working Group had subsequently developed a generic approach to the trigger events of a Legal Challenge (including appeals under the Energy Act 2004) in the legal drafting for CAP077 such that the outcome of the DTI consultation was not after all necessary to progress CAP077. At the special Panel meeting on 12th January the Panel were unanimous in their view that the Working Group had met its Terms of Reference and that CAP077 should proceed to industry consultation.

12.0 NATIONAL GRID RECOMMENDATION

- 12.1 National Grid proposed CAP077 and supports the view of the CAP077 Working Group that CAP077 addresses a current defect in the CUSC and better facilitates the achievement of the Applicable CUSC Objectives but believes that the WGAA better facilitates the Applicable CUSC Objectives compared to the original Amendment Proposal.
- 12.2 Although NGC recommends approval of the WGAA, were the Authority to reject the WGAA, NGC would favour the adoption of the original proposal as better facilitating the Applicable CUSC Objectives.

13.0 COMMENTS ON DRAFT AMENDMENT REPORT

- 13.1 National Grid received 2 responses following the publication of the draft Amendment Report. The following table provides an overview of each representation. Copies of the representations are attached as Annex 6.

Reference	Company	Summary of Comments
CAP077-AR-01	EdF Energy Merchants	Minor drafting comments
CAP077-AR-02	Centrica	Critical of NGC's arguments relating to consultation arrangements (now deleted). Critical of NGC's support for the WGAA.

- 13.2 NGC agrees with the respondent's comment in CAP077-AR-01 that the wording he identified in Paragraph 11.1 could be misleading and has deleted that wording.
- 13.3 NGC disagrees with the respondent's comments under a) in CAP077-AR-02 but in any case has re-drafted its comments on the response to the consultation report in the Amendment Report such that the original paragraph 10.15 in the draft Amendment Report has now been deleted. For the reasons set out in this Amendment Report, NGC still continues to believe that the WGAA has a number of advantages over CAP077 original proposal. NGC agrees with the respondent's comment under b).

Annex 1 - Amendment Proposal Form

CUSC Amendment Proposal Form	CAP:077
<p><i>Title of Amendment Proposal:</i></p> <p><i>Revision to CUSC Amendment implementation dates, where an Authority decision is referred to Appeal or Judicial Review.</i></p>	
<p>Description of the Proposed Amendment (mandatory by proposer):</p> <p><i>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.</i></p> <p><i>(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.)</i></p> <p><i>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.</i></p> <p><i>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.</i></p> <p><i>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.</i></p> <p><i>This proposal does not cover any other scenarios beyond those relating to Appeals and Judicial Review.</i></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
<i>Capacity in which the Amendment is being proposed:</i> (i.e. CUSC Party, BSC Party or "energywatch")	CUSC party
Details of Proposer's Representative: Name: Organisation: Telephone Number: Email Address:	<i>Ben Graff</i> NGC 01926 656312 <i>ben.graff@uk.ngrid.com</i>
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 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 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 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 – 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

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

- appeal within 20 working days or such longer period as an authorised member of the Competition Commission may allow.
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.

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 4 - 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

Annex 5 – Copies of Representations Received to Consultation

This Annex includes copies of any representations received following circulation of the Consultation Document (circulated on 12 January 2005, requesting comments by close of business on 28 January).

Representations were received from the following parties:

No.	Company	File Number
1	EdF Energy	CAP077-CR-01
2	British Energy	CAP077-CR-02
3	Centrica	CAP077-CR-03
4	E.ON UK	CAP077-CR-04
5	EdF Energy Merchants	CAP077-CR-05
6	RWE	CAP077-CR-06

Reference	CAP077-CR-01
Company	EdF Energy

**Our Ref
Your**

Richard Dunn
Commercial Framework
National Grid Transco House
Warwick Technology Park
Gallows Hill
Warwick
CV34 6DA

Date 21 January 2005

Dear Richard,

**EDF Energy Response to CUSC Amendment Proposal CAP077–
“Revision to CUSC Amendment Implementation Dates where an Authority
Decision is referred to Appeal or Judicial Review”**

EDF Energy are pleased to have the opportunity to comment on CUSC Amendment Proposal CAP077.

We support the proposed amendment, as we believe that it will better facilitate the applicable CUSC objectives in such circumstances where an Authority decision is referred to Appeal or Judicial Review which would make the existing implementation date unviable.

In addition we feel that it would be beneficial for NGC to consult with CUSC parties as part of this process to ensure that all implications of a change of date are taken into consideration. This would help ensure that CUSC objective (b) was met by allowing parties to comment where they felt that a change of date would put them at a competitive disadvantage. Therefore we prefer the main amendment proposal to the alternative.

If you have any queries, please do not hesitate to contact me on 020 7752 2524.

Yours sincerely



Stephen Moore
Regulation and Market Infrastructure
EDF Energy

Reference	CAP077-CR-02
Company	British Energy

26th January 2005

Richard Dunn
Commercial Frameworks
National Grid Company plc
National Grid Transco House
Warwick Technology Park
Gallows Hill
Warwick
CV34 6DA

Dear Richard

CUSC AMENDMENT PROPOSAL CAP077

Thank you for the opportunity to comment on the issues raised by Amendment Proposal CAP077 and issues arising from the proposed timescale for implementation of CAP077.

British Energy supports the main amendment proposal as set out in the consultation document issued on 12th January 2005. We consider this amendment appropriately addresses the identified defect in the amendment provisions contained within the CUSC in circumstances where an Authority CUSC modification decision is legally challenged. We consider the amendment proposal better facilitates achieving the applicable CUSC objective described by Condition C7F, paragraph 1(a) of the Transmission Licence.

Whereas we agree with NGC that the alternative amendment proposal also better facilitates the applicable CUSC objectives compared to the baseline we do not consider the alternative amendment is in any way more efficient than the main proposal. Indeed, we are not persuaded by either of the arguments put forward by NGC in favour of the alternative over the main amendment proposal. We consider that the inclusion of a process of consultation with CUSC parties when determining an appropriate revised implementation date is efficient and consistent with the current arrangements for consultation contained within the CUSC.

Presently, CUSC parties have the opportunity to provide comments on implementation dates and timetables as both these elements are a fundamental part of any CUSC amendment report, a draft of which is circulated to all CUSC parties for comment in accordance with paragraph 8.20.3. Consequently, any amendment proposal that does not include the opportunity for CUSC parties to comment on revised amendment implementation dates is diluting the existing rights of CUSC parties

In addition, the duration of any legal challenge of an Authority CUSC modification decision is likely to be at least 14 weeks. Therefore, any process for determining a revised implementation date should easily be able to accommodate a short consultation exercise with CUSC parties. Given this we support the adoption of the main amendment proposal.

If you wish to discuss our comments further please do not hesitate to contact me.

Yours sincerely



Steven Eyre
Regulation Analyst

Direct Line: 01452 653741
Fax: 01452 653246
E-Mail: steven.eyre@british-energy.com

Reference	CAP077-CR-03
Company	Centrica



taking care of the essentials

Richard Dunn
Commercial Frameworks
National Grid Company plc
National Grid Transco House
Warwick Technology Park
Gallows Hill
Warwick
CV34 6DA

Centrica Energy

Millstream East,
Maidenhead Road,
Windsor,
Berkshire SL4 5GD

Tel. (01753) 431052

Fax (01753) 431150

www.centrica.com

Our Ref.

Your Ref.

28 January 2005

Dear Diane,

CUSC Amendment Proposal CAP077 – Revision to CUSC Implementation Dates where an Authority decision is referred to Appeal or Judicial Review

Centrica welcomes the opportunity to comment on the above consultation document and supports the implementation of the main Amendment proposal. Centrica believes that the proposed change will generally better facilitate the Applicable CUSC Objectives by increasing the efficiency of the change process. However, Centrica continues to believe that in certain circumstances following the raising of an Appeal or a Judicial Review (JR) it may still be appropriate for a new Amendment Proposal to be raised rather than simply consulting on an amendment to the proposed implementation date to the original Amendment Proposal.

Centrica note the process diagram for the main amendment proposal contained within the consultation document. The process diagram includes a requirement to consult with CUSC parties if NGC believes the proposed implementation date is no longer viable, the draft legal text sets down that obligation. The process diagram also requires NGC to notify CUSC parties if the implementation date remains viable and no consultation is necessary. The legal text does not appear to reflect this requirement. To provide CUSC parties with certainty, Centrica believe this obligation should also be contained within the legal text and thereby hard wired into the CUSC.

The process diagram identifies the starting point of the process as the Authority informing NGC that the Appeal or JR has been granted leave to

proceed. The group discussed whether this was an appropriate starting point for the process and came to the view that placing an obligation on the appellant to inform CUSC parties was outside of scope of CAP077. Since those discussions, the Competition Commission (CC) has issued a consultation on the process, which will allow them to discharge their obligation to consider Appeals. The proposed process obligates the appellant upon raising an Appeal to inform all parties affected by the decision. Centrica would like to seek the views of the CUSC Panel on the appropriateness of a new CUSC Amendment Proposal being required to capture this obligation. Centrica believe the new Amendment Proposal would also improve the process designed to deliver the solution for CAP077. Placing that obligation on the appellant to inform CUSC parties would remove the informal nature of the current process developed to solve the defect identified by CAP077. The current process is dependent upon Ofgem informing NGC that an Appeal or JR has been granted leave to proceed. The difficulty with this approach is that no obligations can be placed on Ofgem via the CUSC. A new Amendment Proposal would ensure the CUSC is consistent with the rules being developed by the CC and make the process of notification more robust.

If you have any questions regarding this response please ring me 01753 431137.

Yours sincerely,

Mark Manley
Contract Manager

Reference	CAP077-CR-04
Company	E.ON UK

Richard Dunn
Commercial Frameworks
National Grid Company plc
NGT House
Warwick Technology Park
Gallows Hill
Warwick
CV34 6DA

E.ON UK plc
Westwood Way
Westwood Business Park
Coventry
CV4 8LG
eon-uk.com

Neil Smith
024 7642 4369

neil.c.smith@eon-uk.com

Friday 28th January 2005

Dear Richard,

RE: CUSC Amendment Proposal CAP077 – Revision to CUSC Amendment Implementation Dates where an Authority Decision is referred to Appeal or Judicial Review.

E.ON UK appreciates the opportunity to comment upon this CUSC Amendment Proposal. We recognise the potential defect within the CUSC whereby an Amendment proposal may become ‘timed out’ as a result of a decision which is subject to Appeal or Judicial Review. We therefore consider that an amendment to the CUSC is necessary. We concur with the suggestion that both of the proposals put forward by the Working Group could address the perceived defect. However we strongly believe ‘Proposal One’ (the working group preferred solution) is far superior to the Alternative solution, in that it better facilitates the achievement of the applicable CUSC objectives.

Proposal 1: Working Group Preferred Solution

We are confident that this solution will address the defect and deliver the benefits as considered by the Working Group. The only substantive difference between the two proposals is the requirement for a consultation phase. We consider the consultation element of this proposal to facilitate the following four significant advantages over the Alternative Amendment;

E.ON UK plc
Registered in
England and Wales
No 2366970
Registered Office:
Westwood Way
Westwood Business Park
Coventry CV4 8LG

Provision of vital information to the Authority

If the CAP077 Amendment is ever to be utilised we can assume that the Authority will be required to revise the implementation date in such a way that it does not fetter their discretion or prejudge the ruling of either the Competition Commission or Judicial Review. To achieve this it will be necessary to consider the views of all affected parties in a non discriminatory way. The necessity for such an action can be highlighted by considering the following hypothetical scenario. If NGC were to be the subject of an appeal, would it be appropriate for them to provide the Authority with the only implementation date alternative? This would clearly be unsatisfactory and would not only place the Authority in an invidious position but may also give rise to subsequent appeals.

Consideration of CUSC Parties Views

The impact of a new implementation date upon CUSC Parties needs to be sought and duly considered. It is extremely important that the result of an Appeal or Judicial Review is seen by the industry as final. It is to be expected that the appeal process will ensure that all affected parties arguments/views will be given due consideration. However, this could be undermined by a process which whilst running contemporaneously with the Appeal, completely fails to consider the impact of implementation upon Parties. In an extreme case this could in itself lead to a challenge against the action of NGC.

Provision of information to NGC

Without full consultation on a newly proposed implementation date NGC will be unable to ascertain the validity of their suggestion. It is also within the realms of possibility that an Appeal or Judicial Review could itself be based on the proposed implementation date. In such a case it would be wholly unacceptable for NGC merely to suggest another date, which without consultation, will fail to address the cause of the Appeal. We firmly believe that it is in NGC's best interests to consult under such circumstances. The potential for conflict of interest (in setting a revised date) is real and can be avoided by consultation.

Market Certainty

The consultation process will not only provide parties with the ability to comment upon the implementation date, it will also act as an important 'flag' to signal the current progress of the appeal and the likely timescale for resolution. It should be remembered that this process will necessarily be under way at a time of great market uncertainty. It is expected that the Appeal or Judicial Review will only have been allowed to proceed on the basis that it has a chance of success and it is reasonable to assume that the challenge will only be raised against commercially significant amendments. A process which can provide an additional signal and information to the market under these conditions has to be beneficial.

Proposal 2: Working Group Alternative Amendment

Whilst we acknowledge that this proposal would address the perceived defect, we believe it to be significantly inferior to the Working Group preferred solution. The omission of a consultation phase from this Alternative will result in the Authority having to make a decision based on a fraction of the information necessary. Additionally, it will force NGC in to a situation where there could be a conflict of interest.

It is in the interest of the entire industry to ensure that the Appeals process results in outcomes which can be accepted as equitable and final. Whilst the Working Group preferred solution is synonymous with this goal, it is debateable whether the Alternative Amendment is quite so compatible.

If you would like to discuss any of the matters raised within our response please don't hesitate to contact me.

Yours sincerely

Neil Smith
Regulatory Analyst
Trading Arrangements
Energy Wholesale
E.ON UK plc

Reference	CAP077-CR-05
Company	Edf Energy Merchants

Richard Dunn
National Grid Company
NGT House
Gallows Hill,
Warwick,
CV34 6DA

28th January 2005

Dear Richard,

CUSC Amendment Proposal CAP077 (Implementation Dates)

Please find herewith, the response made on behalf of EDF Trading Ltd and EDF (Generation) to the CUSC consultation on the Amendment Proposal CAP077 on Implementation Dates.

We fully agree that there is a defect in the CUSC as described by CAP077 and the Consultation Report. Circumstances can arise that mean there is not a viable Implementation Date for the Authority to apply.

The two solutions offered in the report are in our opinion sufficient to address the defect and as such they would both better the CUSC Objectives if adopted. However, in view of the need for an increasing amount of transparency behind any decision making and the potential for any proposed change to an Implementation Date to have an impact on CUSC Parties other than NGC, it is our considered opinion that the Amendment Proposal is better than the Alternative Amendment.

We further note that whilst the work processes intended to be followed by NGC have been included in the report, they have not been fully encapsulated within the legal text. We too see no need for this to be explicitly laid down in the CUSC as it allows for such processes to evolve. However we would urge that the elements of the Work Process are adhered to and only changed with the agreement of the CUSC Panel.

Yours sincerely

Steve Drummond
UK Market Adviser to EDF Trading Ltd

Reference	CAP077-CR-06
Company	RWE

From: Ballard, Terry (Corporate) [TERRY.BALLARD@rwenpower.com]
Sent: 28 January 2005 11:47
To: Dunn, Richard
Subject: FW: CAP077 Implementation Dates

Richard,

I can confirm that RWE support the proposed amendment but agree that if the Authority were to reject the amendment, the alternative amendment also better facilitates the relevant applicable objectives.

By the way there is a typo in the e-mail address under 'Views Invited'. It

says richard.dunn@ngtuk.co.uk which doesn't get through rather than .com
 Regards,

Terry Ballard
 01905-340507
 01793-892715
 07989-493038

Please note my new e-mail address: Terry.Ballard@rwenpower.com

.....
The information contained in this email is intended only for the use of the intended recipient at the email address to which it has been addressed. If the reader of this message is not an intended recipient, you are hereby notified that you have received this document in error and that any review, dissemination or copying of the message or associated attachments is strictly prohibited.
If you have received this email in error, please contact the sender by return email or call 01793 877777 and ask for the sender and then delete it immediately from your system. Please note that neither RWE npower nor the sender accepts any responsibility for viruses and it is your responsibility to scan attachments (if any).

Annex 6 – Copies of Comments received on the Proposed Amendment Report

This Annex includes copies of any representations received following circulation of the Draft Amendment Report (circulated on 2nd February, requesting comments by close of business on 9th February).

Representations were received from the following parties:

No.	Company	File Number
1	EdF Energy Merchants	CAP077-AR-01
2	Centrica	CAP077-AR-02

Reference	CAP077-AR-1
Company	EdF Energy Merchants

From: steve.drummond@edftrading.com
Sent: 03 February 2005 10:55
To: GoldIC, Industry Codes
Cc: Graff, Ben; BrayH@cia.org.uk; Murray, Chris J; David Lane; David Edward; Dick Cecil; dipen.gadhia@ofgem.gov.uk; Simon Goldring; gary.rodgers@pxlimited.com; Hugh Conway; Greasley, John; Katherine.Morrison@energywatch.org.uk; Malcolm Taylor; Paul Jones; Court, Richard; Dunn, Richard; Rob Barnett; Bob Brown; Rupert Judson; Russell Reading; Steve.Mackay@ofgem.gov.uk; Steve Phillips; Steve Drummond
Subject: Re: CUSC: Draft Amendment Report for CAP077

Thanks Richard, I'm happy with the report, save for one small point:

In Section 11 there's reference to 'five members of the Panel (including the Chairman)'. This of course implies the CUSC Panel Chairman which is obviously not right. I'd just delete '(including the Chairman)'.

I'm pleased it now looks like is now going to the Authority in good time,

Regards

Steve

11.0 SUMMARY OF PANEL MEMBERS VIEWS

11.1 Several Members of the Panel initially expressed some doubt over the timing for CAP077 at the Panel meeting on 29th October. These Panel Members were concerned that the outcome of the DTI's consultation (issued on 4th October 2004) on a draft order on Appeals against Ofgem Code Modification decisions under the Energy Act 2004 should be known before CAP077 was taken further. However, five Members of the Panel (including the Chairman) subsequently became Members of the CAP077 Working Group and supported the Working Group's final report to the Panel. The Working Group had subsequently developed a generic approach to the trigger events of a Legal Challenge (including appeals under the Energy Act 2004) in the legal drafting for CAP077 such that the outcome of the DTI consultation was not after all necessary to progress CAP077. At the special Panel meeting on 12th January the Panel were unanimous in their view that the Working Group had met its Terms of Reference and that CAP077 should proceed to industry consultation.

-----+----->

"GoldIC, |
 Industry Codes" |
 <Goldic@ngtuk.co|
 m> |

02/02/2005 16:31|

-----+----->

-----+----->
 -----+----->
 -----+----->

Reference	CAP077-AR-2
Company	Centrica

From: Goldring, Simon [Simon.Goldring@centrica.co.uk]
Sent: 04 February 2005 15:22
To: Dunn, Richard
Cc: Paul Jones; Steve.Mackay@ofgem.gov.uk; Murray, Chris J; Steve Phillips; Steve Drummond; Rupert Judson; Bob Brown; Court, Richard; Malcolm Taylor; Greasley, John; Dick Cecil; David Edward; Graff, Ben; David Lane; Hugh Conway; Manley, Mark
Subject: RE: CUSC: Draft Amendment Report for CAP077

Richard,

Thank you for the opportunity to review the draft Amendment Report. I offer the following two comments:

a) In 10.15 it is stated that NGC could have a problem with having to consult if the answer(s) received don't meet their preferred solution. I think this is rather disingenuous. As the author of the report and the party making the recommendation there is no possibility of a problem occurring. It is also particularly galling when in this report NGC have chosen to make a different recommendation to that supported unanimously by all respondents to the consultation!

b) In 10.18 typo - "form" should read "from".

Regards

Simon Goldring

The information contained in or attached to this email is intended only for the use of the individual or entity to which it is addressed. If you are not the intended recipient, or a person responsible for delivering it to the intended recipient, you are not authorised to and must not disclose, copy, distribute, or retain this message or any part of it. It may contain information which is confidential and/or covered by legal professional or other privilege (or other rules or laws with similar effect in jurisdictions outside England and Wales). The views expressed in this email are not necessarily the views of Centrica plc, and the company, its directors, officers or employees make no representation or accept any liability for its accuracy or completeness unless expressly stated to the contrary.