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The National Grid Company, CUSC Signatories  
and Other Interested Parties

31 March 2005

Our Ref: IND/COD/CUSC/CAP077

Dear Colleague,

**Amendment to the Connection and Use of System Code (“CUSC”) - Decision and Notice in relation to Proposed Amendment CAP077: “Revision to CUSC Amendment Implementation dates where an Authority Decision is referred to Appeal or Judicial Review”.**

The Gas and Electricity Markets Authority (the “Authority”<sup>1</sup>) has carefully considered the issues raised in the Amendment Report<sup>2</sup> in respect of Proposed Amendment CAP077: “Revision to CUSC Amendment Implementation dates where an Authority Decision is referred to Appeal or Judicial Review”.

National Grid recommended to the Authority that the Working Group Alternative Amendment be approved (WGAA).

Having carefully considered the Amendment Report and NGC’s recommendation and having regard to the Applicable CUSC Objectives<sup>3</sup> and Ofgem’s wider statutory duties,<sup>4</sup> the Authority has decided to direct a modification to the CUSC in line with Proposed Amendment CAP077.

A separate letter contains the direction to NGC to modify the CUSC in accordance with the Proposed Amendment relating to CAP77 as set out in the Amendment Report.

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<sup>1</sup> Ofgem is the office of the Authority. The terms “Ofgem” and “the Authority” are used interchangeably in this letter.

<sup>2</sup> CAP077 Amendment Report, Issue 1.0, Dated 10 February 2005.

<sup>3</sup> The Applicable CUSC Objectives are contained in Standard Condition C10 of the licence to transmit electricity treated as granted to NGC under Section 6 of the Electricity Act 1989 (the “Transmission Licence”) and are:

- (a) the efficient discharge by the licensee of the obligations imposed upon it under the Act and by this 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.

<sup>4</sup> Ofgem’s statutory duties are wider than the matters that the Panel must take into consideration and include amongst other things a duty to have regard to social and environmental guidance provided to Ofgem by the government.

This letter explains the background to Proposed Amendment CAP077, and sets out the Authority's reasons for its decision. This letter constitutes notice by the Authority under section 49A of the Electricity Act 1989 in relation to the direction.

## **Background**

The proposed implementation date is an integral part of the final report for proposed code modifications submitted to Ofgem for decision. NGC's Transmission Licence (the Licence) sets out the requirements for the setting of Implementation dates. In summary, the Licence requires implementation dates to be set which allow an Approved Amendment to take effect as soon as practicable after Ofgem has directed the amendment to be made. The Licence also allows for the timetable for implementation to be extended if Ofgem so directs.

Section 8.2.3.3 of the CUSC, which relates to the alteration of implementation dates, does not adequately cater for the alteration of implementation dates in the event that an Authority decision is legally challenged as this section of the CUSC only enables the Authority to grant an extension of the implementation timetable in relation to Approved Amendments.

There are two situations in which legal challenge could arise. The first in the form of Judicial Review. The second could arise after the implementation of the appeal arrangements to the Competition Commission under the provisions introduced by the Energy Act 2004.<sup>5</sup>

Legal challenge has the potential to result in the Authority revisiting its previous decisions. Depending on timescales, a consequence of this may be that the Authority is not capable of re-considering an Amendment before the expiry of the implementation date contained in the original Amendment Report. The practical effect of such a situation could be that the Amendment would "time out" and be incapable of implementation.

In order to rectify this situation, NGC submitted Amendment Proposal CAP077 "Revision to CUSC Amendment Implementation dates where an Authority Decision is referred to Appeal or Judicial Review".

## **The Proposed Amendment**

CAP077 proposes to introduce provisions to the CUSC in order to ensure NGC provides revised implementation dates to the Authority in the event that one of its decisions is subject to a legal challenge and the original decision date in the Amendment Report is no longer considered by NGC as being viable. It was considered appropriate that arrangements should require NGC to further revise the implementation date in order to allow for the possibility that the process of legal challenge became longer than first expected. It was also proposed that CAP077 should be capable of applying to both approved and rejected amendments. Some uncertainty existed as to whether the Secretary of State would designate the CUSC as a document subject to the Appeal provisions of the Energy Act. Whilst this was the case the Working Group considered that if a generic approach were adopted to the definition of legal challenge, CAP077 could cater for references to the Competition Commission without needing to ascertain if the CUSC would be designated for appeal by the Secretary of State.

Two reasons were cited why CAP077 may not be required at all. The first was based on the premise that an Amendment Report could have alternative dates inserted at the time of writing.

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<sup>5</sup> This is dependent on the CUSC being designated as a code subject to appeal.

The Working Group did not consider this solution appropriate as it would require the determination of an alternative date or dates when there was no need, and as it could not take into account any special circumstances arising. The second reason was that legal challenges may highlight new arguments or issues, and as such it would be better for the Amendment to time out and be re-raised in due course. The Working Group considered this unnecessarily inefficient.

The Proposed Amendment developed by the Working Group was the first of two approaches which the group considered might be adopted. The Proposed Amendment included a round of consultation with the CUSC Parties prior to the submission to the Authority of a revised date or dates. The majority of the Working Group favoured the Amendment Proposal on the grounds that it would ensure any impact on CUSC Parties could be sought and duly considered.

The Working Group considered it appropriate for NGC to take account of a number of issues when formulating a date under the provisions of CAP077. Whilst this was the case the Working Group did not consider these requirements needed to be included in the legal text.

### **The Working Group Alternative Amendment**

The WGAA developed by the Working Group was essentially the same as the Proposed Amendment but differed in one respect, namely that the WGAA did not include a round of consultation with the CUSC Parties prior to the submission to the Authority of a revised date or dates.

NGC considered that the inclusion of an extra round of consultation would not add any useful purpose to the proceedings and as such incurred extra resources needlessly. NGC also considered excluding a round of consultation was the most appropriate approach as this was thought to be more in line with existing arrangements and would avoid the introduction of an unnecessary and inefficient element in the process of determining a new implementation date. Accordingly, it was NGC's view that the WGAA better facilitated the Applicable CUSC Objectives as compared to both the legal baseline and the Proposed Amendment.

### **The View of the Working Group**

The Working Group agreed that CAP077 (both the Proposed Amendment and the Alternative Amendment) would ensure that Approved Amendments and Rejected Amendments subjected to legal challenge do not "time out". As such, the Working Group considered that both would enable NGC to more easily and efficiently discharge its obligations under the Electricity Act and the Transmission Licence, thus better facilitating Applicable CUSC Objective (a). It was also thought that by ensuring Amendments do not time out, CAP077 reduces the risk of potential improvements to the existing contractual framework being lost or unduly delayed. As such the Working Group considered that CAP077 would better facilitate competition in the generation and supply of electricity and Applicable CUSC Objective (b).

As the Working Group considered that either formulation would better facilitate the achievement of the Applicable CUSC Objectives when compared to the current baseline, it recognised the need to assess whether or not the WGAA better facilitated those Objectives than the Proposed Amendment. The Working Group considered this issue and concluded, by a majority, that undertaking consultation in relation to a revised date or dates would better

facilitate the achievement of the Applicable CUSC Objectives over and above that achieved by the WGAA.

### **Consultation Document Respondents' views**

NGC issued a consultation paper on 12 January 2005 inviting responses from CUSC Parties and interested parties by 28 January 2005.

NGC received six responses to the consultation in respect of Proposed Amendment CAP077, of which six expressed support for both the Proposed Amendment and the Alternative Amendment when compared to the current baseline, although all of these six also considered that the Proposed Amendment was preferable when compared to the WGAA.

The responses generally agreed that there was a defect in the current arrangements. It was suggested that this deficiency related to the potential for implementation dates to become unviable as a result of a legal challenge being brought against an Authority decision and that this could create a risk of Amendments being timed out, resulting in inefficiencies in the change process of the CUSC.

A number of respondents commented that, in their opinion, the Amendment Proposal was of greater benefit than the WGAA. To this end one respondent commented that parties should be able to comment where they felt that the revised implementation date may put them at a competitive disadvantage. Another respondent suggested it did not perceive any efficiency gain associated with the WGAA, as had been suggested by NGC, and that it considered consultation in relation to a revised implementation date would be consistent with the current arrangements for consultation contained within the CUSC. Another suggested that the Amendment Proposal offered greater transparency as a result of the consultation element it contained. This respondent noted that whilst it was content that the working practices NGC was intending to follow in the event of an appeal were not reflected in the legal text, the respondent considered it important that those processes be adhered to and only changed with the agreement of the CUSC Panel.

One respondent commented that it would be appropriate for the legal text to require NGC to notify CUSC Parties when NGC decides that the implementation date remains viable and that no consultation is necessary. The respondent also noted that the Competition Commission has issued a consultation on the process which will allow them to discharge their obligation to consider appeals. This response indicated that the proposed process obligates the appellant to notify all affected parties upon raising the appeal. It was suggested that placing such an obligation upon CUSC Parties would remove the dependency in the process developed under CAP077 whereby the mechanism is reliant upon the Authority informing NGC that legal challenge has been granted leave to proceed. The respondent sought the views of the CUSC Panel as to whether a new Amendment Proposal might be required to capture this obligation.

Finally one respondent commented that, in its opinion, the Amendment Proposal had four advantages over the WGAA. These included that the Amendment Proposal ensured that vital information would be provided to the Authority, that the views of CUSC Parties would be adequately considered, that the relevant information would be provided to NGC as it undertook to work up a revised implementation date, and provided additional market certainty to the industry in terms of a likely timescale for the resolution of the issue at hand.

The respondents' views are summarised and contained in the Amendment Report in respect of Proposed Amendment CAP077.

### **Draft Amendment Report Respondents' views**

A Draft Amendment Report was circulated on 2 February with comments requested by 9 February 2005. Two responses were received. Both responses offered minor corrections in terms of the phraseology used in the report.

### **NGC's recommendation**

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.

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.

### **Ofgem's view**

Having carefully considered the Amendment Report, Ofgem considers, having regard to its statutory duties and the Applicable CUSC Objectives, that Proposed Amendment CAP077 would better facilitate the achievement of Applicable CUSC Objectives (a) and (b).

Conditions C10 1 &2 of the Transmission Licence require that NGC shall prepare a CUSC including, amongst other things, the procedures required by Condition C10 (6). This Condition requires, amongst other things, the procedures for the modification of the CUSC to allow for the implementation timetable to be extended with the consent of the Authority. Ofgem considers that both CAP077 and the WGAA would better facilitate achievement of Applicable CUSC Objective (a) by enabling the Licensee to more efficiently discharge the obligations imposed upon it by Licence condition C10 6 (c) in relation to instances where Ofgem decisions on Code Amendments are referred to appeal or Judicial Review and where Ofgem consents to the variation of the timetable of implementation.

Further to the above, Licence Condition C10 6 (c) also requires, amongst other things, that the implementation timetable be capable of being extended as directed by the Authority. However neither the proposal nor the current text of the CUSC provides for this. Nevertheless Ofgem considers that both CAP077 original proposal and the WGAA amendment developed are capable of better facilitating the achievement of Applicable CUSC Objective (a) relative to the current code baseline.

The requirement for NGC to consult on revised implementation dates before they are submitted to the Authority provides greater transparency of the two alternatives, and will ensure that all Parties affected by the potential implementation of an Amendment Proposal are involved in the development of the revised date. Failure to consult in this manner may result in Parties being subjected to a material detriment as a result of the Implementation date chosen. As such, in this case, Ofgem considers that the increased transparency offered by the Proposed Amendment outweighs the additional administrative burden that undertaking a round of consultation will entail and that as a result the Proposed Amendment facilitates the achievement of Applicable CUSC Objective (a) to a greater extent than either the current baseline or the WGAA.

Ofgem also considers that by ensuring that improvements to the CUSC are not lost as a result of timing out, that both CAP077 and the WGAA would better facilitate Applicable CUSC Objective (b). Both amendments offer increased regulatory certainty to the market by ensuring the Authority can make a decision in respect of modifications remitted for decision following legal challenge, and that this increase in regulatory certainty promotes Applicable CUSC Objective (b).

The view has been put forward that the WGAA is the most suitable solution as it was more in line with existing arrangements and was suggested to be an unnecessary and inefficient element of the process. Ofgem considers that Implementation dates are a fundamental element of an Amendment Report and the Amendment Proposal(s) detailed in those reports. Ofgem notes that the Consultation Report and the Draft Amendment Report contain, amongst other things, the proposed implementation date for an Amendment Proposal and that respondents are able to make suitable representations. Ofgem considers that it would be inappropriate for the solution developed and implemented under CAP077 to fail to reflect this. Whilst this is the case Ofgem notes that the CUSC does not contain any formal requirement regarding the need to consult on a proposed Implementation date during the assessment of an Amendment Proposal. Given the importance of Implementation dates, as indicated from the unanimous industry perspective that consultation on revised Implementation dates is of significant value, Ofgem considers industry participants may wish to consider whether it would be appropriate to introduce a consultation requirement earlier in the process with a view to ensuring that all opinions are taken into account when setting the original Implementation date.

A submission was made via industry consultation to the effect that the proposed rules for the conduct and disposal of appeals in energy code modification cases as consulted upon by the Competition Commission require prospective appellants to send certain information to persons as appear to the applicant to be affected by the decision. Ofgem notes that these rules are currently in draft format, and it may not have been practical for CAP077 to have been developed to reflect the detail of rules which require finalisation.

### **The Authority's Decision**

The Authority has therefore decided to direct that Proposed Amendment CAP077, as set out in the Amendment Report, should be made and implemented on 14 April 2005. An attached letter contains this direction.

If you have any queries in relation to the issues raised in this letter, please feel free to contact me on the above number.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'N. Simpson', written over a horizontal line.

**Nick Simpson**  
**Director, Modifications**

Signed on behalf of the Authority and authorised for that purpose by the Authority