

**Minutes and Actions Arising from Meeting No.64  
Held on 27 April 2007  
At National Grid Office, Warwick**

**Present:**

Simon Cocks	SC	Panel Chairman
Beverley Viney	BV	Panel Secretary
Duncan Burt	DB	Panel Member (National Grid)
Paul Jones	PJ	Panel Member (Users Member)
Malcolm Taylor	MT	Panel Member (Users Member)
Tony Diccio	TD	Panel Member (Users Member)
Garth Graham	GG	Panel Member (Users Member)
Bob Brown	BB	Panel Member (Users Member)
Simon Lord	SL	Panel Member (Users Member)
Dick Cecil	DC	Panel Member (Users Member)
David Edward	DE	Authority Representative
Hugh Conway	HC	energywatch Representative

**In Attendance:**

Patrick Hynes	PH	National Grid
Craig Maloney	CM	National Grid
Nick Pittarello	NP	National Grid
Emma Carr	EC	National Grid
Mike Davies	MD	Wind Energy (Forse) Limited
Kathryn Coffin	KC	BSC Panel Representative
Paul Mott	PM	EDF energy
Dewi ab-lorwerth	Dal	Centrica

**1 Introductions/Apologies for Absence**

1038. Apologies were received from Hedd Roberts.

**2 Minutes of the Meeting held on 30 March 2007**

1039. The minutes of the 63<sup>rd</sup> Amendments Panel meeting held on 30<sup>th</sup> March 2007 were AGREED with minor amendments.

**3 Review of Actions**

1040. **Action 1011** – BV to mark CAP147 as withdrawn if no response to 5 day notice – action complete.

1041. **Action 1014** – MA to circulate a copy of BSSG Terms of Reference to Panel – action complete.

1042. **Action 1015** – CAP141 to proceed to Consultation – action complete.

1043. **Action 1035** – BV to circulate and publish (March Headline Report) – action complete.

#### 4 New Amendment Proposals (as at 19/04/07)

##### **CAP148: Deemed Access Rights to the GB Transmission System for Renewable Generators –**

1044. Essentially CAP148 is the same as the withdrawn CAP147. The Amendment Proposal was submitted following Ofgem's reply to the letter sent by Simon Cocks in his capacity as CUSC chairman, following the discussions about CAP147 at the February 2007 Panel .
1045. MD gave a presentation on CAP148 confirming that this Proposal would apply to new renewables only. (The presentation can be found on the National Grid Website under Working Groups – CAP148).
1046. MD stated that wind generation does not use the network in the same manner as other Generators and as such should be recognised for this.
1047. The question was raised about what would happen if two wind generators were geographically next to each other but one had TEC and the other was allowed to generate following the implementation of this amendment. MD confirmed DTEC would only apply to new renewables. In the event the system needed to be constrained, MD confirmed that under this amendment he would expect the one with TEC to be the constrained party.
1048. A Panel member raised the concern that CAP148 would increase the overall cost of constraints and which would increase the overheads of all parties.
1049. In response to the question, DE confirmed that the secondary Ofgem objective shouldn't be a consideration of the Working Group. But it would be for parties to consider whether the issue fell within the code objectives.
1050. GG questioned whether it was possible under current EU law for this Amendment Proposal to proceed stating the overriding matter at hand is whether Ofgem or the CUSC Panel has the legal right to impose this change. If they do then the primary issue at hand with regard to CAP148 is transmission access and the granting of priority access to renewable energy. Of secondary consideration is the matter of constraining back of generation.
1051. GG stated it seemed (as stated in item 5 of the "Description of the Defect") that the proposer of CAP148 is relying upon Article 7 of the Renewables Directive 2001 and in particular the second sentence of the first paragraph; the three sentences of which GG outlined below:-
1052. *"Article 7* Grid system issues  
[1st sentence] Without prejudice to the maintenance of the reliability and safety of the grid, Member States shall take the necessary measures to ensure that transmission system operators and distribution system operators in their territory guarantee the transmission and distribution of electricity produced from renewable energy sources.
1053. [2nd sentence] They may also provide for priority access to the grid system of electricity produced from renewable energy sources.

1054. [3rd sentence] When dispatching generating installations, transmission system operators shall give priority to generating installations using renewable energy sources insofar as the operation of the national electricity system permits."
1055. GG understood, having read the first paragraph Article 7, that only a Member State "**may** also provide for priority access to the grid system of electricity produced from renewable energy sources".
1056. Given that the Member State in this instance is the UK and that the Government and Parliament has on at least one (the Energy Act 2004) and possibly two (the Utilities Act 2000) occasions; having been aware of the Renewables Directive 2001; had an opportunity "to provide priority access to the grid system of electricity produced from renewable energy sources" and has not done so GG did not see how any other body (even a 'public authority') had the 'vires' to do so.
1057. GG was mindful that Parliament in establishing NETA and BETTA (as well as the Secretary of State in designating the NETA and BETTA versions of the Grid Code, CUSC and BSC etc.) has set out in the Energy Act 2004 and the Utilities Act 2000 an approach a central tenant of which is specifically none discrimination with regard to transmission access (as well as other matters) which can be said to be directly opposite to providing "for priority access to the grid system of electricity produced from renewable energy sources". This might suggest CAP148 may be 'ultra vires'?
1058. It therefore seems clear to GG that the UK, as the Member State, has not provided "for priority access to the grid system of electricity produced from renewable energy sources".
1059. Furthermore it would seem that if Member States were, prior to the Renewables Directive 2001, empowered under EU Law to "provide for priority access to the grid system of electricity produced from renewable energy sources" there would be no need to state this in Article 7.
1060. GG was unclear as to why the Ofgem legal advisors took account of Foster v British Gas with regard to 'discrimination'.
1061. Reading Foster v British Gas GG noted that there is only one reference to 'discrimination'; namely in paragraph 9:-
1062. "application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex ".
1063. It seemed to GG that Foster v British Gas was not about 'discrimination' per se: it was about whether a 'public authority', in this case state-owned British Gas Corporation, should have been bound by an EU Law where the Member State (in this case the UK) had failed to enact it into national law. As noted in the paragraph 16 of the Foster v British Gas judgement:-
1064. "As the Court has consistently held ( see the judgment in Case 8/81 Becker v Hauptzollamt Muenster-Innenstadt [1982] ECR 53, paragraphs 23 to 25 ), where the Community authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a

court and national courts were prevented from taking it into consideration as an element of Community law . Consequently, a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails. Thus, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State."

1065. This being the case then British Gas Corporation (the predecessor of British Gas plc) was bound by the Article 5 (1) of Directive 76/207, which relates to equal treatment for men and women as regards access to employment and working conditions.
1066. GG was mindful that the legal references to the 'Foster v British Gas' case he had seen are related to 'public authority' matters. GG therefore contended that 'Foster v British Gas', as case law, is not relied upon in relation to 'discrimination' per se, but rather to matters associated with 'public authority'.
1067. GG also contended that the wording in the first paragraph of Article 7, as they relate to "priority access to the grid system of electricity produced from renewable energy sources", has not "placed Member States under a duty to adopt a certain course of action" (paragraph 16 of Foster v British Gas).
1068. The reference in footnote 2 of the Ofgem letter also states that National Grid "are required to be interpreted in a manner consistent with binding EC rules". GG agreed with this statement.
1069. Noting that the second sentence of Article 7 indicates that Members States "may also provide for priority access to the grid system of electricity produced from renewable energy sources" it seemed that "may also provide" is not "binding EC rules" therefore National Grid does not have to comply.
1070. If Article 7 had said Member States "shall also provide for priority access to the grid system of electricity produced from renewable energy sources" then National Grid would be bound to do this, irrespective of whether the Member State; i.e. the UK; Parliament had passed the necessary laws by the due date in the Directive.
1071. The reference in footnote 2 of the Ofgem letter indicates that National Grid is bound by the Foster v British Gas judgement. GG agreed with this statement.
1072. Two points to note: (i) as GG understood the law National Grid would be bound by this judgement whether it was 'Foster v British Waterways' or 'Foster v XYZ' and (ii) his recollection was that British Gas plc (the organisation involved in the Foster case) was split into two; Centrica and Lattice and that subsequently Lattice was split into two parts, BG Group and Transco (which National Grid purchased) – he was not 100% certain that National Grid is actually the predecessor of British Gas plc.
1073. Notwithstanding the above, GG was curious as to how the definition of "DTEC" in 4.1 on page 7 of CAP148 ("Existing renewable generators with TEC should keep it rather than switch to DTEC") would fit in with the principle of discrimination in favour of renewable generation by granting them DTEC?

1074. GG noted that if you were to take the existing North Hoyle windfarm (with TEC) and someone were to build (assuming CAP148 was implemented) an identical windfarm next door then its DTEC would take precedence over North Hoyle TEC. Assuming the wind blows at both sites at the same time, then the DTEC wind farm would prevent the North Hoyle TEC wind farm from exporting; i.e. no extra renewable generation output would arise. How is this consistent with the Renewables Directive?
1075. Noting that CAP148 proposes to recover "Interruption Payments" from TNUoS, which must presumably rise as a result and that the highest level of TNUoS generation charges in GB are currently in northern Scotland GG questioned if CAP148 conforms with paragraph 6 of Article 7, namely that:-
1076. "Member States shall ensure that the charging of transmission and distribution fees does not discriminate against electricity from renewable energy sources, including in particular electricity from renewable energy sources produced in peripheral regions, such as island regions and regions of low population density."
1077. Mindful of the reference in footnote 2 of the Ofgem letter (see 1068-1070 above) and the comments in 1063-1066 above GG noted that this paragraph 6 of Article 7 obligation is binding on all 'public authorities' (including Ofgem and National Grid) irrespective of whether the Member State does so or not.
1078. GG was also mindful that under NETA and BETTA the concept of 'self dispatch' has been established in GB. Whilst the third sentence of the first paragraph of Article 7 ("When dispatching generating installations, transmission system operators shall give priority to generating installations using renewable energy sources insofar as the operation of the national electricity system permits.") does permit a TSO to give priority to renewables, in the GB market as the TSO does not dispatch generation the GBSO is in no position to "give priority to generating installations using renewable energy sources".
1079. As an aside GG noted that regarding the reference in footnote 2 of the Ofgem letter to the interpretation of "efficient operation" it will be for others to judge if "driving the most expensive conventional generation to go" (as stated in the presentation slides for CAP148) where they are cheaper than DTEC Renewables is an "efficient operation" or that it can be done "without prejudice to the maintenance of the reliability and safety of the grid" (the requirement stipulated in the first sentence of the first paragraph of Article 7).
1080. It was suggested that TASG look at CAP148 however the Panel felt that as CAP148 was such a large amount of work this was impracticable.
1081. It was agreed that CAP148 would proceed to Working Group for 3 months with MT as chair of the Working Group. Nominations for the Working Group should be sent to BV by 8<sup>th</sup> May 2007.
1082. During the discussion the following were identified for the CAP148 Working Group Terms of Reference
- Assumptions planning and TEC– are they identical at the moment?
  - Removal of barriers, removal of discrimination and subsidised entry isn't always best for competition
  - Faster market penetration by renewable energy, enhancing competition, furthering Ofgem's secondary objective & achievement of Government

- targets
  - The interaction with CAP131 can't be considered as this is not part of the current baseline.
  - Whether CAP148 compatible with law
- 1083. Discussion was had about obtaining legal advice on the points raised in Ofgem's letter. National Grid informed the Panel that they intended to seek legal advice as a company, and it was agreed that National Grid would also request advice on behalf of the Panel.

**Action: DB**
- 1084. DC also requested DB to circulate the instructions

**Action: DB**
- 1085. SC expressed disappointment with the Ofgem response to the issues raised about CAP147. DE said he would feed back to Ofgem the concerns raised.

### 5 Standing/Working Group Reports

- 1086. **BSSG (Balancing Services Standing Group) – Start Up** – The BSSG was suspended a year ago, the Panel agreed at the March CUSC Panel to reconvene the BSSG to consider frequency response procurement, and reactive power and generation. Some nominations have been received however if anyone had any further nominations these should be sent to Beverley Viney as soon as possible.
- 1087. **TASG (Transmission Access Standing Group)** – PH gave a presentation, there have been a number of trading and access related proposals recently. National Grid are proposing the Transmission Access Standing Group is reconvened to consider some of the key issues which include Bilateral Trading, SO release of spare capacity, short term product, proving local connection, integration of Renewables. It was proposed the standing group would provide the flexibility to discuss issues and develop models prior to Amendment Proposals being submitted.
- 1088. The CUSC Panel agreed to reconvene the standing group and nominations should be sent to Beverley Viney by 8<sup>th</sup> May. It is envisaged the standing group will have a timescale of 3 to 4 months, however it is appreciated that this is a stretching timescale and if more time is required the Panel would grant an extension. The first meeting is scheduled for 15<sup>th</sup> May at National Grid Warwick.
- 1089. **CAP143: Interim Transmission Entry Capacity (“ITEC”) product.** The Working Group Report was presented to the Panel by CM.
- 1090. It was noted by the Panel that a number of Working Group members abstained from the voting on the preferred option of the Original and Working Group Alternative proposals. It was stated that this was due to them not wishing to be perceived as supportive of either option.
- 1091. It was also noted that some Working Group members did not vote on the assessment of the Original and Alternative proposal against the applicable CUSC objectives on the ground that they had not attended all of the Working Group meetings and therefore they felt it would be unfair for them to vote.

1092. Some minor changes were requested for the legal text. GG said that he believed that the Town and Country Planning Act did not apply in Scotland and suggested that CM might want to investigate this further and update the legal text if required.  
**Action : CM**
1093. The Panel agreed for CAP143 to Proceed to Consultation for 5 weeks to allow for the Bank Holiday periods.  
**Action : CM**
1094. **CAP144: Emergency Instruction to emergency deenergise.** The Working Group Report was presented to the Panel by MT.
1095. MT acknowledged the enthusiasm of the Working Group members. In the course of the discussions all Working Group members came to the conclusion that they were uncomfortable with the clarity of CAP048 text. It was suggested that post discussion of CAP144 that a clarification Amendment is raised and was deemed out of scope for this Working Group.
1096. If WGA1 is the option approved it is envisaged that a similar amendment would be raised to CAP048 arrangements within the CUSC to aligne compensation arrangements.
1097. The Panel agreed for CAP144 to Proceed to Consultation for 5 weeks to allow for the Bank Holiday periods.
1098. **CAP146: Responsibilities and liabilities associated with Third Party Works and Modifications made by Modification Affected Users.** TD gave a presentation on the CAP146 Working Group report.
1099. The implementation date was outlined. There are currently two options i) 3 months or ii) 1 month (if only connection offers after implementation was issued under the new arrangements).
1100. DE asked about the retrospective options and it was confirmed that ii) would not be retrospective
1101. The Panel agreed for CAP146 to Proceed to Consultation for 5 weeks to allow for the Bank Holiday periods.

## 6 Consultation Papers (as at 19/04/07)

1102. **CAP131 – User Commitment for New and Existing Generators** – NP informed the Panel that there had been a large number of replies and Consultation Alternatives proposed. Given the number of Consultation Alternative Amendments the most appropriate structure of the Consultation Alternative Document was discussed with focus on the best approach to present the relevant options to Ofgem.
1103. The Panel agreed that where possible each Consultation Alternative Amendment should be aligned to only one Working Group Alternative Amendment in order to

reduce the possible combinations. National Grid agreed to approach those parties that had raised CAAs with this suggestion but noted that under the existing CUSC provisions, relevant parties were under no obligation to limit the applicability of CAAs only to one WGAA.

**Action: NP**

1104. **CAP141 – Clarification of the content of a Response to a Request for a Statement of Works** – BV informed the Panel that the Consultation was issued on 12<sup>th</sup> April with a closing date of 17<sup>th</sup> May.

## **7 CUSC Amendment Panel vote**

1105. **CAP142 Temporary TEC Exchanges** The result of the Panel Recommendation Vote as to whether CAP142 BETTER facilitated the Applicable CUSC Objectives for the majority were as follows:

Original Amendment Proposal	- NO a majority of 1 (5 to 4)
Working Group Alternative Amendment	- YES majority
BEST	- WGAA majority*

\* within one panel Member believing neither the Original nor the Working Group Alternative Amendment better facilitated the CUSC Applicable Objectives

Further details on these discussions can be found within the CAP142 Amendment Report.

1106. **CAP145 Embedded Generator MW Register.** The result of the Panel Recommendation Vote as to whether CAP145 BETTER facilitated the Applicable CUSC Objectives for the majority were as follows:

Original Amendment Proposal	- YES majority
Consultation Alternative Amendment	- YES majority
Consultation Alternative Amendment 2	- YES – unanimous
BEST	- CAA2

Further details on these discussions can be found within the CAP145 Amendment Report.

## **8 Pending Authority Decisions (as at 19/04/07)**

1107. **CAP127: Calculation and Securing Value at Risk** – DE reported that a response was expected in the next few weeks.

## **9 Authority Decisions (as at 19/04/07)**

1108. **CAP126: Clarification of the applicability and definition of Qualifying Guarantee and Independent Security** – The Authority Rejected CAP126 on 18<sup>th</sup> April 2007. Concern was raised by the Panel that the reasons for rejection could have been raised during the Amendment Proposal due process, and that it was not an efficient use of CUSC resources. DE agreed to relay these concerns back to Ofgem.

## **10 Report on other Industry Documents (BSC, STC, Grid Code and DCUSA)**



1109. Nothing to report

### 11 A.O.B

1110. Concern was raised regarding Working Group members voting following missing a large number of the meetings. The Panel considered that although there is nothing in the CUSC at the moment this is an issue that needs to be considered along with other governance issues and possibly a Governance Standing Group Formed. EC agreed to consider these further.

**Action: EC**

1111. KC will check with the BSC as to how this issue is addressed and advise the Panel.

**Action: KC**

1112. It was raised that at the time of the April Panel there is no scheduled business for the May Panel. The Panel were advised and agreed that if no new Amendment Proposals were submitted the May Panel would be cancelled. Notice would be issued to the Panel in accordance with the CUSC in May.

### 12 Record of Decisions – Headline Reporting

1113. The Panel Secretary would circulate an outline Headline Report after the meeting and place it on the National Grid website in due course.

**Action** – BV to circulate and publish.

### 13 Date of Next Meeting

1114. The next meeting is scheduled for Friday 18 May 2007, at National Grid House, Warwick Technology Park, Gallows Hill, Warwick, CV34 6DA. Should the May meeting be cancelled as stated in 1112 then the next meeting would be 29<sup>th</sup> June also at Warwick.