

<b>CUSC Amendment Proposal Form</b>	<b>CAP:190</b>
<p><b>Title of Amendment Proposal:</b> Two-Thirds Majority Voting requirement for CUSC Panel recommendations on Amendments arising from Licence obligations, Authority requests or obligations</p>	
<p><b>Description of the Proposed Amendment</b> (<i>mandatory by proposer</i>):</p> <p>It is proposed that where an Amendment Proposal being presented to the CUSC Panel for a recommendation vote has been raised to comply in full or in part with a Licence change, or following an Authority direction, request or obligation (e.g. potentially from a Significant Code Review (SCR) should this be facilitated under the CUSC), a recommendation to implement that Amendment Proposal by the CUSC Amendments Panel must be based on at least two-thirds of votes cast by those Panel members present being in favour of implementation. Thus if the Panel comprises 7 members plus 1 Consumer Focus representative and 2 National Grid representatives (with one vote) and that all 9 votes are cast, it would take at least 6 votes in favour for the Panel to recommend implementation of such a Proposal. As at present an abstention would not count as a vote cast.</p> <p>Where the Panel does not have a two thirds majority, even if the votes cast do make any majority, the Panel recommendation will be maintain the status quo and not implement the Amendment. This would also be the case where the Panel reaches no decision, for example where the vote is split 4:4.</p> <p>For clarity, it is intended that this Proposal should only apply to Amendment Proposals arising either directly from a Licence condition or Authority request, direction or instruction to bring forward a proposal (i.e. a Proposal raised in response to a Licence condition or SCR conclusions) or indirectly (i.e. a Proposal arising from an industry review process which was initiated to meet a Licence condition or SCR conclusions). For all other Amendment Proposals the current rules shall continue; i.e. a simple majority of votes cast is required, with an abstention not counted as a vote cast.</p> <p>It is suggested that a Proposer should indicate on the CUSC Amendment Proposal Form whether they believe that implementation of their Proposal would meet the requirements of a Licence direction, Authority request, direction or instruction, in full or in part; in which case it should be subject to two-thirds majority voting for the final Panel recommendation. The Panel would review this and confirm by simple majority vote whether or not two-thirds or the default simple majority voting would apply for their final recommendation vote to be presented to the Authority.</p> <p>Alternatively the Panel could write to the Proposer asking that they confirm that the Amendment Proposal falls into one of the categories subject to a two thirds majority vote.</p> <p>It is suggested that the voting approach determined by the Panel for the original Proposal would also apply to any Alternative(s) raised, any such solution(s) having also been raised to comply with the relevant direction or licence change.</p> <p>The proposal is that all Proposed Amendments that meet the criteria are subject to the two thirds majority vote. This would include Licence conditions arising from a price control or other regulatory process that result in a CUSC Amendment being raised.</p> <p>To cover Amendments that may also be fulfilling SCR conclusions, in part or in full, the voting would also be applied to Amendments subsumed into an SCR or suspended during an SCR process. The proposer recognises that an alternative may be to exclude such Amendments.</p>	
<p><b>Description of Issue or Defect that Proposed Amendment seeks to Address</b> (<i>mandatory by proposer</i>):</p> <p>Introducing two-thirds majority voting for recommendation of Licence-originated, Authority directed, requested or instructed Amendment Proposals would safeguard Parties' Appeal rights regarding those Proposals likely to be of greatest impact on industry.</p>	

The requirement to recommend rejection where a two thirds majority cannot be achieved likewise protects and strengthens these appeal rights.

The Panel vote on whether to recommend implementation of an Amendment Proposal determines the ability of a Party or Parties to appeal the Authority's final determination on that Proposal: in order to appeal such a determination, the Authority's decision must be counter to the Panel's recommendation to the Authority. The government having given rights of appeal that allow parties to question the Authorities' policy decisions (rather than the narrower Judicial Review appeal grounds) it signalled that its policy was to implement a check on regulatory powers to change industry contracts. This Amendment seeks to protect those appeal rights and should help achieve better regulation by making the Authority decisions more robust, well argued and supported by appropriate analysis.

The implementation of Ofgem's Code Governance Review recommendations (via the associated changes to Licence conditions) will enable Ofgem to conduct Significant Code Reviews. SCR instigation, assessment and conclusions will all be led by Ofgem, who propose that:

"Ofgem should have the ability to start a SCR where a modification proposal is likely to have significant impacts on consumers, competition or other issues relevant to our statutory duties such as sustainable development." (Code Governance Review Final Proposals 2.29)

The desirability of protecting Parties' appeal rights on any matters where the Authority is 'the effective progenitor of a proposal' was highlighted by the Competition Commission's 2007 appeal decision regarding UNC Modification Proposal 116. This is particularly critical when as the Code Governance Review confirmed, matters addressed by SCRs are likely to be major issues on which the industry may have been unable to reach consensus in the past. Thus Amendment Proposals raised to comply with any SCR Direction issued to a licensee to progress Ofgem's SCR conclusions may well be contentious with potentially major impact on certain Parties. Ofgem acknowledged such concerns in their Final Proposals which also stated:

"To the extent that parties believe that further checks and balances are needed in relation to SCR modification proposals, it may be possible to pursue them through changes to the modification rules. For instance, while panel recommendations are currently made on the basis of a simple majority, the rules could be changed to require a different threshold for SCR modification proposals." (Appendix 2, 1.65)

This proposal thus seeks to introduce an appropriate check to ensure that where potentially contentious issues are addressed via Licence originated Amendment Proposals, an appropriate level of support is required for the Panel recommendation that will ultimately determine the ability of a Party to appeal an Authority determination. This is particularly pertinent to the CUSC Panel where The Company member, who may feel obliged to vote for the Proposal they have been required to raise, is indeed a voting Panel member, potentially one of a quorum of just 6.

The proposal also addresses a related issue raised during the Code Governance Review. The Final Proposals noted that the Panel Chairman should be independent and will be appointed by Ofgem. If the Chairman then gets a casting vote, or seeks to steer the debate, the Chair may effectively close the route to appeal. The Authority's documents appear to foresee this problem arising on Licence originated or Authority directed/requested Amendments:

"We have noted the concern that the independent chair's casting vote should not be able to determine whether or not an SCR proposal is subject to appeal. We note that a casting vote is only relevant where there would otherwise be deadlock and the panel is required to make a determination. We do not consider that a casting vote is necessary in the case of a recommendation, which can legitimately reflect a split vote without hindering the ongoing progress of a proposal; it will simply be recorded as such in the modification report to the Authority." (3.35)

Were Ofgem in future to recommend that the Panel Chairman has a vote, or it appoints another Panel member, as it can under CUSC 8.3.3, this proposal would still ensure that a significant majority is achieved in the very limited circumstances in which the proposal would apply. We believe that in creating the rights of parties to appeal the nature of an Ofgem decision (rather than the limited Judicial Review scope) the government clearly intended that the right to appeal should

be open for contentious issues. This modification would preserve and strengthen those rights.

The proposer is aware that the Authority has at times also requested Amendments are raised without an SCR process (e.g. transmission access) or via other regulatory processes, such as in a price control. Any changes that result in Amendments where the Authority could be perceived as the originator as well as the approver of a change should require greater support from the Panel to ensure the changes can be appealed by those not party to the original origination discussions.

Wyre Power believes that this proposal is particularly important to smaller players who may not have the staff to participate in the resource intensive processes of an SCR, or may not monitor all of the consultations on price controls, so will not necessarily have seen some of these changes coming. This means it may only be at the point of an Amendment being raised that they become aware that the proposal impacts their business. Knowing that such changes must carry a two thirds majority vote will offer some comfort to them that the governance process is weighted towards facilitating appeals where there is a proportion of the market who do not support the change.

We would note that we do not think that the main impact of this Amendment would be to increase the number of appeals, as they themselves are resource intensive and expensive. However, we do believe that it will improve the regulator process, reducing regulatory risk, by encouraging Ofgem to make robust, well analysed decisions. The potential for appeals more than appeals themselves should create the right incentives for good regulation.

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

Amendments to Section 8. A new section on the CUSC Amendment Proposal Form.

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

None anticipated.

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

None anticipated.

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

UNC modification proposal 0312: 'Introduction of Two-Thirds Majority Voting to the UNC Modification Panel'.

BSC modification proposal P264: "Two-thirds majority requirement for Panel recommendations on licence originated modifications".

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

The proposer believes that implementation of this Amendment Proposal would better facilitate the Applicable CUSC Objective:

(a): "the efficient discharge by the licensee of the obligations imposed upon it under the Act and by this licence", specifically with regard to the obligation under standard condition C10 of the licence.

The change suggested by this Proposal is a minor alteration to the working practice of the CUSC Panel which would address the concerns raised at the Competition Commission, in the Code Governance Review and recognised by Ofgem in their Final Proposals. It is efficient for the licensee to meet the spirit of the regime as well as the letter of the licence conditions imposed under the Governance review. This means taking account of the appeal rights created by government and trying to protect and enhance them. The appeal rights become more important in a situation

where Ofgem will run a review, select the solution and then sign off the Amendment, which seriously alters the role of Ofgem.

It will be a more efficient process if the risks associated with these sorts of Amendment are subject to a higher threshold as it will indicate clearly to the Authority the level of support that a change has. This in turn should improve the incentive of the Authority to act in a manner consistent with good regulation, for example not putting badly drafted licence conditions on the licensee and ensuring all the decisions are robust to challenge, were one to arise.

Implementing two-thirds majority voting on Amendment Proposals arising from Licence obligations, Authority requests, obligations or directions reduces the uncertainty and risk of time and money being wasted on legal challenges that might otherwise be raised when Panel recommendations are finely balanced.

In the longer term the efficiency of the market will be helped if a more robust regulatory regime is developed. The Authority getting a clear steer from participants may reconsider some of their proposed solution. They may be encouraged to engage more widely with the participants earlier in the process, as they will need robust decision making processes to accept Amendments that do not have significant support and thus may want earlier dialogue to ensure all angles are covered. It would be in the interests of the market as a whole that the governance process is robust, transparent and open to challenge.

This solution is also in line with that put forward under the BSC and UNC, which will help to ensure consistency across the industry codes.

It would also better facilitate the Applicable CUSC Objective:

*(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."*

This Amendment Proposal will ensure that Panel recommendations on potentially contentious Amendment Proposals resulting from Licence changes, SCR directions or other Authority requests and obligations are subject to an appropriate level of support from the expert Panel Members, and that Parties' rights to appeal Authority decisions regarding such Proposals are protected. The support of the CUSC signatories is vital if the contract is to develop in such a way as to encourage new entrants to the market. Market entry is vital to maintaining competitive pressure in the market.

Perceived regulatory risk is increasing with the Authority taking a more active role in the design and operation of the market. When civil servants are seen to be significantly impacting the way businesses operate this creates a barrier to entry. For example a regime that can change pricing rules with limited notice can be seen as being too risky for a new entrant. To increase competition the CUSC governance process should try to reduce regulatory risk and create a stable investment background where new entrants and smaller players feel they will have rights of recourse against any bad regulation.

This Amendment may be of particular relevance to smaller players who do not have the resources to participate in the SCR or price control type of processes (with many meetings and pages of documents). The raising of an Amendment Proposal may be the first opportunity that they have had to consider the impact of a change on them, possibly raising issues the SCR has not considered. To close down the route of appeal for such parties will increase the regulatory risk that they face. Regulatory risk is far greater if (like smaller players) you do not have the resources to fully participate in the regulatory process due to the work load created by activities such as SCRs. We note that in 2004 the original cash-out review consultation only received responses from big players and in 2006, though the response was better, there are still only 18 responses to the impact assessment.

<b>Details of Proposer:</b> Organisation's Name:	Wyre Power
<b>Capacity in which the Amendment is being proposed:</b> (i.e. CUSC Party, BSC Party or "National Consumer Council")	CUSC Party
<b>Details of Proposer's Representative:</b> Name: Organisation: Telephone Number: Email Address:	Lisa Waters Wyre Power 020 8286 8677 lisa@waterswyre.co.uk
<b>Details of Representative's Alternate:</b> Name: Organisation: Telephone Number: Email Address:	Esther Sutton E.On UK 024 7618 3440 <a href="mailto:esther.sutton@eon-uk.com">esther.sutton@eon-uk.com</a>
<b>Attachments (Yes/No): No</b> <b>If Yes, Title and No. of pages of each Attachment:</b>	

**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:

Steven Lam  
Commercial  
National Grid  
National Grid House  
Warwick Technology Park  
Gallows Hill  
Warwick  
CV34 6DA

Or via e-mail to: [steven.lam@uk.ngrid.com](mailto:steven.lam@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 Electricity Transmission plc Licence under Standard Condition C10, paragraph 1. Reference should be made to this section when considering a proposed amendment.