



AMENDMENT REPORT VOLUME 2

CUSC Amendment Proposal 179: Prevention of Timing Out of Authority Decisions on Amendment Proposals

**This document contains Working Group Consultation responses and Company
Consultation responses**

Amendment Ref	CAP179
Issue	0.2
Date of Issue	24 th November 2010
Prepared by	National Grid

I DOCUMENT CONTROL

a National Grid Document Control

Version	Date	Author	Change Reference
V0.1	16/11/10	National Grid	Version for industry comment
V0.2	24/11/10	National Grid	Draft for Panel Recommendation Vote
V0.3		National Grid	Draft for Panel comment following recommendation vote
V1.0		National Grid	Formal version for submission to the Authority

b Distribution

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

PART 1 REPRESENTATIONS TO THE FIRST WORKING GROUP CONSULTATION

PART 2 REPRESENTATIONS TO THE SECOND WORKING GROUP CONSULTATION

PART 3 REPRESENTATIONS TO THE COMPANY CONSULTATION

PART 1 REPRESENTATIONS TO THE FIRST WORKING GROUP CONSULTATION

This Annex includes copies of representations received to the first Working Group Consultation

Representations were received from the following parties:

First Working Group Consultation	Respondent
CAP179-WGC-01	Centrica
CAP179-WGC-02	EDF Energy
CAP179-WGC-03	Drax Power Limited
CAP179-WGC-04	Scottish and Southern Energy
CAP179-WGC-05	E.ON UK
CAP179-WGC-06	Consumer Focus

CUSC WORKING GROUP CONSULTATION – RESPONSE PROFORMA

CAP179: Prevention of "Timing Out" of Authority Decisions on Amendment Proposals

Industry parties are invited to respond to this consultation expressing their views and supplying the rationale for those views, particularly in respect of the specific questions detailed below.

Please send your responses by **5pm on 29th April 2010** to **cusc.team@uk.ngrid.com**. Please note that any responses received after the deadline or sent to a different email address may not receive due consideration by the Working Group.

Any queries on the content of the consultation should be addressed to Alex Thomason at National Grid at alex.thomason@uk.ngrid.com.

These responses will be considered by the Working Group at their next meeting, scheduled for 4th May 2010, at which members will also consider any WG Consultation Alternative Requests. Where appropriate, the Working Group will record your response and its consideration of it within the final Working Group report which is submitted to the CUSC Amendments Panel.

Respondent:	<i>Chris Stewart</i>
Company Name:	<i>Centrica</i>
<p>Please express your views regarding the Working Group Consultation, including rationale.</p> <p>(Please include any issues, suggestions or queries)</p>	<p><i>Centrica believes there are scenarios in which it would be appropriate for Amendments to time out. This could be when the validity of the analysis and/or the recommendations of the Working Group and Panel have decayed to such a point that the Authority would not be able to make a robust decision.</i></p> <p><i>CAP179 would increase regulatory uncertainty by creating a process in which an Amendment can never time out. This would be detrimental to competition (objective (b)) and the efficient discharge of the Transmission Licence obligations (objective (a)).</i></p> <p><i>If Amendments must always be subject to a process that could have a 'pending decision' status in perpetuity, this presents significant uncertainty as it is virtually impossible for a Party to plan for potentially open ended risks. Such uncertainty does not facilitate investment. Additionally, the validity of impact assessments, analysis and recommendations can be expected to decay over time and it would be questionable for the Authority to make robust decisions based on these.</i></p> <p><i>Centrica believes that the suggested benefits of the modification in terms of reducing wasted industry resource are negligible and there are in fact reasons in which additional resource would be required under CAP179. For example, this could occur:</i></p>

	<ul style="list-style-type: none"> • <i>When Parties engage consultants to support subject areas. These consultants would need to be kept on a retainer (or at least available) until such time as an Authority decision is made and the implications can be worked through. This could be expensive without a clear end date and could especially impact smaller players;</i> • <i>Where a decision has had a substantial delay, resource must be continually applied to the subject area to ensure relevant knowledge and the ability to implement is retained and adequate continuity planning is achieved;</i> • <i>When a new modification is raised that impacts the same systems as the pending modification. This uncertainty would lead to additional costs to evaluate modification impacts and possibly greater costs to implement; and</i> • <i>Because this period is more likely to involve personnel changes which would lead to duplication of work.</i> <p><i>Centrica believes that the costs of CAP179 would significantly exceed the benefits. As identified above, there would be real costs in terms of uncertainty and retaining knowledge of subject matter and readiness to implement across the industry. In order to estimate positive benefits of CAP179, a view would have to be taken as to how often timing out would occur under the current arrangements. Arguably a reasonable estimate based on CUSC history could be zero. However, even if this did occur occasionally, Centrica believes that the benefits of saved industry resource under CAP179 would be outweighed by the increased ongoing costs.</i></p> <p><i>Finally, it is not clear that there would be any efficiency gain by including a formal process by which the Panel can communicate with the Authority.</i></p>
<p>Do you believe that the proposed original or any of the alternatives better facilitate the Applicable CUSC Objectives? Please include your reasoning.</p>	<p><i>No, for the reasons outlined above.</i></p>
<p>Do you support the proposed implementation approach? If not, please state why and</p>	<p><i>Yes</i></p>

provide an alternative suggestion where possible.	
Do you have any other comments?	No
Do you wish to raise a WG Consultation Alternative Request for the Working Group to consider?	No

Specific questions for CAP179

Q	Question	Response
1	Do you believe there is a defect within the CUSC to be addressed?	<p><i>No. The Working Group report makes it clear that the existing practice of constructing implementation dates has never led to a 'timing out' scenario under the CUSC. The Panel has either provided open ended implementation dates or been very mindful of the Authority requirements when constructing the dates. There is no justification to expect this to change in future.</i></p> <p><i>The argument for CAP179 that resources could be wasted under the current arrangements would only ever occur in the very infrequent occasions when the Authority cannot make a decision within the timescales set out. Whilst this might result in a similar Amendment being raised, the fact that the validity of analysis and recommendation has decayed, means it is efficient and appropriate for the industry to readdress these aspects prior to the Authority making a decision. This is the appropriate process to follow.</i></p> <p><i>Further, Centrica believes that CAP179 would in fact be introducing a defect by explicitly ruling out the construction of implementation dates that can time out. There are scenarios, such as where there is time-limited validity of analysis or working group/Panel recommendations, where timing out would be appropriate.</i></p>

Q	Question	Response
2	Do you have any views on the proposed Implementation Date for CAP179?	<i>This appears appropriate.</i>
3	Do you have any views on whether the Working Group should develop the potential Working Group Alternative Amendment further?	<i>Whilst unlikely to support the Alternative compared to the current arrangements (due to the same reasons outlined above), Centrica believes that one should be developed and considered by the Working Group.</i> <i>Given the proposed solution could result in scenarios in which the Authority can trigger the Panel to supply revised implementation dates, it would be prudent to ensure that the Panel update its report and recommendation. This would ensure the Panel can provide a meaningful recommendation to the Authority. The Alternative would therefore be likely to be a better Amendment than the Proposed solution.</i>

To: cusc.team@uk.ngrid.com

29th April 2010

Dear CUSC Team

CAP179 Working Group Consultation

EDF Energy welcomes the opportunity to respond to the above consultation. The key points of our response are as follows:

- EDF Energy does not believe that there is a defect with the baseline as described by this amendment proposal
- CAP179 does not better facilitate the applicable CUSC objectives
- Should this proposal be implemented the timetable proposed by this consultation would appear reasonable
- We support the development of a working group alternative amendment proposal as outlined in this consultation document.

Our views are described in more detail below.

The processing of CUSC amendment proposals does not involve setting implementation dates which would allow an Amendment Proposal to "time out" as CUSC implementation dates are relative to the timing of an Ofgem decision. Indeed, "timing out" has never occurred for CUSC amendment proposals. It is our view that it would be inappropriate to add to the body of the code and its perceived complexity needlessly; this is inefficient, and makes it still more daunting for new entrants.

We agree that in all cases, the risk of timing out will always exist (irrespective of whether CAP179 is implemented) as there is a requirement in law for the Authority to act reasonably. Therefore, if the Authority took an unreasonably long period to decide upon an Amendment Proposal then it would "time out".

We note that the majority of the Working Group at its one meeting so far, believed that CAP179 does not better facilitate either of the Applicable CUSC Objectives. EDF Energy supports this view.

The proposal that CAP179 should be implemented 10 Business Days after an Authority decision (in line with custom and practice for the CUSC) would be acceptable, were it to be approved by the Authority. We agree that if CAP179 is implemented, no element of it should be applied retrospectively.

Working group alternative amendment proposal

During any consultation on revised implementation dates it is possible that the Panel may highlight to the Authority that the original analysis considered by the Panel has expired. It has been argued that there exists the potential for a successful Judicial Review in cases where the Authority did not take account of such Panel information in making a decision on the Amendment Proposal concerned. EDF Energy acknowledges this risk and believes that in instances where the original analysis goes past its 'use by date' additional analysis performed by the Authority and used as part of a Regulatory Impact assessment should not 'update' the out of date original analysis such that it becomes 'usable' by the Authority.

CAP179 as drafted does not permit the Panel, upon receiving consultation responses or other information suggesting that the analysis used to inform a Panel recommendation has expired, to rerun its original recommendation vote. However, we do agree that CAP179 could effectively prevent any successful appeals to the Competition Commission, as it would permit the Authority to argue before the Commission that its decision was based on the up to date analysis and the Panel's recommendation on out of date analysis.

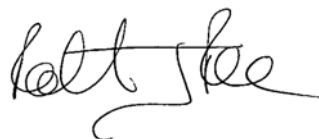
We note that Ofgem's Code Governance Review proposals include a concept that the Authority may "send back" a modification proposal to the relevant Panel in the event of there being deficiencies in the report. In such circumstances the Panel is required to revise and re-submit the report where appropriate which includes the possibility of a fresh Panel vote on the revised report. The alternative to CAP179 that the Working Group has considered is not inconsistent with this.

EDF Energy therefore supports the development by the Working Group of the alternative amendment outlined in the consultation document to address this flaw in CAP179 (original).

Finally we note that the consultation states at one point: "Part 3 proposes a further process to allow the Panel Secretary to write to the Authority, on behalf of the Amendments Panel, to request a likely decision date....". The CUSC panel is already allowed (via the Panel Secretary) to write to any party, including Ofgem. The word "allow" here, should be "give a mandate for".

If you have any queries on this response or would like to arrange a meeting to discuss further, please do not hesitate to contact me directly, or my colleague Paul Mott on 0203 126 2314.

Yours sincerely

A handwritten signature in black ink, appearing to read "Rob Rome".

Rob Rome
Head of Transmission and Trading Arrangements

CUSC WORKING GROUP CONSULTATION – RESPONSE PROFORMA

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Respondent:	Stuart Cotten (01757 612 751)
Company Name:	Drax Power Limited
<p>Please express your views regarding the Working Group Consultation, including rationale.</p> <p>(Please include any issues, suggestions or queries)</p>	<p>Under the current arrangements, the majority of CUSC Amendments do not contain "decision by" dates. Those Amendments that are considered to create little uncertainty or are perceived to have no / little material impact on participants tend to have open ended date constructions; Drax believes such Amendments should continue to have open ended date constructions.</p> <p>However, those Amendments that are considered likely to cause greater uncertainty or perceived to have a greater material impact on industry participants tend to contain "decision by" dates in order to limit the life of such uncertainty for both new and current investors.</p> <p>It is important that the Amendment process promotes timely decision making by the Authority, particularly where the analysis associated with a given Amendment has a finite life. CAP179 would increase costs to investors associated with the added burden of regulatory uncertainty caused by decisions that are not determined by the Authority in a timely fashion.</p> <p>Whilst Drax does not believe there to be a CUSC defect surrounding "decision by" dates, the CAP179 Amendment may be more useful if it were worded to provide a <i>single</i> extension to decision timing in order to take account of unforeseen circumstances that the Authority may encounter during the decision making process. In order to ensure that the CUSC continues to provide certainty of decision dates, CAP179 must ensure that the Authority could not effectively make</p>

	<p>the decision timetable open ended by making repeated requests for additional “decision by” dates over a prolonged period of time.</p> <p>Further to this, it should be clear that a request by the Authority to revise the “decision by” date can only be made <i>prior</i> to the final “decision by” date contained within the original Amendment proposal; i.e. to ensure that requests are not made retrospectively. Inaction by the Authority <i>prior</i> to the “decision by” date should result in the modification timing out, in order to ensure that the Authority continues to make timely decisions and that the “decision by” date construct does not, in essence, become completely defunct. This would not require a new Alternative Amendment; it could be a simple alteration to the current CAP179 wording.</p> <p>Drax notes the comments of one Working Group member regarding the sterilisation of subject matters (paragraph 4.2.15). This is an area that should be discussed further, particularly given the potential for repeated requests to revise “decision by” dates and the length of time that a subject matter could effectively remain ‘out of bounds’ due to indecision on the part of the Authority.</p> <p>Finally, Drax does not see any harm in including Part 3 of CAP179 with regards to requesting the Authority to provide a likely decision date for a given Amendment. However, Drax agrees with the Working Group that as the CUSC could not oblige the Authority to reply, the provision may be very limited in its usefulness.</p>
<p>Do you believe that the proposed original or any of the alternatives better facilitate the Applicable CUSC Objectives? Please include your reasoning.</p>	<p>Drax agrees with the majority of the Working Group that the proposed Amendment would <u>not</u> better facilitate Applicable CUSC Objectives (a) and (b) when compared to the current baseline.</p> <p>The Amendment does not ensure that future Working Group analysis will stand the test of time above and beyond that provided under the current baseline. The Amendment fails to address the validity of analysis over time and the potential implications (to both CUSC Parties and consumers) if a final decision was reached based upon “out of date” analysis. If the Authority were to make decisions that were based upon “out of date” analysis, subsequent Amendments may be required to rectify anomalies caused by such action.</p> <p>CAP179, in its current form, will result in greater uncertainty due to the fact that Amendments can still be left “open ended” if the Authority were to make repeated requests for modified “decision by” dates. This could have a material impact on CUSC Parties and prove detrimental to competition, particularly where a given Amendment results in industry “winners</p>

	<p>and losers”.</p> <p>Finally, the Amendment does not introduce any new date constructions over those currently available to the CUSC Panel. The CUSC Panel and the Working Groups currently use their experience and best judgement to determine the most appropriate date constructions for Amendments on a case-by-case basis; they would continue to do this should CAP179 be approved.</p>
<p>Do you support the proposed implementation approach? If not, please state why and provide an alternative suggestion where possible.</p>	<p>If approved, the planned implementation approach appears reasonable.</p> <p>Drax agrees with the Working Group that CAP179 should not be implemented retrospectively. This will prevent uncertainty over the process for existing Amendment proposals, whilst the outcome of CAP179 is determined.</p>
<p>Do you have any other comments?</p>	<p>No.</p>
<p>Do you wish to raise a WG Consultation Alternative Request for the Working Group to consider?</p>	<p>No.</p>

Specific questions for CAP179

Q	Question	Response
1	<p>Do you believe there is a defect within the CUSC to be addressed?</p>	<p>It should be recognised that the use of fixed “decision by” dates is quite rare for CUSC Amendments, due to the nature of the code and the analysis that tends to accompany such Amendments, i.e. proposed Amendments tend not to be as time or commercially sensitive as those raised under other codes (such as the BSC).</p> <p>Furthermore, the use of fixed “decision by” dates ensures that those Amendments that do contain time sensitive analysis receive the appropriate attention and timely decision making that is required to ensure that the decision is made based upon the best possible data available whilst attempting to limit the level of regulatory uncertainty that surrounds a given topic, e.g. the decision timing construct used for CAP164-166 regarding capacity allocation, bearing in mind the impact such Amendments have on the decisions of both new and existing investors.</p> <p>Finally, there has been no instance of an Amendment under the CUSC “timing out”.</p> <p>On this basis, Drax does <u>not</u> agree that there is a</p>

Q	Question	Response
		defect.
2	Do you have any views on the proposed Implementation Date for CAP179?	<p>If approved, the planned implementation approach appears reasonable.</p> <p>Drax agrees with the Working Group that CAP179 should not be implemented retrospectively, in order to prevent process uncertainty regarding existing Amendment proposals whilst the outcome of CAP179 is determined.</p>
3	Do you have any views on whether the Working Group should develop the potential Working Group Alternative Amendment further?	<p>Drax raised similar issues with regards to BSC Modification P250. The final CAP179 solution should be consistent with the comments contained within the Judicial Review Judgement. As such, a given Amendment should either “time out” if the analysis is no longer considered to be valid or the final report should be returned to the Panel in order to enable a Working Group to update the analysis and the Panel to provide a new recommendation based upon such updated analysis.</p> <p>There needs to be greater clarification over the process that follows the Panel (after consultation with industry participants) advising that the analysis for a given Amendment is no longer valid. Failure to clarify this process now could lead to a future Judicial Review to resolve the matter, which (with some foresight) is an avoidable waste of time and resource.</p> <p>As such, Drax believes that the Working Group should explore the suggested Working Group Alternative Amendment.</p>

CUSC WORKING GROUP CONSULTATION – RESPONSE PROFORMA

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Respondent:	<i>Garth Graham</i> <i>garth.graham@scottish-southern.co.uk</i>
Company Name:	<i>Scottish and Southern Energy</i>
Please express your views regarding the Working Group Consultation, including rationale. (Please include any issues, suggestions or queries)	<p>CAP179 has three elements. We comment on these in turn.</p> <p>In respect of Part 1, we support the continuation of the CUSC working practice of setting implementation dates; where practical; as being XX business days / months etc., after an Authority Decision. For the avoidance of doubt, this should be, in all cases, a minimum of ten business days.</p> <p>In respect of Part 2, notwithstanding our comments under Part 1, it must be recognised that fixed dates maybe necessary. For example, undertaking a particular change to coincide with another change (perhaps linked to a date imminent event like an IT system release date) could offer significant cost benefits. However, undertaking that same change at another time might offer little, if any, benefits. Given this then a fixed date is required. Allowing (as Part 2 proposes) the Authority to write to the Panel setting out its (the Authority's) reason as to why a decision cannot be made by the fixed date is a welcomed step forward. This is an important element in the 'checks & balances' by which good regulatory practice operates.</p> <p>In respect of Part 3, we support the notion that the Panel write to the Authority when it (the Panel) becomes aware that analysis etc., upon which its recommendation is based could soon become out of date. It is beholden upon all public authorities to act reasonably when carrying out their duties. If they become aware of an issue (such as the risk that a decision might be flawed because its based upon inaccurate / out of date / wrong / defective information or analysis) then, in our view, they are duty bound to act to address this. Part 3 is, therefore, a welcomed step forward.</p>

	<p>However, Part 3, on its own, would not, in our view, be sufficient as having identified a deficiency (namely out of date analysis / information etc.) there would not be a way to rectify this. This would mean that the work undertaken to date would have to lapse. A “Part 4”, as outlined in the suggested Working Group Alternative (see below), whereby the out of date analysis / information etc., is updated, CUSC Parties consulted, a new Panel recommendation vote undertaken (based on the most up to date analysis / information etc.) and a new Amendment Report submitted to the Authority is, in our view, the best way forward.</p>
<p>Do you believe that the proposed original or any of the alternatives better facilitate the Applicable CUSC Objectives? Please include your reasoning.</p>	<p><i>For reference, the Applicable CUSC Objectives are:</i></p> <p><i>(a) the efficient discharge by the licensee of the obligations imposed upon it under the Act and by this licence; and</i></p> <p><i>(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.</i></p>
<p>Do you support the proposed implementation approach? If not, please state why and provide an alternative suggestion where possible.</p>	<p>We support the Group’s view that CAP179 should follow a similar implementation approach as CAP160; namely that it should only apply to Amendment Proposals raised on or after the CAP179 Implementation Date. To do otherwise would mean that CAP179 would be a retrospective Amendment. We do not believe in retrospective Amendments as it gives rise to a substantial increase in regulatory uncertainty.</p>
<p>Do you have any other comments?</p>	<p>Referring to paragraph 4.2.15, we are concerned to learn that a subject matter that might be of particular importance to a stakeholder could, if CAP179 were to be implemented, be ‘sterilised’ for the duration of the decision time period taken by the Authority (which would be an indeterminate period). Whilst the Authority provides a helpful ‘timetable’ of its likely decision making process for industry code changes it should be noted that (a) these are based on quarters and (b) can (and do) change. A ‘fixed date’ does, in this respect, provide stakeholders with certainty as to when they can raise their own Amendment Proposal on a particular matter (without it being ‘sterilised’).</p>
<p>Do you wish to raise a WG Consultation Alternative Request for the Working Group to consider?</p>	<p>No</p>

Specific questions for CAP179

Q	Question	Response
1	Do you believe there is a defect within the CUSC to be addressed?	<p><i>(see paragraphs 4.2.2 – 4.2.6)</i></p> <p>We have reviewed the comments in paragraphs 4.2.2 – 4.2.6. We are mindful that the issue of “timing out” has not occurred within the CUSC, although we accept the risk might, in theory, exist in the future. We are also mindful, in particular, of the time taken by the Authority (for understandable reasons) to decide upon the current ‘suite’ of CUSC Amendments that are before it.</p> <p>We are also aware that, as noted, by the Ofgem representative, a ‘reasonableness’ legal test exists which, in effect, ‘time limits’ the Authority to determine upon an Amendment Proposal within a reasonable time period. Given this we find it difficult to conclude that a defect does in fact exist. However, we are prepared to give the Proposer the benefit of the doubt in this case.</p>
2	Do you have any views on the proposed Implementation Date for CAP179?	<p><i>(see paragraph 7.1)</i></p> <p>We have reviewed the comments in paragraph 7.1 and, as noted above, we support the Group’s view that CAP179 should follow a similar implementation approach as CAP160; namely that it should only apply to Amendment Proposals raised on or after the CAP179 Implementation Date. To do otherwise would mean that CAP179 would be a retrospective Amendment. We do not believe in retrospective Amendments as it gives rise to a substantial increase in regulatory uncertainty.</p>

Q	Question	Response
3	Do you have any views on whether the Working Group should develop the potential Working Group Alternative Amendment further?	<p><i>(see paragraphs 4.3.5-4.3.7)</i></p> <p>We believe that if the Panel becomes aware that the analysis / information etc., within an Amendment Report that is with the Authority for decision has become materially inaccurate / out of date / wrong / defective that it should take steps to address this. For the avoidance of doubt, it seems to us intrinsically wrong for either the Panel or the Authority (having become aware of this fact) to not take steps jointly to address this. To do otherwise could, in our view, lead to the eventual decision (by the Authority) to either accept or reject a particular Amendment Proposal being successfully challenged at law. This, in our view, would be most regrettable.</p> <p>Therefore to address this, the power should exist for the Panel to re-do (via a Working Group if necessary) any (out of date) analysis contained within the Amendment Report and then re-consult CUSC Parties and re-vote on its recommendation to the Authority.</p> <p>This, in our view, best conforms with the P198 Judgement that “in such circumstances a power to remit the matter to the Panel for complete reconsideration, rather than a power in the Authority to change the timetable for implementation of what had in substance become by lapse of time a different [Amendment], might better preserve the institutional balance between the Panel and the Authority and better serve the objectives of the [CUSC]”.</p> <p>We note the comments in paragraph 4.3.9 that this “might duplicate the ‘send back’ process which Ofgem is already proposing to introduce”.</p> <p>However, it maybe sometime before this development is incorporated within the CUSC. It appears that any Licence changes will not come into effect until the summer, after which Amendments will need to be raised, developed, consulted upon etc., which implies this is unlikely to be in effect before Christmas. Undertaking this proposed (alternative) development of CAP179 would not, in our view, conflict with Ofgem’s intentions; rather it would build upon them, and see them being introduced much earlier. We therefore conclude that the Working Group Alternative (as outlined in paragraph 4.3.8) should be developed.</p>

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Respondent:	<i>Esther Sutton</i>
Company Name:	<i>E.ON UK</i>
Please express your views regarding the Working Group Consultation, including rationale. (Please include any issues, suggestions or queries)	We do not believe there is a defect in the CUSC. Normal CUSC working practice already utilises an implementation date construct of n days after Authority decision, where appropriate, though fixed implementation dates are sometimes preferable e.g. to accommodate system changes. No date format can itself 'prevent' timing-out; implementation dates should continue to be constructed to suit the amendment in question. The Authority has input to determination of decide-by and implementation dates during the modification process and this should be sufficient to produce reasonable and achievable dates. Formalising a mechanism for the Authority to request revised dates would disincentivise timely decision-making, increase uncertainty for existing Parties and deter new entrants.
Do you believe that the proposed original or any of the alternatives better facilitate the Applicable CUSC Objectives? Please include your reasoning.	<i>For reference, the Applicable CUSC Objectives are:</i> <i>(a) the efficient discharge by the licensee of the obligations imposed upon it under the Act and by this licence; and</i> <i>(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.</i> No. As identified by the Working Group, CAP179 could only be read to support Applicable objective (a) in that it would clarify the process for extending an implementation timetable as per clause 6c) of Standard condition C10 of the licence. However this clause refers only to the timescale for implementation of a modification that has been approved, not for a potential implementation to be deferred through extending the time that can be taken to

make a decision whether or not to implement a proposal. Such a prospect would be less efficient, increasing uncertainty, risk and cost to Parties. The Panel and industry members have to meet deadlines for responding to consultations and providing Final Reports to the Authority; the Authority should also be able to make a decision within the timescales agreed for a modification. It is not efficient to disincentivise prompt decision-making and facilitate unlimited modification timescales. The potential for a new set of dates to be requested, once or repeatedly, would significantly increase uncertainty for the industry. The longer the Authority takes to make a decision is proportional to the increased risk to industry members and enabling the potential for an open-ended loop of requests for new dates would not improve the efficiency of the procedures to modify the CUSC. 'Send-back' powers have been suggested in Ofgem's Code Governance Review Final Proposals for those modifications where Ofgem believes that analysis is lacking. It should not be necessary to request revised dates for other modifications where it is internal procedures not the quality of the Final Modification Report delaying a decision.

CAP179 would also be detrimental to Applicable objective (b) as the uncertainty that may arise through the potential for occasional 'timing out' of proposals is less than CAP179 would create for all proposals. The Authority acknowledged this in its rejection of P93. This would be unhelpful for existing Parties and also anticompetitive being a deterrent to any new entrants considering investing in the UK market. It could be further detrimental to competition as the potential for prolonged decision-making timescales might well deter Parties from raising new modifications.

Neither the proposed or potential Working Group Amendment would be better than the baseline unless it is clear that the Panel retain the right to refuse a request for further dates where they view this as unreasonable.

The potential Working Group Amendment would however be preferable to the Proposed CAP179. It would be a flawed approach to request revised dates from the Panel without allowing the Panel to check the validity of the original analysis and their consequent decision. To request revised dates without enabling the Panel to refresh analysis considered out of date and re-make its recommendation would undermine the legitimacy of any decision made by the Authority. As emphasized by the Judge in the 2008 Judicial Review regarding BSC Losses proposals: where analysis may be time-sensitive risking that after any delay the Authority may not in substance and reality be considering the same Modification as that submitted by the Panel, "the power to remit the matter to the Panel for complete re-consideration, rather than a power in the Authority to change the timetable might better preserve the institutional balance between the Panel and the Authority". It would be more efficient thus more supportive of Objective (a) for the Panel on receiving any reasonable request for revised dates to review and update analysis and their recommendation to Ofgem; further analysis would only be undertaken if

	necessary. Nevertheless the Panel must retain the ability to refuse a request for new dates. Although Ofgem may have a KPI of decisions on 70% of modification proposals within 25 working days, at the time of writing the average of those CUSC proposals still awaiting a decision appears to be >400 days.
Do you support the proposed implementation approach? If not, please state why and provide an alternative suggestion where possible.	Yes.
Do you have any other comments?	No.
Do you wish to raise a WG Consultation Alternative Request for the Working Group to consider?	No.

Specific questions for CAP179

Q	Question	Response
1	Do you believe there is a defect within the CUSC to be addressed?	<i>(see paragraphs 4.2.2 – 4.2.6)</i> No. As per answer to Q1 above dates can and typically are already constructed so that they do not allow a Modification to time out, and Ofgem have influence to the dates agreed through the Modification Groups.
2	Do you have any views on the proposed Implementation Date for CAP179?	<i>(see paragraph 7.1)</i> -
3	Do you have any views on whether the Working Group should develop the potential Working Group Alternative Amendment further?	<i>(see paragraphs 4.3.5-4.3.7)</i> Yes, this is preferable to the Proposed and at the very least legal opinion should be sought to confirm the viability of this option.

CUSC WORKING GROUP CONSULTATION – RESPONSE PROFORMA

CAP179: Prevention of "Timing Out" of Authority Decisions on Amendment Proposals

Industry parties are invited to respond to this consultation expressing their views and supplying the rationale for those views, particularly in respect of the specific questions detailed below.

Please send your responses by **5pm on 29th April 2010** to cusc.team@uk.ngrid.com. Please note that any responses received after the deadline or sent to a different email address may not receive due consideration by the Working Group.

Any queries on the content of the consultation should be addressed to Alex Thomason at National Grid at alex.thomason@uk.ngrid.com.

These responses will be considered by the Working Group at their next meeting, scheduled for 4th May 2010, at which members will also consider any WG Consultation Alternative Requests. Where appropriate, the Working Group will record your response and its consideration of it within the final Working Group report which is submitted to the CUSC Amendments Panel.

Respondent:	<i>Richard Hall (Richard.hall@consumerfocus.org.uk)</i>
Company Name:	<i>Consumer Focus</i>
<p>Please express your views regarding the Working Group Consultation, including rationale.</p> <p>(Please include any issues, suggestions or queries)</p>	<p><i>We understand, and share, the industry's desire for prompt, robust, decisions from the regulator – it should not be assumed that this is an industry-only concern; we are similarly frustrated by slow decision timescales. Deadlines are a good way of focussing minds and we understand the anxiety that open-ended 'decide-by' dates may have a dilatory effect on the accountability of the regulator.</i></p> <p><i>That said, we think there are strong natural disincentives on the regulator not to 'sit on' modifications indefinitely – not least of which is the dilatory effect that such behaviour has on the quality of the decision making process, and the amplifying effect that it has on the risk of successful legal challenge.</i></p> <p><i>Across the codes, open-ended 'decide-by' dates are already prevalent – indeed, they are the norm on the UNC – and this has not stopped the majority of decisions from being made promptly. Ironically, the most obvious recent example of tardy decision making timescales relates to the suspended Transmission Access Reform proposals – which were brought forward under existing CUSC rules.</i></p> <p><i>We agree with the working group that there is a risk that evidence will be 'sterilised' by events; such as changes to legislation or other market arrangements.</i></p> <p><i>We think this risk could be best mitigated by the regulator making appropriate use of the 'send back' powers proposed by the Code Governance Review. These would give an opportunity to refresh the</i></p>

	<i>evidence (if/as needed) at the same time as refreshing the decide-by date.</i>
Do you believe that the proposed original or any of the alternatives better facilitate the Applicable CUSC Objectives? Please include your reasoning.	<p><i>We think the case is ambiguous on objective (b) but is more obviously positive on objective (a). On balance, we think the proposal marginally better facilitates the code objectives.</i></p> <p><i>Were a modification timed out – and it must be noted that this is currently highly unlikely - the current arrangements may result in the process starting again from scratch (indeed, this is what happened on the BSC transmission loss proposals). This could result in duplication of effort and loss of time. This would help to facilitate Objective (a) the efficient discharge by the licensee of the obligations imposed upon it under the Act and by this licence.</i></p> <p><i>The case on the competition objective can easily be argued either way. CAP179 may reduce regulatory accountability through a dilution of pressure on the regulator to make prompt decisions. By extension, this may have an adverse effect on competition by increasing the perceived ‘riskiness’ of participating in the market. This could also increase the costs that consumers face, i.e. as the costs of industry risk are eventually backed off through bills.</i></p> <p><i>This detrimental effect on competition may be counterbalanced by the reduced risk that a reform proposal that is in consumers’ interests will be timed out.</i></p> <p><i>Both of those arguments are theoretical – much as the defect itself is on this code. As such, it is hard to give either any credible weighting; we therefore consider that the case on objective (b) is neutral.</i></p>
Do you support the proposed implementation approach? If not, please state why and provide an alternative suggestion where possible.	<i>It seems reasonable.</i>
Do you have any other comments?	<p><i>Noting that the format of ‘decide-by’ dates is not prescribed by the code, it appears to us that this proposal could have been avoided if only the working relationship between regulator and industry was not as bad as it evidently is.</i></p> <p><i>As a ‘code only’ proposal, CAP179 is not an expensive proposal – but nor is it free. Both industry and the regulator have sunk resources in to its development, and ultimately the costs of both flow through to consumers. While these costs are likely to be quite limited, they appear to have been avoidable.</i></p>
Do you wish to raise a WG	<i>No.</i>

Consultation Alternative Request for the Working Group to consider?	
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Specific questions for CAP179

Q	Question	Response
1	Do you believe there is a defect within the CUSC to be addressed?	<p><i>There is a theoretical defect with the CUSC whereby, in principle, a proposal that was in consumers' interests could be frustrated were the Panel to set a 'decide-by' date that could not be met by the regulator.</i></p> <p><i>This defect has never crystallised on this code. We think it is relatively unlikely that it ever would, although, given that it derailed the last suite of unpopular transmission loss proposals on the Balancing and Settlement Code, there is some latent risk that a decision timetable that could not be met might be set by the Panel.</i></p> <p><i>It is not clear to us that this proposal gives stakeholders anything that could not be delivered through the 'send back' powers envisaged by the Code Governance Review.</i></p>
2	Do you have any views on the proposed Implementation Date for CAP179?	<p><i>It seems entirely reasonable.</i></p>

Q	Question	Response
3	Do you have any views on whether the Working Group should develop the potential Working Group Alternative Amendment further?	<p><i>CAP179 provides insurance against the unlikely risk that a CUSC proposal will be timed out. Whether this insurance will ever pay-out is unknown, but, as with any form of insurance, its value is dependent on the premium (in this case, the resources being ploughed in to the development and consideration of the proposal).</i></p> <p><i>Ultimately that premium is paid by consumers. We would rather that:</i></p> <ul style="list-style-type: none"><i>• industry did not spend any more of consumers' money developing creative ways to mitigate the perceived risk arising from a largely theoretical defect;</i><i>• the regulator concentrated its efforts on implementing the materially more useful 'send back' powers envisaged by the Code Governance Review;</i> <p><i>than that significant further expense/resource was put in to this proposal.</i></p>

PART 2 REPRESENTATIONS TO THE SECOND WORKING GROUP CONSULTATION

This Annex includes copies of representations received to the second Working Group Consultation

Representations were received from the following parties:

Second Working Group Consultation	Respondent
CAP179-WGC2-01	EDF Energy
CAP179-WGC2-02	E.ON UK
CAP179-WGC2-03	ScottishPower
CAP179-WGC2-04	Scottish and Southern Energy

11 October 2010

Dear CUSC Team,

CUSC Amendment Proposal CAP179 (Timing Out and Related Issues): Second Working Group Consultation

EDF Energy welcomes the opportunity to respond to the above consultation. The key points of our response are as follows:

- We believe that CAP 179 original has no merit against the baseline.
- The existing WGAA to CAP179 has merit against baseline, if the unlikely event of a timing-out issue in the CUSC were to arise.
- We agree that National Grid's new proposed alternative amendment should be formally brought forward so that the working group and panel can vote on its merits. We do not give an opinion here on its merits against base line.
- We agree that CAP179 should not be implemented retrospectively (to amendments already progressing through the CUSC modification process).

As we have stated above, we believe that CAP 179 original has no merit against the baseline and therefore does not better facilitate the applicable CUSC Objectives.

The issue at hand for the BSC, the timing-out issue, is not an issue at CUSC due to underlying governance and process issues. The processing of CUSC amendment proposals does not involve setting implementation dates which would allow an Amendment Proposal to "time out" as CUSC implementation dates are relative to the timing of an Ofgem decision. Although paragraph 8.20.1.2(f) of the CUSC does state that an Amendment Report to be submitted to Ofgem by the CUSC panel shall include the proposed Implementation Date, in practice these dates are almost invariably stated in relation to the timing of a possible Ofgem decision, rather than being absolute. This is why we regard timing-out as not an issue for CUSC governance processes. We do not believe that there is a defect in the baseline; and we do not believe that CAP179 better facilitates either of the Applicable CUSC Objectives.

Working group alternative amendment

We note that there exists the potential for a successful Judicial Review if, following the Panel consultation on revised Implementation Dates, the Panel were to flag the issue of expiry of the shelf-life of any analysis undertaken for an Amendment Proposal and Ofgem were not to take account of that information in making a decision on the Amendment Proposal concerned. We believe that once the original analysis goes past its 'use by date' then if Ofgem undertakes some form of additional analysis as part of a Regulatory Impact Assessment, this cannot, in some way, 'update' the out of date original analysis such that it becomes 'usable' by Ofgem.

The lack of ability in CAP179 as originally drafted for the Panel to not only revisit its analysis but also have a fresh vote could, in our view, effectively prevent any successful

appeals to the Competition Commission as it would permit the Authority to argue before the Commission that its decision was based on the up to date analysis and the Panel's recommendation on an out of date (flawed) analysis.

However, we note that Ofgem's Code Governance Review proposals includes a concept that the Authority may "send back" a modification proposal to the relevant Panel, for a fresh Panel vote if necessary. The existing WGAA to CAP179 is consistent with this, and therefore has merit against baseline, if the unlikely event of a timing-out issue in the CUSC were to arise. This is because the WGAA includes a "bring back" mechanism, whereby the Amendments Panel can update the Amendment Report with any revised analysis and, importantly, a new Panel recommendation vote.

A second working group alternative amendment

We note National Grid's conclusion in its August advice to the working group that "proposer ownership" does not apply, and that National Grid believes that it is unable, as Proposer, to amend the original solution for CAP179 agreed by the Working Group. The consultation therefore seeks industry views on the additional Working Group Alternative Amendment proposed by National Grid (with legal text), which would become, if approved by the group, a second WGAA.

A key difference between National Grid's proposed new additional, second, Working Group Alternative Amendment and the original and the first WGAA, is that where it is mentioned that Ofgem may request additional analysis by the Panel, there is now a bracketed additional phrase "(such request not to be unreasonably refused)". This almost, but not quite, converts the original text "request", into the new phrase that Ofgem had suggested that it would like to see, "instruct". It is this phrase to which the working group objected at its meetings.

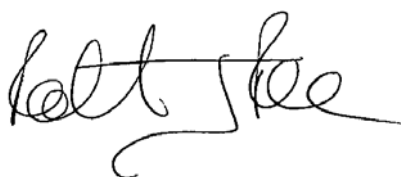
This point has been discussed at length and therefore we believe that National Grid's proposed new additional Working Group Alternative Amendment should indeed be permitted to come into existence formally as a second WGAA. It can then be voted on as to its merit by the working group and the Panel prior to the submission of the final amendment report to Ofgem. We do not propose to offer a view at this stage as to the relative merits of National Grid's proposed additional Working Group Alternative Amendment.

Regarding the wording of the consultation, as per the previous consultation and other documentation, the word allow is used in the context of: "allow the Panel Secretary to write to the Authority, on behalf of the Amendments Panel, to request a likely decision date..... The CUSC panel is already allowed (via the Panel Secretary) to write to any party, including Ofgem. The word "allow" here, should be replaced in each instance by, "give a mandate for".

Finally, we agree with respondents to the previous consultation that CAP179 or any Working Group Alternative version of it, should definitely not be applied retrospectively, if it is implemented.

If you have any queries on this response or would like to arrange a meeting to discuss further, please do not hesitate to contact me directly, or my colleague Paul Mott on 0203 126 2314.

Yours sincerely

A handwritten signature in black ink, appearing to read "Rob Rome".

Rob Rome
Head of Transmission and Trading Arrangements
Corporate Policy and Regulation

CUSC WORKING GROUP CONSULTATION – RESPONSE PROFORMA

CAP179: Prevention of "Timing Out" of Authority Decisions on Amendment Proposals

Industry parties are invited to respond to this **second** Working Group consultation, expressing their views and supplying the rationale for those views.

Please send your responses by **5pm on 11th October 2010** to cusc.team@uk.ngrid.com. Please note that any responses received after the deadline or sent to a different email address may not receive due consideration by the Working Group.

Any queries on the content of the consultation should be addressed to Alex Thomason at National Grid at alex.thomason@uk.ngrid.com.

These responses will be considered by the Working Group at its next meeting in October 2010. Where appropriate, the Working Group will record your response and its consideration of it within the final Working Group report which is submitted to the CUSC Amendments Panel.

Respondent:	<i>Esther Sutton</i>
Company Name:	<i>E.ON UK</i>
Please express your views regarding the Working Group Consultation, including rationale. (Please include any issues, suggestions or queries)	<p>Best: Baseline Next: WGAA 1 Then: Proposed Worst: WGAA 2</p> <p>The first WGAA is preferable to the Proposed which is preferable to the unacceptable 'additional' WGAA. However none are preferable to the baseline; we still do not believe that there is a defect in the CUSC. Working practice already utilises an implementation date construct of n days after Authority decision where appropriate, but sometimes fixed implementation dates are preferable e.g. to accommodate system changes. No date format can in itself ever 'prevent' timing-out as there will always be the possibility of analysis becoming out of date if the Authority takes an unreasonably long time to make a decision. Implementation dates should continue to be constructed to suit the amendment in question; if decisions are made in accordance with the 28-day kpi no issue should arise. The Authority has input to determination of decide-by and implementation dates during the modification process and this should be sufficient to produce reasonable and achievable dates. Formalising a mechanism for the Authority to request revised dates would disincentivise timely decision-making, increasing uncertainty for existing Parties and deterring new entrants.</p>
Do you believe that the proposed original or either of the alternatives better facilitate the Applicable CUSC Objectives?	<p><i>For reference, the Applicable CUSC Objectives are:</i></p> <p><i>(a) the efficient discharge by the licensee of the obligations imposed upon it under the Act and by this licence; and</i></p>

<p>Please include your reasoning.</p>	<p><i>(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.</i></p> <p>No. Our reasons remain fundamentally the same as in our last response. As above the first WGAA is preferable to the Proposed but neither are preferable to the baseline and the additional WGAA is definitely worse than the other options and the baseline, inefficient and with a significant negative impact under Objective (b). As identified by the Working Group, CAP179 can be read to support Applicable objective (a) in that it would clarify the process for extending an implementation timetable as per clause 6c) of Standard condition C10 of the licence. However this refers only to the timescale for implementation of an approved modification, not for a potential implementation to be deferred through extending the time that can be taken to make a decision whether or not to implement a proposal. Such a prospect would be less efficient, increasing uncertainty, risk and cost to Parties. The Panel and industry members have to meet deadlines for responding to consultations and providing Final Reports to the Authority; the Authority should also be able to make a decision within the timescales agreed for a modification. It would be inefficient to disincentivise prompt decision-making and facilitate unlimited modification timescales. The potential for a new set of dates to be requested, once or repeatedly, would significantly increase uncertainty for the industry. The longer the Authority takes to make a decision is proportional to the increased risk to industry members and enabling the potential for an open-ended loop of requests for new dates would not improve the efficiency of the procedures to modify the CUSC. 'Send-back' powers have been suggested in CAP186 to implement Ofgem's Code Governance Review Final Proposals for when Ofgem believes that analysis is lacking. It should not be necessary to request revised dates for other modifications where it is internal procedures not the quality of the Final Modification Report delaying a decision.</p> <p>CAP179 would be further detrimental to Applicable objective (b) as any uncertainty raised through the potential for occasional 'timing out' of proposals is less than CAP179 would create for all proposals. The Authority acknowledged this in its rejection of P93. This would be unhelpful for existing Parties and also anticompetitive being a deterrent to any new entrants considering investing in the UK market. It could be further detrimental to competition as the potential for prolonged decision-making timescales might well deter Parties from raising new modifications.</p>
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	<p>WGAA '1' is preferable to the Proposed CAP179. It would be a flawed approach to request revised dates without allowing the Panel to check the validity of the original analysis and their consequent decision. To request revised dates without enabling the Panel to refresh analysis considered out of date and re-make its recommendation would undermine the legitimacy of any decision made by the Authority. As emphasized by the Judge in the 2008 Judicial Review regarding BSC Losses proposals: where analysis may be time-sensitive risking that after any delay the Authority may not in substance and reality be considering the same Modification as that submitted by the Panel, 'the power to remit the matter to the Panel for complete re-consideration, rather than a power in the Authority to change the timetable might better preserve the institutional balance between the Panel and the Authority'. It would be more efficient thus more supportive of Objective (a) for the Panel on receiving any reasonable request for revised dates to review and update analysis and their recommendation to Ofgem; further analysis would only be undertaken if necessary. Nevertheless the Panel must retain the ability to refuse a request for new dates. Although Ofgem may have a KPI of decisions on 70% of modification proposals within 25 working days, at the time of writing the average of those CUSC proposals still awaiting a decision appears to be >400 days.</p> <p>WGAA '2' is unacceptable and an alarming development; we would not expect the Authority to make any unreasonable requests but its insistence on bringing forward this WGAA seems to suggest that very prospect. The Panel would only view any request as unreasonable with good reason so in such circumstances, no new dates should be provided and the modification in question should time out if a decision is not made by the original 'decide-by' date.</p>
<p>Do you support the proposed implementation approach? If not, please state why and provide an alternative suggestion where possible.</p>	<p>Yes</p>
<p>Do you have any other comments?</p>	<p>We are disappointed that the additional WGAA was progressed by the Chair (National Grid standing in for Elexon), being in fact strongly opposed by all members of the Working Group, with pressure on the Proposer from Ofgem's observer and seemingly spurious concerns regarding the definition of 'unreasonable' the only apparent driver for this WGAA. The fact that any request would not be unreasonably refused should be sufficient to satisfy this proposal and it is concerning that Ofgem think</p>

	unreasonable requests should be enabled.
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CUSC WORKING GROUP CONSULTATION

CAP179: Prevention of "Timing Out" of Authority Decisions on Amendment Proposals

Industry parties are invited to respond to this **second** Working Group consultation, expressing their views and supplying the rationale for those views.

Please send your responses by **5pm on 11th October 2010** to **cusc.team@uk.ngrid.com**. Please note that any responses received after the deadline or sent to a different email address may not receive due consideration by the Working Group.

Any queries on the content of the consultation should be addressed to Alex Thomason at National Grid at alex.thomason@uk.ngrid.com.

These responses will be considered by the Working Group at its next meeting in October 2010. Where appropriate, the Working Group will record your response and its consideration of it within the final Working Group report which is submitted to the CUSC Amendments Panel.

Respondent:	<i>Martin McDonald</i> <i>T: 01355 35 2760</i> <i>E: sp_electricity.spoc@accenture.com</i>
Company Name:	<i>Accenture Ltd on behalf of ScottishPower's Energy Wholesale Business which includes ScottishPower Generation Ltd, ScottishPower Energy Management Ltd and ScottishPower Renewable Energy Ltd.</i>
Please express your views regarding the Working Group Consultation, including rationale. (Please include any issues, suggestions or queries)	<i>Comments on Proposed Additional Working Group Alternative Amendment:</i> <i>Part 2 proposes that the Panel can optionally request additional analysis be undertaken to support an Amendment only after the Authority requests new Implementation Dates. ScottishPower agrees with the majority of the Working Group's idea that it would be "inappropriate to introduce a process for revising Implementation Dates without the ability to revise any out-of-date analysis and obtain a revised Panel recommendation where necessary."</i> <i>Part 3 proposes a further process to allow the Panel Secretary to write to the Authority, on behalf of the Amendments Panel, to request a likely decision date. Whilst this is a reasonable approach it is arguably superfluous since the Amendments Panel cannot compel the Authority to respond.</i>
Do you believe that the proposed original or either of the alternatives better facilitate the	<i>For reference, the Applicable CUSC Objectives are:</i> <i>(a) the efficient discharge by the licensee of the</i>

<p>Applicable CUSC Objectives? Please include your reasoning.</p>	<p><i>obligations imposed upon it under the Act and by this licence; and</i></p> <p><i>(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.</i></p> <p>=====</p> <p><i>ScottishPower agrees, albeit heavily caveated, that the Proposed Amendment does better facilitate Applicable CUSC Objective (a) as this will bring the CUSC into line with the associated code changes to the BSC already approved by the Authority. Whilst ScottishPower believes that Amendments should be allowed to time out if the Authority cannot make a decision with a given timescale, maintaining a difference between the Codes is detrimental to the overall efficiency of the industry.</i></p> <p><i>ScottishPower agrees with the Working Group that the Proposed Amendment does not better facilitate Applicable Objective (b) for the following reasons: (1) there would be an increased uncertainty as to when changes would be implemented; (2) participants could not accurately assess the costs, impacts and required implementation lead times; (3) there would be increased costs in assessing and implementing Modification Proposals; (4) and smaller Parties and new entrants would be impacted significantly as they would be less able to deal with uncertain Implementation Dates. This would be detrimental to smaller Parties and act as a barrier to entry.</i></p>
<p>Do you support the proposed implementation approach? If not, please state why and provide an alternative suggestion where possible.</p>	<p><i>Agree with the Working Group's proposal that CAP179 should be implemented 10 Business Days after an Authority decision.</i></p>
<p>Do you have any other comments?</p>	<p><i>ScottishPower is cognisant of the fact that the Authority has already approved the equivalent changes to the BSC via Modification P250 (Alternative). This was approved by the Authority despite a recommended rejection from both the Modification Group and from the BSC Panel.</i></p>

CUSC WORKING GROUP CONSULTATION – RESPONSE PROFORMA

CAP179: Prevention of "Timing Out" of Authority Decisions on Amendment Proposals

Industry parties are invited to respond to this **second** Working Group consultation, expressing their views and supplying the rationale for those views.

Please send your responses by **5pm on 11th October 2010** to **cusc.team@uk.ngrid.com**. Please note that any responses received after the deadline or sent to a different email address may not receive due consideration by the Working Group.

Any queries on the content of the consultation should be addressed to Alex Thomason at National Grid at alex.thomason@uk.ngrid.com.

These responses will be considered by the Working Group at its next meeting in October 2010. Where appropriate, the Working Group will record your response and its consideration of it within the final Working Group report which is submitted to the CUSC Amendments Panel.

Respondent:	<i>Garth Graham</i> <i>garth.graham@sse.com</i>
Company Name:	<i>SSE</i>
Please express your views regarding the Working Group Consultation, including rationale. (Please include any issues, suggestions or queries)	<p>We note the comments in paragraph 4.5.2:-</p> <p>"Ofgem noted that such a refusal could lead to the Amendment Proposal which was subject to the request "timing out"."</p> <p>We appreciate the underlying aim of the CAP179, namely to avoid a 'timing out' situation arising. However, as we noted in our previous response* there maybe very exceptional circumstances (such as a major IT system change) where it maybe preferable to have a fixed date as the cost benefit analysis (upon which the change was justified) would no longer be valid; i.e. the saving would not be realised; and, therefore, in this exceptional case a 'timing out' may be the preferred (Panel) way forward.</p> <p>In terms of acting "reasonably" we note that this requirement is placed upon all the parties concerned; namely the Panel and the Authority; and that if another party felt that a party had not acted "reasonably" then, ultimately, they might seek legal redress.</p> <p>* [SSE's previous CAP179 Working Group consultation response]</p> <p>"In respect of Part 2, notwithstanding our comments under Part 1, it must be recognised that fixed dates maybe necessary. For example, undertaking a particular change to coincide with another change (perhaps linked to a date imminent event like an IT system release date) could offer significant cost benefits. However, undertaking that same</p>

	<p>change at another time might offer little, if any, benefits. Given this then a fixed date is required. Allowing (as Part 2 proposes) the Authority to write to the Panel setting out its (the Authority's) reason as to why a decision cannot be made by the fixed date is a welcomed step forward. This is an important element in the 'checks & balances' by which good regulatory practice operates."</p>
<p>Do you believe that the proposed original or either of the alternatives better facilitate the Applicable CUSC Objectives? Please include your reasoning.</p>	<p><i>For reference, the Applicable CUSC Objectives are:</i></p> <p><i>(a) the efficient discharge by the licensee of the obligations imposed upon it under the Act and by this licence; and</i></p> <p><i>(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.</i></p> <p>Our views, as set out in our previous (April) response to the first Working Group Consultation are still valid and we have nothing further to add at this time.</p>
<p>Do you support the proposed implementation approach? If not, please state why and provide an alternative suggestion where possible.</p>	<p>We support the Group's view that CAP179 should follow a similar implementation approach as CAP160; namely that it should only apply to Amendment Proposals raised on or after the CAP179 Implementation Date. To do otherwise would mean that CAP179 would be a retrospective Amendment. We do not believe in retrospective Amendments as it gives rise to a substantial increase in regulatory uncertainty.</p>
<p>Do you have any other comments?</p>	<p>We have no additional comments at this time over and above those we set out in our previous (April) response to the first Working Group Consultation.</p>

PART 3 THE COMPANY CONSULTATION

This Annex includes copies of representations received to the Company Consultation

Representations were received from the following parties:

The Company Consultation	Respondent
CAP179-CR-01	E.ON UK
CAP179-CR-02	ScottishPower
CAP179-CR-03	EDF Energy
CAP179-CR-04	Scottish and Southern Energy

CUSC Secretary
National Grid
National Grid House
Warwick Technology Park
Gallows Hill
Warwick
CV34 6DA

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

Esther Sutton
T 024 76183440
esther.sutton@eon-uk.com

05/11/2010

CAP179 – Prevention of Timing Out of Authority Decisions on Amendment Proposals

Thank you for the opportunity to comment on the Company Consultation for CAP179. This response is made on behalf of E.ON UK and E.ON Energy Trading.

E.ON UK does not support the implementation of CAP179.

Our view has not changed since our responses to the Working Group consultation of 16/04/10, and second Working Group consultation of 27/09/10, as included within 'Consultation Document Volume 2'. In summary,

- We do not believe there is a defect in the CUSC.
- CAP179 would not better facilitate the applicable CUSC Objectives.
- WGAA1 would not better facilitate the applicable CUSC Objectives but is an improvement on CAP179 Proposed.
- WGAA2 would not better facilitate the applicable CUSC Objectives and is worse than CAP179 Proposed and WGAA1.
- CAP179 would rather have a negative impact upon the applicable CUSC Objectives:
 - Preventing fixed implementation dates as CAP179 would effect is overly restrictive thus inefficient; a fixed date with the prospect of timing out if this is not achieved may occasionally be most appropriate.
 - Removing an incentive for timely decision-making is inefficient.
 - Increasing uncertainty for all market participants for all Amendment Proposals would have greater impact than the potential for timing-out, and be detrimental to competition.

Our views are described in more detail below.

Nature of the Defect

We do not see a defect in the current arrangements. The situation CAP179 seeks to address has never arisen under the CUSC and normal CUSC working practice

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already utilises an implementation date construct of n days after Authority decision. Where a fixed date is considered more appropriate by the Working Group the Authority can influence both the decide-by and implementation date during the amendment process to ensure that these should be achievable. Financially or otherwise, fixed dates may be the only suitable implementation option for some Proposals, for instance those relating to other fixed changes to industry arrangements, or IT system changes. Indeed the merit of such Proposals could well be diminished or negated if a fixed implementation date is in doubt or prevented through implementation of CAP179. Because of this, implementing CAP179 would rather introduce a defect to the CUSC.

Moreover no date format can itself 'prevent' timing-out. The Authority has a duty to act reasonably, therefore even if CAP179 is implemented timing out will still occur if the Authority takes an unreasonably long time to decide upon a Proposal.

For these reasons we do not believe a defect exists within the CUSC, and rather that CAP179 would introduce a defect by removing the certainty that where a fixed date had been judged to suit an Amendment Proposal, either this would apply, or the Proposal would time out, not be at risk of changing at the whim of the Authority.

Further assessment against CUSC Objectives

Formalising a mechanism for the Authority to request revised dates would also disincentivise timely decision-making. Parties have to meet deadlines for responding to consultations; Groups and the Panel for providing Final Reports to the Authority; the Authority should also be able to make a decision within the timescales agreed for those Proposals where a fixed implementation date is warranted. It is not efficient to disincentivise prompt decision-making and facilitate unlimited modification timescales. The approval of CAP186 to enable Send Back where Ofgem believes that the Final Report is insufficient should ensure that work undertaken on a proposal is not wasted; it should not be necessary to request revised dates where internal Ofgem procedures not the quality of the Final Report delay a decision.

The potential for a new set of dates to be requested, as per the Original CAP179 Proposal and WGAA1, would significantly increase uncertainty for the industry. The longer the Authority takes to make a decision the greater the risk to industry members: both unhelpful and raising costs for existing Parties to monitor the potential impact of and remain ready to implement such proposals, plus deterring new entrants considering investing in the UK market. Commitment to Ofgem's 28-day KPI for reaching decisions is called into question by CAP179; such a KPI could give little comfort to Parties if CAP179 implementation enabled request or direction of new dates at Ofgem's behest, potentially repeatedly. This is detrimental to competition and would not improve the efficiency of the procedures to modify the CUSC.

CAP179 would be further detrimental to competition due to the potential for prolonged decision-making timescales leading to 'sterilisation of subject matter' while the original Proposal is still with the Authority.

Furthermore a change of implementation date without the opportunity to revise analysis if appropriate, and subsequently the Panel vote, as proposed by CAP179 Original and WGAA2, would be inappropriate. Removing the Panel's ability to make a recommendation based on up to date analysis undermines the role of the Panel and may have implications on parties' ability to appeal GEMA decisions.

We also refer to recent discussions at the CUSC Panel regarding the relative weight that should be given to the Applicable Objectives when assessing a Proposal; we are disturbed by the proposer's justification with reference to fulfilment of Objective (a) only. This alone should not justify a recommendation to implement a proposal. In our view when considering Objective (a) the Panel must have the right to make a recommendation based on the intrinsic merits of the proposal under (a), not only the satisfaction of a Licence condition which parties did not have a right to object or appeal. To do otherwise could preclude a potential merits based appeal by affected parties under the statutory Energy Code Modification appeals process.

Other issues

With regard to WGAA2 to enable the Authority to *direct* dates to be revised, we are disappointed that Ofgem's attendee insisted upon this wording when under the Original and WGAA1 no reasonable request would be refused by the Panel. This seems to suggest some distrust of the Panel and/or expectation from Ofgem, that they are anticipating unreasonable requests.

We note that WGAA2 was not supported by any member of the Working Group other than the Proposer (National Grid) and only put forward by the Chair (Elexon/National Grid), and that the Panel has agreed that the GSG should consider the ongoing appropriateness of the CUSC's requirements on Working Group Chairmen regarding WGAA's.

Implementation

If approved we agree that implementation should not be retrospective, in order not to exacerbate the increase in uncertainty that CAP179 would bring.

In conclusion WGAA1 is preferable to CAP179 Original which is preferable to WGAA2. However the uncertainty, increased risk and costs to industry likely from CAP179 mean that it does not better facilitate the Applicable CUSC Objectives, and E.ON UK cannot support its implementation.

I hope the above comments prove helpful. If you have any queries, please do not hesitate to contact me on the above number

Yours faithfully

Esther Sutton
Trading Arrangements

Bali Virk
Commercial
National Grid
National Grid House
Warwick Technology Park
Gallows Hill
Warwick
CV34 6DA

Ref CAP179
Date 15th November 2010

Tel No. 01355 35 2760
Email: sp_electricity.spoc@accenture.com

CUSC Amendment Proposal CAP179 - Prevention of “Timing Out” of Authority decisions on Amendment Proposals.

Thank you for the opportunity to comment on the Consultation for Amendment Proposal CAP179. This response is submitted on behalf of ScottishPower’s Energy Wholesale Business which includes ScottishPower Generation Ltd, ScottishPower Energy Management Ltd and ScottishPower Renewable Energy Ltd.

One driver for raising this Amendment is to harmonise as far as possible the various codes within the utilities industries. Initially there does not appear to be an issue with the current baseline for Amendments. The current working practise for the CUSC uses the construction of “x business days after receipt of an Authority decision”. Therefore an Amendment cannot “time out” if the Authority has still to make a decision, although a decision would be expected within a reasonable time. The point of contention then surrounds the definition of what constitutes “reasonable”.

ScottishPower supports the requirement for there being certainty within the electricity industry so that business decisions and investment can be undertaken. The business imperatives differ between industry Parties and The Authority; the former arguably wishing definitive answers and timescales to enable work to progress whereas the latter must take cognisance of factors outside the normal remit of Parties before making a decision on Amendments.

ScottishPower does not agree that the Proposed Amendment better facilitates the Applicable CUSC Objectives. Although the Proposed Amendment will bring the CUSC into line with the associated code changes to the BSC already approved by the Authority, thus facilitating Applicable Objective (a), ScottishPower believes that Amendments should be allowed to time out if the Authority cannot make a decision within a given timescale.

The Proposed Amendment (Part 2) includes a resolution of the problem of the Authority being constrained by a fixed Implementation Date and hence by extension a fixed Decision Date. Such a situation has not occurred to date within CUSC Amendments. It is possible that a requirement for a fixed implementation date could exist, generally driven by external or associated factors such as systems implementations. A delay in an Authority decision could compromise said implementation.

Working Group Alternative Amendment 1 allows the Panel to request analysis to be updated if there is a delay in an Authority decision. Furthermore, the Panel could make further or even contrary recommendations depending upon the result. This mitigates the risk of an Authority Decision delay compromising the integrity of the analysis, ensuring that an Authority Decision is made using the most appropriate information. However, the impact of an Authority Decision delay would still exist.

For Working Group Alternative Amendment 2, the Authority will direct the Panel to provide alternative Decision Dates if the Authority cannot meet the original dates. This will prevent a “time-out” for The Authority but will both return the responsibility to the Panel to consult with industry Parties about a new date and also delay the decision making process. This adds uncertainty to the industry process.

ScottishPower does not believe that the Proposed Amendment better facilitates Applicable Objective (b) as there would be an increased uncertainty as to when changes would be implemented; (2) participants could not accurately assess the costs, impacts and required implementation lead times; (3) there would be increased costs in assessing and implementing Modification Proposals; (4) and smaller Parties and new entrants would be impacted significantly as they would be less able to deal with uncertain Implementation Dates. This would be detrimental to smaller Parties and act as a barrier to entry.

ScottishPower does not agree with implementation of the Proposed Amendment but if the Authority does approve it, ScottishPower agrees with the Working Group's proposal that CAP179 should be implemented 10 Business Days after an Authority decision.

I hope you find these comments useful. Should you have any queries on the points raised, please feel free to contact us.

Yours sincerely,

Martin McDonald



For and on behalf of: ScottishPower's Energy Wholesale Business which includes ScottishPower Generation Ltd, ScottishPower Energy Management Ltd and ScottishPower Renewable Energy Ltd.

To : cusc.team@uk.ngrid.com.

15 November 2010

Dear CUSC Team,

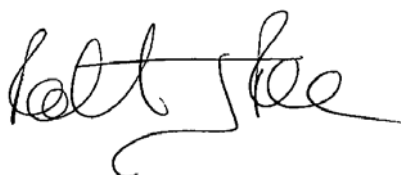
CUSC Amendment Proposal CAP179 (Timing Out and Related Issues): Final Consultation

EDF Energy welcomes the opportunity to respond to the above consultation on CAP179.

- EDF Energy does not believe that there is a defect with the baseline as described by this amendment proposal. Consequently, CAP179 and its alternatives do not better facilitate the applicable CUSC objectives.
- Whilst believing that no version of CAP179 has merit against the baseline, of the three variants on offer, we favour the first working group alternative amendment, WGAA1, as it allows for a revised vote by the CUSC Panel on the merits of an amendment proposal where fresh analysis has been undertaken.
- We do not support the original or the new, second working group alternative amendment, as both preclude the possibility of a revised vote by the CUSC Panel on the merits of an amendment where fresh analysis has been undertaken. To not allow for a revised Panel vote could potentially damage parties appeal rights as the original Panel vote will be based on the 'old' analysis compared to the new analysis which Ofgem will assess when it finally makes a decision.
- We agree that if CAP179 is implemented no element of it should be applied retrospectively.

If you have any queries on this response or would like to arrange a meeting to discuss further, please do not hesitate to contact me directly, or my colleague Steven Eyre on 01452 653741.

Yours sincerely



Rob Rome
Head of Transmission and Trading Arrangements

Virk, Bali

From: garth.graham@sse.com
Sent: 15 November 2010 17:10
To: Virk, Bali
Cc: .Box.Cusc.Team
Subject: Re: Company Consultation CAP179

Dear Sirs,

CAP179 Prevention of Timing Out of Authority Decisions on Amendment Proposals

This response is sent on behalf of Scottish and Southern Energy, Southern Electric, Airtricity Developments (Scotland) Limited, Airtricity Developments (UK) Limited, Clyde Wind Farm (Scotland) Limited, Dalswinton Wind Farm (Scotland) Limited, Greenock Wind Farm (Scotland) Limited, Griffin Wind Farm Limited, Keadby Developments Limited, Keadby Generation Limited, Medway Power Limited, Minsca Wind Farm (Scotland) Limited, Slough Energy Supplies Limited, SSE (Ireland) Limited, SSE Energy Limited and SSE Generation Limited.

In relation to the Consultation Document associated with CUSC Amendment Proposal CAP179 "Prevention of Timing Out of Authority Decisions on Amendment Proposals" (contained within your email of 1st November 2010) we provide our comments below.

CAP179 has three elements. We comment on these in turn.

In respect of Part 1, we support the continuation of the CUSC working practice of setting implementation dates; where practical; as being XX business days / months etc., after an Authority Decision. For the avoidance of doubt, this should be, in all cases, a minimum of ten business days (and sixteen days, if 'self-governance' changes are permitted - as set out in CAP184).

In respect of Part 2, notwithstanding our comments under Part 1, it must be recognised that fixed dates maybe necessary. For example, undertaking a particular change to coincide with another change (perhaps linked to a date imminent event like an IT system release date) could offer significant cost benefits. However, undertaking that same change at another time might offer little, if any, benefits. Given this, it follows that the ability to have a fixed date is required. Allowing (as Part 2 proposes) the Authority to write to the Panel setting out its (the Authority's) reason as to why a decision cannot be made by the fixed date is a welcomed step forward. This is an important element in the 'checks & balances' by which good regulatory practice operates.

In respect of Part 3, we support the notion that the Panel write to the Authority when it (the Panel) becomes aware that analysis etc., upon which its recommendation is based could soon become out of date. It is beholden upon all public authorities to act reasonably when carrying out their duties. If they become aware of an issue (such as the risk that a decision might be flawed because its based upon inaccurate / out of date / wrong / defective information or analysis) then, in our view, they are duty bound to act to address this. Part 3 is, therefore, a welcomed step forward.

However, Part 3, on its own, would not, in our view, be sufficient as having identified a deficiency (namely out of date analysis / information etc.,) there would not be a way to rectify this. This would mean that the work undertaken to date would have to lapse.

In light of this we believe that WGAA1, in addressing this matter (whereby the out of date analysis / information etc., is updated, CUSC Parties consulted, a new Panel recommendation vote undertaken (based on the most up to date analysis / information etc.,) and a new Amendment Report submitted to the Authority) is, in our view, the better way forward when compared with (a) the CAP179 Original and (b) the baseline.

This view is based on the better achievement of the Applicable CUSC Objectives.

In considering WGAA2 we appreciate the desirability of the Authority to be able to "direct" (rather than "request") and we have sympathy with this view.

However, whilst WGAA2 does provide for 'direction' (which, in this context, we agree with) it fails to address the issue of Part 3 that WGAA1 addresses (whereby the out of date analysis / information etc., is updated, CUSC Parties consulted, a new Panel recommendation vote undertaken (based on the most up to date analysis / information etc.), and a new Amendment Report submitted to the Authority).

As we have indicated previous, we believe that if the Panel becomes aware that the analysis / information etc., within an Amendment Report that is with the Authority for decision has become materially inaccurate / out of date / wrong / defective that it should take steps to address this. For the avoidance of doubt, it seems to us intrinsically wrong for either the Panel or the Authority (having become aware of this fact) to not take steps jointly to address this. To do otherwise could, in our view, lead to the eventual decision (by the Authority) to either accept or reject a particular Amendment Proposal being successfully challenged at law. This, in our view, would be most regrettable.

Therefore to address this, the power should exist for the Panel to re-do (via a Working Group if necessary) any (out of date) analysis contained within the Amendment Report and then re-consult CUSC Parties and re-vote on its recommendation to the Authority.

This, in our view, best conforms with the P198 Judgement that "in such circumstances a power to remit the matter to the Panel for complete reconsideration, rather than a power in the Authority to change the timetable for implementation of what had in substance become by lapse of time a different [Amendment], might better preserve the institutional balance between the Panel and the Authority and better serve the objectives of the [CUSC]".

Given this we reluctantly conclude that WGAA2 does not better achieve the Applicable CUSC Objectives when compared with either (a) CAP179 Original or (b) WGAA1 or (c) the baseline on the ground, in particular, that it does not allow for a re-consultation / re-vote by the Panel which is detrimental to CUSC Applicable Objective (a) (on the grounds of efficiency) and (b) (as inefficient processes are detrimental to facilitating competition) as we set out in further detail above.

However, in coming to this view we are mindful of the comments, in particular, contained in paragraph 3.3 of the CAP186 Final Amendment Report which indicates that this (CAP186) proposal would address both the (CAP179) WGAA1 and WGAA2 matters of substance. It (CAP186) would allow for the Authority to 'direct' the Panel (thus matching the intent of WGAA2) whilst allowing the Panel to re-consult / re-vote etc., (thus matching the intent of WGAA1). In light of this we conclude that the 'ideal' situation would be for the Authority to approve the implementation of CAP186 and reject CAP179 (Original, WGAA1 and WGAA2).

Yours faithfully

Garth Graham
Electricity Market Development Manager
SSE

From: "Virk, Bali" <bali.virk@uk.ngrid.com>
To:
Date: 01/11/2010 16:49
Subject: Company Consultation CAP179

Dear CUSC Parties

16/11/2010

Please note that the Company Consultation for CAP179 Prevention of Timing Out of Authority Decisions on Amendment Proposals will be available at: <http://www.nationalgrid.com/uk/Electricity/Codes/systemcode/amendments/currentamendmentproposals/> later this afternoon.

Please send responses to this consultation to cusc.team@uk.ngrid.com by 5pm on 15th November 2010.

Regards

Bali Virk
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UK Transmission - Commercial
National Grid
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