

**Minutes and Actions Arising from Meeting No.65  
Held on 29 June 2007  
At National Grid Office, Warwick**

**Present:**

Nigel Williams	NW	Panel Chairman
Beverley Viney	BV	Panel Secretary
Hedd Roberts	HR	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

**In Attendance:**

Duncan Burt	DB	National Grid
Nick Pittarello	NP	National Grid
Angie Quinn	AQ	National Grid
Aileen McLeod	AM	Scottish and Southern
Andy Balkwill	AB	National Grid
Kathryn Coffin	KC	BSC Panel Representative
Paul Mott	PM	EDF energy
Dewi ab-lorwerth	Dal	Centrica

**1 Introductions/Apologies for Absence**

1115. Apologies were received from Hugh Conway, Simon Cocks

**2 Minutes of the Meeting held on 27 April 2007**

1116. The minutes of the 64<sup>th</sup> Amendments Panel meeting held on 27<sup>th</sup> April 2007 were AGREED.

**3 Review of Actions**

1117. **Action 1083** – DB request legal advice on behalf of the Panel – action complete.

1118. **Action 1084** – DB to circulate legal advice instructions – action complete.

1119. **Action 1092** – CM to check legal text in CAP143 regarding planning law in Scotland – action complete.

1120. **Action 1093** – CM to proceed CAP143 to Consultation – action complete.

1121. **Action 1097** – EC to proceed CAP144 to Consultation – action complete.

1122. **Action 1101** - EC to proceed CAP146 to Consultation – action complete.

- 1123. **Action 1103** – NP Proceed with CAP131 agreed approach for CAA issue. – complete
- 1124. **Action 1110** – EC to consider Working Group voting and attendance issues – on going to be discussed at the next panel meeting.
- 1125. **Item 1111** – KC to send information regarding Working Group voting and attendance – complete
- 1126. **Item 1113** – BV to circulate headline report of April Panel - complete

#### **4 New Amendment Proposals (as at 21/06/07)**

##### **CAP149: TEC Lite –**

- 1127. AM gave a presentation on CAP149 which is available on the CUSC Website at <http://www.nationalgrid.com/NR/rdonlyres/5D71B0A6-270A-49A6-A6D6-68926FB12F16/18184/CAP149presentationJune07Panel.pdf>.
- 1128. Discussion was had as to whether it was a new access product or it was TEC but with some restrictions applied.
- 1129. It was agreed that CAP149 should proceed to Working Group for 3 months and TD would be chair.
- 1130. Nominations for the Working Group would be sent to BV by 6<sup>th</sup> July.

##### **CAP150: Capacity Reduction**

- 1131. AB gave a presentation on CAP150 which is available on the CUSC Website at <http://www.nationalgrid.com/NR/rdonlyres/075012CD-58A1-41E7-BC8D-00E62131A5BF/18185/CAP150155PresentationJune07.pdf>
- 1132. DC raised concern that it is inappropriate to endeavour to resolve a contractual issue by bringing forward amendment of a governance code. Such a procedure is not the purpose of a governance body, especially where it could effect financial decisions made before contracts were entered into.
- 1133. The question of a refund if an Asset is reused was raised, and the criteria for milestones needed to be detailed. The Panel therefore agreed that CAP150 should proceed to Working Group for 3 months. (It was later agreed that CAP150-155 would be processed by one Working Group)

Nominations for the Working Group would be sent to BV by 6<sup>th</sup> July.

##### **CAP151 Construction Agreements Works Register**

- 1134. AB gave a presentation on CAP151 which is available on the CUSC Website <http://www.nationalgrid.com/NR/rdonlyres/075012CD-58A1-41E7-BC8D-00E62131A5BF/18185/CAP150155PresentationJune07.pdf>
- 1135. The question of the content and format of the information to be provided in the register, the timing of when such information should be made available and the need

to assess consequential impacts on users was raised. The Panel therefore agreed that CAP151 should proceed to Working Group for 3 months. (It was later agreed that CAP150-155 would be processed by one Working Group) with DB the Chair of the Working Group

1136. Nominations for the Working Group would be sent to BV by 6<sup>th</sup> July.

### **CAP152-155: Revision to CUSC Exhibit B, D, F and I**

1137. AB gave a presentation on CAPs152, 135, 154 and 155 which is available on the CUSC Website at <http://www.nationalgrid.com/NR/rdonlyres/075012CD-58A1-41E7-BC8D-00E62131A5BF/18185/CAP150155PresentationJune07.pdf>

1138. The question of the need to assess consequential impacts on users including in particular elements surrounding key milestones along with the issue of altering the need for a user to state their required TEC was raised. Although this is not expected to be a lengthy Working Group and is likely to need only one or two meetings it was still deemed as requiring a Working Group to discuss further these proposals. The Panel therefore agreed that CAP152-155 should proceed to Working Group for 3 months. (It was later agreed that CAP150-155 would be processed by one Working Group), with DB the Chair of the Working Group.

1139. Nominations for the Working Group would be sent to BV by 6<sup>th</sup> July.

## **5 Standing/Working Group Reports**

1138. **BSSG (Balancing Services Standing Group)** – The BSSG has now met and are discussing frequency response and reactive tender process timescales. Further details of the Standing Group can be found at <http://www.nationalgrid.com/uk/Electricity/Codes/systemcode/workingstandinggroups/bssg/>

1139. **TASG (Transmission Access Standing Group)** – HR gave an update on TASG stating that a number of meetings had been held, during which a number of models have been proposed. There has been a useful debate on the pros and cons of these models and an interim report will be given to the next CUSC Panel, with the Final report at the August panel. Further details of the Standing Group can be found at <http://www.nationalgrid.com/uk/Electricity/Codes/systemcode/workingstandinggroups/TASG/>

1140. **CAP148: Deemed Access Rights to the GB Transmission System for Renewable Generators** – MT presented the revised Terms of Reference which were approved by the Panel.

1141. Whilst the group are making good progress the group still had a lot more work and therefore MT requested a month's extension for CAP148 Working Group which was approved by DE.

1142. The action regarding legal advice for CAP148 was briefly discussed. GG had provided Panel members with comments on the legal advice (see below). However,

AQ had not been made aware of GG's comments. In view of this and given time pressure it was agreed to hold over the action regarding the legal advice on CAP148 till the next meeting where AQ would address GG's comments and any other matters raised on this issue at the meeting.

**Action:AQ**

To avoid the need for GG to repeat in detail at the meeting his comments on the legal advice (as outlined in his email to the Panel of 18<sup>th</sup> June 2007) the Panel agreed that GG's comments should be included in the minutes.

GG noted that on 5<sup>th</sup> June 2007 the legal advice received by National Grid was circulated to Panel members (as well as members of the CAP148 Working Group). On 18<sup>th</sup> June 2007 GG wrote to Panel members indicating a number of concerns and flaws with the legal advice.

GG had some substantive comments on the legal opinion; however, before turning to those he noted that his understanding was that a "QC's" opinion would be obtained which would clarify things. GG indicated that at the second CUSC 148 Working Group meeting on 1st June (i) the Proposer of CAP148 (ii) the Chair of the Working Group (iii) the National Grid Technical Secretary and (iv) GG (as a Working Group member) all referred to a QC's opinion being obtained. However, National Grid instead only sought an opinion from its external lawyers which, it seems to GG, had skipped over the key issue (if only a Member State "may" do something can CUSC or Ofgem legally do this?).

GG then turned to his substantive comments. It is inferred (see for example para 2.1.5, 2.1.6 and 2.1.9) in the legal opinion that maybe Ofgem can take upon itself the role that the Directive reserves to the 'Member State'.

Specifically, the first sentence in para 2.1.9 (together with 2.1.5 and 2.1.6) is the relevant part of the opinion in this regard. It intimates that Ofgem, as an 'emanation' of the state', could do what a Member State 'may' do ("In its role as an emanation of the State, or Member State in this context, Ofgem could choose to, but does not have to, implement the option in the Directive").

GG thought this argument, in 2.1.9, to be flawed for a number of reasons:-

a). GG's understanding (vis for example Foster v British Gas) is that the obligation is on the 'emanation of the state' to do what a Directive says a Member State 'must'/'shall' do and not what a Member State 'may'/'might' do.

b). GG noted that if he were wrong in (a) and para 2.1.9 is right what would happen if another 'emanation of the state' (the DTI, or National Grid etc.) were to decide the opposite to Ofgem. One of the them (DTI) could be argued to be a 'superior' emanation of the state to Ofgem whilst the other (NG) could be argued to be an 'inferior' emanation of the state (if such a concept as 'superior' or 'inferior' emanations of the state exist?).

c). In the (BSC) P173 discussion Dentons (legal advisors to Elexon) provided legal advice to the working group which argued that National Grid and utilities (in exercising certain functions) could be considered to be 'emanations of the state' (a view GG did not necessarily subscribe to). If so could they (as well as Ofgem) decide to do what a Directive says a Member State 'may' do, and would it be legal? Para 2.1.9. implies, if they are 'emanations of the state', they could.

d). With (b) and (c) it seemed to GG there would be huge uncertainty - a recipe for disaster

- as we would not know what law (as to priority for renewables etc.) applied; (i) that decided by Ofgem or (ii) that decided by the DTI or (iii) that decided by any other 'emanation of the state' (such as NG or another utility).

e). If 2.1.9. were correct it implies the decision is binding in the Member State as a whole (as Ofgem has decided on the Member States' behalf). So what happens in Northern Ireland? It is a part of the Member State, and yet Ofgem has no vires there?

f). Whilst there are legal references and case law, such as Foster v British Gas etc., to back up GG's understanding in (a) he had not seen any legal references or case law to back up the argument in para 2.1.9. about an 'emanation of the state' doing what a Member State 'may' do. National Grid (at the 11th June CAP148 Working Group meeting) undertook to provide legal references, case law etc., on this matter, and GG looked forward to receiving this in due course.

g). The decision, to allow priority access for renewables, it seems to GG is a 'policy decision' for the Member State alone to take (perhaps having consulted others). As such he did not believe Ofgem has the vires to consider policy decisions like this which go beyond its statutory duties.

h). Whilst GG had not had a chance to read through the Parliamentary debate on the implementation of the Renewables Directives and in particular the first paragraph of Article 7, as he noted previously if this matter was addressed in Parliament then, notwithstanding the arguments above, he could not see under what statutory/legal basis Ofgem can act in contravention of the will of Parliament.

After all if Parliament had opined in support of prioritising for renewables (during the debate on the implementation of the Renewables Directives) GG would have expected, by now, that (1) the Proposer and/or (2) National Grid and/or (3) Ofgem would have pointed us to the relevant references.

i). As to why this is important GG was mindful that the very first sentence of the "Description of the Proposed [CAP148] Amendment" states that:-

"This Amendment Proposal will prioritise the use of the GB Transmission System by renewable generators, in accordance with the Renewables Directive 2001/77, Article 7."

The core of GG's argument is that, no matter how worthwhile or otherwise this proposal maybe, only the Member State is entitled under EC Law to implement a permissive provision of a Directive; i.e. paragraph 1 of Article 7 of the Renewables Directive 2001/77 .

Clearly if this is the case then, as stated in public by the QC for GEMA (when he quoted from the first, second and fifth sentences of paragraph 77 (at page 23) of the GEMA Statement of Reply) at the E.On Mod 116 Appeal hearing on 7th June:-

"It would plainly be unlawful for GEMA (or for the Commission) to act in breach of EC law. EC law is supreme. .... GEMA could not approve a modification proposal which was in breach of EC law, even if it could be said otherwise to "better facilitate" the relevant objectives".

That concluded GG comments in his email of 18<sup>th</sup> June 2007.

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

- 1143. **CAP141 – Clarification of the Content of a Response to a Request for a Statement of Works** –The Panel were informed that the Consultation Alternative closed on 12<sup>th</sup> June, and the draft Amendment Report would be issued in July.
- 1144. **CAP143 – Interim Transmission Entry Capacity (“ITEC”) product** – BV informed the Panel that a Consultation Alternative will be issued in July.
- 1145. **CAP144 – Emergency Instruction to emergency deenergise** – BV informed the Panel that the Consultation closed on 22<sup>nd</sup> June 2007 and a Consultation Alternative will be issued in July.
- 1146. **CAP146 – Responsibilities and liabilities associated with third Party Works and Modification made by Modification Affected Users** - BV informed the Panel that the Consultation closed on 29<sup>th</sup> June.

**7 CUSC Amendment Panel vote**

- 1147. **CAP131 User Commitment for New and Existing Generators** The result of the Panel Recommendation Vote as to whether CAP131 BETTER facilitated the Applicable CUSC Objectives are detailed in the Amendment Report. Due to the number of options to vote on the Panel were asked to vote for each individual option and a top 5 preference of the options. The majority of the Panel chose WGAA – B3 as there 1<sup>st</sup> or 2<sup>nd</sup> choice as the BEST option.

BEST - WGAA – B3 majority\*  
 • 6 of the 8 voting CUSC Panel members voted this as there 1<sup>st</sup> or 2<sup>nd</sup> choice.

- 1148. On the question of whether CAP131 would BETTER facilitate achievement of the Applicable CUSC Objectives, the Panel majority vote was as follows;

Original	- NO - unanimous
WGAA – A1	- NO
WGAA – A2	- NO
WGAA-A3	- NO
WGAA-B1	- YES
WGAA – B2	- equal split for and against
WGAA – B3	- YES
CAA-C	- NO
CAA-CO1	- NO
CAA – CO2	- NO unanimous
CAA- CO3	- NO unanimous
CAA- CO4	- NO unanimous
CAA-CO5	- NO
CAA- CO6	- NO
CAA-CO7	- NO
CAA-CO8	- NO
CAA-CO9	- NO
CAA-CO10	- NO
CAA-CO11	- NO
CAA-CO12	- NO

CAA-CO13	- equal split for and against
CAA-CO14	- NO unanimous
CAA-CO15	- NO unanimous
CAA-CO16	- NO unanimous
CAA-CO17	- NO unanimous
CAA-CO18	- NO unanimous
CAA-CO19	- NO
CAA-CO20	- NO unanimous
CAA-CO21	- NO unanimous
CAA-CO22	- NO unanimous
CAA-CO23	- NO unanimous
CAA-CO24	- NO unanimous
CAA-CO25	- NO

**8 Pending Authority Decisions (as at 21/06/07)**

1149. None

**9 Authority Decisions (as at 21/06/07)**

1150. The following have had decisions during May and June and the Panel were advised to refer to the website for the individual decisions

- **CAP127:** Calculation and Securing Value at Risk
- **CAP140:**Change to BSC Party Obligation
- **CAP142:** Temporary TEC Exchanges
- **CAP145:** Embedded Generator MW Register

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

1151. Nothing to report

**11 A.O.B**

1152. Concern was raised regarding the number of Alternatives proposed for CAP131 and it was agreed for BV to circulate some ideas for future amendments to help reduce the number of Alternatives.

**Action: BV**

1153. It was agreed that following the July CUSC Panel the Panel members will sit as a Governance Standing Group for a short meeting to discuss the above options and to consider any other options as a way forward

**Action: All**

1154. The Panel were made aware of the Mid Wales seminar and NW agreed to forward a link to the website.

**Action: NW**

1155. BV reminded the Panel that the CUSC Election process had started and the timescales were published on the website for nominations and voting.

**12 Record of Decisions – Headline Reporting**

1156. 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**

1157. The next meeting is scheduled for Friday 27 July 2007, at National Grid House, Warwick Technology Park, Gallows Hill, Warwick, CV34 6DA.