Stage 04: Code Administrator Consultation

Connection and Use of System Code

CMP261

'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'

What stage is this document at?

01	Initial Written Assessment
02	Workgroup Consultation
03	Workgroup Report
04	**Code Administrator Consultation**
05	Draft CUSC Modification Report
06	Final CUSC Modification Report

CMP261 seeks to ensure that there is an ex post reconciliation of the TNUoS paid by GB Generators during charging year 2015/16 which will take place in Spring 2016 with any amount in excess of the €2.5/MWh upper limit being paid back, via a negative Generator residual levied on all GB Generators who have paid TNUoS during the period 1st April 2015 to 31st March 2016 inclusive.

Published on: **26th May 2017**
Length of Consultation: **10 Working Days**
Responses by: **9th June 2017**

The Workgroup concludes:
CMP261 with majority voted that WACM1 better facilitates the Applicable CUSC Objectives with note of support for the baseline, WACM2 and the original proposal.

High Impact:
Users who pay either Generation or Demand TNUoS tariffs

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Any Questions?

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About this document

This is the Code Administrator Consultation following Ofgem sendback on 22 February 2017. This consultation includes the deliberations of the Workgroup both post and pre sendback, responses from the Workgroup Consultation conducted pre sendback and the final conclusions of the Workgroup post sendback.

Document Control

Version	Date	Author	Change Reference
0.1	10/08/2016	Code Administrator	Draft Workgroup Report
0.2	05/09/2016	Code Administrator	Draft Workgroup Report
0.3	12/09/2016	Code Administrator	Draft Workgroup Report
0.4	15/09/2016	Code Administrator	Draft Workgroup Report
0.5	22/09/2016	Code Administrator	Draft Workgroup Report
1.0	05/10/2016	Code Administrator	Final Workgroup Report
1.1	19/10/2016	Code Administrator	Final Workgroup Report
0.6	07/03/2017	Code Administrator	Draft Workgroup Report following sendback
1.2	23/05/2017	Code Administrator	Final Workgroup Report following sendback
1.3	26/05/2017	Code Administrator	Code Admin Consultation

1 Summary

1.1 This document describes the Original CMP261 CUSC Modification Proposal (the Proposal), summarises the deliberations of the Workgroup and sets out the options for potential Workgroup Alternative CUSC Modifications (WACMs).

1.2 CMP261 was proposed by SSE and was submitted to the CUSC Modifications Panel for their consideration on 9th March 2016 at an urgently convened CUSC Panel. A copy of this Proposal is provided within Annex 1. The proposed request for urgency was not supported by a majority of the CUSC Panel or by Ofgem (in their letter of 17th March 2016). The Panel and Ofgem did agree to progress CMP261 on an accelerated timetable. The Panel decided to send the Proposal to a Workgroup to be developed and assessed against the CUSC Applicable Objectives. The Workgroup is required to consult on the Proposal during this period to gain views from the wider industry (this Workgroup Consultation).

1.3 The Final Modification Report was submitted to Ofgem in December 2016 for decision. In February 2017 the Final Modification Report was sent back by the Authority for further work. This work was focussed on amending legal text errors and ensuring that the options on the table ensured that the right people were paid the right amount of money. The Workgroup reconvened in February 2017 and now present a Workgroup Report for agreement by the Panel to progress onto Code Administrator Consultation for 10 working days.

1.4 CMP261 aims to ensure that there is an ex post reconciliation of the TNUoS paid by GB Generators during charging year 2015/16 which will take place in Spring 2016 with any amount in excess of the €2.5/MWh upper limit being paid back, via a negative Generator residual levied on all GB Generators who have paid TNUoS during the period 1st April 2015 to 31st March 2016 inclusive[1].

1.5 Following the Workgroup discussions post sendback, as summarised in this Report, this Code Administrator consultation has been prepared in accordance with the terms of the CUSC. An electronic copy can be found on the National Grid Website, http://www2.nationalgrid.com/UK/Industry-information/Electricity-codes/CUSC/Modifications/CMP261/ along with the Response Pro-forma.

1.6 Please note that Section 2 to Section 9 remains unchanged from the original Final Modification Report submitted on 30th November 2016 to the Authority. Discussions resulting from the Ofgem send back letter of 22nd February 2017 are recorded in Section 10 to Section 12.

Workgroup Conclusions

1.7 At the (final) Workgroup meeting on 11th October 2016, Workgroup members voted on the Original proposal and the three WACMs: Three of the Workgroup members voted that the Baseline better facilitated the Applicable CUSC Objectives, one Workgroup member abstained, one Workgroup member voted for the Original Proposal and 6 Workgroup members voted that WACM1 better facilitated the Applicable CUSC Objectives. This vote was reflected in the original Final Modification Report submitted on 30th November 2016 to the Authority. Following the Ofgem send back letter of 22nd February 2017 and the outcome of the 12th May 2017 Special CUSC Panel meeting the Workgroup (re)voted on 22nd May 2017 on the Original proposal and the three WACMs in light of the changes to the legal text and the updated analysis arising from the send back, the results were by majority the Workgroup support WACM1 with note for WACM2, the baseline and the original. Detailed voting can be found in Section 12 of this report.

[1] The CMP261 original solution proposes the same mechanism as that of CMP251 original to remedy any exceedance of the €2.5/MWh value for average Generator transmission charges. However, it is a one-off change proposal applying to the charging year 2015/16, whereas CMP251 would, if approved, apply on an enduring basis commencing 2017/18. The other important distinction is that CMP261 considers the €2.5/MWh value as a cap whereas CMP251 is a target with reconciliation possible in both directions.

2 Workgroup Discussions

Background and the Defect

2.1 Commission Regulation (EU) No 838/2010 Part B (the 'Regulation') restricts annual average transmission charges paid by electricity Generators in Great Britain to the range of €0/MWh to €2.50/MWh. The Regulation is legally binding for all Transmission licensees across Europe. If in any given year the average annual generation transmission charges in GB do not fall within this range (€0-2.5/MWh), National Grid runs the risk of being non-compliant with the Regulation. Therefore it is important that the average annual generation transmission charges remain within the current prescribed range. The methodology for generation transmission charges in Great Britain is defined in Section 14 of the CUSC. Therefore, to seek to ensure compliance of Great Britain with the above Regulation, CUSC modification CMP224[2] "Cap on the total TNUoS target revenue to be recovered from generation users" was raised by National Grid with a Workgroup formed consisting of Generation and Demand participants with a Panel recommendation that was, subsequently, approved by Ofgem on 8th October 2014[3].

2.2 Under CMP224, and as now codified in the CUSC[4], the proportion of the total annual average TNUoS revenue paid by GB generation in any given Charging Year is the lower of 27% or a calculated percentage to ensure that the upper €2.50/MWh limit in the Regulation is not exceeded. To calculate this percentage in order to set TNUoS tariffs in January (preceding the start of the Charging Year in April) the €2.50/MWh figure is converted to pound sterling using the OBR Spring Forecast €/£ Exchange Rate in Charging Year n-1. This OBR forecast (as set out, for example, in Table 4.1 of their 2014 Budget report[5] on page 92) was €/£ 1.22 for the 2015/16 Charging Year. The MWh is considered by using Forecast GB Generation Output for generation liable for Transmission charges (i.e. total measured energy injected annually by producers into the transmission system) for Charging Year n. In addition an error margin is applied to the €2.50/MWh figure to account for the difference in the one year ahead forecast and outturn values for Forecast TO Maximum Allowed Revenue (£) and Generation Output (MWh), based on previous years error at the time of calculating the error for Charging Year n.

2.3 The calculation of the percentage for the Charging Year 2015/16 was undertaken prior to the TNUoS tariffs being set at the end of January 2015 and is shown in Figure 1. The calculation was to seek to limit the amount of the total TNUoS revenue that could be recovered from GB Generators so as not to breach the €2.50/MWh cap. For Charging Year 2015/16 the calculation yielded a generation percentage of 23.2% which was equivalent to expected revenue of £613m to be paid by generation out of the total expected TNUoS revenue of £2,637m.

		2015/16
CAP_{EC}	Limit on generation tariff (€/MWh)	2.50
y	Error Margin	6.4%
ER	Exchange Rate (€/£)	1.22

[2] http://www2.nationalgrid.com/UK/Industry-information/Electricity-codes/CUSC/Modifications/CMP224/
[3] Implementation took place on 22nd October 2014
[4] The CUSC, Section 14 – Charging Methodologies, 14.14.5 (v)
[5] http://cdn.budgetresponsibility.org.uk/37839-OBR-Cm-8820-accessible-web-v2.pdf

MAR	Total Revenue (£m)	2637
GO	Generation Output (TWh)	319.6
G	% of revenue from generation	23.2%
D	% of revenue from demand	76.8%
G.R	Revenue recovered from generation (£m)	613
D.R	Revenue recovered from demand (£m)	2024

Figure 1: *The application of the €2.50/MWh cap applied to final tariffs (set in January 2015) for 2015/16 under the current CUSC methodology.*

2.4 As implemented by CMP224, to calculate the percentage of the total TNUoS to be recovered from GB Generators, the upper limit to generation charges has been implemented through a variable described as "CAPec". This is defined in the CUSC as the "*Upper limit of the range specified by Commission Regulation (EU) No 838/2010 Part B paragraph 3 (or any subsequent regulation specifying such a limit) on annual average transmission charge payable by generation*" [6].

Workgroup Discussions

2.5 The Proposer raised the proposal (CMP261) which identified the defect that; using an indicative estimate, based on publically available information (up to the end of February 2016); the average annual TNUoS charges paid by Generators in GB, in Charging Year 2015/16, was likely to amount, at that time, to circa €3.22 /MWh, which is approximately €0.73/MWh, or 29%, in excess of the €2.50/MWh upper limit set in the Regulation. The Proposer updated these figures (from end February to end March 2016) in the Workgroup meetings (see Figure 2 below).

2.6 The Proposer noted if a GB Generator paid a TNUoS tariff exceeding the €2.50/MWh cap then National Grid will have charged an excessive amount of TNUoS in the 2015/16 Charging Year. The Proposer noted that, had their arguments been accepted, the CMP261 solution (had urgency been granted and approval given to the Original, to change tariffs by the end of March 2016) would have seen the Generator TNUoS tariffs for Charging Year 2015/16 changed 'mid-year' (in reality, it would have been at the end of March 2016) and this would have resulted in the Generator Reconciliation carried out in accordance with CUSC 3.13.2-3 in April 2016 ensuring that, via a circa £1.92/kW residual paid to Generators, there was compliance with the €2.50/MWh limit set in the Regulation with the balancing amount (of approximately £130M) being recovered from Suppliers in the following year 2017/18 (Charging Year Y+2).

2.7 One Workgroup member noted that no draft CUSC legal text had been included with the CMP261 proposal, so the Proposer was asked to clarify what the modification was seeking to change in the CUSC. The Proposer noted that it was not altogether unusual for draft legal text not to be provided at this stage in the process, and clarified that any change to the CUSC resulting from CMP261 would be a one-off occurrence in order to mitigate what the Proposer considered to be a breach of the Regulation in Charging Year 2015-2016. The Proposer clarified that if the €2.50/MWh limit was to be exceeded in any future Charging Year then another (separate to CMP261) modification would need to be raised. One Workgroup member noted that if an ex post reconciliation of the TNUoS tariffs was carried out for 2015/16, and then this would effectively set a precedent which would need to be continued

[6] The CUSC, Section 14 – Charging Methodologies, 14.14.5 (v)

year on year if there were further breaches of the €2.50/MWh limit in a future year.

2.8 One Workgroup member suggested that the CUSC modification should seek an enduring solution to amend the formula (e.g. bigger risk margin) if the principles of an ex ante approach was valued by the industry. The Proposer noted that the reason an enduring solution was not sought as part of the CMP261 solution to the defect is because a variety of economic events, such as 'Brexit'[7], could have a significant impact either positively or negatively on the €/£ exchange rate in Charging Year 2016/17. The Proposer, mindful of CMP251, noted that they were conscious of CMP261 not affecting the progression of CMP251 and also that CMP251 would not be implemented in enough time to ensure that the €2.50/MWh cap is not exceeded, in Charging Year 2015/16, and to minimise any associated costs that might be attributed to parties and the SO.

2.9 Some Workgroup members raised the dangers of retrospective changes and the impact on Supplier and Demand customers. Those members did not foresee any retrospective ex post reconciliation of tariffs to be applied to the Charging Year 2015/16. Notwithstanding that, the Proposer suggested that any impacts arising from exceeding the €2.50/MWh upper limit cannot be billed as being totally unexpected by stakeholders for a number of reasons, including:

i. It was, set out in 2010 when the Regulation was introduced that the limit cannot be exceeded;

ii. it was identified in the September 2011 Ofgem Project Transmit Technical Working Group Initial Report, which noted that "*Analysis was presented to the Working Group to ascertain when the EU €2.5/MWh guideline would be likely to be breached. It was estimated that, in the context of GB, the EU Tarification Guidelines could be breached as early as 2015/16 using 'worse case' assumptions and by 2018/19 using assumptions considered to be a 'central case*[8] ".

iii. it was implicitly recognised that a possibility of a change to TNUoS tariffs would occur, if required, within a particular Charging Year by virtue of the statement (within the CMP224 proposal itself of September 2013) that "*In any given charging year, if the generation revenue falls within the range then the G/D split ratio will not be modified*." or, to put the counter factual, 'if the generation revenue falls out with the range then the G/D split ratio will be modified';

iv. it was highlighted in the May 2014 CMP224 Final Modification Report (see, for example, Figures 1 and 2) that an exceedance of the €2.50/MWh limit was forecast to occur during Charging Year 2015/16[9]

v. it was recognised in Ofgem's October 2014 CMP224 Decision Letter[10] that "*Based on current forecasts and the current G:D split of 27:73, average transmission charges for Generators in Great Britain are expected to exceed the €2.5/MWh upper limit at some point over the five years from 2015/16 to 2020/21*"; and

[7] This discussion having taken place prior to the 23rd June 2016 Referendum result being known.

[8] Paragraph 9.15 https://www.ofgem.gov.uk/ofgem-publications/54282/transmit-wg-initial-report.pdf

[9] CMP224 Final Modification report, paragraph 4.6, page 10.

[10] https://www.ofgem.gov.uk/sites/default/files/docs/2014/10/cmp224_d.pdf

vi. it was highlighted to stakeholders on numerous occasions[11] during 2015 and 2016 (culminating in the raising of CMP261 in March 2016) that there was a possibility of an exceedance of the €2.50/MWh limit occurring in Charging Year 2015/16.

2.10 In respect of item (ii) above a Workgroup member did not feel that it was reasonable to expect users to read all documentation publicly available in order to make a judgement on the expectancy of an exceedance of the €2.50 CAP.

2.11 In respect of item (iv) above a Workgroup member commented that this was already a risk prior to the implementation of CMP224 and was why CMP224 was raised.

2.12 In respect of all items above some Workgroups members felt that an ex post reconciliation was totally unexpected and that an ex post adjustment could be considered in future methodology discussions. It is unexpected due to the ex ante methodology being approved in the CMP224 modification. Some Workgroup members felt that it was foreseen as an obligation exists in the Transmission licence[12] that users should have clear sight of the Charging Methodology and risks associated with it. Some Workgroup members felt that CMP224 considered the potential of the above risks and put in place a methodology to address them.

2.13 The Proposer also noted that, with the proposed CMP261 (Original) solution, Suppliers would not have an immediate cash flow impact as their transmission charges would not be changed until the following 2017/18 Charging Year by amending the K factor. However, some Workgroup members believed that there would be an immediate Profit and Loss impact resulting from the impact of long term fixed contracts. Resulting action from some Suppliers could be to increase forward looking tariffs. A Workgroup member then asked if costs could be passed onto Suppliers in the 2015/16 Charging Year. The Proposer noted that the Regulation only stipulates Generators should not pay more than €2.50/ MWh and, in terms of the CMP261 (Original) solution, any corresponding change, in terms of Supplier TNUoS tariffs, would occur in 2017/18.

2.14 With the approval by Ofgem[13] of CMP224[14] the approved methods to seek to ensure compliance with the Regulation was to use an ex ante methodology. The driver for the CMP224 proposal was to counter the risk of non-compliance with the Regulation if indeed a breach of the €0/MWh to €2.50/MWh range applied on generation transmission charges becomes a possibility in the future. The logic behind CMP224 was to set an error margin (deliberately not taking account of movements in the €/£ exchange rates as this was considered to be outside industry control) based on historical evidence of demand and revenue forecast error which would be a reasonable approach to ensure the €2.50/MWh limit was not exceeded. However, the Regulation is silent on what should be done where the limit is expected to be exceeded, and indeed when it is actually exceeded.

2.15 One Workgroup member challenged that as a result of the ex post nature of CMP261 we are questioning the principles of the wider

[11] Examples of these are listed below in paragraph 2.33.

[12] '*The licensee shall, for the purpose of ensuring that the use of system charging methodology achieves the relevant objectives, keep the use of system charging methodology at all times under review*' – Electricity Transmission standard licence condition C5(1).

[13] In its decision letter of 8th October 2014.

[14] Which was implemented on 22nd October 2014.

methodology as a whole. The Proposer noted that given the strong argument that a breach of the €2.50/MWh limit had occurred in the 2015/16 Charging Year that a remedy was required to address the harm that (a) had been experienced during 2015/16 and (b) was continuing to be experienced during 2016/17 by GB Generators. A Workgroup member felt it important to flag that if there was no breach then no remedial action would be required.

2.16 Some Workgroup members felt that the concept of 'harm' referenced above is not in scope of the modification as it stands. The modification proposal (Original) specifically seeks a reconciliation to ensure that Generation charges are no higher than €2.50 MWh for the Charging Year 2015/16. Subsequently in light of the legal advice received it states that it would be prudent to adjust the Generation charges paid in the relevant year by adjusting on a backward looking basis in order to bring them materiality in line with €2.50 MWh limit in order to demonstrate compliance with the Regulation.

2.17 A further Workgroup member argued that if local charges were excluded from the calculation then the €2.50/MWh limit would not be exceeded. The Proposer countered that the arguments for including and excluding generation only spurs were set out in the CMP224 Final Modification Report. The Proposer highlighted that stakeholders were afforded three separate occasions (the Workgroup consultation, the Code Administrator consultation and the Ofgem Regulatory Impact consultation) to set out those arguments. The Proposer noted that, mindful of these arguments, in the CMP224 decision, the Authority decided to include generation only spur charges in the pot of money recovered, and that no other proposals had come forward to change this definition since CMP224 was implemented. The Ofgem representative at the CMP261 Workgroup noted that in its CMP224 decision letter, the Authority approved an option that would result in charges that comply the "stricter" interpretation of the Regulation (and a broad interpretation) on grounds of legal risk, not that they had accepted the principle that local circuit charges should be included in the calculation of GB's average charge. The Proposer considered that this was the practical effect. The Ofgem representative disagreed with the Proposer on this point.

2.18 Subsequently, at the second Workgroup meeting[15], the Proposer noted to the Workgroup that the legal robustness of including generation only spurs was confirmed by the Addleshaw Goddard legal advice provided to the CMP261 Workgroup in, for example, their answer to Question (iv), at paragraph 20, which states that *"… we agree with the conclusions reached in respect of the CMP224 that it is reasonable that such spurs should be included within the average G charge calculation*". The Proposer highlighted that detailed arguments to include generation only spurs had, for example, been set out over some 20 pages in the SSE response to the CMP224 Workgroup consultation of 23rd January 2014[16]. Furthermore, the Proposer indicated that the Addleshaw Goddard note went on to say, in answer to Question (iv); at the end of paragraph 20; "*In contrast, it is not clear on what basis the exclusion of "charges paid by producers for physical assets required for connection to the system" justifies the exclusion of TNUoS charges (as opposed to connection charges) in respect of generation only spurs, and therefore the justification for such a specific carve-out appears lacking*". The Proposer stated therefore that it would seem wholly appropriate for Workgroup members who supported excluding

[15] 29th April 2016.

[16] Pages 97-119 of the CMP224 Final Modification Report.

generation only spurs (despite the evidence and advice to the contrary) should provide that justification.

2.19 Some Workgroup members felt that whether there has been an exceedance of the Regulation depends on the viewpoint of individual parties; Suppliers might view that having an ex ante approach displays sufficient prevention to avoid the limit being exceeded. The Proposer reminded the Workgroup that such a viewpoint, whilst interesting, did not address the legal requirement, namely not breaching the €2.50/MWh limit.

2.20 In order to make an informed decision on the CMP261 impacts, it would be useful to understand how a process might work for the reconciliation. The Chair confirmed at the first Workgroup meeting[17] that it would need a CUSC modification to change the date the Generator Reconciliation would be produced (which was, at the time, the end of April). The Proposer highlighted that had CMP261 been dealt with in the 'urgent' timescales asked for then he had envisaged that the truing up of the TNUoS paid by Generators in Charging Year 2015/16 would have occurred as part of the existing Generation Reconciliation process set out in the CUSC[18]. The Proposer argued that the longer it took for any reconciliation to take place the greater the harm done to GB Generators by having to fund the circa £130M not only during the course of 2015/16 but also (until a remedy occurred) during the course of Charging Year 2016/17 as well. At the second Workgroup meeting the Proposer asked National Grid (i) if the 'Generation Reconciliation Statement(s)' prepared in accordance with 3.13.2 of the CUSC, for Charging Year 2015/16, had already been issued; and (ii) did those statements include any amount(s) associated with the exceedance of the €2.50/MWh in Charging Year 2015/16. National Grid confirmed that the answer to (i) was 'yes' and the answer to (ii) was 'no'. The Proposer noted that this would mean that if CMP261 was approved by the Authority that another form of 'Generation Reconciliation' would seem to be required.

2.21 As Some Workgroup members previously mentioned they felt that the concept of 'harm' as referenced above is not in scope of the modification as it stands.

2.22 National Grid added that if the CMP261 Original was to be approved by the Authority a second Generation Reconciliation would be carried out at a later date. The Proposer noted that given all the data necessary to calculate the exceedance and the amount to be returned to GB Generators (of some £1.92/kW) was already available (as at the 29th April 2016, if not before); coupled with National Grid having the means necessary to perform this task including, practically, contacting / making payment to the affected Generators; that this should be done with the utmost alacrity to minimise the harm and costs arising from the breach of the €2.50/MWh limit in Charging Year 2015/16. National Grid noted that because the reconciliation involves a change in TNUoS tariffs, it will require approval from the Authority to make the changes. The Proposer asked National Grid to confirm if it had asked Ofgem for approval for a mid-year tariff change in Charging Year 2015/16 in accordance with its Licence; and to confirm the outcome of that request; in terms of was it still pending or had it been approved or rejected by the Authority? National Grid confirmed, at the third Workgroup meeting that no approach to Ofgem had been made as it was following the ex ante CMP224 methodology. A Workgroup

[17] 23rd March 2016.

[18] Section 3.13.2-3

member felt it would be helpful to have a process map detailing the reconciliation process options.

2.23 As Some Workgroup members previously mentioned they felt that the concept of 'harm' and 'costs' as referenced above is not in scope of the modification as it stands.

2.24 The Workgroup agreed that a legal opinion would be useful in terms of 1) coming to the conclusion as to whether the TNUoS tariffs for Charging Year 2015/16 paid by GB Generators were in breach of the Regulation and 2) whether reconciliation is an absolute requirement to ensure compliance with the Regulation.

2.25 The Workgroup debated the legal questions with the final version (below) submitted to Addleshaw Goddard by National Grid:

1. If under the current methodology (which uses an ex-ante approach with error margin and no reconciliation) GB's average G charge exceeds €2.5/MWh due to forecast error for the 2015/16 charging year, is it compliant with the regulation (i.e. no action is required) and if not, what action is required:
    a. Reconciliation for the 2015/16 charging year
    b. Changes to the methodology to apply for future charging years
2. If changes are required for future charging years must they ensure we do not exceed €2.5/MWh, e.g. by introducing ex-post reconciliation, or would changes to reduce the risk of exceeding €2.5/MWh, e.g. a larger error margin, be sufficient?
3. If Generator charge reconciliation is required for 2015/16, how quickly should this happen?
4. Should the charges for Generation only Spurs be included in the calculation of the average Generation charge? (See CMP224 Report and Responses).
5. Would the use of the exchange rate at the time the Regulation was set be reasonable?

Views on the legal opinion from Addleshaw Goddard (dated 22nd April 2016).

2.26 The legal opinion can be found in Annex 4.

2.27 Before presenting the legal opinion to the Workgroup, the National Grid legal representative made the following comments:

- The advice has been obtained by National Grid at the request of the Workgroup and solely in the context of the Workgroup deliberations on CMP261 and so was without prejudice to National Grid's own views
- It addresses the specific Workgroup questions
- It is an informed view, but still a view

2.28 In summary, according to the National Grid legal representative, the legal opinion states:

- A pure ex ante approach, by its nature, is never guaranteed to be 100% precise or accurate and is the approved GB approach to compliance with the Regulation
- In establishing the GB approach judgements have been made as to what charges are included in the calculation of transmission charges for the purposes of setting the G:D split
- The fact the €0/MWh to €2.50/MWh range has been exceeded is contrary to the strict requirements of the guidelines within the Regulation but as would generally be the case whether, how and when to "remedy" would generally be considered on the facts and against the effect and consequences and risk of any enforcement routes available.

2.29 The majority of the Workgroup members felt that the Addleshaw Goddard's legal opinion confirmed that an ex-ante approach has still got its merits, but that if National Grid have exceeded the €2.50 CAP then best practice would be to remedy the non-compliance. The Proposer highlighted that the legal opinion identifies that there is a strong legal argument that a material breach of the €2.50/MWh limit set in respect of the 2015/16 Charging Year had occurred and that this equates to non-compliance with the Regulation. Accordingly the Proposer and some other Workgroup members felt that the legal opinion was unequivocal that a remedy is required following the breach of the €2.50/MWh limit and, that the discussions of the Workgroup needed to focus on the type of remedies that are available. In the view of some Workgroup members they felt the interpretation of the legal opinion by the Proposer and some Workgroup members was incorrect because the legal opinion in 9a and 9b states:

a. there is a *strong argument* that a material breach of the €2.5/MWh G Charges limit in respect of the 2015/16 charging year equates to non-compliance with the Guidelines Regulation;

b. as a result, we are of the view that reconciliation of G Charges for the 2015/16 charging year *would be prudent*;

2.30 The Proposer noted the National Grid view set out in paragraph 9.5[19] of the CMP251 Workgroup report submitted to the April 2016 CUSC Panel that "…,*the purpose of the Regulation is not consistent with an ex post reconciliation*" and wondered therefore, whether reconciliation, per se, would be permitted under the Regulation with this interpretation.

2.31 It was clarified by the National Grid legal representative that the Regulation does not say how you achieve anything; it just says what you need to achieve (namely remaining within the €0/MWh to €2.50/MWh range). The aim and the purpose of the Regulation are to not exceed the €2.50/MWh limit, but, it does not mandate how to achieve it. The question that needs to be asked is how fast any reconciliation should be done. It was flagged that National Grid is required to carry out Generator volume reconciliations by 30th April after each Charging Year (i.e. by 30th April 2016, for Charging Year 2015/16) and in the Workgroup discussions[20] on CMP251 National Grid confirmed that the data is available to carry out a tariff reconciliation if this was required in an enduring industry process. The Proposer noted that, in his view, the data had been available for Charging Year 2015/16 by the 30th April 2016 to permit National Grid to remedy the breach that, based on the legal opinion (dated 22nd April 2016), there were strong arguments to believe had occurred. It was added by some Workgroup members that the governance process needs to be followed in order for full Workgroup discussion before conclusions can be made on a remedy and timescale.

2.32 A Workgroup member pointed out that paragraph 3 of the legal opinion states that exceedances are permissible; it is only where the exceedance is material that reconciliation may be considered best practice. In a Workgroup members view we are not permitted to exceed so we are not permitted to reconcile, it was noted that reconciliation is a standard industry practice where a limit has been exceeded, and where it was appropriate to do so. A further Workgroup member's opinion was provided that through the governance process (CMP224) an ex-ante approach had been agreed as a methodology that was put in place to address revenue and generation output forecast risk.

2.33 The Proposer highlighted that a question arose as to whether National Grid could (or should) have acted sooner, to address the breach in Charging Year 2015/16. The Proposer noted that on numerous occasions during 2015 and 2016 (culminating in the raising of CMP261) that the possibility of an exceedance of the €2.50/MWh limit occurring in Charging Year 2015/16 had been identified.

2.34 Examples of these warnings included:-

- January 2015
  - 30th at the CUSC Panel (minute 4409-4411) raised on the back of an email sent on
  - 19th[21] to a National Grid CUSC Panel member @ 09:27
- May 2015

[19] "*As the legal opinion from Addleshaw Goddard alludes, EU Regulation 838/2010 is purposive and the intent of the Regulation is to promote cross border trade. Given that ex ante tariffs provide price certainty to market participants, the purpose of the Regulation is not consistent with an ex post reconciliation*"

[20] Paragraph 4.12 "*In the event an ex post process was adopted, National Grid confirmed that a good enough set of data for Generator reconciliation is available at D+23 as per the existing standard metering settlement timescales. Presently a generation reconciliation process is carried out at the end of April (in t+1) to take account of power station demand and generation in negative TNUoS charging zones in the preceding Charging Year t*."

[21] The email is reproduced in Annex 6.

- 13th at the Transmission Charging Methodology Forum (TCMF) (minute 7)
- 29th at the CUSC Panel (minute 4597-4600 with a follow up email[22] shortly after that meeting @ 13:48 based on the email of 19th January)

- August 2015
  - 28th at the CUSC Panel (minute 4673-4694) plus the CMP251 Modification Proposal[23] and Proposers' presentation to the Panel where, for example, the forecast Generator €/MWh for 2015/16 was identified as €2.65/MWh (slide 3).
- November 2015
  - 11th at the TCMF (minute 2-4 plus slides 13-18)
- February 2016
  - 26th at the CUSC Panel (minute 5079-5082)
- March 2016
  - 9th at the CUSC Panel (minute 5087-5112) plus the CMP261 Modification Proposal and Proposers' presentation to the Panel

2.35 Notwithstanding these warnings as to the possibility of a breach, the Proposer noted that National Grid through its Transmission Licence Condition C5(1) is obliged to "*keep the use of system charging methodology at all times under review*". The Proposer suggested that even a cursory examination during 2015/16; be it on a 'spot check' or regular basis; of the available data would have indicated to National Grid the possibility (and towards the latter half of the period, the probability, if not near certainty?) of a breach of the €2.50/MWh limit set in the Regulation. This is illustrated in Figures 2 and 3 below where neither of the two variable (the €/£ exchange rate or the generation output) actuals came within the levels used when setting the 2015/16 Charging Year generation TNUoS tariffs in January 2015. The cumulative effects of these two variables (the €/£ exchange rate and the generation output) is shown in Figures 4. This, the Proposer suggested, would have indicated that National Grid could have carried out a mid-year tariff change in order to address the risk of a breach. It was noted that a mid-year tariff change had been carried out before by National Grid. In this respect the Proposer highlighted the 'Good Industry Practice' standard that is widely used within the industry; namely that degree of skill, diligence, prudence and foresight expected from the same type of undertaking under the same or similar circumstances; and wondered why that appeared not to have occurred this time. As noted in paragraph 2.22 above, National Grid confirmed that it had not approached Ofgem to undertake a mid-year tariff change in Charging Year 2015/16 as it was following the ex ante CMP224 methodology. Therefore the required changes to the Charging Methodology to comply with the Regulation had been made. Further the validity of the ex ante approach had been reconfirmed by the CMP251 legal opinion in October 2015.

2.36 In a Workgroup member's opinion National Grid would not have even needed to seek Authority approval as European law takes precedence over national law, if National Grid thought that was the appropriate thing to do.

[22] The email is reproduced in Annex 6.

[23] CMP251, description of issue or defect: "*For instance, if the Euro/pound exchange rate remains at the level observed since April 2015 (an average of 1.38 for the period 1 April to 30 June) then the cap would be exceeded in 2015/16 (holding all other assumptions constant)*".

2.37 A Workgroup member added that the most important statement in the legal opinion is in paragraph 4 where it refers to the "*materiality*" of the breach[24] that has occurred in Charging Year 2015/16:

"….*in circumstances where the outturn figures for a charging year demonstrate average €/MWh G Charges which are materially above the G Charge Guidelines limit (as is the case for the 2015/16 charging year), on balance we would suggest that the G Charges paid for the relevant year should be adjusted on a backward looking basis in order to bring them materially in line with the €2.5/MWh limit and in order to demonstrate compliance with the Guidelines Regulation*."

2.38 The Proposer believes that CMP261 needs to be progressed in line with the defect raised; however, it needs to be considered somewhere how an enduring solution can be introduced to avoid the reoccurrence of the issues currently faced. In some Workgroup members' opinion the information written in paragraphs 4, 5 and 10 of the CMP261 legal opinion gives enough information to confirm that it is the requirement of the Workgroup to discuss whether reconciliation is appropriate and the appropriate timescales to accompany the reconciliation.

Further Workgroup Discussion

2.39 The Proposer provided (for the 2nd Workgroup meeting) the following updated figures in reference to the defect (based on the available data up to 31st March 2016):

		NG published Jan final 2015/16	Outturn full charging year 2015/16
		Jan-2015	Mar-2016
Cap Euro/MWh	€/MWh	2.50	
Target Euro/MWh	€/MWh	2.34	
Expected Exchange Rate	€:£	1.22	
Expected Cap Sterling	£/MWh	1.92	
Expected Output	TWh	320	
Expected Revenue	£M	613	613
Expected Outturn Exchange Rate	€:£		1.362
Expected Outturn Generation	TWh		259
Expected Revenue collected from generators	€m		835
Expected Outturn unit revenue	€/MWh		3.22
Excess Unit Revenue	€/MWh		0.72
Excess Revenue	€m		187
Generation Capacity	GW		71.5
Reduction in TNUoS generation charge	€/kW		2.62
Exchange Rate	€:£		1.364
Reduction in TNUoS generation charge	£/kW		1.92

***Figure 2**: Key data items for Charging Year 2015/16 pertaining to CMP261*

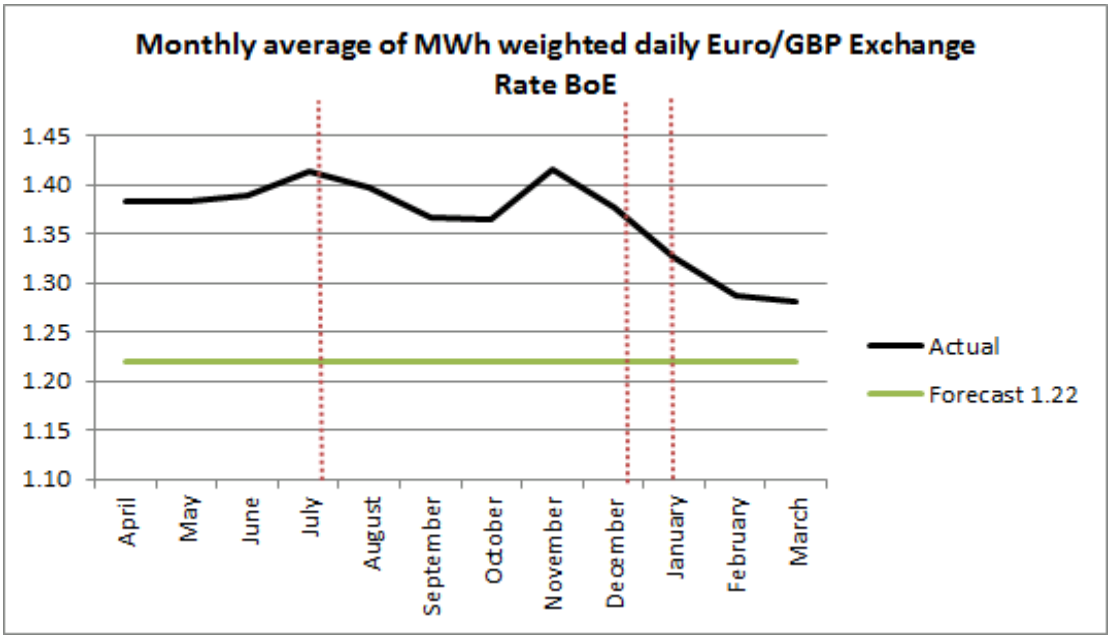

***Figure 3**: Graph showing the Daily Bank of England €/£ Exchange Rate for 2015/16 and the forecast rate used in tariff setting for 2015/16*

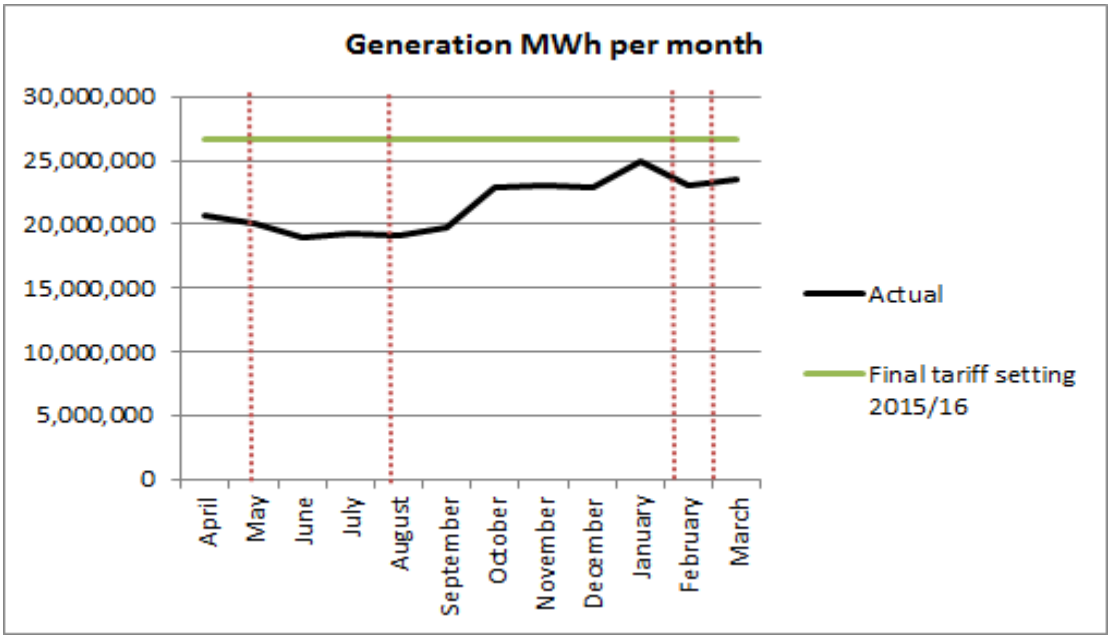

***Figure 4**: Graph showing the actual Generation Output and the forecast figure used in tariff setting for 2015/16*

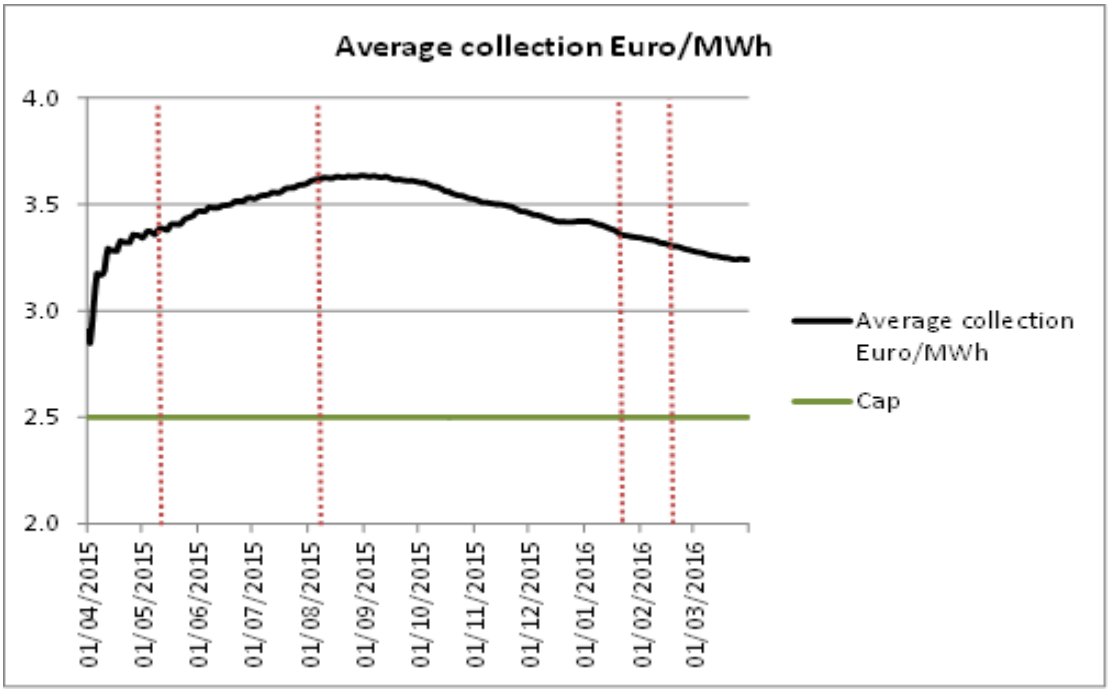

***Figure 5**: Graph showing the combined effect of the two individual items shown in Figures 3 and 4 in 2015/16*

2.40 The Proposer argued that due to higher than necessary generation TNUoS charges electricity wholesale costs could have had a negative impact on consumers, cross border trade, competition and interconnectors could have financially benefited due to increased flows.

Workgroup discussion on National Grid Analysis in Annex 5

2.41 In the second Workgroup meeting of CMP261 an action was placed on National Grid to confirm the outturn figures for 2015/16. At the third Workgroup meeting National Grid noted that in providing outturn data, there were a number of interpretations that could determine the actual outturn. For instance, it was flagged that in the CMP224 methodology specifically excludes exchange rate risk from the calculation and therefore in judging the outturn, it could be argued that the original exchange rate used in the forecast should also be used in the outturn. The Proposer noted that in light of the Addleshaw Goddard legal advice; and in particular paragraphs 23 and 24[25]; it was neither rational, logical or reasonable to now assess actual (as opposed to forecast) compliance with the Regulation in Charging Year 2015/16 on the basis of a forecast from March 2014 when the actual exchange rate data for the year in question was now freely available. For completeness, National Grid also provided outturn numbers where a "broad" interpretation of local circuit charges was used. The Proposer reiterated the points noted in paragraph [2.18] and also referred to the Ofgem CMP224 decision letter where it is stated *"We must approve either the original proposal or WACM1 [both of which used the 'strict'*

[25] [para 23] "*In the context of a reconciliation of G Charges (in the context where reconciliation is deemed appropriate) the Guidelines Regulation does not mandate a specific approach on exchange rates. However, we would suggest that a robust and reasonable approach would be to use average actual exchange rates during the period of the 2015/16 charging year*".

[para 24] "*By way of example, the EU Merger Regulation 139/2004/EC sets mandatory thresholds for notification in euro and the Commission's Consolidated Jurisdictional Notice made under that Regulation states that the annual turnover should be converted at the average rate for the 12 months concerned.[25] We believe that the same approach to currency conversion would be expected in this context, as it would be more consistent with the purpose of the Guidelines Regulation to use an exchange rate for the relevant year, which better represents the economic reality in that year*".

interpretation] to ensure compliance with the Regulation…" A Workgroup member highlighted that Ofgem were clear in their CMP224 decision letter that the CMP224 Original and the 3 WACMs, using both the strict and broad interpretation mitigated (to a greater or lesser degree depending on the interpretation of the Regulation used) the risk of non-compliance with the Regulation.

2.42 CMP261 has opened up the debate previously discussed in the CMP224 Workgroup about whether local circuit charges should be included in the calculation for Regulation compliance. The Proposer noted that this 'opening up of the debate' seemed bizarre, given that it had not led to a similar debate under CMP251; where the undertaking of the same calculation of the three variables to determine post reconciliation compliance with the €2.50MWh elicited none of this 'debate' now seen when undertaking that same calculation for CMP261. Rather, the Proposer hypothesized, it appeared that the local circuit charge 'issue' was perhaps now being resurrected for CMP261 as a crude attempt to artificially 'remove' the breach of the €2.50/MWh by massaging the variables to achieve the result desired. The Proposer wondered if a less generous person might conclude that the only reason that this approach (of excluding Generator only spurs plus using forecast rather than actual data) was now being taken forward was in order to both frustrate and obfuscate the remedying of the breach and the ceasing of the harm at the earliest practical opportunity. National Grid made the point that data was provided on the impact of Generator spurs following comments made by Ofgem in a Workgroup meeting. The Ofgem representative noted that if a broad interpretation of the Regulation as regards, "*charges in respect of assets required connecting to the system*", is correct, GB's average charge would be less than €2.5/MWh. Some Workgroup members considered that the debate around the 'strict' and 'broad' interpretation was closed following Ofgem's decision on CMP224 and, therefore, wasn't relevant to CMP261. In their view Ofgem had decided that the strict interpretation was correct and market participants had a reasonable expectation that compliance with the Regulation would be carried out based on a strict interpretation. The Ofgem representative noted that the CMP224 decision was based on the view that the words "*charges in respect of assets required to connect to the system*" were ambiguous. Ofgem, therefore, approved a CMP224 option that would comply with either the 'strict' or the 'broad' interpretation, which ever was correct, on the grounds of legal risk.

2.43 The Proposer noted that the relevant CUSC legal text [26] for the 'strict' (i.e. including Generator spurs) and 'broad' (i.e. excluding Generator spurs) options under CMP224 were fundamentally different. Thus the relevant legal text for CMP224 WACMs 2 [27] and 3 [28] (i.e. the options that were based on the 'broad' / exclude approach to Generator only spurs) specifically had a 'REC spurs' element[29]. However, the relevant legal text for CMP224 Original [30] and WACM1 [31] (i.e. the options that were based on the 'strict' / include approach to Generator only spurs) specifically did not have this 'REC spurs' element; and it was the Original option that was approved by the Authority and therefore that is the version of the legal text in the current (baseline) CUSC. The Ofgem representative also considered that regardless of Ofgem's view, the interpretation of the Regulation would be relevant to CMP261, for

[26] The relevant part of the CUSC for the purposes of CMP224 being 14.14.5 (v).
[27] See page 194 of the CMP224 Final Modification Report (13th May 2014)
[28] See page 200 of the CMP224 Final Modification Report (13th May 2014)
[29] Which was defined as "*Forecast Revenue from generation only spur connections in charging year n*"
[30] See page 182 of the CMP224 Final Modification Report (13th May 2014)
[31] See page 188 of the CMP224 Final Modification Report (13th May 2014)

example, Workgroup members might bring forward arguments or evidence suggesting a broad interpretation is correct.

2.44 Some Workgroup members felt that Ofgem made it clear in their CMP224 decision letter that local circuit charges needed to be included in the calculation in order to ensure compliance with the Regulation. Analysis was provided to highlight the differing levels of exceedance that may or may not have occurred depending on whether an 'include' or 'exclude' approach[32] to the local circuit charges was taken on compliance with the Regulation. One Workgroup member also suggested that an outturn should be provided using only forecast rather than actual generation output, as this was the approach taken in Sweden[33]. As with the exchange rate noted above, the Proposer highlighted that the use of an old, outdated, forecast figure when actual data was now available was neither rational, logical nor reasonable. The National Grid analysis provided to the second Workgroup meeting is represented in the figure below:

Summary of EU Regulation 838/2010 Interpretations

Exceedance

		Exchange Rate Interpretation					
		Risk Excluded Forecast data used		Risk Included Actual data used			
Generation Output Interpretaion	Using Actual Data	Outturn €/MWh	2.81	Outturn €/MWh	3.15	Include (Strict)	Local Circuits Interpretation
		G Charge over-recovery £m	64.12	G Charge over-recovery £m	119.50		
		£/KW over-recovery	0.92	£/KW over-recovery	1.71		
	Using Forecast Data	Outturn €/MWh	2.21	Outturn €/MWh	2.47	Include (Strict)	
		G Charge over-recovery £m	N/A	G Charge over-recovery £m	N/A		
		£/KW over-recovery	N/A	£/KW over-recovery	N/A		
	Using Actual Data	Max Outturn €/MWh	2.02	Max Outturn €/MWh	2.26	Exclude (Broad)	
		G Charge over-recovery £m	N/A	G Charge over-recovery £m	N/A		
		£/KW over-recovery	N/A	£/KW over-recovery	N/A		

***Figure 6**: Summary of EU Regulation 838/2010 Interpretations*

2.45 Figure 6 shows that two scenarios indicate an exceedance of the €2.50/MWh limit has arisen; with the 'strict' interpretation (of the Generator only spurs) and use of actual data (for (i) the €/£ exchange rate and (ii) generation output). Depending on the exchange rate interpretation; in terms of using either the March 2014 forecast or using the actual data for Charging Year 2015/16; that exceedance is either €0.31/MWh or €0.65/MWh respectively.

2.46 A Workgroup member asked the Workgroup how the figures provided by National Grid differed from those provided by the Proposer. It was confirmed that the main difference was that the Proposer had assumed National Grid had recovered the full targeted £612m from Generator TNUoS tariffs, whereas National Grid has stated that there was an under-recovery with actual recovery from Generator TNUoS tariffs amounting to £578m. The Proposer noted that this excluded the small Generator discount figure of £18.3m which, if included, would take the total amount to £596m.

2.47 A Workgroup member felt that in CMP251 the conclusion of the legal opinion was that the interpretation is strict and excluded using actual data. If this interpretation is correct then the question that the Workgroup needs to discuss is if €2.74 is a '*material*' exceedance of the Regulation. The Proposer countered this view, noting that currently in

[32] Further details of which can be found in the CMP224 Final Modification report.
[33] CMP251 Workgroup Report Annex 9.

the Regulation as it stands it does not use the definition '*material*' and so the Proposer's belief is that a reconciliation is required regardless of the size of the breach.

2.48 The Proposer provided a list of questions on the data provided by National Grid to the Workgroup after the third Workgroup meeting which is represented in Annex 6 of this document. The questions and answers are as follows:

1. In respect of the "Actual Recovery from Generators £560M could you please confirm that this was the total transmission tariffs paid by GB Generators in charging year 2015/16, which included any amount(s) associated with the April 2016 Generation Reconciliation statements (but excluded any amount(s) associated with the equivalent statements from April 2015)?

   Response: Yes, the spreadsheet shows how the £560m is calculated (see column G of tab "Gen Output and Charge Data 1516).

2. In respect of the £560M outturn compared to the expected revenue (as at January 2015) of £612M for Charging Year 2015/16 - could you please provide an explanation of this difference; i.e. what was the cause; as I'm keen to understand what was the reason(s) for this reduction (as it appears to account for the bulk of the difference between our two respective figures)?

   Response: There are two components to the under recovery in the Charging Year 2015/16: (i), difference being between the expected Generator TEC as at the time of charge setting in January 2015, and the actual TEC held by Generators during Charging Year 2015/16. Those differences can be found in the spreadsheet tab "Gen Output and Charge Data 15/16"; and (ii), the Small Generator Discount that is applied after the charge setting process. It was clarified by the National Grid representative that the Small Generation Discount is detailed in the Transmission Licence and not mentioned in the charge setting process so as a result the process is applied after charge setting has been completed. To calculate the value of the Small Generator Discount, the generation and demand residuals must be calculated first as it is the sum of the generation and demand residual tariffs to which the 25% discount applies, as described in section 14.18.19 of the CUSC. The application of the Small Generator Discount is detailed in the spreadsheet tab "Small Gen Discount", and totals for Charging Year 2015/16 approximately £18million.

3. In respect of the outturn energy TWh, could you please provide the associated individual figures that were summated to come to your total (of 250.7)?

   Response: the National Grid representative asked the Proposer if they wanted a breakdown by power station or something more holistic. The Proposer confirmed that he is only looking for the total daily output in order to understand how the figure of 250.7TWh was calculated. The spreadsheet tab "Gen Output and Charge Data 15/16" in Annex 5 shows how the 250.7TWh is calculated in column E.

4. In respect of the average exchange rate for the year, your figure of 1.366 is close to our number of 1.362 – you appear to have based your calculation on a simple (time) weighted basis. Is this correct?

   If this is how you have done it, I would suggest a daily **MWh** weighted average is more in line with the legal requirement.

Furthermore, how have you treated weekends / Bank Holidays? They appear to be blank.

By contrast, we have assumed that for days where there was no exchange rate published by the Bank of England, it was the same as the day before; i.e. the Friday rate for Saturday and Sunday. This is because if you are using an MWh weighted approach, then you do need to fill in the blank dates using this (or some other method?).

Response: the mechanism for calculating the exchange rate is not currently defined. The National Grid representative confirmed that in order to arrive at the values on the spreadsheet only a working day time weighted average was used based on the published daily Bank of England exchange rate. It was noted by the Workgroup that various methods could be used to take into account daily averages, monthly averages, weekends and weekdays, weighted by energy flows per MWh, or even weighted by energy deals given that 80% of energy is traded 18 months ahead of time etc. The Proposer confirmed that they solely wanted to understand the method of calculation used by National Grid in the analysis. The Workgroup agreed at the fifth Workgroup meeting that the National Grid approach of using a working day time weighted average based on the Bank of England published daily exchange rate was appropriate.

5. In respect of the 'Capped €2.5/MWh Revenue from Generators (£m)' whilst both of our final figures appear close (£458.84 v £458.66) it seems to me that you have come to your figure via a convoluted route which, in my view, gives an almost correct, but not quite right answer.
   It seems, looking at the spreadsheet that your calculation of the final answer ((£458.84) is based on:
   Final answer = Cell D17 "Capped €2.5/MWh Revenue from Generators (£m)" = "**ROUND(2.5/D10*D7/D9,3)*D9**"
   The component parts of this are:

- Cell D10 "Exchange Rate" = Time weighted exchange rate = "**1.366**"
- Cell D7 "Energy (TWh)" = "**250.7**"
- Cell D9 "Allowed Revenue (£m)" = "**2637**"

Therefore the total calculation is:

- **ROUND (2.5 Euros / 1.366473 Exchange Rate * 250.7 TWh / 2637 allowed revenue,3) * 2637 allowed revenue = £458.838m**

This raises some specific (sub) questions:

a) The "allowed revenue" cancels out in the calculation (apart from the rounding) – there is mathematically no point in including it, so why is it there?

b) Why does the calculation do the rounding in the middle of the calculation? Further detail:
   - It divides the calculation be 2637 to make it a really small number, before rounding it to 3 decimal places, which makes it less accurate
   - It then scales it back up by multiplying by 2637 again (this is why the 2637 cancels out) to get it back up to the number they first thought of, but slightly less accurate because of the supplemental rounding step in the middle.
   - Why not just round at the end of the calculation if they want it rounded?

- The calculation would be better done using only the part highlighted in blue since this matches my suggested simpler methodology – You do not need the rest of the calculation, so what is it there for?

  Just using the part highlighted in blue matched our suggested methodology and provides:

- 2.5 euros / 1.366473 exchange rate * 250.7 TWh = **£458.66m**

Response: it was confirmed that the G:D split is currently rounded to 1 decimal place which has been replicated in the spreadsheet.

Options for a Reconciliation.

2.49 The options for the process of any potential reconciliation were discussed by the Workgroup. A Workgroup member flagged that if monies were recovered from Suppliers then that should happen in t+2; i.e. Charging Year 2018/19; to avoid losses arising from contracts that had already been agreed. Ultimately it was felt that the impact on the end consumer needs to be taken into account.

2.50 It was felt by the Workgroup that any options to be put forward should not include a mid-year tariff change for demand in Charging Year 2016/17 as it would place too much burden of cost onto Suppliers. Some members felt that in the pursuit of cost reflectivity a mid-year tariff change would not reconcile Generation plant already closed. The Proposer confirmed that the Original proposed a reconciliation of the Charging Year 2015/16 breach for Generators in spring 2016 and not a mid-year tariff change for either Demand or Generation in Charging Year 2016/17.

2.51 A Workgroup member commented that National Grid had recovered less than the targeted £612m from generation and so questioned whether any harm had actually been done.to Generators – National Grid had charged less than market expectations.

2.52 Some Workgroup members felt that a lot of panic has been raised around CMP261 but that no harm has currently been done, what is written in the CUSC has been complied with and that any remedy that was being sought by some Workgroup members would only end up harming consumers as Generators would get a windfall gain and end consumers would end up paying TNUoS twice; once in the Charging Year in question and then once in a future (yet to be defined) Charging Year. One of the Workgroup members then added that in their view most Generators plan in sterling, invoice in sterling and all payments are made in sterling so no harm had been caused. The Proposer re-iterated that compliance was with EU Law, which had demonstrably not been complied with as there had been a breach of the €2.50/MWh limit. As a result harm had been done (and was continuing to be done, until it was remedied).

Commentary on the Analysis in Annex 5.

2.53 Analysis was undertaken by National Grid on the Workgroup's behalf. The spreadsheet containing the analysis will be available on the National Grid website alongside this report. The spreadsheet analysis consist of 13 figures, of which figures 1-7 are the core inputs and figures 8-13 (reproduced in Annex 5 to this report) contain the main outputs.

2.54 The figures have the following inputs:

- Forecast and actual TEC – used to determine the target TNUoS revenue recovery and the actual TNUoS revenue recovery, as TNUoS is primarily a capacity based charge for generation

- Whether a power station is chargeable – not all power stations are chargeable as they may not hold TEC

- Generation output in 2015/16 by power station – this is used to calculate the £/MWh figure which is later converted to €/MWh

- TNUoS charges recovered from each chargeable power station – the actual revenue recovered from each Generator after application of the relevant transmission tariffs

- Cancellation Charges – where a Generator terminates ahead of connection to the transmission network, or fails to give the notice of closure required, other charges apply, as defined in the CUSC.

- Small Generator Discount (figure 14) – Generators less than 100MW connected to the transmission system in Scotland receive a small Generator discount.

2.55 A Workgroup member asked the National Grid representative whether the figures used in the pricing spreadsheet for the £119.5M (as represented in Annex 5) excluded the (CUSC defined) 'Connection Charges' paid in 2015/16.

2.56 The National Grid representative confirmed that the (CUSC defined) 'Connection Charges' paid in 2015/16 are excluded from the spreadsheet.

2.57 Figures 9-12 collate the data to reflect the different interpretations of EU Regulation 838/2010. Figure 9 presents the CMP224 methodology, Figure 10, the SSE methodology, Figure 11 and 12, other approaches depending on the treatment of local circuits. These figures also contain the original inputs at the time Generator TNUoS charges were set, namely, forecast Generation Output, Allowed Revenue and the exchange rate for 2015/16. Figures 11 and 12 include inputs relating to a further breakdown of Generator TNUoS charges so that the impact of local circuit interpretations on the €/MWh outturn can be observed.

2.58 Figure 13 summarises the final €/MWh numbers for each interpretation of the Regulation.

2.59 Following the Workgroup review of the consultation responses and WACM voting at meeting 6[34], a Workgroup member questioned how the reconciliation, if approved, would be applied under Original and WACMs 1, 2 and 3 to generators that paid TNUoS or cancellation

[34] Held on 8th August 2016

charges in 2015/16. The Workgroup recognised that the National Grid calculation of the applicable £/kW reconciliation of the £119.5m overcharge needs to reflect generators that paid cancellation charges in the proportion paid (i.e. 100%, 75%, 50% or 25%) in accordance with the CUSC. It was proposed to calculate the appropriate TEC/Chargeable Capacity for these generators using the percentage of charges that they paid. In other words a 100MW generator that paid a 75% cancellation charge related to charging year 2015/16 would have an adjusted TEC/Chargeable Capacity of 75MW[35] to which the calculated reconciliation rate would then be applied. The £119.5m will then be divided by the sum of the adjusted TEC/Chargeable Capacity for all generators that paid TNUoS or cancellation charges in 2015/16 to give the overall £/kW rate (with the Original and WACM 1) or taken off the amount to be recovered in generator TNUoS tariffs (with WACM 2 and WACM 3).

Ofgem Guidance on the Content of the Report

2.60 At the end of meeting 6 of the CMP261 Workgroup (and following the Workgroup review of the consultation responses, discussions on alternatives and the formal vote on WACMs) Ofgem informed the Workgroup that they had been advised in a meeting with leading junior barrister from Blackstone chambers a few days before[36] that:

- The Regulation says you must exclude charges associated with physical assets required to connect in calculating the average charge.
- The Regulation requires us to look beyond the names we give charges and look instead at the nature of the underlying asset.
- Before we can work out whether there has been a breach of the regulation we need to make clear that we are applying the calculation correctly and excluding charges in respect of physical assets required to connect to the transmission system.
- CMP 224 was a legitimate and reasonable approach to constructing a compliant charge, but it did not set out the rules for how we calculate whether we are in fact compliant – that is in the Regulation. Therefore the approach to constructing a compliant charge under CMP224 is not binding.

2.61 Based on this advice, the Ofgem representative requested that the Workgroup carry out further analysis around the different transmission assets that generators use to connect to the system, in order for the Authority to make a determination on the modification. Given that Ofgem informed the Workgroup of its deliberations with legal counsel at the end of meeting 6, the Workgroup asked if the points could be set out in an email (for members to consider overnight). This was done later that day (this email can be found in Annex 9 of the Report).

2.62 The following day, at meeting 7[37] of the CMP261 Workgroup, the Workgroup discussed in more detail Ofgem's request (arising from the legal advice[38] they had received) for further supporting analysis. Ofgem laid out that, in order to allow Ofgem to reach a conclusion on the modification, the Workgroup needed to consider the physical transmission assets used by generators including (i) what assets are built when a Generator connects to the Transmission System and (ii) any relevant differences between local onshore and offshore

[35] 75% of the 100MW
[36] Held on Wednesday 3rd August 2016
[37] Held on Tuesday 9th August 2016
[38] Ofgem was unable to confirm to the Workgroup (at meeting 7) that the responses to the Workgroup consultation had or had not been shared with counsel prior to them providing advice to Ofgem. The Workgroup wished to understand if the advice had been made on the basis of the latest available information.

connections. Ofgem stressed that this may not be a complete list. They stressed that it was important for the workgroup to consider this issue fully in order to inform their decision and the views of stakeholders and CUSC Panel members.

2.63 Ofgem suggested a sensible approach to carrying out this analysis would be to consider different connection scenarios. One Workgroup member suggested using historic examples – rather than hypothetical scenarios. Ofgem confirmed their aspiration that the analysis should be able to inform the interpretation of the Regulation and any determination on whether some of all local circuit charges should be excluded from the calculation of GB's average transmission charge for the purposes of determining whether a breach of the Regulation had occurred or not.

2.64 A Workgroup member noted the recent[39] comments from the Judge in the Nuclear Decommissioning Authority judgement[40] with respect to that Authority 'fudging' in terms[41] of him saying "*By the word "fudging" I mean choosing an outcome, and manipulating the evaluation to reach that outcome*." [42] The Ofgem representative stated that they were in no way attempting to manipulate the modification to reach a certain outcome. They noted that they had received clear legal advice that they need to carefully consider what charges should be excluded in order to determine whether there has been a breach or not within the meaning of the EU Regulation and that they were requesting factual information in order to assist them in making this decision.

2.65 A Workgroup member responded that over the last two years or so through at least six separate consultations[43], only one stakeholder has argued as to why local circuits should be excluded from the calculations despite this being a known 'issue' since at least the Ofgem's Project Transmit Technical Working Group deliberations in the autumn of 2011. This point was also picked up in paragraph 20[44] of the legal advice provided by Addleshaw Goddard. Furthermore, the Workgroup member noted that there had been additional opportunities for Ofgem to highlight any concerns they had with respect to the interpretation of the Regulation in terms of connection assets; these opportunities included (a) post the Regulation being published[45] and pre-CMP224 being raised[46] (such as during Ofgem's Project Transmit Technical Working Group deliberations in the autumn of 2011); or (b) in their CMP224 decision letter[47] (by, for example, approving a WACM that explicitly was the 'exclude' approach); or (c) in their CMP224 decision letter (by, for example, approving the Original (as they did) but specifically highlighting that 'include' / 'exclude' needed to be reviewed by industry at a later date); or (d) post the CMP224 decision, but pre

[39] 29th July 2016
[40] http://www.bailii.org/ew/cases/EWHC/TCC/2016/1988.html
[41] At paragraph 945, page 323
[42] "*In my judgment the NDA sought to avoid the consequence of disqualification by "fudging" the evaluation of those Requirements to avoid reaching a situation where CFP would be given a "Fail" or "Below Threshold" score. By the word "fudging", I mean choosing an outcome, and manipulating the evaluation to reach that outcome. This was by choosing a score high enough to avoid that undesirable outcome, rather than arriving at a score by properly considering the content of the tender against the scoring criteria. If that were to be the approach during the evaluation – some sort of institutional reluctance by the NDA to score a Requirement correctly, if that were to result in a score "Below Threshold" or a "Fail" – one wonders why the NDA imposed such terms within the SORR in the first place. The NDA was the architect of its own misfortune in that respect*."
[43] The three separate CMP224 consultations noted in paragraph 2.17 (the Workgroup consultation, the Code Administrator consultation and the Ofgem Regulatory Impact consultation) plus the two CMP251 consultations (Workgroup and Code Administrator) and the CMP261 Workgroup consultation.
[44] "…*it is not clear on what basis the exclusion of "charges paid by producers for physical assets required for connection to the system" justifies the exclusion of TNUoS charges (as opposed to connection charges) in respect of generation only spurs, and therefore the justification for such a specific carve-out appears lacking*"
[45] 23rd September 2010
[46] 19th September 2013
[47] 8th October 2014

CMP251 being raised[48] (such as during the ACER electricity transmission tariff structures scoping activity, undertaken during 2015); or (e) with its CMP251 urgency decision letter[49;] or (f) post CMP251 being raised and pre CMP261 being raised[50]; or (g) during the CMP251 deliberations or (h) during the CMP261 deliberations (from it's being raised till after the Workgroup vote, at meeting 6, on WACMs). However, none of these opportunities were taken up by Ofgem. As a result, that member believed it brought into question the timing of this work now being requested by Ofgem at meeting 6 (and set out in their email[51] of 8th August 2016). That member understood that the Workgroup had clearly mapped out the reasoning for why local circuits should be included in the calculation but that no clear reasoning has been presented to the Workgroup (prior to Ofgem's intervention) for why they should be excluded.

2.66 In relation to the comment above that that no justification has been provided by stakeholders over the last two years as to why local circuits should be excluded from the calculations, another Workgroup member noted that some stakeholders did argue that local circuits should be excluded from the calculations in responses to some of the consultations referred to.

2.67 The Ofgem also representative noted at an earlier meeting that he had suggested the Workgroup look into the interpretation of the Regulation earlier in the Workgroup process and the Workgroup had chosen not to (as discussed in paragraph 2.44). He also noted that different potential interpretations had been discussed as part of the CMP224 Workgroup process. He later noted (by email) that arguments for excluding some or all local charges had been considered as part of the CMP224 workgroup process (as well as in response to the consultation) and that the Addleshaw Goddard advice did not appear to address these arguments.

2.68 Another Workgroup member felt that there is ambiguity in the way that the Regulation had been interpreted in relation to the charges that make up the €2.50 cap in GB.

2.69 Some Workgroup members did not disagree on the ambiguity of the Regulation; however, the problem for many Workgroup members was the Ofgem timing of raising the issue. Those Workgroup members believed that the ambiguity could have been resolved on many previous occasions[52;] A Workgroup member also postulated that when the Regulation was being developed and the €2.50/MWh cap was set by the Comitology process that the UK Government would have been fully involved in that process during 2010 and would, in turn, have likely consulted closely with both National Grid and Ofgem (as the relevant parties with knowledge of transmission charges in GB, unlike the UK Government) as part of the decision making process which determined the €2.50/MWh cap for GB[53.] That Workgroup member further hypothesised that when the €2.50/MWh cap was decided in 2010 it must have been concluded that local charges should be included in the calculation.

2.70 Finally another Workgroup member wished to flag that the CUSC modification process is designed to provide evidence to demonstrate

[48] 19th August 2015
[49] 8th September 2015
[50] 8th March 2016
[51] Reproduced in Annex 9.
[52] See paragraph 2.62 for further details.
[53] Plus Northern Ireland and Ireland.

whether a proposal better meets the applicable CUSC objectives, and not to gather evidence to reject it. That Workgroup member also argued that the initial Ofgem legal counsel advice which detailed the need to consider certain interpretations of the Regulation in relation to the assets required to connect, had only been provided in summary form to the Workgroup at a late stage in the process, whilst the Workgroup legal opinion had been received in full by the Workgroup, allowing it to be questioned, consulted upon with stakeholders and transparently represented in the Workgroup Report. That Workgroup member wished to state that if the full Ofgem legal advice were shared with the group, then, it would be easier to understand the importance of the extra analysis required, and without this information it could be perceived as an attempt to guide the Workgroup to find a certain outcome. The Ofgem representative again confirmed that they were not attempting to "fudge" the issue. The Ofgem representative later made clear they are asking for the additional analysis in order to assess the modification, rather, they are not attempting to reject it as alluded to above.

2.71 The National Grid representative reminded the Workgroup that Ofgem needed full evidence to make a determination on any CUSC proposal. He argued that, in his experience, not providing all required information would likely result in a proposal being sent back to the Workgroup for further assessment.

2.72 At the 11th Workgroup meeting[54] of CMP261 the Workgroup discussed the analysis carried out following the Ofgem steer; this analysis can be found in Annex 11 of the Workgroup Report. The Workgroup finalised the direction that the analysis needed to follow in order to define which assets are required to connect to the transmission system based on a request provided by Ofgem which can be found in Annex 12 of this Report.

2.73 A Workgroup member expressed their concern that the Workgroup were providing explanations and examples of transmission network assets to Ofgem Legal Counsel without being able to discuss these with them. The Workgroup member was concerned that without direct engagement with the Ofgem Legal Counsel, or provision of their advice to the Workgroup, that the Legal Counsel may misunderstand or misinterpret the analysis work, or it may not accurately answer Legal Counsel's original questions.

Discussion on the legal text

2.74 Some Workgroup members felt that the legal text should only detail the process to calculate any amount over and above the €2.50/MWh figure in the Regulation and not the actual hardcoded figure produced by the National Grid (based on the numbers shown in their spreadsheet – see Annex 5) whilst some other Workgroup members felt that the figures should be hardcoded into the legal text. It was flagged by more than one Workgroup member that the essence of the Proposers' modification was that it was looking to recover a precise overcharge figure for 2015/16 only. The definition of the figure has been concluded with detailed analysis so it should be hardcoded into the legal text. As a result the figure of £119.5million would need to be hardcoded into the CUSC should the modification be approved.

2.75 The chair wished to note that if a number is hardcoded into the CUSC and is later found to be erroneous by even a modest amount then it could lead to a modification being rejected, whereas, if a process was

[54] Held on 3rd October 2016

included it allows for some variance on the decision from the Authority. The usual manner to achieve this would be to put the figure as a definition in the CUSC and the value in the Statement of Use of System charges. The Proposer noted that the various component elements[55] needed to calculate the relevant £/kW figure for charging year 2015/16 were already known based on the data produced by National Grid (see Annex 5) . The Proposer was confident that National Grid would have exercised 'good industry practice'[56] when producing this information and, therefore, considered it appropriate to include the relevant figure within the CUSC itself rather than the need to include, in the legal text, a process the outcome of which may not be the essence of what the Proposer is seeking. This was supported by other Workgroup members.

2.76 A Workgroup member felt that when the WACM voting was concluded that it did not solely include the SSE interpretation but rather that WACM were open for the interpretation of the Authority on the strict/broad approach etc. It was confirmed by the other Workgroup members that the WACM voting at meeting 6 was carried out on the sole basis that all alternatives were based on the £119.5M figure in terms of the breach. Following this the Workgroup member was happy to proceed. Therefore, based on the information produced by National Grid (see Annex 5) using the £119.5M figure[57], an average exchange rate of 1.3664 [58] and a total TEC figure of 69,784MW[59] this means (if the proposal is approved by Ofgem) that the rebate figure paid to generators (under either the Original or WACM 1) would be shown, in the legal text, as £ 1.71/ kW[60]. This would then be multiplied by the appropriate TEC/Chargeable Capacity[61] figure for each relevant generator[62]. However, the rebate to generators with either WACM 2 or WACM 3 would be shown, in the legal text, as the £119.5M figure (rather than as a £/kW figure) which would be reflected in an alteration to the initial amount(s)[63] to be recovered from Generators and Demand transmission tariffs in the relevant charging year (2017/18 with WACM 2 or 2018/19 with WACM 3).

2.77 Finally, it was concluded that the hardcoded figure would be used in the draft legal text with the majority of the Workgroup happy to trust National Grid to have calculated the value correctly and to take the small risk that the modification could be rejected because the figure is incorrect once the Authority make their determination on the strict/broad local circuit inclusion determination. National Grid agreed to clarify this approach with their legal team as part of the normal legal drafting process.

[55] The actual exchange rate (based on the Bank of England publication), the total amount of charges paid by GB generators and the applicable generator volume (MW).
[56] Defined in the Grid Code as "*The exercise of that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced operator engaged in the same type of undertaking under the same or similar circumstances*".
[57] This is shown in Column 'N', line 152 on the 'Gen Output and Charge Data 15/16' tab in the spreadsheet at Annex 5.

[58] This is shown in Column 'L', line 261 on the 'SSE' tab in the spreadsheet at Annex 5.
[59] This is shown in Column 'F', line 152 on the 'Gen Output and Charge Data 15/16' tab in the spreadsheet at Annex 5.
[60] This is shown in Column 'N', line 156 on the 'Gen Output and Charge Data 15/16' tab in the spreadsheet at Annex 5.
[61] See paragraph 2.58
[62] This is shown in Column 'F' on the 'Gen Output and Charge Data 15/16' tab in the spreadsheet at Annex 5
[63] Absent the £119.5M figure.

Discussion with Ofgem's Principal Legal Advisor on CMP261

2.78 At the eighth Workgroup meeting[64] Ofgem's Principal Legal Advisor on CMP 261 provided the Workgroup with further clarification around the information provided to them by Counsel[65] which was first raised initially at the sixth Workgroup and then discussed further at the seventh Workgroup meeting. The Principal Legal Advisor on CMP261 noted that the rationale for CMP261 turns on whether there has been a breach of the Regulation which requires to be rectified.

2.79 The Ofgem Principle Legal Advisor on CMP261 noted that this was a different issue to the one sought to be addressed by CMP224. The purpose of CMP 224 was to devise an *ex ante* charging scheme which had sufficient margin of error to seek to ensure that it was not capable of resulting in charges which breached the €2.50/MWh cap. The Ofgem Principal Legal Advisor on CMP261 went on to note that as set out in its CMP224 decision letter; Ofgem agreed that it was most appropriate to devise the charging scheme on the basis of an extremely conservative reading of the Regulation, and particularly what constitutes a connection asset, and it was also appropriate to include an additional error margin. The Ofgem Principal Legal Advisor on CMP261 noted that it had originally thought that the additional error margin would have been sufficient to avoid any questions of compliance with the €2.50/MWh cap; however, for a variety of economic reasons this has not proved to be the case and so the question we must now consider is whether there has, in fact, been a breach of the Regulation on its own terms, given that it is the terms of the Regulation that bind Ofgem.

2.80 The Ofgem Principal Legal Advisor on CMP261 confirmed that the question that needs to be answered is which charges does the Regulation require to be included in the calculation of the €2.50/MWh cap and which does it require to be excluded from that calculation. Ofgem's legal team reviewed the Addleshaw Goddard advice to the CMP261 Workgroup from April[66], but had some additional questions which that advice had not considered. Ofgem sought its own legal advice on how a UK Court would interpret the requirements of the Regulation, which are directly applicable and effective.

2.81 The Ofgem Principal Legal Advisor on CMP261 noted that it is bound by the Regulation; Ofgem could not take a decision on CMP261 without having addressed the issue of whether the right charges had been taken into account in calculating whether or not there had been a breach of the €2.50/MWh cap. To assist them they went to a senior junior Counsel at Blackstone Chambers who confirmed Ofgem's thinking that the key issue is how to apply the connection charge exclusion in respect of physical assets required to connect: i.e. what does '*physical assets required to connect to the system*' mean within the context of generator transmission charging in GB. This turned on the wording of the Regulation itself. The Ofgem Principal Legal Advisor on CMP261 noted that the wording requires us to look behind the names given to charging, or whether they are one off or ongoing, but instead to look at whether they relate to "physical assets required connecting to the system".

2.82 This might mean, depending on the facts, that some radial links or other aspects of the local charge could be excluded from the calculation.

[64] Held on 30th August 2016
[65] At the meeting held on Wednesday 3rd August 2016
[66] Dated 22nd April 2016

2.83 A Workgroup member asked whether the European Commission had been approached in relation to the question of what is meant in the Regulation as they may be able to provide further clarity. The Ofgem Principal Legal Adviser on CMP261 said that they had sought further clarity at the time of comitology[67] (of the Regulation) but that this had not materialised in the final draft. Further clarity today from the Commission was a possibility, although we had to be mindful of that what was achievable in the post 23rd June 2016 Brexit context maybe limited. But in any event, the Ofgem Principal Legal Advisor on CMP261 clarified that the relevant provisions were directly enforceable and effective provision in a Regulation: it was something the UK court could interpret. The Ofgem Principal Legal Advisor on CMP261 agreed that you can ask the Commission for their interpretation of a particular piece of legislation but it is ultimately a matter for the courts.

2.84 In instructing Counsel, Ofgem reviewed the Commission's consultation documents for the Regulation. Ofgem highlighted (i) the Impact Assessment and (ii) the Consultation Document produced by the Commission[68] prior to the Regulation being approved which seemed to suggest that the key issue was the nature of the assets being funded rather than whether a connection charge was one off or ongoing.

2.85 In order to examine the question of '*physical assets required to connect to the system*' the Ofgem representative provided[69] the Workgroup with items and scenarios to be considered further.

2.86 In light of the above, it was agreed that the Workgroup would examine further the items and scenarios that Ofgem had highlighted with a view to providing Counsel with a pictorial and written clarification on these points.

2.87 Ofgem also noted that they need to submit a report to ACER in relation to the Regulation but they will not do so until after this issue on CMP261 is resolved.

Further Workgroup Discussions

2.88 At the ninth Workgroup meeting[70] a Workgroup member expressed concern that Ofgem had taken so long to seek its own legal opinion, especially given that the Workgroup's own legal opinion[71] had been available from the end of April 2016. He felt this delay was hard to understand as surely Ofgem would have made this matter a priority given the magnitude of National Grid's alleged breach of the Regulation and the level of Generator refunds that CMP261 would entail of circa £119M.

2.89 There was also a short but vocal discussion as to whether further Workgroup alternatives should be considered. It was noted that Ofgem had informed the Workgroup at the end of meeting 6 of the Workgroup (and following the Workgroup review of the consultation responses, discussions on alternatives and the formal vote on WACMs at that meeting) that they had received their legal opinion three working days before. The majority of Workgroup members considered that it would be improper to now consider further Workgroup alternatives, as a vote on the Workgroup alternatives had already taken place at meeting 6. Ofgem could have raised their legal opinion concerns prior to the Workgroup's consideration of and voting on WACMs.

[67] Circa 2009
[68] http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2010/sec_2010_1075_en.pdf
[69] Via email, which is reproduced in Appendix 10.
[70] Held on 5th September 2016
[71] From Addleshaw Goddard

2.90 At the tenth Workgroup meeting of CMP261, the Workgroup reviewed the supporting analysis provided in relation to the potential rebate[72].

2.91 Based on the Workgroup's deliberations to use an "Adjusted TEC" upon which to calculate the potential rebate value for each power station, it was noted how two power stations (Abernedd and Brigg) could receive a higher rebate than the actual wider cancellation charge paid.

2.92 The Proposer suggested that in the case of Abernedd, although the wider cancellation charge was £287,182 the total cancellation charge paid was £10.8m, and that this total amount should be considered as the reference figure and that therefore the calculated possible rebate of £413,990 was less than the original amount paid. Some members of the Workgroup challenged this approach noting that the vast majority of the cancellation charge paid by Abernedd had nothing whatsoever to do with the GB split and would have remained the same regardless of any potential correction to the TNUoS charge. The Proposer noted that this was about the total contribution of generators to the 'generator pot', of which the £10.8m was a part. The Proposer noted that the general principle behind the Modification was that any generator who had contributed (even those in negative charging zones) to the total transmission charges 'generator pot' within 2015/16 was entitled to a rebate, whilst noting that for cancellation plant they had a lower TEC figure calculated in the way the Workgroup had agreed previously. The Workgroup agreed there was no further adjustment necessary to the calculated possible rebate of £413,990 for Abernedd.

2.93 In the case of Brigg, it was noted that the potential rebate would exceed the cancellation charge and it was agreed that the potential rebate should be capped at the original cancellation charge amount paid. The Ofgem representative noted that it was not clear that generators should receive rebates in relation to their cancellation charges, particularly if the money rebated is more than the value paid by those Generators. He also noted that Ofgem would need to consider these issues when reaching a decision on the proposals submitted to them. The Workgroup then discussed whether it was sensible to look at further WACMs to avoid a situation where the modification was rejected and a further modification had to be raised. The Proposer stated that he was aware that this could cause further delay but in his view this was part of the CUSC process and did not consider further WACMs should be raised. The Proposer was more concerned about the risk of delay to the submission of the Report rather than the possibility of send back for further analysis by Ofgem.

2.94 The discussions then progressed onto the formulation of the legal text. The Proposer and some Workgroup members reiterated the preference to hardcode the sum £119.5m into the legal text. A Workgroup member felt that due to the Regulation being unclear in referring to TNUoS, the broad range of charges that could make up Transmission charges adds an element of risk to Ofgem's review of the modification as it does not allow flexibility in the interpretation of Transmission charges. The chair asked the Workgroup whether they felt using a formula rather than a hardcoded figure may be wiser to avoid any potential of send back or rejection. If this was done then it would allow for any permutations resulting from the interpretation of Transmission charges.

2.95 Several Workgroup members felt that the number should be hardcoded into the legal text because (1) a formulaic approach would make it difficult to consult stakeholders and (2) it would mean that Ofgem could

[72] Represented in Annex 6

choose any number between £0 and £119.5m when making a determination. A Workgroup member pointed out the fundamental difference between the hard coded figure approach (which, to be clear, has been itself derived explicitly from the formulaic approach) compared to just a formulaic approach is that the three elements used in the formulaic approach (in terms of Generator transmission charges paid, the applicable exchange rate and the applicable volume for Charging Year 2015/16) are already known. A further Workgroup member felt it was also important to note that due process should be followed in the essence of the original proposal and the Proposers' wishes.

3 Impact and Assessment

Impact on the CUSC

3.1 Changes to Section 14

Impact on Greenhouse Gas Emissions

3.2 None identified.

Impact on Core Industry Documents

3.3 None identified.

Impact on other Industry Documents

3.4 None identified.

4 Proposed Implementation and Transition

4.1 Over the course of its early meetings the Workgroup considered a number of possible implementation approaches for CMP261 and (as at the time of this Workgroup Consultation) the following options were mapped out by the Workgroup:

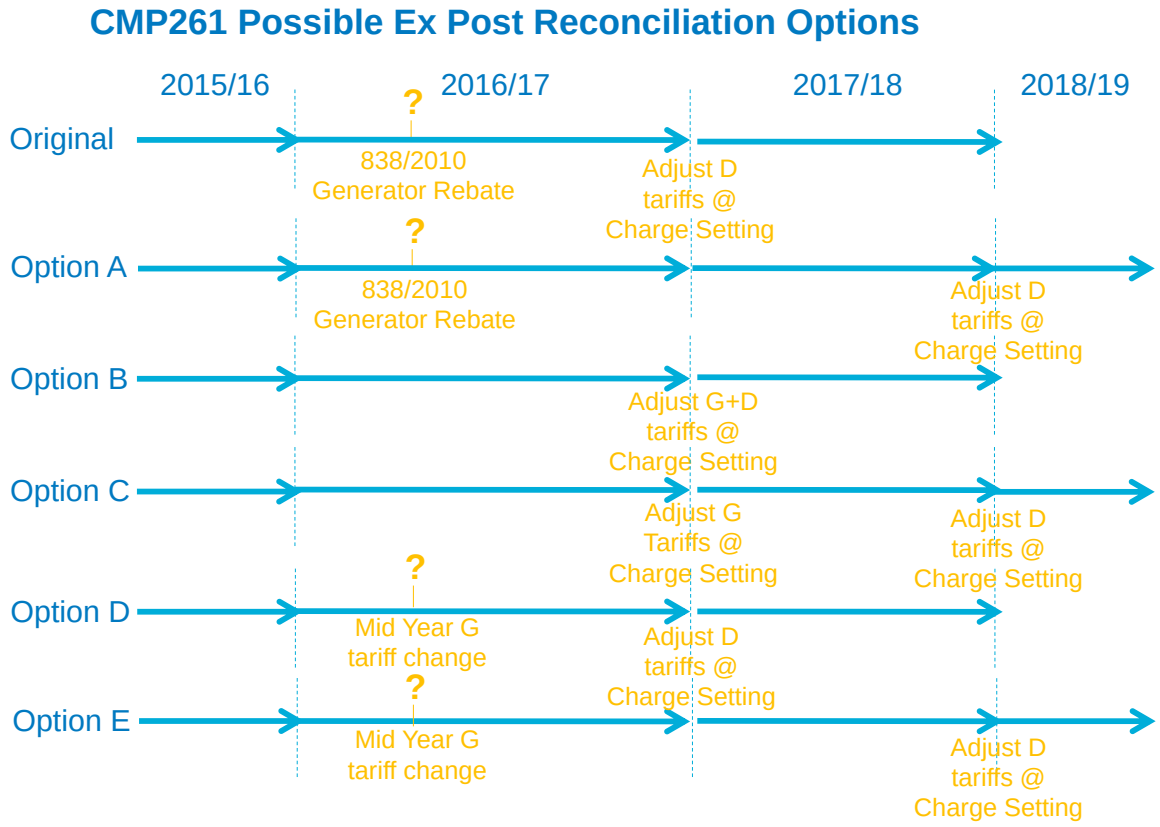

***Figure 7** : Possible Ex Post Reconciliation Options*

4.2 The Workgroup initially identified five possible reconciliation options (A to E) in addition to the Original approach to a possible reconciliation. A further option (F) was identified after the Workgroup Consultation stage.

4.3 The **Original** proposes a rebate (as opposed to a Generator TNUoS tariff change in a future – non 2015/16 – Charging Year) to all those Generators holding Transmission Entry Capacity in Charging Year 2015/16 as soon as possible following a decision by Ofgem to approve the Original, with the value of the reconciliation amount paid to Generators being recovered from Suppliers by an adjustment to Demand TNUoS tariffs in the Charging Year 2017/18.

4.4 Option A was the same as the Original, except that the adjustment to demand TNUoS tariffs would take place in Charging Year 2018/19 (rather than 2017/18 with the Original). Following the vote at meeting 6 of the Workgroup, this option became **WACM 1**.

4.5 Option B would adjust Generators[73] by adjusting Generator and Demand TNUoS tariffs at the same time at Charge Setting (in January 2017) and then applying them to both sets of TNUoS tariffs in Charging Year 2017/18. Following the vote at meeting 6 of the Workgroup, this option became **WACM 2**.

[73] This would include those Generators who did not hold TEC in Charging Year 2015/16, but did hold TEC in Charging Year 2017/18. It would exclude those Generators who held less (or no) TEC in Charging Year 2017/18 but who did hold TEC in in Charging Year 2015/16.

4.6 Option C, based on Option B, with Generator[74] TNUoS tariffs being adjusted at Charge Setting (in January 2017) for Charging Year 2017/18, but demand TNUoS tariffs being adjusted at Charge Setting (in January 2018) for Charging Year 2018/19. Following the vote at meeting 6 of the Workgroup, this option was not taken forward.

4.7 Option D proposes a mid-year tariff change for Generators[75] in the current Charging Year 2016/17 with implementation as soon as possible following a determination from Ofgem. Demand TNUoS tariffs would be adjusted at Charge Setting (in January 2017) for Charging Year 2017/18. Following the vote at meeting 6 of the Workgroup, this option was not taken forward.

4.8 Option E is a variation on this (with Generation being treated as per Option D) with a one year later adjustment to demand TNUoS tariffs - in Charging Year 2018/19 (rather than 2017/18, as per option D). Following the vote at meeting 6 of the Workgroup, this option was not taken forward.

4.9 Option F was developed by the Workgroup at meeting 6 in light of the Workgroup consultation responses. This Option F is similar to Option B (WACM 2) but would adjust Generators[76] by adjusting Generator and Demand TNUoS tariffs at the same time at Charge Setting (in January 2018) and then applying them to both sets of TNUoS tariffs in Charging Year 2018/19. Following the vote at meeting 6 of the Workgroup, this Option F became **WACM 3**.

4.10 The Proposer asked the Workgroup to consider how certain items of cost may be recovered if the modification is approved which is represented in the figure in Annex 6. The Workgroup noted the items listed in the annex. Some Workgroup members felt that it was questionable whether all of the items raised are relevant to the CUSC but the Proposer still felt it important to note in relation to the defect and the solution.

4.11 According to National Grid the Original Proposal, and Options A (WACM1), D and E would require non-standard processes for implementation. The Proposer noted that CMP261 Original is linked to the established Generator Reconciliation Statement which is a standard process set out in the CUSC (which is well understood by National Grid who, for example, undertook that process, for Charging Year 2015/16, in April 2016).

4.12 The Original Proposal and Option A (WACM1) would require the preparation of 70-80 ad hoc credits, advice notes, calculation of the revised methodology and performance of the usual controls and checks. It is anticipated the above can be completed in 14 calendar days.

4.13 In addition to any industry notification periods as confirmed by Ofgem following any decision for implementation, and the 14 calendar days outlined above, Options D and E would require an additional 10 working days to process the main system. It should be noted however that a mid-year tariff change (with Options D and E only) has not previously been carried out in the current charging system and the test environment would require a 6-8 week lead time.

4.14 Based on the above discussions implementation of the code changes would be progressed 5WD's following decision in order to give enough time for the credit, advice notes and calculation of the methodology to be run as represented in paragraph 4.12 above.

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[74] This would include those Generators who did not hold TEC in Charging Year 2015/16, but did hold TEC in Charging Year 2017/18. It would exclude those Generators who held less (or no) TEC in Charging Year 2017/18 but who did hold TEC in in Charging Year 2015/16.

[75] This would include those Generators who did not hold TEC in Charging Year 2015/16, but did hold TEC in Charging Year 2016/17. It would exclude those Generators who held less (or no) TEC in Charging Year 2016/17 but who did hold TEC in in Charging Year 2015/16

[76] This would include those Generators who did not hold TEC in Charging Year 2015/16, but did hold TEC in Charging Year 2018/19. It would exclude those Generators who held less (or no) TEC in Charging Year 2018/19 but who did hold TEC in in Charging Year 2015/16.

5 Workgroup Consultation Responses Summary

5.1 Nine responses were received to the Workgroup Consultation. These responses are contained in full in Annex 4 of the report.

5.2 The following table provides an overview of the responses received for the standard Workgroup questions;

	Do you believe that CMP261 Original proposal, or any potential alternatives for change that you wish to suggest, better facilitates the Applicable CUSC Objectives?	Do you support the proposed implementation approach?	Do you have any other comments?	Do you wish to raise a WG Consultation Alternative Request for the Workgroup to consider?
British Gas	We do not believe CMP261 Original Proposal or any of the potential options identified better facilitate the CUSC objectives. (Further comments can be found in Annex 4).	We do not support the modification. However, any implementation should seek to limit or avoid windfalls. This will require options which delay the reconciliations to G&D tariffs.	The workgroup should consider more fully the impact on consumers.	No.
InterGen	We believe there has been a breach of the €2.50/MWh CAP set by EU Regulation 838/2010, which requires a reconciliation or rebate equal to £1.71/kW, as per the SSE approach in Figure 10, Annex 5 of the workgroup report. (Further comments can be found in Annex 4).	Yes, the proposed options outlined in section 5 of the workgroup report seem logical.	No.	No.
Drax Power and Haven Power Ltd	Yes. We believe that the CMP261 Original and the potential options for change all better facilitate Applicable CUSC Objectives (ACOs) (a), and (d). In the 15/16 charging year, generators were overcharged for transmission	There are a number of potential options for change currently on the table. Generators should be paid back as soon as possible to limit the damage and ensure that we comply with the 838/2010 regulation as soon as possible. Further, suppliers should be given	No.	No.

	charges against the €2.50/MWh cap. This represents a breach of the technical requirements of the guidelines regulation. This position has been supported by legal advice from Addleshaw Goddard, procured by National Grid for the workgroup. Therefore, with respect to ACO (d), CMP261 realigns GB transmission charging for 15/16 with European regulation that takes precedence over the CUSC.	sufficient time to correct their pricing strategies for future charging years to ensure that these costs can be recovered appropriately from customers via TNUoS tariffs.		
EDF Energy	We believe that CMP261 Original Proposal for change better facilitates the CUSC Objectives, in particular (d) "Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency". (Further comments can be found in Annex 4).	We support the proposed implementation approach preferring Option A, Generator rebates in 2016/17 and the Adjustment of Demand tariffs in 2018/19.	Commission Regulation (EU) No 838/2010 Part B restricts annual average transmission charges paid by electricity Generators in Great Britain to the range of €0/MWh to €2.50/MWh. The Regulation is legally binding for all Transmission licensees across Europe so it is reasonable to expect National Grid to ensure demonstration of compliance.	No.
RWE Npower	We do not believe the original change proposal facilitates the CUSC as it does not better facilitate competition, cost reflective or Transmission investment. (Further comments can be found in Annex 4).	We do not support the ex post reconciliation but should Ofgem choose to award this money. In the event of Ofgem awarding this money we believe that 3 years notice would be required from the date of the decision for these costs to be included in customer contracts / prices.	It is unclear whether any CUSC changes are required as no legal text changes have been provided. This can only mean that the current arrangement (money is not given back to generators) remains in place. Reference made to section 14 of the CUSC however no legal text changes have been included.	3 years notice for implementation of recovery from suppliers / consumers post the decision.
Smartest	No. The whole point about the current	No.	Yes – if the proposal is to go ahead then the	No.

Energy	arrangements is that there is an error margin to try to avoid breaching the cap. If a breach were illegal there would have been no point to the error margin; the whole calculation would have had to include a reconciliation.		reconciliation should be two ways; if generators have been given an additional discount beyond that which is necessary for the €2.50 cap, it should be refunded to suppliers.	
SSE	We believe that the Original Proposal better facilitates the Applicable CUSC Objectives. We set out, in the proposal itself, the reasoning for this. (Further comments can be found in Annex 4).	We believe that the implementation of the Original and potential option A1 can be undertaken within 14 calendar days from an Authority decision. (Further comments can be found in Annex 4).	A number of comments were made on the following: Alternative Recourse and Double Recovery, Treatment of Small Generator Discount and Generation Only Spurs. (Further comments can be found in Annex 4).	No.
VPI Immingham	Yes, we believe that CMP261 better facilitates the applicable CUSC objectives. (Further comments can be found in Annex 4).	We would support option A in terms of implementation. We think it is right that generators who held TEC in 2015/16 are given an immediate rebate whereas the costs are recovered from suppliers further in the future. This is on the basis that a large amount of generation that paid TEC in 2015/16 is no longer operational so any future reconciliation would not recompense the affected parties. (Further comments can be found in Annex 4).	We do not support the argument that CMP261 creates a windfall payment for generators. Looking at thermal generators' profits over the last few years, it becomes obvious that most have been suffering from serious financial issues. One such reason for this has been the inability for generators to recover their fixed costs, including TNUoS, via the wholesale market. (Further comments can be found in Annex 4).	No.
Scottish Power	We believe that the Original Proposal and Option A overall better meet the Applicable CUSC Charging Objectives than the baseline principally by ensuring compliance with Electricity Regulation 838/2010 and ensuring that the average charge paid by GB generators does not exceed	We support the implementation approaches outlined in Section 5 for the Original Proposal and Option A. As outlined above we do not support implementation of Options B, C, D & E.	No.	No.

	€2.50/MWh. Options B, C, D and E do not better meet the Applicable CUSC Charging Objectives as they describe a reconciliation process which makes reconciliation payments to generators which were not impacted by the original "overcharge" (i.e. they have increased TEC between charging years) and fails to make payments to others affected by the "overcharge" (i.e. they have reduced TEC between charging years).			

5.3 The following table provides an overview of the responses received to the CMP261 specific Workgroup questions:

	Do you have any comments on the legal opinion?	Is ex-ante certainty preferred over ex-post accuracy?	Do you believe a breach of the Regulation has occurred for Charging Year 2015/16? If so do you believe that an ex post reconciliation should be carried out?	If an ex post reconciliation was to be adopted how quickly should the reconciliation be completed?
British Gas	The legal opinion in 9a and 9b states: a. there is a *strong argument* that a material breach of the €2.50/MWh G Charges limit in respect of the 2015/16 charging year equates to non-compliance with the Guidelines Regulation; b. as a result, we are of the view that reconciliation of G Charges for the 2015/16 charging year *would be prudent*; It is not clear for whom it would	Ex-ante certainty was believed to have been provided by CMP224. Having identified defects in the CMP224 methodology, the appropriate response is to improve the methodology going forward, as is proposed by CMP251, not to retrospectively change the methodology as is now proposed by CMP261.	Regardless of whether the €2.50 limit has been breached (which is unclear at this stage) we do not believe a breach of the Regulation has occurred. We agree that the nature of the Regulation is purposive and National Grid acted with the purpose of complying with the Regulation, as is clearly demonstrated by the use of an error margin (Further comments can be found in Annex 4).	We consider that options which delay the reconciliation are preferable to adjustments with shorter notice periods. In this exceptional circumstance, given the unexpected nature of any additional costs to be passed onto suppliers, we believe any reconciliation affecting suppliers should not occur before 2018/19 at the earliest (Further comments can be found in Annex 4).

	be prudent to make reconciliation, and we disagree that it is the prudent course of action. National Grid has not been found to be in breach of the Regulation. It is also highly uncertain whether it could be found to be in breach of the Regulation.			
InterGen	The legal opinion, in our view, supports that there has been a material breach of the €2.50/MWh CAP and that an ex-post reconciliation is therefore required to ensure compliance with the regulation. (Further comments can be found in Annex 4).	No, ex-post accuracy is a requirement in this situation. TNUoS paid by generators must remain within the 0 - €2.50/MWh range, to ensure compliance with the regulation. In principle, we prefer ex ante certainty, providing that there exists a reconciliation element (as per CMP251) that would, for example, take place the following charging year, should the TNUoS paid by generators not fall within the 0 - €2.50./MWh in a given charging year.	Yes, we believe there has been a material breach of the €2.50/ MWh cap in the 2015/16 charging year, amounting to a generator rebate of £1.71/kW.	An ex-post reconciliation should be adopted as soon as is practically possible.
Drax Power and Haven Power Ltd	The legal opinion is heavily weighted in support of reimbursing generators for the 15/16 overcharge. We believe that the generator rebate should take place as soon as possible. Recouping revenue from suppliers, however, should allow sufficient time for them to correct their	The current methodology better facilitates efficient trading in the market and provides certainty to market participants. An ex post approach will detrimentally impact the	The regulation clearly states that average generation transmission charges should not exceed €2.50/MWh. The workgroup has shown that average generation transmission charges for the 15/16 charging year were €3.22/MWh and therefore we believe that a breach has	The legal response states that "The G Charges Guidelines do not mandate how such reconciliation should be performed" and we therefore believe that a reconciliation that will cause minimal distortion should take place. However, the reconciliation should not be delayed

	pricing methodology for future charging years.	predictability of TNUoS charges and will clearly result in a risk premia being factored into wholesale prices. The increased uncertainty will result in higher costs to the consumer. (Further comments can be found in Annex 4).	occurred and should be remedied as soon as possible in order to be compliant with EU Regulation.	too far. We believe that a suppliers should pay the difference between €2.50/MWh and €3.22/MWh in the 18/19 charging year.
EDF Energy	The legal opinion provided to the workgroup is clear that where a forecast proves (despite the Error Margin) to have been inaccurate for a given year, and therefore takes the average Generator Charge above the €2.50/MWh limit, this exceedance of the Guidelines Regulation limit represents a breach of the technical requirements of the Guideline Regulation.	In most cases ex-ante certainty in network charges is preferred over an ex-post change to ensure accuracy. However, in this particular case there appears to be a legal requirement to undertake an ex-post reconciliation as the average Generator Charge is above the €2.50/MWh limit, a clear breach of the EU Regulation. (Further comments can be found in Annex 4).	Using actual data and the strict interpretation of EU Regulation 838/2010, there has clearly been a material breach for Charging Year 2015/16. Moreover this is the view provided by expert legal opinion. Given the legal opinion, we believe that an ex post reconciliation must be carried out and support the proposed implementation approach preferring Option A, with Generator rebates in 2016/17 and the Adjustment of Demand tariffs in 2018/19.	We support an implementation approach preferring Option A, with Generator rebates paid as soon as practicable in 2016/17 and the Adjustment of Demand tariffs in 2018/19. (Further comments can be found in Annex 4).
RWE Npower	Legal opinion may be misled as certain local connection charges for offshore generation are included in the total costs recovered through the tariff & transport model. If these costs were excluded from the calculation as shown in section 2.45 then there is no breach of the EU legislation.	Yes this is preferred as it provides competitive certainty. Provides cost reflectivity for future customer / energy contracts and pricing of generation. Ex post reconciliation of prices leads to the potential need for risk premia being applied. This in turn increases costs for the	We do not believe a breach has occurred as certain local connection charges for offshore generation are included in the total costs recovered through the tariff & transport model. If these costs were excluded from the calculation as shown in section 2.45 then there is no breach of the EU legislation. (Further comments can be found in Annex 4).	3 years notice for implementation of recovery from suppliers / consumers post the decision.

		end consumer. Windfall gains can also occur leading to additional costs for consumers.		
Smartest Energy	We agree with the NGT interpretation that “a pure ex ante approach, by its nature, is never guaranteed to be 100% precise or accurate and is the approved GB approach to compliance with the Regulation.”	In this instance, yes.	No.	Before the end of the calendar year.
SSE	We strongly agree with the legal opinion in respect of the fact that there has been a breach of the Regulation and that a remedy is required. (Further comments can be found in Annex 4).	Whilst we appreciate the desirability of having ex ante certainty when compared with ex post accuracy, the overriding requirement must be to comply with the law. If either an ex ante or an ex post approach would (in both cases) ensure compliance with the law (in this case that GB generators did not pay, in charging year 2015/16, in excess of the €2.50/MWh figure) then, an ex ante approach would seem preferable. (Further comments can be found in Annex 4).	Yes, we do firmly believe that a breach of the Regulation has occurred in charging year 2015/16 as transmission charges paid by GB generators during the period were in excess of the permitted range of €0-2.50/MWh. (Further comments can be found in Annex 4).	As we set out in response to Question 2 above, the reconciliation should be undertaken within 14 calendar days from an Authority decision (noting that the processes, procedures and systems already existing within National Grid to perform this task; it being a repeat of the Generator Reconciliation Statement processes and procedures already undertaken (in April 2016) for charging year 2015/16 in accordance with 3.13.2 and 3.13.3 of the CUSC. (Further comments can be found in Annex 4).
VPI Immingham	We are in full agreement with the Legal opinion. Despite the ex-ante approach being in place, it is clear that Regulation 838/2010 has been breached, and a material breach at that. As a result,	We support the principle of ex-ante certainty over ex-post accuracy, however not at any cost. Ex-ante certainty must also be compliant with the	Yes, we believe a significant breach, close to 30%, has occurred which has resulted in a huge over-payment by generators and National Grid being non-compliant with EU law. (Further	Immediately. All of the data is available to assess the size of the breach and to calculate monies owed to generators. Given that there has been a clear breach of the law and that all necessary

	National Grid are non-compliant with the law and we believe that immediate recompense should be made to affected parties. (Further comments can be found in Annex 4).	relevant Regulations (in this case Regulation 838/2010) and therefore the error margin included in the ex-ante approach must be appropriate to ensure compliance. (Further comments can be found in Annex 4).	comments can be found in Annex 4).	information is available, we see no reason to delay such payments.
Scottish Power	We agree with the legal opinion in Annex 4 that; - the average generation charge has materially exceeded the G Charge Guidelines limit (Key Conclusion 4) - that taking the average G Charge above €2.50/MWh and exceeding the Guidelines Regulation limit represents a breach of the technical requirements of the Guidelines Regulation (Key Conclusion 3) - that reconciliation of G Charges for the 2015/16 charging year would be prudent (paragraph 9 (b)) - that the breach in respect of the 2015/16 charging year does not automatically mean the methodology for future charging years requires amending	There will always be a trade-off between the certainty provided by ex-ante charge-setting and ex-post accuracy and the current charging methodology allows for ex-post reconciliation of demand charges and charges payable to generators in negative charging zones. (Further comments can be found in Annex 4).	As outline in our response to question 5 we believe that there has been a material breach of Regulation 838/2010 and that an ex-post reconciliation should be carried out.	For the parties which have been adversely affected by the breach, namely generators paying TNUoS charges during charging year 2015/16, the reconciliation should be completed as soon as reasonably practicable. (Further comments can be found in Annex 4).

	Are there trade-offs between speed of reconciliation and the most appropriate process?	Do you believe any harm has been done in the spirit of the defect identified?	Do you believe that Generators contracting to sell output or set market prices do so at a level that assumes the €2.50MWh CAP will be complied with regardless of the tariffs set by National Grid? If you have any supporting information please provide this directly to Ofgem directly.
British Gas	We believe that any reconciliation that may be required should seek to limit or avoid windfalls to generators and losses to suppliers and consumers. This will require options which delay the reconciliations to G&D tariffs.	No – tariffs were set for 2015/16 under a methodology which was accepted as an ex-ante methodology. Therefore there has been no over-charging of TNUoS to generators above that which they expected once tariffs were set. Until such time as National Grid are found to be actually 'in breach' of the regulation, the concept of 'harm' is not relevant.	Under CMP224 compliance with the relevant EU Regulation is managed via an ex-ante approach with no reconciliation. This was the accepted expectations of the market. The examples presented in paragraph 2.34 of the consultation which show that National Grid and market participants were aware that the €2.50/MWh limit might have been exceeded during 2015/16 simply serve as evidence that the accepted expectations of the market was that there would be no mid-year tariff change or reconciliation in respect of the cap since at no point during 2015/16 did National Grid propose any mid-year tariff change to address the potential exceedence – which, as has been demonstrated, would have been visible to it and market participants (Further comments can be found in Annex 4).
InterGen	In our opinion the €2.50/MWh has been exceeded, and a rebate of £1.71/kW is required to be compliant with the regulation. The most appropriate process must therefore carry out this rebate as soon as is practically possible to ensure compliance.	We do not believe that the concept of harm is in the scope of this modification as it currently stands, as the modification seeks to ensure that transmission charges remain within the €0 - €2.50/MWh range, so as to remain compliant with the regulation (Further comments can be found in Annex 4).	Yes, InterGen operates on the assumption that National Grid will not exceed the €2.50/MWh Cap set by the EU regulation. National Grid have the ability to make a mid-year tariff change (Further comments can be found in Annex 4).
Drax Power	If the reconciliation process was done in the 17/18	Impact on market economics. Due to generators	There are many different variables that affect a

and Haven Power Ltd	charging year this would seriously impact suppliers, in particular smaller suppliers who may not be able to properly respond to the impact in time. Suppliers generally fix costs within their contracts and many of these contracts covering future years and in particular 2017/18 will already have been signed meaning that increases in costs cannot be recovered directly from customers. (Further comments can be found in Annex 4).	being overcharged in the 15/16 charging year, generators have higher costs to recover during period of low market spreads. There may have been an impact to the economic basis of energy flows between Europe and GB which would be detrimental to competition. (Further comments can be found in Annex 4).	generator TNUoS bill which generators have minimal/no visibility of. The difficulties are only amplified by the fact parties are only given 2 months' notice of the final charges. There are lots of variable elements and therefore year on year we don't know how it will change. We therefore rely on National Grid forecasts and therefore can only assume the €2.5/MWh cap will not be breached. It states in EU Regulation 838/2010 that UK generators should not be charged over €2.50/MWh so this is a fair assumption.
EDF Energy	We consider the best implementation approach is Option A, with Generator rebates paid as soon as practicable in 2016/17 and the Adjustment of Demand tariffs in 2018/19. Please see our answer to Q8 above.	Generators contracting to sell output and setting market prices for 2015/16 before Draft and Final tariffs were published would have built into their cost base forecasts of TNUoS costs on the expectation that the EU Regulation 838/2010 €2.50MWh cap would be complied with. (Further comments can be found in Annex 4).	Generators were contracting to sell output and setting market prices for 2015/16 before Draft and Final tariffs were published. It was reasonable for Generators to build into their cost base a forecast of TNUoS costs on the expectation that the EU Regulation 838/2010 €2.50MWh cap would be complied with. As Final 2015/16 tariffs were set that actually had an average Generator Charge well in excess of the EU Regulation 838/2010 €2.50MWh cap, they will have under-forecast the TNUoS cost.
RWE Npower	Should Ofgem choose to award this money we believe that 3 years notice would be required from the date of the decision for recovery from the demand side of tariffs. We recognise the same timescales would need to apply to the generator reconciliation, given this would be a windfall gain for them.	We do not believe any harm has been done as generators will have priced in the short term based on published tariffs rather than an accurate forecast of the exchange rate. There is harm to suppliers and customers on pass through TNUoS contracts if this modification is approved. As a result of the windfall gains to generators.	Both the supply and generation businesses use the published tariff where available and do not expect ex post variations. We wouldn't have the information to be able to anticipate, nor would we expect any other outcome.
Smartest Energy	Yes. There must be an element of pricing certainty for suppliers.	No.	We do not believe that commercially astute generators would have been so foolish as to take this risk. The current arrangements are perfectly

			clear: an ex ante approach with an error margin (but no agreed reconciliation) would always imply the possibility of exceeding the €2.50MWh cap.
SSE	For the reasons we outlined in our answers to Questions 2 and 8 above, the most appropriate process is that already approved by the Authority (as set out in 3.13.26 and 3.13.37 of the CUSC). There is no need for another process – any suggestion otherwise is a '*red herring*'. Given that National Grid has, by virtue of undertaking this process annually for many years we see there being no practical 'trade-off' between 'speed' and 'process' – the existing process can be undertaken quickly (within 14 calendar days of an Authority decision). (Further comments can be found in Annex 4).	As we set out in detail in our answer to Question 7 above there has been a clear breach of the EU Regulation 838/2010 Part B. That being the case it is self-evident that where the law has been broken that harm has arisen. Whilst there maybe discussion to be had as to the quantum of the harm, it cannot be denied that breaking the law (any law) causes harm. (Further comments can be found in Annex 4).	All parties must operate on the basis that they and all other parties will fully comply with the prevailing law at all time. To do otherwise would not only be irrational and call into question a central tenant of how both business and the regulatory arrangements work (and indeed those of the wider society) but would also invite the party (a) who believes that party (b) will not comply with a certain law to then themselves (party (a)) instead 'substitute' what level or standard of 'law' (rather than the prevailing law itself) that party (b) would comply with. (Further comments can be found in Annex 4).
VPI Immingham	There is a trade off between payments to generators and when these costs can be recovered from suppliers and the costs associated with bearing this debt. (Further comments can be found in Annex 4).	Yes, we do believe that there has been harm as a result of this defect. Most obviously is the impact on higher transmission charges on GB thermal generators compared to their competitors on the continent, many of whom do not pay transmission charges and those that do, pay considerably lower charges. The capping of GB Generation transmission charges was introduced to help mitigate this discrepancy and disadvantage. The ongoing discrepancy make it ever hard to harmonise the EU Energy market. (Further comments can be found in Annex 4).	We are not in a position to comment on our own or other generators' approach to contracting in the market or setting prices. However, given that this issue has been flagged to National Grid and a corresponding modification raised, it would not be unreasonable to assume that some parties actively monitor TNUoS against the €2.5/MWh limit.
Scottish Power	We do not foresee the need for any trade-off between the speed of reconciliation and the most appropriate process. National Grid now has access	Yes. The intent of regulation 838/2010 is to promote a common approach to transmission charging with a view to supporting the internal energy market	In examining the costs to be recovered through electricity contracts, GB generators will consider, amongst other factors, the anticipated level of

	to all the data required to perform the calculation of how much on average generators paid in charging year 2015/16 (TNUoS costs, generation output, exchange rate) and so there should be no compromise on accuracy. (Further comments can be found in Annex 4).	through competition. Breach of Regulation 838/2010 has resulted in GB generators suffering an undue burden of transmission charges relative to other European generators and is detrimental to competition.	TNUoS tariffs. Each generator has access to the TNUoS tariff model and is able to use its own assumptions to determine its own view of TNUoS tariffs not only for the current charging year but for future charging years for which tariffs have not yet been set. One of the key assumptions has been that future generation tariffs will be constrained by the cap contained within Regulation 838/2010. (Further comments can be found in Annex 4).

6 Workgroup Alternatives

6.1 Section 4 of this report highlights the main areas of the Workgroup discussion that could lead to possible alternatives.

6.2 CMP261 aims to ensure that there is an ex post reconciliation of the TNUoS paid by GB Generators during Charging Year 2015/16 which will take place as soon as possible after an Ofgem decision[77] with any amount in excess of the €2.5/MWh upper limit being paid back, via a negative Generator residual levied on all GB Generators who have paid TNUoS during the period 1st April 2015 to 31st March 2016 inclusive

6.3 Discussion began among the Workgroup members whether they wished to raise any WACM Proposals. It was decided by the Workgroup members that Options A, B and C which are considered in the Implementation and Transition section (4) of this Workgroup Consultation should be taken forward as suggested WACM proposals. Furthermore, on the back of the RWE Consultation response one Workgroup member raised a further Option (F) which looks to carry out the Generator Rebate and Supplier charge at the same time in Charging Year 2018/2019. The WACM proposals are detailed in the below table.

WACM Proposals	Rebate vs Tariff	Generator Rebate Year	Supplier Charge Year
Proposal 1	Rebate	ASAP	18/19
Proposal 2	Tariff	17/18	17/18
Proposal 3	Tariff	17/18	18/19
Proposal 4	Tariff	18/19	18/19

Table 1 details the WACM Proposal discussed by the Workgroup.

6.4 Following a Workgroup vote WACM Proposal 1 was the only proposal raised as an official WACM (WACM1) by the Workgroup members. The Workgroup chair voted to save WACM Proposals 2 (WACM2) and 4 (WACM3) because WACM Proposal 2 follows a tried and tested methodology as set out in the CUSC which industry clearly understands whilst also providing a forecast of future costs for Generation and Demand whilst, WACM Proposal 4 follows a process that could be more favourable for the consumer/Suppliers following Supplier feedback. The formal WACM numbers and their attributes are represented in the table below:

WACM Numbers	Rebate vs Tariff	Generator Rebate Year	Supplier Charge Year
WACM 1	Rebate	ASAP	18/19
WACM 2	Tariff	17/18	17/18
WACM 3	Tariff	18/19	18/19

Table 2 details the WACMs raised by the Workgroup.

6.5 A detailed description of the WACMs is as follows:

1. **WACM 1: Carries out a Generator Rebate ASAP, charging Suppliers through tariffs in Charging Year 2018/19.**
2. **WACM 2: Carries out both reconciliations through tariff adjustments for both Generators and Suppliers in the Charging Year 2017/18.**
3. **WACM 3: Carries out both reconciliations through tariff adjustments for both Generators and Suppliers in the Charging Year 2018/19.**

[77] When CMP261 was raised this was anticipated to be in Spring 2016.

6.6 The Workgroup then voted against the Original and the 3 WACMs, these votes can be seen in section 7.

7 Workgroup Vote

7.1 The Workgroup believes that the Terms of Reference has been met and that CMP261 has been fully considered.

7.2 For reference the CUSC objectives are:

a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity;
b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection);
c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses;
d) compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency. These are defined within the National Grid Electricity Transmission plc License under Standard Condition C10, paragraph 1.).
e) promoting efficiency in the implementation and administration of the CUSC arrangements.

7.3 The Workgroup met on the 11th October 2016 and voted on the Original Proposal and the three Workgroup Alternative CUSC Modifications. Three of the Workgroup members voted that the Baseline better facilitated the Applicable CUSC Objectives, One Workgroup member abstained, One Workgroup member voted that the Original Proposal better facilitated the Applicable CUSC Objectives and six Workgroup members voted for WACM1. The Workgroup members votes and reasoning's are shown in the table below

National Grid view.

7.1 National Grid considers that it is not clear whether a defect exists. National Grid has followed an industry-agreed process to set the G:D split, established by the CMP224 industry working group, and subsequently ratified by the Regulator, to comply with EU Regulation 838/2010. The CMP224 methodology preserved the ex ante principle that tariffs are set in advance. This is consistent with the intention of EU Regulation 838/2010, which is designed to promote cross border trade. The CMP224 methodology also deliberately excluded exchange rate risk to avoid inclusion of risk premia into contract pricing which would be to the detriment of GB consumers. CMP224 did not include an ex post reconciliation mechanism to adjust tariffs, but does include an error margin calculated on the basis of historic data to adjust tariffs in future years to ensure the G:D split is set in a way that recovers the appropriate revenue from generation, and which is in itself a form of ex post reconciliation. Hence the CMP224 methodology preserves the ex ante principle, avoids exchange rate risk, and includes a mechanism to adjust the calculation of the G:D split with the latest data. CMP224 remains a reasonable methodology for compliance with EU Regulation 838/2010.

7.2 Using ex post data applied to the CMP224 methodology, an exceedance of €2.50/MWh can be shown. However, if the ex ante principle is disregarded, whether a breach of the Regulation has actually arisen depends on the interpretation of the EU Regulation and hinges on what is meant by excluding "*charges paid by producers for physical assets required for connection to the system*". There is an argument, that costs associated with local circuits should be excluded, and the Workgroup has provided analysis to compare the charging treatment of assets on the system. If those assets are excluded, there is no exceedance of €2.50/MWh and therefore until a decision is made on this point, it is not clear a defect exists.

7.3 In the event a defect is identified, then measures should be taken to take account of any generator overcharges. National Grid believes the most appropriate method to do this to avoid windfall gains to generators is by preserving the principle of ex ante tariff setting and using existing processes and timescales to adjust future tariffs. This approach would provide most certainty to market participants and avoid the addition of risk premia in future prices which would adversely affect GB consumers.

Nick Pittarello	Applicable CUSC Objectives					
	(a)	(b)	(c)	(d)	(e)	Overall
	Vote 1 (proposal vs baseline)					
Original	No, unclear whether defect exists. If it does, ex post reconciliation of tariffs does not facilitate cross border trade and leads to higher risk premia for GB consumers	No, potentially leads to windfall gains as market expectations were based on published tariffs. Whether the rebate is cost reflective depends on the definition of "assets physically required for connection" in the interpretation of the Regulation.	No, unless it is clear there is a defect	No, unless it is clear there is a defect. CMP224 put in place a reasonable industry-agreed approach to comply with Regulation 838/2010	No, requires an additional non-standard process	Abstain
WACM1	No, unclear whether defect exists. If it does, ex post reconciliation of tariffs does not facilitate cross border trade and leads to higher risk premia for GB	No, potentially leads to windfall gains as market expectations were based on published tariffs. Whether the rebate is cost reflective depends on the definition of "assets	No, unless it is clear there is a defect	No, unless it is clear there is a defect. CMP224 put in place a reasonable industry-agreed approach to comply with Regulation 838/2010	No, requires an additional non-standard process	Abstain

	consumers	physically required for connection" in the interpretation of the Regulation				
WACM2	No, unclear whether defect exists. If it does, this approach is consistent with industry timescales (K adjusted t+2)	Neutral, whether tariff adjustment is cost reflective depends on the definition of "assets physically required for connection" in the interpretation of the Regulation	No, unless it is clear there is a defect	No, unless it is clear there is a defect. CMP224 put in place a reasonable industry-agreed approach to comply with Regulation 838/2010	Neutral	Abstain
WACM3	No, unclear whether defect exists. If it does, this approach is not consistent with industry timescales as K is adjusted t+3	Neutral, whether tariff adjustment is cost reflective depends on the definition of "assets physically required for connection" in the interpretation of the Regulation	No, unless it is clear there is a defect	No, unless it is clear there is a defect. CMP224 put in place a reasonable industry-agreed approach to comply with Regulation 838/2010	Neutral	Abstain
	Vote 2 (Each WACM vs original)					
WACM1	Neutral	Neutral	Neutral	Neutral	Supplier tariff adjustment not consistent with t+2 timescales	No

WACM2	Yes, avoids ex post adjustment of tariffs which promotes cross border trade and leads to lower risk premia for GB consumers	Yes, Adjustment of future tariff rather than rebate means less risk of windfall gains	Neutral	Neutral	Yes, consistent with existing industry processes and treatment of K	Yes
WACM3	Yes, avoids ex post adjustment of tariffs which promotes cross border trade and leads to lower risk premia for GB consumers	Yes, Adjustment of future tariff rather than rebate means less risk of windfall gains	Neutral	Neutral	Supplier tariff adjustment not consistent with t+2 timescales	No
	Vote 3 (Which best meets applicable CUSC objectives)					
Abstain						

Garth Graham	Applicable CUSC Objectives					
	(a)	(b)	(c)	(d)	(e)	Overall
	Vote 1 (proposal vs baseline)					
Original	Yes It (i) removes the uncertainty / risk of infraction proceedings; and (ii) it removes uncertainty / risk of changes to charges at a later date. These uncertainties / risks undermine generators/ suppliers commercial positions and therefore interfere with the correct functioning of the markets in generation and supply of electricity.	Yes By ensuring that the charges are set in accordance with the Regulation this will ensure they are more reflective of costs than if this change were not undertaken.	Neutral	Yes The Regulation (EC) No 714/2009 and Commission Regulation 838/2010 are binding for all Transmission licensees across Europe. We believe that this proposal ensures that GB remains compliant with the European legislation and properly reflects National Grid's duties in the development of its transmission business.	Neutral	Yes As has been set out in detail in the Workgroup report, and in accordance with the legal advice obtained by National Grid, the breach of the Regulation in 2015/16 has occurred and must be addressed and rectified immediately. The harm that has arisen from the breach of Regulation in 2015/16 is ongoing and is being further compounded by the lack of it's rectification at the earliest possible opportunity. The CMP261 Original ensures compliance with the Regulation and, accordingly, both better facilitates competition whilst also ensuring that cost reflective charges are

						applied.
WACM1	Yes It (i) removes the uncertainty / risk of infraction proceedings; and (ii) it removes uncertainty / risk of changes to charges at a later date. These uncertainties / risks undermine generators/ suppliers commercial positions and therefore interfere with the correct functioning of the markets in generation and supply of electricity.	Yes By ensuring that the charges are set in accordance with the Regulation this will ensure they are more reflective of costs than if this change were not undertaken.	Neutral	Yes The Regulation (EC) No 714/2009 and Commission Regulation 838/2010 are binding for all Transmission licensees across Europe. We believe that this proposal ensures that GB remains compliant with the European legislation and properly reflects National Grid's duties in the development of its transmission business.	Neutral	Yes This WACM (1) has all the positive attributes of the CMP261 Original, whilst allowing for a delay of up to an extra year (2018/19 instead of 2017/18) for the amount to be recovered from Suppliers (via an appropriate amendment to their TNUoS charges). For the same reasons as noted above with respect to the Original, and as has been set out in detail in the Workgroup report, and in accordance with the legal advice obtained by National Grid, the breach of the Regulation in 2015/16 has occurred and must be addressed and rectified immediately. Rebating Generators within 14 days, whilst allowing an extra year (to 2018/19) achieves this. The harm that has arisen from the breach of the

						Regulation in 2015/16 is ongoing and is being further compounded by the lack of it's rectification at the earliest possible opportunity. This WACM (1) (along with the CMP261 Original) ensures compliance with the Regulation and, accordingly, better facilitates competition whilst also ensuring that cost reflective charges are applied.
WACM2	No A significant proportion of Generator Users who paid TNUoS in 2015/16 will not receive any rebate from the breach of the Regulation in 2015/16 whilst other Generator Users (in a later charging year) will receive a rebate this WACM (2) does not better facilitate effective competition.	No A significant proportion of Generator Users who paid TNUoS in 2015/16 will not receive any rebate from the breach of the Regulation in 2015/16 whilst other Generator Users (in a later charging year)will receive a rebate this WACM (2) this will not be cost reflective and	Neutral	No A significant proportion of Generator Users who paid TNUoS in 2015/16 will not receive any rebate from the breach of the Regulation in 2015/16 whilst other Generator Users (in a later charging year) will receive a rebate. Furthermore, even those Generator Users who did pay TNUoS in 2015/16 who remain	Neutral	No. This WACM (2) would, if implemented, not correct the defect identified in the proposal; as a significant proportion of the Generator Users who paid, during 2015/16, on average in excess of the €2.50/MWh upper limit would not receive any rebate, whilst others, who were non Generator Users during 2015/16 would (as Generator Users in 2017/18) receive

		thus not better facilitate the applicable objective.		on the system in 2017/18 will not receive a speedy rectification, in the form of a rebate, for in excess of two years after the breach of the Regulation was identified. Therefore this WACM (2) does not better facilitate compliance with the Regulation.		a 'windfall gain'.
WACM3	No A significant proportion of Generator Users who paid TNUoS in 2015/16 will not receive any rebate from the breach of the Regulation in 2015/16 whilst other Generator Users (in a later charging year) will receive a rebate this WACM (3) does not better facilitate effective competition.	No A significant proportion of Generator Users who paid TNUoS in 2015/16 will not receive any rebate from the breach of the Regulation in 2015/16 whilst other Generator Users (in a later charging year)will receive a rebate this WACM (3) this will not be cost reflective and thus not better facilitate the	Neutral	No A significant proportion of Generator users who paid TNUoS in 2015/16 will not receive any rebate from the breach of the Regulation in 2015/16 whilst other Users (in a later charging year) will receive a rebate. Furthermore, even those Generator Users who did pay TNUoS in 2015/16 who remain on the system in 2018/19 will not receive a speedy	Neutral	No. This WACM (3) would, if implemented, not correct the defect identified in the proposal; as a significant proportion of the Generator Users who paid, during 2015/16, on average in excess of the €2.50/MWh upper limit would not receive any rebate, whilst others, who were non Generator Users during 2015/16 would (as Generator Users in 2018/19) receive a 'windfall gain'.

		applicable objective.		rectification, in the form of a rebate, for in excess of three years after the breach of the Regulation was identified. Therefore this WACM (3) does not better facilitate compliance with the Regulation.		
	Vote 2 (Each WACM vs original)					
WACM1	Neutral	Neutral	Neutral	Neutral	Neutral	Neutral. This WACM (1) has the positive attributes of the Original.
WACM2	No	No	Neutral	No	Neutral	No, for reasons detailed under Vote 1.
WACM3	No	No	Neutral	No	Neutral	No, for reasons detailed under Vote 1.
	Vote 3 (Which best meets applicable CUSC objectives)					
The CMP261 Original.						

Peter Bolitho	Applicable CUSC Objectives					
	(a)	(b)	(c)	(d)	(e)	Overall
	Vote 1 (proposal vs baseline)					
Original	Yes - Competition is facilitated through compliance with EU law	Neutral	Neutral	Yes - This proposal ensures compliance with EU law but there is some detrimental impact to suppliers as pass through in customer tariffs in 2017/18 is difficult	Neutral	Yes - This change goes some way towards addressing the harm to generators by NGET's failure to comply with the Regulation. Rebate payments to generators covering the 'overcharge' amount as specified in the CMP261 legal text will address this and provide confidence to the market that the Regulation, which was enacted to promote competition through facilitating cross-border trade and a single electricity market, is complied with. Unfortunately, this proposal does not

						compensate for the loss of revenue of generators from reduced operating hours in 2015/16, because of displacement by cheaper imported power that did not pay GB transmission charges. A failure of Ofgem to approve the original proposal or WACM1, will increase regulatory uncertainty and reduce confidence in the very EU laws enacted for the purpose of supporting an efficient, competitive market. Such an outcome would also undermine the reasonable expectation of market participants that previous regulatory decisions (including the implied settled policy position as to what constitutes a "transmission tariff charge" under CMP244) will remain unchanged.
WACM1	Yes - Competition is	Neutral	Neutral	Yes - This proposal	Neutral	Yes +

	facilitated through compliance with EU law			ensures compliance with EU law but, supplier charge impact can more reasonably be passed through in customer tariffs in 2018/19		As per the text for the Original above. WACM1 has the added benefit that the consequential adjustment to supplier charges is made a year later in 2018/19, which allows suppliers in most cases to pass the costs through to customers in tariffs; thus avoiding some distortion to competition in the supply market.
WACM2	No - A different set of generators receives the tariff benefit resulting from the 2015/16 overcharge amount.	No - Poor targeting of costs is not cost reflective	Neutral	No - A different set of generators receives the tariff benefit resulting from the 2015/16 overcharge amount.	Neutral	No - This is not a legitimate alternative as it does not address the defect set out by the proposer of CMP261. The Regulation deals with "annual average transmission charges" paid by producers" in a particular year (in this case 2015/16). Any 'overcharge' must be targeted via a rebate, otherwise generators that

						have since closed or operate less will lose out financially and those that have just started operating, or operate more, in 2016/17 will receive a windfall reduction in charges. Such reallocation of costs between users across different timeframes is not cost reflective and overall is detrimental to competition.
WACM3	No - A different set of generators receives the tariff benefit from the 2015/16 overcharge amount.	No - Poor targeting of costs is not cost reflective	Neutral	No - A different set of generators receives the tariff benefit resulting from the 2015/16 overcharge amount,	Neutral	No - Comments as per WACM2. This proposal is even worse than WACM2 as there is an even longer delay to recover the generator 'overcharge' amount arising in 2015/16. This means that cost targeting will be even less reliable and therefore less cost reflective than WACM2.
	Vote 2 (Each WACM vs original)					
WACM1	No	n/a	n/a	Yes	n/a	For reasons set out

						above.
WACM2	No	No	n/a	No	n/a	"
WACM3	No	No	n/a	No	n/a	"
	Vote 3 (Which best meets applicable CUSC objectives)					
WACM1 – it is better than the Original as the potential adverse impact on supply competition is mitigated to some extent as suppliers are better able to pass through tariff changes to customers in 18/19 rather than in 17/18.						

Comments on the process

7.4 The decision on this modification will have a material impact on market participants. It is therefore particularly concerning that that there have been unnecessary and avoidable delays in assessing this modification. This has not been helped by the late interventions of Ofgem, or in some cases how National Grid has chosen to manage the process.

7.5 Being seen to act impartially as code administrator is bound to be difficult for National Grid when it is alleged to have overcharged generators by over £120m in 2015/16; and Ofgem may also genuinely believe it is appropriate for it to steer the industry assessment process given it is the relevant GB NRA charged with deciding compliance with the Regulation. However, it should be noted that these actions of National Grid and Ofgem has altered the nature of the assessment process and the alternatives that have been put forward. In turn this may well impact the eventual decision made by Ofgem and affect parties' rights of appeal under the statutory, merits based, industry code appeals process.

7.6 In my opinion, Ofgem has not, to date, approached its evaluation of CMP261 with an open mind. Despite strong evidence to support CMP261 (including the unequivocal legal opinion of Addleshaw Goddard produced in April), Ofgem has consistently remained sceptical of the claims of the proposer that a material breach of the Regulation has occurred. In August however, after the workgroup had voted on the alternatives, it decided (in my opinion in an entirely inappropriate fashion) to intervene and steer the process, so as to seek to find evidence that could lead to a more restricted definition of what constitutes a "transmission tariff charge" and thereby potentially conclude that a breach was either smaller than set out in the original proposal, or had not occurred at all. Furthermore, workgroup members were put under pressure to reconsider voting on possible alternatives. To re-open such a voting process would have been improper and depending on a subsequent CUSC Panel recommendations, could well limit statutory rights of appeal of any Ofgem modification decision.

7.7 Unfortunately, the actions of National Grid have not helped expedite the CMP261 process either. Their actions may well be commercially understandable, as they could well be found to be materially in breach of the Regulation, but at the same time as code administrator could be perceived to lack impartiality. The actions that could be misconstrued have included:

- extending the scope of analysis beyond that requested by the workgroup;
- the chair saving an alternative proposal that had been proposed by the National Grid representative but had been rejected by the workgroup; and

- various chairs actively encouraging the workgroup to reconsider its vote on alternatives, after the vote had already been taken,

7.8 In making its recommendation, on the above proposals, I would urge the CUSC Panel to reflect on the above procedural concerns.

Simon Vicary	Applicable CUSC Objectives					
	(a)	(b)	(c)	(d)	(e)	Overall
	Vote 1 (proposal vs baseline)					
Original	yes	neutral	neutral	yes	neutral	yes
WACM1	yes	neutral	neutral	yes	neutral	yes
WACM2	no	neutral	neutral	no	neutral	no
WACM3	no	neutral	neutral	no	neutral	no
	Vote 2 (Each WACM vs original)					
WACM1	yes	neutral	neutral	yes	neutral	yes
WACM2	no	neutral	neutral	no	neutral	no
WACM3	no	neutral	neutral	no	neutral	no
	Vote 3 (Which best meets applicable CUSC objectives)					
WACM 1 best meets applicable CUSC objectives.						

Supporting Text for Voting

7.9 Given the legal opinion supporting the view that there is a breach of the €2.50/MWh annual average limit for TNUoS paid by Generators in GB in Charging Year 2015/16, as set in EU Regulation 838/2010 Part B (3), we believe that an ex post reconciliation must be carried out.

7.10 CMP261 Original and WACM1 would ensure compliance with the EU Regulation 838/2010 Part B (3).

7.11 The proposed implementation approach in WACM1, with Generator rebates as soon as practicable and the Adjustment of Demand tariffs in 2018/19 is the best solution for both generators and customers.

7.12 The adjustment of generation tariffs in 2017/18 (WACM3) or 2018/19 (WACM4) will not ensure that the generators that overpaid TNUoS in 2015/16 receive adjustments that correctly reverse their overpayments.

George Moran	Applicable CUSC Objectives					
	(a)	(b)	(c)	(d)	(e)	Overall
	Vote 1 (proposal vs baseline)					
Original	NO	NO	NEUTRAL	NEUTRAL	NEUTRAL	NO
WACM1	NO	NO	NEUTRAL	NEUTRAL	NEUTRAL	NO
WACM2	NO	NO	NEUTRAL	NEUTRAL	NEUTRAL	NO
WACM3	NO	NO	NEUTRAL	NEUTRAL	NEUTRAL	NO
	Vote 2 (Each WACM vs original)					
WACM1	YES	NEUTRAL	NEUTRAL	NEUTRAL	NEUTRAL	YES
WACM2	YES	NEUTRAL	NEUTRAL	NEUTRAL	NEUTRAL	YES
WACM3	YES	NEUTRAL	NEUTRAL	NEUTRAL	NEUTRAL	YES
	Vote 3 (Which best meets applicable CUSC objectives)					
The Baseline best meets the applicable CUSC objectives.						

Supporting Text for Voting

Vote 1 (proposal vs baseline)

7.13 The CMP261 Original Proposal and all of the WACMs do not better facilitate the CUSC objectives.

Applicable Objective (a)

7.14 Under CMP224, compliance with the relevant EU Regulation is managed via an ex-ante approach with no reconciliation. This was the accepted expectation of the market. The examples presented in paragraph 2.34 of the workgroup consultation show that National Grid and market participants were aware that the €2.50/MWh limit might have been exceeded during 2015/16. This demonstrates that the accepted expectation of the market was that there would be no mid-year tariff change or reconciliation in respect of the cap. This expectation was also affirmed at both the May 2015 and August 2015 CUSC Panel meetings – by National Grid in May 2015, who were clear that there was no intention of reviewing the CMP224 solution and by the proposer of CMP 251 in August 2015, who was clear that any solution should not be applied retrospectively to 2015/16.

7.15 National Grid did not, at any point, propose any mid-year tariff change to address the potential exceedance – which would have been fully visible to it. Therefore the Original and all of the WACMs perform worse against applicable objective (a) as the unexpected nature of this modification would

damage competition because the impact on parties, and parties' ability to manage those impacts, will vary. The retrospective nature of the changes could also lead to increased risk premiums applied to future tariffs.

Applicable Objective (b)

7.16 The principles underpinning the charging methodology, including the default proportion of revenue to be recovered from generators in 2015/16, were approved as meeting objective (b).

7.17 Therefore, any unnecessary restrictions or changes to how these principles are translated into charges are detrimental to meeting objective (b). To the extent that the proposed change retrospectively moves Generation tariffs from the default position in the methodology for 2015/16, CMP261 performs worse against applicable objective (b).

Applicable Objective (d)

7.18 CMP261 has no impact on Objective (d) as the current methodology is compliant with the relevant EU Regulation. This is clear as:

- There has been no enforcement action taken or (as far as we are aware) being considered.
- The legal advice does not conclude that National Grid is not compliant.

7.19 Until such time as non-compliance is found, and given the uncertainty surrounding whether such a finding would be achievable, no impact can be assessed against objective (d).

Vote 2 (Each WACM vs Original)

7.20 The WACMs only affect the assessment against applicable objective (a).

WACM 1: Worse than the baseline but better than Original as the D reconciliation includes reasonable notice for suppliers and also customers on pass-through contracts.

WACM 2: Worse than baseline but better than Original as there is a slight delay in G adjustment which provides some (limited) opportunity for the adjustment to pass through to wholesale prices (and to consumers), reducing any windfall to Generators (and detriment to consumers/suppliers).

7.21 In this instance do not believe the notice for Demand charge adjustment is sufficient due to the unexpected nature of the modification. Also insufficient notice for customers on pass-through contracts.

WACM 3: Worse than baseline but better than Original, and the least detrimental of the WACMs, as the delay in the Generation adjustment provides more opportunity for the adjustment to pass through to wholesale prices (and to consumers), limiting any windfall to Generators (and detriment to consumers/suppliers). Also, the Demand reconciliation includes reasonable notice for suppliers and customers on pass-through contracts

Jeremy Guard	Applicable CUSC Objectives					
	(a)	(b)	(c)	(d)	(e)	Overall
	Vote 1 (proposal vs baseline)					
Original	Negative	Negative	Negative	Negative	Negative	Negative
WACM1	Negative	Negative	Negative	Negative	Negative	Negative
WACM2	Negative	Negative	Negative	Negative	Negative	Negative
WACM3	Negative	Negative	Negative	Negative	Negative	Negative
	Vote 2 (Each WACM vs original)					
WACM1	Negative	Neutral	Neutral	Neutral	Neutral	Negative
WACM2	Positive	Neutral	Neutral	Neutral	Neutral	Positive
WACM3	Positive	Neutral	Neutral	Neutral	Neutral	Positive
	Vote 3 (Which best meets applicable CUSC objectives)					
Baseline						

Supporting Text for Voting

7.22 This modification does not encourage competition, it does the exact opposite; the threat of this modification alone regardless of the outcome could lead to parties leaving the market due to the excessive level of cost uncertainty and risk of retrospective charging being too high. Suppliers that are vertically integrated and have a large proportion of generation vs demand would receive an adverse distributional benefit if this modification were to be approved. It is detrimental to objective a.

7.23 This modification attempts to exploit an exchange rate fluctuation that had little material impact on the cost to generate. If there was any risk of a material impact on generators from such an exchange rate fluctuation then generators themselves should have managed that risk within their own businesses. This modification is detrimental to objective b.

7.24 Charging methodologies in themselves exist to provide certainty to the affected parties, this modification undermines the whole purpose of charging methodologies and the basic principle of cost certainty and is therefore detrimental to objective c.

7.25 Regarding the regulation; (i) The regulation specifies a cap in Euro's; (ii) It is widely accepted that ex-ante charging methodologies are preferable to ex-post; (iii) There is no mention of a retrospective adjustment in the regulation; (iv) The regulator would have been aware of an exchange rate

fluctuation risk. The regulation therefore never intended for a retrospective adjustment to be made, therefore this modification does not have a positive impact with compliance of any regulation or objective d.

7.26 This modification would introduce inefficiencies into the implementation of the CUSC and would therefore have a negative impact on objective e.

Matthew Hulks	Applicable CUSC Objectives					
	(a)	(b)	(c)	(d)	(e)	Overall
	Vote 1 (proposal vs baseline)					
Original	YES	YES		YES		YES
WACM1	YES	YES		YES		YES
WACM2	YES	YES		YES		YES
WACM3	YES	YES		YES		YES
	Vote 2 (Each WACM vs original)					
WACM1	YES	YES		YES		YES
WACM2	NEUTRAL	NEUTRAL		NEUTRAL		NO
WACM3	NEUTRAL	NEUTRAL		NEUTRAL		NO
	Vote 3 (Which best meets applicable CUSC objectives)					
WACM 1						

Supporting Text for Voting

7.27 WACM 1 allows generators to be paid back as soon as possible, whilst limiting any damage caused and ensuring compliance with the 838/2010 regulation quickly and efficiently. Further, suppliers should be given sufficient time to correct their pricing strategies for future charging years to ensure that these costs can be recovered appropriately from customers via TNUoS tariffs.

George Douthwaite	Applicable CUSC Objectives					
	(a)	(b)	(c)	(d)	(e)	Overall
	Vote 1 (proposal vs baseline)					
Original	No	No	Neutral	Neutral	No	No
WACM1	No	No	Neutral	Neutral	No	No
WACM2	No	No	Neutral	Neutral	No	No
WACM3	No	No	Neutral	Neutral	No	No
	Vote 2 (Each WACM vs original)					
WACM1	Yes	Neutral	Neutral	Neutral	Neutral	Yes
WACM2	Yes	Yes	Neutral	Neutral	Neutral	Yes
WACM3	Yes	Yes	Neutral	Neutral	Neutral	Yes
	Vote 3 (Which best meets applicable CUSC objectives)					
Baseline						

Supporting Text for Voting

7.28 Direction was given by Ofgem early on that the workgroup should discuss the best solution should Ofgem determine a breach in regulation has occurred, and that it is up to Ofgem to make that determination. Since the original proposal and WACMs still perform that function of determining a breach and specifying the size of that breach, in addition to proposing a solution for any such breach, we are unable to support them.

7.29 Since we do not feel that a breach in regulation has been adequately proven, this change does not improve compliance to EU regulations. It not only represents a reduction in competition by adding uncertainty to published tariffs, but it also represents a reduction in the cost-reflectivity of this charge by attempting to redistribute costs from an earlier charging year and additionally decreases efficiencies in the administration of the CUSC. Further distortions to cost-reflectivity occur with any windfall gain, since customers will fail to get a rebate on any deemed over-charging. In this instance, we believe that generators will have priced their energy on published tariffs rather than taking a view on the exchange rate at the time of contracting and therefore their costs will have been passed through. As a result, any rebate on these costs should be applied through tariffs to ensure sufficient lead time for cost reductions to get passed back to customers. Although it is recognised the customer base may have changed from that of 2015/16, without adequate lead time it could be that all customers are disadvantaged.

7.30 Should Ofgem determine that a breach in EU regulation has occurred, we feel that the WACMs offering better cost reflectivity would be those where any reduction in the generators' TNUoS charges were to be applied through the tariffs, to minimise the possibility of there being a windfall gain.

Competition is best served where there being no windfall gains, through sufficient notice in changes to tariffs. Therefore, should some breach in regulation be determined, we feel that WACM3 offers the best methodology for resolving that breach.

Joe Underwood	Applicable CUSC Objectives					
	(a)	(b)	(c)	(d)	(e)	Overall
	Vote 1 (proposal vs baseline)					
Original	Yes	Yes	Neutral	Yes	No	Yes
WACM1	Yes	Yes	Neutral	Yes	No	Yes
WACM2	No	No	Neutral	No	No	No
WACM3	No	No	Neutral	No	No	No
	Vote 2 (Each WACM vs original)					
WACM1	Yes	Yes	Neutral	Yes	Neutral	Yes
WACM2	No	No	Neutral	No	Neutral	No
WACM3	No	No	Neutral	No	Neutral	No
	Vote 3 (Which best meets applicable CUSC objectives)					
WACM1						

Supporting Text for Voting

7.31 I consider both the CMP261 Original and WACM 1 to better facilitate the Applicable CUSC Objectives with respect to the baseline with WACM 1 being the superior of these two options. WACM 1 recovers cost in the 18/19 charging year therefore consumers can benefit from the extra notice being given to demand charges.

7.32 I do not believe that WACM2 or 3 properly hit the defect. A tariff adjustment will not reimburse generators effected by the overcharge that have closed since the 15/16 charging year. This also means that transmission connected generators that have entered the market since the 15/16 charging year will be getting payed for an overcharge they were not subject to.

7.33 I consider that there has been a material breach of the €2.50/MWh average transmission charges cap and effected generators should be immediately remitted the amount they were overcharged.

7.34 In the 15/16 charging year, generators were overcharged for transmission charges against the €2.50/MWh cap. This represents a breach of the technical requirements of the guidelines regulation. This position has been supported by legal advice from Addleshaw Goddard, procured by National Grid for the workgroup and effected generators should be immediately rebated the amount they were overcharged.

7.35 With respect to ACO (d), CMP261 Original and WACM 1 realigns GB transmission charging for 15/16 with European regulation that takes precedence over the CUSC.

7.36 Approving CMP261 or WACM 1 will reduce the risk of infraction proceedings and remove the uncertainties of future changes to charges that will undermine commercial positions of suppliers and generators thereby better facilitating ACO (a).

7.37 It is our view that the generator rebate should occur as soon as practical. Recouping revenue from suppliers, however, should allow sufficient time for them to correct their pricing methodology for future charging years. We therefore believe that the potential option A would best facilitate the ACOs with respect to the other options.

7.38 For the avoidance of doubt I also feel it necessary to note that I do not support the exclusion of generation only spurs from the TNUoS charging methodology as per the Addleshaw Goddard legal response (para. 19): *As was concluded during the CMP224, we would agree with the view that it is a reasonable interpretation of the Guidelines Regulation for TNUoS in respect of generation only spurs to be included within the TNUoS charges subject to the Guidelines Regulation G Charge limits (as implemented under the CUSC).*

Karl Maryon	**Applicable CUSC Objectives**					
	(a)	**(b)**	**(c)**	**(d)**	**(e)**	**Overall**
	Vote 1 (proposal vs baseline)					
Original	Yes	Yes	Neutral	Yes	No	Yes
WACM1	Yes	Yes	Neutral	Yes	No	Yes
WACM2	No	No	Neutral	No	No	No
WACM3	No	No	Neutral	No	No	No
	Vote 2 (Each WACM vs original)					
WACM1	Yes	Yes	Neutral	Yes	Neutral	Yes
WACM2	No	No	Neutral	No	Neutral	No
WACM3	No	No	Neutral	No	Neutral	No
	Vote 3 (Which best meets applicable CUSC objectives)					
WACM1						

Paul Jones	Applicable CUSC Objectives					
	(a)	(b)	(c)	(d)	(e)	Overall
	Vote 1 (proposal vs baseline)					
Original	YES	Neutral	Neutral	YES	Neutral	YES
WACM1	YES	Neutral	Neutral	YES	Neutral	YES
WACM2	YES	Neutral	Neutral	YES	Neutral	YES
WACM3	YES	Neutral	Neutral	YES	Neutral	YES
	Vote 2 (Each WACM vs original)					
WACM1	YES	Neutral	Neutral	Neutral	Neutral	YES
WACM2	Neutral	NO	Neutral	Neutral	Neutral	NO
WACM3	Neutral	NO	Neutral	Neutral	Neutral	NO
	Vote 3 (Which best meets applicable CUSC objectives)					
WACM 1						

Supporting Text for Voting

7.39 All options improve on the baseline in respect of objective e) as they ensure compliance with Regulation (EU) No 838/2010 Part B, in line with the legal advice provided to the working group. The current ex ante approach is normally sufficient to ensure compliance with the regulation in general, but when material breaches occur it is correct that adjustments are made to ensure that generators as a class are not exposed to excessive levels of TNUoS charges. This provides regulatory certainty and promotes competition in the wholesale market better meeting objective a). They are neutral against objectives b), c) and e).

7.40 Compared with the original proposal, WACM 1 is better as it recovers the additional cost from suppliers a year later, giving them a better opportunity to manage the associated risk on behalf of their customers. WACMs 2 and 3, whilst better than the baseline, are not as cost reflective as the original and WACM1 as they seek to provide the rebate through an adjustment in future tariffs. In this time the chargeable capacities of affected generators may have changed, meaning that they would receive the incorrect level of refund.

8 Code Administrator Consultation Responses Summary

8.1 13 responses were received by the Code Administrator Consultation. These responses are contained within Annex 5 of the report. The following table provides an overview of the responses received.

	Do you believe that CMP261 better facilitates the Applicable CUSC Objectives? Please include your reasoning.	Do you support the proposed implementation approach? If not, please provide reasoning why.	Do you have any other comments?
EDF Energy	Yes, we believe that the CMP261 proposal for change better facilitates the CUSC Objectives, in particular (d) "Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency". (Further detail can be found in Annex 5).	Yes, we support the proposed implementation approach preferring WACM1, Generator rebates in 2016/17 and the Adjustment of Demand tariffs in 2018/19.	Commission Regulation (EU) No 838/2010 Part B restricts annual average transmission charges paid by electricity Generators in Great Britain to the range of €0/MWh to €2.50/MWh. The Regulation is legally binding for all Transmission licensees across Europe so it is reasonable to expect National Grid to ensure demonstration of compliance.
First Utility	CMP261 does not better facilitate CUSC Objectives A, B and D and is neutral against C. (Further detail can be found in Annex 5).	No. (Further detail can be found in Annex 5).	CMP224 implemented the mechanism for dealing with the €2.50 cap, this costing mechanism should have been used by parties to determine their prices. We are open to the mechanism being changed on a forward-looking basis only.
Smartest Energy	No,e are not convinced there is a defect. (Further detail can be found in Annex 5).	Notwithstanding our view that a change should not take place, if this were to happen, then between the original and the WACMs, we would prefer WACM1 or WACM3 (which may be preferable to NGT) i.e. recover the monies through the tariffs in 2018/2019	No.
Drax Power Limited and Haven Power	Yes. The Original Proposal and WACM 1 better facilitate the Applicable CUSC Objectives (ACOs) (a), (b)	Yes.	For the avoidance of doubt, we also feel it necessary to note that we do not support the exclusion of generation only spurs from the TNUoS charging methodology, as per

Limited	and (d). (Further detail can be found in Annex 5).		the Addleshaw Goddard legal response. (Further detail can be found in Annex 5).
OVO Energy	OVO does not support the passage of this modification. We do not think the evidence provided by the workgroup sufficiently proves that TNUoS charges for generators exceeded €2.50/MWh in 2015/16.	If it is decided that generators paid in excess of €2.50 /MWh in TNUoS charges for the charging year 2015/16, OVO's preference would be that suppliers would not be charged until at least TNUoS charging year 18/19 for the cost of compensating generators, if not later. (Further detail can be found in Annex 5).	No response
SSE	SSE detail in the response (1) a breach of a relevant legal requirement has occurred and (2) this has resulted in significant commercial impacts on SSE (and other GB generators). CMP261 Original and WACM1 seek to rectify the breach. SSE believes that CMP261 Original and WACM1 do both better facilitate the Applicable CUSC Objectives and that WACM2 and WACM3 do not better facilitate the Applicable CUSC Objectives. (Further detail can be found in Annex 5).	SSE supports the implementation approach with respect to CMP261 Original and WACM1. (Further detail can be found in Annex 5).	SSE does have other comments that are focussed on (i) the wider legal contextual setting associated with the transmission charges applied to GB generators during Charging Year 2015/16; (ii) responding to the 'National Grid View'; (iii) Trade; (iv) the Treatment of Overcharged Customers; and (v) the draft legal text. (Further detail can be found in Annex 5).
Opus Energy	We do not believe CMP261 better facilitates CUSC objective (a) (Further detail can be found in Annex 5).	We do not support the implementation of CMP261. However, should CMP261 be approved, we believe that the earliest the adjustment to demand tariffs should be applied is 2018/19.	No response
VPI Immingham	Yes, we believe that CMP261 better facilitates the applicable CUSC objectives. (Further detail can be found in Annex 5).	We support the implementation approach that reimburses generators immediately, yet delays recovery from suppliers to a later date to enable them to factor costs in (i.e. WACM1)	It is disappointing that this modification has taken such a long time to reach this point when it materially affects generators within the UK. (Further detail can be found in Annex 5).
Scottish Power	We believe that the Original Proposal and WACM1	We support the implementation	No.

	overall better meet the Applicable CUSC Charging Objectives than the baseline principally by ensuring compliance with Electricity Regulation 838/2010 and ensuring that the average charge paid by GB generators does not exceed €2.50/MWh (Objective (d). (Further detail can be found in Annex 5).	approaches outlined in Section 5 for the Original Proposal and WACM1. As outlined above we do not support implementation of WACM2.	
ESB	The modification better facilitates Objectives A and D and is neutral against Objective B, C and E. (Further detail can be found in Annex 5).	Providing a generator re-bate is the only approach that could feasibly be implemented to correct the defect. Under any other proposal monies would not necessarily be repaid to parties that were affected by the defect, thus failing to fulfil the competition and cost reflectivity objectives of the CUSC.	We note procedural concerns that a number of parties have raised in relation to this modification and would urge both the CUSC Panel and Ofgem to address these concerns during their deliberations on the proposal.
Highlands and Island Enterprise	Not clear. (Further detail can be found in Annex 5).	No. (Further detail can be found in Annex 5).	We are concerned that this expedited CUSC change process has resulted in a proposed methodology change which does not properly address the actual CUSC defect with an enduring solution. (Further detail can be found in Annex 5).
The Renewable Energy Company (Ecotricity)	We believe that CMP261 better facilitates the Applicable CUSC objectives as the intentions of this modification better facilitates objective D. This is based on the rationale that this shall ensure compliance with EU regulation.	We support the proposed implementation approach of Option A. (Further detail can be found in Annex 5).	We would suggest that the implementation of Option A would be the best possible solution for the industry.
British Gas	The CMP261 Original Proposal and all of the WACMs do not better facilitate the CUSC objectives. (Further detail can be found in Annex 5).	We do not support the modification. However, any implementation should seek to limit or avoid windfalls and should seek to protect consumers. (Further detail can be found in Annex 5).	No.

9 CUSC Panel Recommendation

9.1 The CUSC Panel met on 25 November 2016 and voted on the Original Proposal and the three Workgroup Alternative CUSC Modifications.

9.2 For reference the Use of System Charging Methodology Objectives are;

(a) That compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity;

(b) That compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard licence condition C26 requirements of a connect and manage connection);

(c) That, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses*;

(d) Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency. These are defined within the National Grid Electricity Transmission plc Licence under Standard Condition C10, paragraph 1; and

(e) Promoting efficiency in the implementation and administration of the CUSC arrangements.

*Objective (c) refers specifically to European Regulation 2009/714/EC. Reference to the Agency is to the Agency for the Cooperation of Energy Regulators (ACER).Overall the Panel view was split with one Panel member voting for the Original; five Panel members voting for the WACM and three Panel members voting for the Baseline. Therefore, the Panel voted by majority that the WACM should be implemented.

9.3 The Panel voted on CMP261 Original and WACMs against the Applicable CUSC Objectives. The majority of Panel members agreed that the Original and WACM1 was better than the baseline. The majority of the Panel recommended WACM1 as being the best option with five votes.

Vote 1 – Does the original or WACM facilitate the objectives better than the Baseline?

9.4 Each Panel member provided their voting opinion and also provided a voting statement which is shown after their voting opinion.

James Anderson						
	Better facilitates ACO (a)	**Better facilitates ACO (b)?**	**Better facilitates ACO (c)?**	**Better facilitates ACO (d)?**	**Better facilitates ACO (e)?**	**Overall (Y/N)**
Original	Neutral	Neutral	Neutral	Yes	Neutral	Yes
WACM1	Neutral	Neutral	Neutral	Yes	Neutral	Yes
WACM2	No	Neutral	Neutral	No	Neutral	No
WACM3	No	Neutral	Neutral	No	Neutral	No
Voting Statement; The CMP261 Original Proposal and WACM1 overall better meet the Applicable Charging Objectives (ACOs) than the current baseline principally by ensuring compliance with the Electricity Regulation						

838/2010 and ensuring that the average charge paid by GB generators does not exceed €2.50/MWh. The Original and WACM1 therefore better meet ACO (d).
Of particular note is Key Conclusion 4 from Addleshaw Goddard that:

"in circumstances where the outturn figure for a charging year demonstrates average €/MWh G charges which are materially above the G Charge Guideline limit (as is the case for 2015/16 charging year) [emphasis added], on balance we would suggest that the G charges for the relevant year should be adjusted on a backward looking basis in order to bring them into line with the €2.50/MWh limit and in order to demonstrate compliance with the Guidelines Regulation."

And at paragraph 20 of Addleshaw Goddard's opinion that:

"..it is reasonable that such (Generator only) spurs be included in the average G charge calculation. It is not clear on what basis the exclusion of " charges paid by producers for physical assets required for connection to the transmission system" justifies the exclusion of TNUoS charges in respect of generation only spurs, and therefore the justification for such a carve-out appears lacking."

The Original Proposal and WACM1 are neutral against the other ACOs.

WACMs 2 & 3 do not better meet the ACOs than the current baseline.

Both include a process which would make payments to generators who were not impacted by the original "overcharge" (i.e. those who have increased TEC since 2015/16) and would fail to make payments to other generators affected by the "overcharge" (i.e. those who have decreased TEC since 2015/16). Such an arrangement would constitute an unjustified enrichment to the first category of generators, detrimental to competition, ACO (a), and fail to ensure compliance with the Electricity Regulation in respect of the latter category, ACO (d).

WACMs 2 & 3 are neutral against the other ACOs.

Overall, WACM 1 would best meet the ACOs.

Bob Brown

	Better facilitates ACO (a)	Better facilitates ACO (b)?	Better facilitates ACO (c)?	Better facilitates ACO (d)?	Better facilitates ACO (e)?	Overall (Y/N)
Original	No	No	Neutral	Neutral	No	No
WACM1	No	No	Neutral	Neutral	No	No
WACM2	No	No	Neutral	Neutral	No	No
WACM3	No	No	Neutral	Neutral	No	No

Voting Statement;
Determination of this proposal will be significantly influenced by legal opinion and there are various views in the report that make it difficult to come to a robust view that the proposal or alternatives positively better the baseline. Should a change be made, it appears appropriate to avoid windfall (and possible detriment to consumers) by making forward changes to charges in order to redistribute any sums. This would allow the market to adjust prices in an orderly competitive manner.

Kyle Martin

	Better facilitates ACO (a)	Better facilitates ACO (b)?	Better facilitates ACO (c)?	Better facilitates ACO (d)?	Better facilitates ACO (e)?	Overall (Y/N)
Original	Yes	Neutral	Neutral	Yes	Neutral	Yes
WACM1	Yes	Neutral	Neutral	Yes	Neutral	Yes
WACM2	No	Neutral	Neutral	No	Neutral	No
WACM3	No	Neutral	Neutral	No	Neutral	No

Voting Statement;
Approving CMP261 will reduce the risk of infraction proceedings (as supported by the legal opinion) which better facilitates objective (d). Additionally, providing generators with cost reflective charges removes distortions in the charging regime and improves the commercial position of suppliers and generators, thereby, better facilitating CUSC objective (a). WACM1 recovers costs in the 18/19 charging year, therefore, suppliers can benefit from the extra notice being given before costs are recovered through demand changes. There is a further question as to whether suppliers should pay back the money owed to generation at all. If a breach has occurred - the question is then whether National Grid should face the cost of this charge.

Garth Graham

	Better facilitates ACO (a)	Better facilitates ACO (b)?	Better facilitates ACO (c)?	Better facilitates ACO (d)?	Better facilitates ACO (e)?	Overall (Y/N)
Original	Yes	Yes	Neutral	Yes	Neutral	Yes
WACM1	Yes	Yes	Neutral	Yes	Neutral	Yes
WACM2	No	No	Neutral	No	Neutral	No
WACM3	No	No	Neutral	No	Neutral	No

Voting Statement;
It is clear that a breach of the upper limit of €2.50/MWh; set out EU Guidelines Regulation 838/2010 Part B; has occurred. Only the CMP261 Original and WACM1 address this breach and so better facilitate Applicable Objective (d) and in so doing are better in terms of competition (a) and cost reflectivity (b). In addition only the CMP261 Original and WACM1 ensure that the CUSC is compliant with Article 8(7) of EU Regulation 714/2009 as the current baseline affects cross-border trade by virtue of the charges not being in compliance with the €2.50/MWh cap set in the Guidelines Regulation (including for the reasons that the Commission set out in their documentation that accompanied the Guidelines Regulation, which Ofgem highlighted to the CMP261 Workgroup).
I note the comments in the responses to the Code Administrator Consultation with respect to the purported Supplier impacts with CMP261 Original and WACM1. However, it should be pointed out that had the correct charges been applied, as they should have been (not least because this is what the market expected), in Charging Year 2015/16 that, on average, Supplier transmission charges would (in accordance with the legally determined level) have been €0.65/MWh greater than they were. Accordingly the impact (of CMP261 Original or WACM1) on Suppliers is minimal (if not non-existent) as they have demonstrably benefitted from not having to pay this amount during 2015/16 and (to date) 2016/17 (with the Original) plus 2017/18 (with WACM1). Returning Suppliers to where (in law) they should have been is now being portrayed as 'detrimental' or having 'significant distributional impacts' – it is neither, it merely returns them (12 to 24 months later) to where they should, rightly, have been. Any 'detrimental' effects or 'significant distributional impacts' have been on GB generators in paying, on average, €0.65/MWh greater than they should have (during Charging Year 2015/16) which has affected competition within the GB market as well as affected cross-border trade with other Member States (and within the UK Member State).
WACM 2 and WACM 3 do not address the breach of the upper limit of €2.50/MWh; set out EU Guidelines Regulation 838/2010 Part B; as some of the affected Users will not receive any refund of the €0.65/MWh excess, on average, that they paid during Charging Year 2015/16. This does not better facilitate Applicable Objective (d). Furthermore, these unpaid funds will, instead, be paid to other Users which is neither cost reflective or better for completion; and thus does not better facilitate Applicable Objectives (a) and (b).

Nikki Jamieson (alternate Jon Wisdom)

	Better facilitates	Better facilitates	Better facilitates	Better facilitates	Better facilitates	Overall (Y/N)

	ACO (a)	ACO (b)?	ACO (c)?	ACO (d)?	ACO (e)?	
Original	Abstain					
WACM1						
WACM2						
WACM3						

Voting Statement;
It is not clear that the defect exists. If it does, National Grid would support WACM2 as the best option on the grounds that it is consistent with Industry timescales (K adjusted t+2), preserves the principle of ex-ante charging, and avoids the risk of windfall gains to generators.

Paul Jones

	Better facilitates ACO (a)	Better facilitates ACO (b)?	Better facilitates ACO (c)?	Better facilitates ACO (d)?	Better facilitates ACO (e)?	Overall (Y/N)
Original	Yes	Neutral	Neutral	Yes	Neutral	Yes
WACM1	Yes	Neutral	Neutral	Yes	Neutral	Yes
WACM2	Yes	Neutral	Neutral	Yes	Neutral	Yes
WACM3	Yes	Neutral	Neutral	Yes	Neutral	Yes

Voting Statement;
All options improve on the baseline in respect of objective e) as they ensure compliance with Regulation (EU) No 838/2010 Part B, in line with the legal advice provided to the working group. The legal advice is that the current ex ante approach is normally sufficient to ensure compliance with the regulation in general, but when material breaches occur it is correct that adjustments are made to ensure that generators as a class are not exposed to excessive levels of TNUoS charges. This provides regulatory certainty and promotes competition in the wholesale market, better meeting objective a). They are neutral against objectives b), c) and e). However, it also provides uncertainty to other parties whose transmission charges would change to pay for the refund.

Compared with the original proposal, WACM 1 is better as it recovers the additional cost from suppliers a year later, giving them a better opportunity to manage the associated risk on behalf of their customers. WACMs 2 and 3, whilst better than the baseline, are not as cost reflective as the original and WACM1 as they seek to provide the rebate through an adjustment in future tariffs. In this time the chargeable capacities of affected generators may have changed, meaning that they would receive the incorrect level of refund.

Simon Lord

	Better facilitates ACO (a)	Better facilitates ACO (b)?	Better facilitates ACO (c)?	Better facilitates ACO (d)?	Better facilitates ACO (e)?	Overall (Y/N)
Original	No	No	Neutral	Neutral	No	No
WACM1	No	No	Neutral	Neutral	No	No
WACM2	No	No	Neutral	Neutral	No	No
WACM3	No	No	Neutral	Neutral	No	No

Voting Statement;
TNUoS is a forward looking charge to re-allocate the charges because of circumstances that happen post event is not cost reflective as the change in charge is not able in influence actions. There is no reconciliation in circumstances where demand forecasts errors lead to over/under recovery or similarly when generation joins or leaves the TNUoS charging base. The regulation are silent on post event reconciliation and is assumed that this was not contemplated by those setting the regulation. None of the

options improve on the baseline.

Cem Suleyman

	Better facilitates ACO (a)	Better facilitates ACO (b)?	Better facilitates ACO (c)?	Better facilitates ACO (d)?	Better facilitates ACO (e)?	Overall (Y/N)
Original	Neutral	Neutral	Neutral	Yes	Neutral	Y
WACM1	Neutral	Neutral	Neutral	Yes	Neutral	Y
WACM2	Neutral	Neutral	Neutral	No	Neutral	N
WACM3	Neutral	Neutral	Neutral	No	Neutral	N

Voting Statement;
I believe that both the Original and WACM1 better facilitate ACO (d) for the same reasons as given by the Proposer. Moreover, I also agree with the Proposer's argument that WACMs 2 and 3 do not better facilitate ACO (d) and do not represent valid solutions to the proposed defect. Whilst the Proposer's arguments that the Original and WACM1 better facilitate ACO (a) are valid and correct, the counter argument that there could be a detrimental impact to competition due to the retrospective nature of the proposal also has merit. These two impacts will offset one another to some extent. It is difficult to determine which impact holds greater weight so overall I consider that the Original and WACM1 are likely to have a neutral impact against ACO (a). Overall, both the Original and WACM1 better facilitate the ACOs, however I consider WACM1 is best as the potential adverse impact on supply competition is mitigated to some extent as suppliers are better able to adjust their retail tariffs accordingly with the additional notice provided.

Paul Mott

	Better facilitates ACO (a)	Better facilitates ACO (b)?	Better facilitates ACO (c)?	Better facilitates ACO (d)?	Better facilitates ACO (e)?	Overall (Y/N)
Original	Yes	Neutral	Neutral	Yes	Neutral	Yes
WACM1	Yes	Neutral	Neutral	Yes	Neutral	Yes
WACM2	No	Neutral	Neutral	No	Neutral	No
WACM3	No	Neutral	Neutral	No	Neutral	No

Voting Statement;
A legal opinion exists supporting the view that there was a breach in 2015/16 of the EC 838/2010 annual average limit for generation TNUoS. An ex post reconciliation will put the breach right, and competition (CAO (a)) is better facilitated through the certainty that comes from due compliance with the law. This proposal ensures that GB remains compliant with the European legislation and properly reflects Grid's duties in the development of its transmission business,relevant to CAO (d). WACM2 and WACm3 both have a flaw though: A significant proportion of Generator Users who paid TNUoS in 2015/16 will not receive any rebate from the breach of the Regulation in 2015/16 whilst other Generator Users (in a later charging year) will receive a (windfall, in a way...) rebate - so WACM 2 and WACM 3 do not better facilitate effective competition (CAO (a)). Even generators which paid TNUoS in 2015/16 which remained on the system in subsequent years would not receive a repayment of their overcharge in a timely manner - the rebate wouldn't be paid for quite a while after the breach of the Regulation was identified. As a result, WACM2 and WACM 3 wouldn't better facilitate compliance with the Regulation in terms of CAO (d), either.

Vote 2 – Which option is the best?

Panel Member	BEST Option?
James Anderson	WACM1

Bob Brown	Baseline
Kyle Martin	WACM1
Gareth Graham	Original
Nikki Jamieson	Abstain
Paul Jones	WACM1
Simon Lord	Baseline
Cem Suleyman	WACM1
Paul Mott	WACM1

10 Workgroup discussions following sendback

10.1 Ofgem issued a send back letter on 22nd February 2017 to the CUSC Panel setting out the Authority's decision to direct that the CMP261 30th November 2016 Final Modification Report be revised and resubmitted. This section of the Report details the Workgroup deliberations associated with the send back, together with the further Panel deliberations following receipt of the Workgroup's update and industry consultation.

10.2 The Panel met on 24th February 2017 and agreed that the CMP261 Workgroup should be reconvened to address the issues that Ofgem had identified in the send back letter needed to be addressed, namely:

a) *"the legal text included in the FMR is not consistent with the options discussed in the FMR*[78]*.*

b) *if there has been a breach, it is not clear that the options submitted to us remedy it, i.e. that they reimburse the right users the right amount of the alleged overcharge".*[79]

10.3 Following the send back of CMP261 by Ofgem the Chair wished to address some comments received via circulation and at the CUSC Panel questioning the impartiality and independence of the Chairpersonship of the Workgroup.

10.4 The Chair confirmed that they were accepted as the Workgroup Chair by the CUSC Panel and subsequently has ran all meetings independently. Also, the Chair wished to express from the outset that CMP261 is dealing with a very emotive topic and it has resulted in some challenging Workgroups. Although Ofgem have yet to determine a breach decision, for the purposes of the Workgroup, the Chair reflected that it needs to be assumed a breach has occurred and a method to remedy the breach needs to be provided. Also, the Chair expressed that all involved in the Workgroup want to ensure the right outcome and that any discussions within the Workgroup need to be considerate of individual's views to ensure that discussions are balanced, fair and equitable.

10.5 The Chair also confirmed that National Grid want to see a speedy resolution to the issues and addressed points previously raised in different forums:

- From National Grid's perspective they are not in the 'dock';
- National Grid is not fundamentally affected;
- National Grid is neutral in its position in relation to the modification; and

In the event of a breach being determined National Grid will take action accordingly.

10.6 Ofgem's send back letter expanded[80] on what 'legal text' amendments and 'additional analysis [was] required'. The CMP261 Workgroup met on 7th March, 8th March, 16th March, 27th March, 12th April, 24th April, 5th May, 12th May, 15th May and 22nd 2017 to consider these issues in the 30th November 2016 Final Modification Report. At the start of the 7th March meeting, the chair proposed, and the Workgroup agreed, to proceed with their deliberations on the send back letter on the basis of a *working assumption* that a breach of the €2.50/MWh limit had occurred in 2015/16, Ofgem then provided feedback on their send back letter for CMP261 and highlighted that they understood Workgroup member's frustrations and that they want the modification to progress as quickly as possible. However, Ofgem have yet to come to a final conclusion on whether a breach has or has not occurred. Ofgem went on to confirm that they could not form an opinion on the modification for two reasons: the current[81] Final Modification Report has legal text error which is the responsibility of

[78] Final Modification Report, dated 30th November 2016.
[79] Page 1, Ofgem's 22nd February 2017 letter.
[80] On page 2 of the letter.
[81] 30th November 2016 version.

the Workgroup to make sure accurately reflects the solutions put forward in that Report. Also, the Workgroup has not fully considered that the right people are being paid the right amount of money. Ofgem also wanted to reiterate that it was not directing the Workgroup to raise or consider any further alternatives, however, in order to avoid any further delay it would be helpful if there was an option they can approve if a breach is determined. Several Workgroup members felt that it's not the role of the Workgroup to give Ofgem multiple options as Ofgem see fit.

10.7 On 28th February 2017 a Workgroup member asked, via email[82], if Ofgem could update the group on a number of aspects that may assist the Workgroup in its deliberations in regard to the send back letter and CMP261. These questions (and the Ofgem response shown in red) are detailed in Annex 11.

10.8 A Workgroup member asked Ofgem if they had any particular remedy in mind that the Workgroup would be prudent to develop to ensure Ofgem could approve the modification if a breach is determined. Ofgem confirmed that they have to yet to conclude a final legal view on whether a breach has occurred and that it was the responsibility of the workgroup to suggest a suitable solution.

10.9 The same Workgroup member also asked if Ofgem; given the EU law compliance aspects with CMP261; could give any indication on the balance between meeting their Statutory Duties in the context of their Principle Objective ("…to protect the interests of existing and future consumers in relation to electricity conveyed by distribution systems or transmission systems[83]") within the context that "Those interests of existing and future consumers are their interests taken as a whole, including…(c).their interests in the fulfilment by the Authority, when carrying out its functions as designated regulatory authority for Great Britain, of the objectives set out in Article 36(a) to (h) of the Electricity Directive.[84]". Ofgem confirmed the Principle Objective is to protect Consumer

10.10 Another Workgroup member asked further follow up questions as follows:

- Would it be prudent to include Time Value of Money (i.e. the payment of interest) into the basis of the adjustment? Ofgem felt that the Workgroup had been working on the assumption that Time Value of Money would be included as part of the remedy in the event breach was found.

- Can it be clarified whether Ofgem has a view on what should be used as the basis of the adjustment when calculating the exchange rate? Should the exchange rate be the OBR forecast, from spring 2014, €1.22 to the pound which was the rate set[85] in accordance with the CMP224 arrangements, or should it be €1.37 to the pound which was the actual daily average exchange rate during the 2015/16 Charging Year?

10.11 In respect of the payment of Time Value of Money as discussed above, the Workgroup felt the Authority needs to determine the value, composition and recovery (if allowed) of any value related to Time Value of Money.

10.12 A Workgroup member highlighted a Ofgem letter[86] on 12th August 2016 (in Annex 15) which deals with appropriate interest and ex-gratia payments for customers who have been overcharged due to a breach by Licence holders and therefore this should be taken into account when Ofgem considers what, if any, action it will take with respect to the alleged breach.

10.13 A Workgroup member countered that the Workgroup member is taking the letter out of context as customers in the context of the letter are consumers who Ofgem have a

[82] Emailed to the CMP261 Workgroup at 12:23.
[83] Section 3A (1) of the Electricity Act 1898 (as amended).
[84] Section 3A (1A) of the Electricity Act 1898 (as amended).
[85] Based on the Office of Budget Responsibility spring 2014 Budget forecast.
[86] https://www.ofgem.gov.uk/system/files/docs/2016/08/open_letter_to_gas_suppliers_on_metricimperial_indicator_charging_error.pdf

particular duty to protect. Ofgem also clarified that the letter related to a specific set of circumstances (a gas meter metric/imperial indicator charging error), and putting the letter into context it related to a unnamed Supplier adopting principles to address the issue which Ofgem then encouraged other Suppliers to follow suit. The principles in the Ofgem 12th August letter are:

"*For overcharged customers:*

- *Repayments include a payment for the historic overcharging as well as an appropriate interest payment.*

- *Repayments include an ex-gratia payment reflective of the detriment caused*".

10.14 A Workgroup member also noted that in the case covered by the 12th August Ofgem letter that the "*supplier has done the right thing in coming forward promptly and taking decisive action to identify affected customers*". However, in the case at hand; of the exceedance, by over 25%, of the €2.50/MWh upper limit in 2015/16; that the breaching party had (i) not acted promptly and (ii) had not come forward themselves to alert Ofgem to the breach even though, the Workgroup member noted, the possibility of a breach had been signalled before 2015/16 (as exampled at paragraph 2.9 of the Final Modification Report[87]) and the probability of a breach was signalled during 2015/16 (as exampled at paragraph 2.34 of the Final Modification Report[88]). This, the Workgroup member suggested, might thus result in additional sanctions (if appropriate) by Ofgem in this case.

10.15 The National Grid representative and some Workgroup members, considered that the above suggestion of additional sanctions by Ofgem was inappropriate and inflammatory, thus not appropriate or relevant to the Workgroup Report.

10.16 If a breach is determined National Grid confirmed to the Workgroup that they would be looking to include an interest payment consistent with current CUSC arrangements (base rate + 2% in the context of the treatment of K) in any rebate.

10.17 The Workgroup consider that it is Ofgems determination in remedying any alleged breach the appropriate rate to be used in relation to interest/Time Value of Money and if any ex-gratia payment for any detriment that may have been caused is appropriate and the associated amount.

10.18 A Workgroup member questioned whether the Workgroup should be more prescriptive on the calculation of quantifying the detriment caused should Ofgem decide that ex-gratia payments are appropriate in this case. The Workgroup concluded that it is Ofgems decision on how it will quantify any detriment that may have been caused, which may include such things as consultation responses, a separate call for evidence or bilateral discussions with affected parties including National Grid.

10.19 Some Workgroup members felt that it was not clear whether Suppliers should be paying any interest as they are not the breaching party (National Grid), however, the National Grid opinion, in approving CMP224 the Authority was approving a process to deliver the requirements under EU Regulation 838/2010 and if this process results in a breach then this should be borne by Consumers.

10.20 A Workgroup member felt in response to the question as to what was that the exchange rate and the outturn figure were not mutually exclusive. The legal opinion from Addleshaw Goddard stated that you can use ex ante or ex post processes, but if you get it wrong then you need to consider how you might remedy that. As a result, there is nothing that makes one more special than the other and so they should both be considered in tandem.

[87] 30th November 2016 version.
[88] 30th November 2016 version.

10.21 Further to the above it was felt by some Workgroup members that in sending back the modification Ofgem are not providing direction that other alternatives need to be considered or providing further evidence to support a breach. It is clear in the send back letter that Ofgem are seeking clarification on two points: correcting the legal text and ensuring the correct parties are reimbursed if a breach is determined. Those members, mindful of Ofgem's decision letter on CAP186, believed that the Workgroup are not allowed to raise additional Alternatives that go beyond the deficiencies outlined in the send back letter.

10.22 A Workgroup member asked if a solution is no longer implementable then would it not be prudent to change the Alternatives. The remainder of the Workgroup felt that all options provided in the Final Modification Report[89] are still implementable; if required by Ofgem instructing a mid-year tariff change[90]/[91]. This is also the case for any Time Value of Money (interest) and detriment caused claims, Ofgem can also direct further work required in the decision letter in order to address Time Value of Money (interest) etc.

10.23 In light of the discussion around changing the intent or merit of the proposals, raising new alternatives etc., and the CAP186 decision letter the Workgroup agreed that for the remainder of the 7th March 2017 meeting it would proceed on the basis of the *working assumption*; pending the receipt of further clarification on CAP186 from Ofgem at the following day's[92] meeting; that options that address the deficiencies in the send back letter only could be considered.

Legal Text correction following the send back.

10.24 Noting the points raised in the send back letter, and in light of the arguments set out in the paragraphs 10.27 to 10.47 below, with respect to cancellation charges, the Workgroup has concluded that the legal text for CMP261 Original and WACM1 should be amended to £1.66/kW (from £1.71/kW). The Workgroup believes that this amendment to the legal text ensures that the Original and WACM1 are now consistent with what was discussed in the Final Modification Report[93].

10.25 Further to this, and noting the points raised in the send back letter, a correction was also been made to the legal text for the Original and WACM's 1-3 as the formula included in the Final Modification Report[94] legal text for calculating the demand residual subtracts, rather than adds, the revenue adjustment. The Workgroup believes that these amendments to the legal text ensure that the Original and WACM's 1-3 are now consistent with what was discussed in the Final Modification Report[95].

10.26 Post sendback the Workgroup identified additional changes required to the formula in the legal text and subsequent issues with the K factor for WACM1. The intent of WACM1, when raised, was to carry out an immediate rebate to Generators with recovery from Demand delayed by 2 Charging Years. Similarly the original proposal intended an immediate rebate to Generators with a recovery from Demand in the following Charging Year, rather than due to the passage of time a within year Demand tariff change.

[89] 30th Novermber 2016 version.
[90] The mid-year tariff change arrangements were introduced via GB-ECM21, which was approved by Ofgem on 9th April 2010 http://www.nationalgrid.com/NR/rdonlyres/F0298A1C-0945-4D49-982A-3D733A967A6D/40573/GB_ECM21_Ofgem_decision_letter.pdfv
[91] Only one mid-year tariff change has, to date, been undertaken by National Grid and that was in 2010/11, as set out in their open letters to industry of 1st September 2010 and 1st October 2010 together with their notice, of the tariff changes, of 1st December 2010..
[92] 8th March 2017.
[93] 30th November 2016 version.
[94] 30th November 2016 version.
[95] 30th November 2016 version.

Further Consideration of Cancellation Charges following the send back

10.27 The Workgroup considered the requirement for additional analysis to address the concerns raised in respect of cancellation charges set out in the Ofgem send back letter, namely that the Original and the WACMs include rebates in respect of cancellation charges and so may not reimburse the right people the right amount of money. The Workgroup identified that there were two elements associated with cancellation charges[96] namely the financial amount (£) and, if appropriate, the associated volume (MW). The Workgroup looked at these elements and identified the following arguments in favour of/against different approaches:

Why cancellation charges should be included?

10.28 As noted in Regulation 838/2010 Part B, the annual average transmission charge paid by generators does not exclude 'cancellation charges'; as it only explicitly excludes three items, namely: (i) connections charges, (ii) ancillary services charges and (iii) transmission losses charges. If the intention had been to also exclude cancellation charges paid by generators then this would have been made clear within the Regulation.

10.29 On this basis the total actual (as opposed to forecast) value of cancellation charges for 2015/16 was £18.3 million[97] and this was included within the overall £119.5M figure that forms the basis of the generator rebate amount for 2015/16 in the Original and WACM1.

Why cancellation charges should be excluded?

10.30 Cancellation charges are not a charge for use of system, by definition, and therefore are not included in the Regulation.

10.31 Transmission tariff regimes vary immensely across Europe, and not all European countries may have a concept of "Cancellation Charges", which may account for why the Regulation does not explicitly refer to this as a specific exclusion. Indeed Cancellation Charges did not exist in GB when the Regulation was being developed, although these charges replaced a similar arrangement based on TNUoS. Using the argument that Cancellation Charges should be included in average G because they are not explicitly excluded in the Regulation might also lead to the argument that £250m constraint payments[98]/[99] paid to Generators in 2015/16 should be netted from the gross amount paid by Generators because they are also not explicitly excluded.

10.32 When National Grid are calculating[100] the Generation/Demand (G/D) split for the purposes of (i) forecasting tariffs (which they undertake a number of times each year) and (ii) tariff setting (which, absent a 'mid-year' tariff change, they undertake once a year), forecast revenue from cancellation charges are not included. Cancellation charges are based on an altogether different tariff described in a separate section of the CUSC. Moreover, the value of the revenue from cancellation charges (affects maximum allowed revenue ultimately reduces TNUoS charges) does not change if you were to readjust the inputs to recalculate the G/D split so they are not included as a portion of the revenue to recover from Generation. It would seem odd for cancellation charges to form part of the definition of average G.

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[96] For further information on cancellation charges please refer to the National Grid website: http://www2.nationalgrid.com/WorkArea/DownloadAsset.aspx?id=8589938703

[97] As detailed in Annex 8 of the 30th November 2016 Final Modification Report.

[98] Some Workgroup members believe it is debatable whether Constraint Management is an Ancillary service and therefore whether it should be excluded from the calculation. Indeed the European Commission suggest it is not an Ancillary service; directive of European parliament and of the Council on common rules for the Internal Market in Electricity dated 30th November 2016 page 55, para 38 "Ancillary service" means a service necessary for the operation of a Transmission or Distribution System including balancing and non-frequency Ancillary services but not for Congestion Management.

[99] Some Workgroup members believe that given that Ancillary service i.e. BSUoS includes constraints these should not be netted off.

[100] National Grid undertook this calculation, with respect to 2015/16 charges, six times and has undertaken the calculation at least thirteen times since.

Why should capacity be adjusted for cancellation charges?

10.33 Noting the arguments above with respect to including the value (£) of the cancellation charges, it therefore follows that the parties who paid the said cancellation charges should in principle be entitled to a rebate where a breach of the Regulation has occurred.

10.34 The CMP261 Original and WACM1 proposal for the amount of rebate includes the revenue (£) from the cancellation charges (£18.3M) and a value (MW) calculated to adjust the actual TEC for 2015/16. This reflects the proportion of the cancellation charge paid by the relevant Generator's as the basis of the capacity to apply the £/kW rebate to be received by that Generator. For example a 100MW Generator that reduced its TEC to zero but was liable (and paid) for a 50% cancellation charge is allocated an adjusted TEC of 50MW for the purpose of the rebate calculation.

10.35 On the capacity calculation basis for the Original and WACM1 noted above, the total volume associated with cancellation charges for this purpose would amount to 2,380MW[101].

Why capacity should not be adjusted for cancellation charges.

10.36 Cancellation charges aren't affected by the ex-ante forecast calculation undertaken by National Grid to meet the €2.5/MWh target when they set the TNUoS charges in January 2015 for charging year 2015/16. Therefore, there is no need to provide a rebate in respect of cancellation charges that have been paid, for 2015/16, in order to compensate for this calculation being incorrect.

10.37 The Workgroup dismissed a fourth option where the calculation would take account of the capacity (MW) but exclude the sum of money (£) related to that capacity. Three options on the treatment of cancellation charges were agreed on by the workgroup members, to be represented in a table where the fourth option would be greyed out

10.38 The Workgroup being mindful of Ofgem's send back letter in respect of cancellation charges has considered the above reasoning in additional to those previously presented[102] as potential steps to ensure the right people are reimbursed the right amount of money.

Further Variations on WACM2 and WACM3.

10.39 In light of the send back from Ofgem the Workgroup discussed different ways that the right parties could be reimbursed the right amount if amendments were permitted to WACM's 2 and 3. The intent of these different variations is to maintain one of the original principles of WACM's 2 and 3, namely that the rebate to Generators and recovery of the same amount from Demand occurs within the same Charging Year.

10.40 Some Workgroup members' had flagged, in the Final Modification Report[103], that adjustment of future Generation TNUoS tariffs does not reimburse the right people the right amount of money. One Workgroup member suggested a slightly different approach would address this issue and maintain one of the original principles of WACM's 2 and 3 that the rebate to Generators and recovery of the same amount from Demand occurs within the same Charging Year. This would work in the following way.

- On the assumption that a breach has occurred the total amount of overpayment is known for each Generator.
- The G:D split is calculated for the relevant future charging year without any adjustment.

[101] As detailed in Annex 8 of the 30th November 2016 Final Modification Report.
[102] In the 30th November 2016 Final Modification Report.
[103] 30th November 2016 version.

- Generation TNUoS tariffs are set using this G:D split.
- The demand tariff residual element is adjusted by adding the £m of overcharge and demand tariffs are calculated to recover this adjusted amount.
- Generators paying TNUoS in the year of adjustment that overpaid TNUoS in 2015/16 have one twelfth of the amount due to be rebated issued as a credit note to their monthly invoice.
- Generators closed before the year of adjustment that overpaid TNUoS in 2015/16 have one twelfth of the amount due to be rebated issued as a credit note each month and paid to them directly.
- Generators not due any rebate for 2015/16 TNUoS overpayment receive no credit adjustments.
- This would also avoid any consequential impacts on K as both rebate to the Generators and recovery from Consumers occurs in the same Charging Year.

10.41 Section 11 details potential further WACM Proposals based on further consideration of Cancellation Charges following the sendback of the CMP261 Final Modification Report. A variation of additional options were developed over and above the three WACMs, and original proposal submitted in the 30th November 2016 version of the CMP261 Final Modification Report) that could be proposed based on the options already discussed above by the Workgroup to address the points raised in the Ofgem send back letter. In Section 11 of the Report you can see the voting against these options to progress to formal WACM's and the details behind each of the options.

10.42 The National Grid representative pointed out that the TNUoS tariffs are derived on a Generator specific basis, and that therefore the TNUoS tariffs could be adjusted based on TEC to rebate the same monthly amounts. This was seen as a variation to WACMs 2 and 3 as raised, which were intended to avoid windfall gains. However, the National Grid representative noted that:

- Adjusting tariffs would either give a competitive advantage in a later year, which to all intents and purposes would have the same financial impact as single or 12 monthly payments over the year.

- Any Generator subject to negative tariffs may have an outturn TEC different to forecast, resulting in a failure to compensate the correct amount and leading to further impacts to K. In negative charging zones, although actual TEC is not known at the start of the Charging Year (as this is determined later by three proving runs over the course of the winter), for the purposes of this variation to WACMS 2 and 3 as currently drafted the nominated TEC at the start of the Charging Year would be used. This raises the issue that at the end of the Charging Year, if the actual TEC over the three proving runs is less, then a further reconciliation would be necessary as the power station would have received more or less in rebate than to which it was entitled, and would additionally involve a further reconciliation to ensure the Generator received the correct amount.

- The calculation of tariffs would be more complex than calculation of monthly rebate payments.

- There would be different treatment for generation that has closed since 2015/16 to generation that is still running.

- By using this mechanism to provide a reduction through tariffs the proposed treatment of Generators that are now closed or have a TEC of zero is that they would receive a one-off credit note. However it was noted that this may be unfair as those Generators are likely part of wider portfolios, and so the owners of those Generators would receive cash upfront while others would receive discounted tariffs over the course of the Charging Year.

Can new WACMs be raised following a sendback?

10.43 At the 8th March 2017 meeting, some Workgroup members considered that putting more WACM(s) on the table could constrain a materially affected party's right to appeal an Ofgem CMP261 decision[104] under the merits based, statutory appeals process[105] at the Competition and Markets Authority.

10.44 It is understood that the concern would arise if the Panel were to vote to recommend such a new WACM(X) proposal and Ofgem were to consent to this. In such a case a right to appeal any other CMP261 proposal that had also been recommended by the Panel would be excluded (currently the Original and WACM1, but not WACMs 2 or 3). This would apply even if the Panel considered the later proposal offered the best solution. For example, the Panel might state it has a clear preference for WACM1 with a £1.66/kW refund to Generators, but a new WACM(X), based on an option with a £1.45/kW refund that was also recommended by the Panel, could now be approved by Ofgem instead. If that were to happen an appeal, to the CMA, of WACM1 would be excluded.

10.45 As the CMA appeals process is a statutory one the Workgroup member considered that neither Ofgem nor National Gird as Code Administrator should attempt to 'steer' the process (including during the send back process) if this were to restrict rights of appeal, which might have otherwise been available to materially affected parties. To do so could well be acting contrary to the will of Parliament.

10.46 Under CMP261 it is alleged that National Grid has substantially 'overcharged' generators. The Workgroup member therefore considered that in the light National Grid's stake in the decision, it should be especially mindful of demonstrating impartiality in how it chairs and manages the Workgroup process.

10.47 The Workgroup member flagged three points where National Grid's actions might be misconstrued:

- extending the scope of analysis beyond that requested by the Workgroup or Panel;
- the chair actively encouraging the Workgroup to reconsider:
  a) its vote on the Original, WACM1, WACM2 and/or WACM3;
  b) or to propose new possible WACMs; and
- the chair saving a WACM proposal that had been proposed by the National Grid representative but had been rejected by the majority of the Workgroup.

10.48 The Workgroup member clarified that he was referring to the appropriate conduct of both Ofgem and National Grid in the process. The Workgroup member indicated that he was not singling out any individual or suggesting that inappropriate conduct had taken place. However, the Workgroup member felt these procedural matters were of utmost importance given the material impact the eventual CMP261 decision will have on affected parties.

[104] An important consideration is what constitutes an Ofgem decision to give consent to or not give consent to a code modification. The Workgroup member understands that the settled position on this topic is set out in Ofgem's letter dated 26 October 2007. https://www.ofgem.gov.uk/sites/default/files/docs/2007/10/unc0116-enduring-offtake-next-steps_0.pdf. In essence, there is one CMP261 decision for the Original and all WACM proposals.

[105] The Electricity and Gas Appeals (Designation and Exclusion) Order 2005 http://www.legislation.gov.uk/uksi/2005/1646/article/6/made. Note this has been extended to other codes since 2005. Statutory processed take precedence over National Grid's transmission licence and the CUSC.

10.49 At the meeting on 16th March 2017 a Workgroup member expanded on points set out in paragraph. He stated that, in his opinion, that the CUSC Panel should also be careful not to 'steer' the process to encourage the workgroup to consider new WACMs, as such an action could prejudice statutory rights for materially affect parties to appeal the eventual Ofgem CMP261 modification decision at the CMA. The Workgroup member suggested that this was particularly problematic as the CUSC Panel would be directly conflicted, as it is their recommendations on the proposals put to them, that determines whether an appeal is allowed or not. In addition, in the light of concerns about statutory appeal rights, the Workgroup member suggested that Workgroup members should think very carefully about whether it is appropriate for them to support new WACMs.

Can existing WACMs be altered?

10.50 A Workgroup member said that the Workgroup is entitled to rely on Ofgem guidance that existed at the date of the CMP261 send back decision, namely the position set out in the CAP186 decision letter. The Workgroup member considered that this guidance purposely defined the scope of changes that could be made following send back quite narrowly, and it did not permit changes beyond the intent of the proposals first put to Ofgem.

10.51 It was the Workgroup member's belief that it would be procedurally improper to re-visit the vote on the Original and WACMs 1-3. Furthermore, he considered that a further vote would not be necessary given that only changes that reflect the intent of such proposals should be allowed following send back. He said that intent is represented by the Workgroup's understanding of the proposals at the time of the original vote and this is recorded in the FMR – it is also reflected in any Workgroup members' reasons for voting for or against particular proposals. On this basis, the Workgroup member concluded that the widest credible scope of intent, could reasonably be determined by considering whether changes to a proposal would alter Workgroup members' views on the merits of that proposal – if views were unchanged (i.e. perspectives and strength of views remain the same) it could be allowed; if they were changed then this option would effectively be a new WACM.

10.52 In this regard the Workgroup member said that the Original Proposal and WACM1 should reflect the 'correct' intended value, namely £1.66/kW, but amendments to WACM2 and 3 to alter the tariff adjustments so as to accurately target 'refunds' to the right generators should not be permitted, as it was always acknowledged that WACM2 and 3 would not achieve that aim.

10.53 A further Workgroup member felt that the Workgroup has vires to Report back to the CUSC Panel once it concludes its work. Thus, the Workgroup need to rely on the views of the CUSC Panel when determining whether current Proposals can be amended or new Proposals can be made in light of a send back.

10.54 The Proposer was concerned that if either (i) amending the Original and WACMs 1-3 beyond the vires of the send back process (as set out in the CAP186 decision letter[106], in terms of incorrectly drafted legal text and a lack of clear and transparent reasoning and robust analysis) that goes to the intent and / or merit of those four proposals; and / or (ii) new WACMs (over and above the three existing WACMs) were now brought forward and that these changes ((i) and / or (ii)) were then incorporated into the revised Final Modification Report submitted to the Authority that this might 'invalidate' the Original and WACMs 1-3 by virtue of the revised Final Modification Report (sent to the Authority for decision) itself being considered, by the Authority, as 'flawed' (by virtue of it going beyond the vires of the send back process). If this situation were to arise, the Proposer believed that the Authority would be duty bound to send back this revised Final Modification Report so that these changes ((i) and / or (ii)) could expeditiously be removed and the Final Modification Report resubmitted to the Authority within the day.

[106] Dated 19th October 2010.

Ofgem's thoughts on further Alternatives

10.55 Following the discussion at the 7th March 2017 meeting, Ofgem updated the Workgroup at the 8th March meeting in respect of (i) amending the existing CMP261 proposals (the Original and WACMs 1-3) and (ii) raising new CMP261 WACMs. Ofgem clarified that they were not directing additional WACMs to be raised however in the send back letter stated that the Workgroup may want to consider further options. The view of some Workgroup members is that it is not possible, under the send back procedure, to (a) either change the current CMP261 proposals (the Original and WACMs 1-3) where it relates to the merit or the intent of those proposals or (b) raise further CMP261 WACMs as the focus, under send back, is on addressing the deficiencies in the CMP261 proposals set out in the Final Modification Report submitted[107] to the Authority for decision. Ofgem confirmed that they do not have a view on whether it is allowable to raise new CMP261 WACMs or amend the current CMP261 proposals (the Original and WACMs 1-3) Rather, they asked the Workgroup to consider whether the right people are reimbursed the right amount of money so, they are asking the Workgroup to consider how they can provide suitable options in order to remedy any breach if determined. However, given that those 'options' cannot be approved by Ofgem unless they constitute WACM(s) for CMP261 some Workgroup members believed that it could amount to nugatory work to consider other options which, depending on Workgroup members views, may or may not be suitable.

10.56 It was discussed whether it is appropriate to amend a CMP261 proposal if it no longer meets the principle behind which it was raised. A Workgroup member said WACM 1 was raised with the original intention of being identical to the Original Proposal but allowing for a longer cost recovery from Suppliers. The Workgroup member said that due to the delay caused by the send back process, the original intention behind WACM1 is diminished and it may be prudent to amend WACM 1 so to recover costs from suppliers in the 2019/20 charging year instead of the 2018/19 charging year, as originally drafted. He reasoned that the amendment is needed purely as a pragmatic solution to maintain the original intention of the WACM that arouse due to the delay caused by the send back process. Again, Ofgem stated that they do not have a view on whether this is allowable.

10.57 Some Workgroup members felt that changing any aspects of the existing CMP261 proposals (the Original and WACMs 1-3) beyond the deficiencies allowed under the CAP186 process would change the merit and or the intent of those proposals which would not be allowed under the send back powers. A Workgroup member had set this out further in an email[108] to the Workgroup prior to the start of the 8th March meeting. Alternatively, other Workgroup members felt in opening and amending the Original and the WACMs would not change the merit of the current proposals (the Original and WACMs 1-3).

[107] In the case of CMP261, 30th November 2016.

[108] [Email to CMP261 Workgroup 8th March 2016 @ 08:22] "I've reviewed further the CAP186 papers since the meeting yesterday and it is clear to me, no matter the 'merit' (and there are many) of 'updating' the proposals (and preparing new WACMs), that we are not permitted, in respect of send back, to include any new amendments or make changes to the merits of those existing proposals set out in the FMR.

In coming to this view I've, in particular, taken account of the Ofgem statement in its CAP186 decision letter (second paragraph, page 3) as to the deficiencies (which send back will address) "which are not related to the merits of proposals". This wording builds upon similar wording, in paragraph 3.44 (page 25) of Ofgem's 'Code Governance Review - Final Proposals' of 31st March 2010 (which gave rise to CAP186) which deals with the introduction of the send back powers.

We can correct legal text deficiencies Ofgem identified in its letter of 22nd February (as in make the original £1.66) and update analysis (such as the justification around why cancellation charges are included) but we cannot for example, put forward the various 'options' we explored further yesterday [7th March].

To do this would be to go to the merit(s) of the proposals before the Authority in the FMR.

Thus, with WACMs 2 and 3, the issue of non-payment to 2015/16 generators was clearly known and was a deliberate 'feature' of those proposals (see for example paragraph 4.5 and footnote 73 in the FMR). In terms of the send back power, there is no deficiency in that regard.

10.58 A number of Workgroup members cited Ofgem's decision letter that set out Ofgem's rationale for establishing the send-back process under the CUSC, CAP186 Code Governance Review: Send Back Process:

"*In November 2007, Ofgem initiated a review of the existing industry codes governance processes (known as the Code Governance Review (CGR)). During the CGR, we highlighted particular concerns we have that some final modification reports can be deficient. These deficiencies (such as insufficient or incorrectly drafted legal text, lack of clear and transparent reasoning and robust analysis) may lead the Authority to reject proposals and will affect the Authority's ability to make optimal decisions on those proposals.*

In our view, it would be more appropriate to address these deficiencies efficiently without the need to reject and re-submit proposals. We noted that one aspect of an effective governance regime should be rigorous and high quality analysis of the case for or against a proposed code change.

Our CGR initial proposals suggested that it would be reasonable and practical for the Authority to 'send back' final modification reports to code panels where the Authority could not make a decision on proposed code changes due to deficiencies in the reports, in preference to rejecting those code proposals. We noted that 'send back' powers ought to be used rarely and that Ofgem would participate in code modification processes at an early stage as often as possible to limit use of these powers"

10.59 In that decision letter Ofgem make clear the scope of the "send back power":

"*We also note that the purpose of the 'send back' power and its use is clear and would not cover re-writing the intent of an amendment proposal."*

This was also picked up in the same letter, in similar terms, with respect to the merits of the proposals:

"*There would also be a broader beneficial impact on the efficiency of the CUSC governance process by removing a risk that amendment proposals are rejected because of identified deficiencies which are not related to the merits of proposals. By addressing these deficiencies through 'send back', in a timely manner and without wastage of previous valid work on proposals, the governance process would operate more effectively and produce better and more robust decisions*." [emphasis added]

This, in turn, picked up similar wording used by Ofgem in their Code Governance Review Final Proposals document of 31st March 2010[109] where, under the send back powers section[110], Ofgem stated that:

"*We remain of the view that the 'send back' provisions will provide an effective safeguard against the Authority being placed in a position where it is unable to accept a proposal, not on its merits, but owing to deficiencies in the report such as an insufficient assessment, incorrect legal text or other technical flaws*." [emphasis added].

Changing them now, to (as we discussed in the group yesterday) (a) make a payment to those 2015/16 generators and (b) make no payment to those generators not there in 2015/16 would clearly go to the merits of WACMs 2 and 3 as it would fundamentally change the nature of those proposals.

Similarly, with cancellation charges, excluding either the volume (72GW v 69GW) or the revenue (£119M v £101M) goes to the merit of the proposal. That this goes to the merit of the proposal was, if nothing else, acknowledged by Ofgem at paragraph 2.94 (second and third sentence) [of the CMP261 Final Modification Report].

This may seem a 'harsh' position to take, but it was exactly what Ofgem deliberately set out would be the case with send back. To now, for this Mod, take a different course of action would not only be wrong, it would also be nugatory as the legal status of those 'new' WACMs would be called into question (as would any Ofgem decision to approve one of them, if it did so)."

[109] https://www.ofgem.gov.uk/ofgem-publications/61245/cgrfinalproposals310310.pdf

[110] Pages 24-25 of the document

10.60 A Workgroup member described how he understood the CUSC modifications process was intended to work in the context of this additional send back power. The CUSC modifications is a process designed to allow affected parties to propose changes, to address a defect identified (in the proposal form) by a party, and for industry experts to develop and recommend modifications for Ofgem's consideration. Only the Original and the WACMs agreed by a majority of the Workgroup or 'saved' by the Workgroup chair are taken forward. Strict voting objectives are applied to determine which possible WACMs are taken forward, but the Workgroup chair has discretion to 'overrule' a Workgroup majority vote not to take forward one or more of the possible WACMs if they believe it better meets the applicable CUSC Objectives.

10.61 In this context, the send back process is intended to allow deficiencies in the Final Modification Report[111] to be addressed, but not re-open the entire process or alter the nature or intent of the proposal(s) in that Report. In the opinion of some Workgroup members this is why the Workgroup should not consider further WACMs Furthermore, Ofgem should not seek to direct the development of new WACMs under its send back power as this would appear to represent a misuse of such a power. A response by the Panel or code administrator to such a request may also be procedurally improper if this were to lead to statutory appeal rights for materially affected parties being limited.

10.62 The Workgroup confirmed that in light of the requirements of the send back process, as set out in the Ofgem CAP186 decision letter; together with Ofgem's confirmation that they do not have a view on whether it is allowable to raise new CMP261 WACMs or amend the current CMP261 proposals (the Original and WACMs 1-3), and without a clear instruction from the CUSC Panel; that they were unable to consider other CMP261 WACMs or change the current CMP261 proposals. The fact that Ofgem could not confirm that further CMP261 WACMs could be presented or the current CMP261 proposal changed as a result of send back powers meant that the Workgroup felt no changes could be made to the CMP261 proposals currently presented beyond addressing the legal text aspects Ofgem highlighted in their letter (as well as providing the additional analysis required). However, the Workgroup agreed (prior to the 31st March 2017 CUSC Panel meeting) to consider and document different approaches that had not been presented in the original FMR[112] as part of the additional analysis requested by Ofgem on the specific issues set out in their send back letter.

CUSC Panel deliberations on the ability raise new Alternatives or amend current Proposals.

10.63 Following the Workgroup deliberations recorded above on whether amendments to current Proposals was permissible, or as some Workgroup members believe this is out of scope of the send back powers[113], the Workgroup posed the following nine questions to the March 2017 CUSC Panel. A paper was developed by the Code Administrator which was sent to the Panel on Friday 31 March 2017, using the following questions on the back of Workgroup discussion and an industry party raising a concern regarding the ambiguity of send back powers.

1. Are legal text 'corrections' (as set out in the legal text section of the Ofgem send back letter dated 22 February) to the four existing Proposals permissible?

2. Are legal text 'corrections' not identified (i.e. the sign of the GDSadj term also needs to be corrected for the Original Proposal and WACM1) in the send back letter permissible to the four existing Proposals?

3. Are other changes to the Proposals presented in the FMR amendable under send back powers?

[112] 30th November 2016 version.
[113] Implemented into the CUSC, via CAP186, in November 2010.

4. Are changes for the passage of time (shunting entire Proposals forward 1 year in legal text) related to the decision permissible?

5. Are changes for the passage of time (changing references from Charging Year 2016/2017 to 2017/2018 in legal text) related to the decision permissible?

6. Are new WACM's permissible that address what is in the send back letter?

7. Are new WACM's permissible that go beyond what is in the send back letter (passage of time)?

8. Are new WACM's permissible that go beyond what is in the send back letter?

9. If new WACM's are raised is a re-vote prudent on all Proposals?

10.64 Following deliberation at the CUSC Panel, please find below the CUSC Panel minutes relating to the discussions and also an email exchange between the CUSC Panel Chairman and the Authority:

NH confirmed that the modification has been sent back due to issues with the legal text in the Final Modification Report being inconsistent and clarity on whether the options submitted reimburse the right Users the right amount of the alleged overcharge. CF joined the meeting for the discussion on CMP261.

As the Workgroup Chair, NJ provided the Panel with an update on the Workgroup, using the presentation slide titled 'CMP261 Send Back CUSC Panel 1 Pager', which contained nine questions that the Workgroup sought guidance on, and highlighted the following points:
The Workgroup are not on track with the agreed timeline (agreed by the CUSC Panel) following the send back.
The Workgroup have debated in length the requirements of the send back letter, adding a significant amount of content into the Workgroup Report and have had a sometimes heated debate.

As it stands the Workgroup is struggling to progress without a Panel determination on whether the Workgroup can amend or raise new alternatives in light of the send back with the Workgroup split on this topic.

NJ advised the Panel that the Code Administrator had been contacted by a Party who had been questioning the interpretation of the send back letter.

MT presented the Panel with two documents to view these were:
- *Letter from Eggborough Power, Calon Energy and Intergen*
- *Copy of correspondence between MT and Ofgem*

The correspondence between MT and Ofgem was read out and deliberated upon by the Panel. The pertinent extracts are:

Ofgem will not direct the Panel as to the legal interpretation of the CUSC and no comment by Ofgem, now or previously, should be taken as instruction as to how the CUSC should be interpreted.

Ofgem is principally concerned that the Workgroup and the Panel address the all issues which have been raised in the send back letter, which include the consideration of alternatives to the proposed mod dealing with the same defect, but which may not have been raised as WACMs to date.

In considering these issues the Panel is not bound by any particular interpretation of the Authority's FMR letter on CMP 186.[114]

And

"I think the points below [above] are a fair reflection of what we discussed. It is now over to the Panel tomorrow to decide next steps."[115]

MT asked GG if, as proposer of CMP261, he wished to make any comments. GG as proposer of CMP261 noted in Ofgem's send back letter they have asked for options and not alternatives, and that there was a risk that if this lead to developing new WACMs that this could put at risk the four existing proposals if the revised FMR was considered to be flawed as a result of these new WACMs being incorporated within it..

PM noted his view in relation to the CAP186 papers is that he could not see why following send back the Workgroup were not permitted to raise new alternatives i.e. this had not been an issue for CMP268.

MT summarised the CUSC does not say what we can or cannot do; therefore the panel has to exercise discretion bearing in mind its responsibilities and the desirability of presenting Ofgem with a report on which a robust decision can be made

The Panel agreed by a majority that the Workgroup are empowered to consider options to address the defect, which could lead to new alternatives being raised, in line with what was detailed from Points 1-6 on the presentation slide titled 'CMP261 Send Back CUSC Panel 1 Pager'.

GG raised a question to NH, which related to the point GG had raised earlier, namely if Ofgem decide that, on reflection, new WACMs are not permissible would the Authority, send back the amended CMP261 FMR so that these new WACMs could be swiftly stripped out of the amended FMR rather than the Authority rejecting the amended FMR due to the presence within it of new WACMs. NH considered the question to be inappropriate because it fettered Ofgem's discretion to determine the modification following resubmission of the FMR. MT advised this is not something the Panel have to make a decision on and advised GG to discuss this with Ofgem and report back to the Panel.

Dear Lesley,

Thank you for taking my call.

I am setting out below my understanding of the advice you have given me on Ofgem's position on the question of the panel's remit in relation to the send back of CMP 216.

1. *Ofgem will not direct the panel as to the legal interpretation of the CUSC and no comment by Ofgem, now or previously, should be taken as instruction as to how the CUSC should be interpreted.*
2. *Ofgem is principally concerned that the workgroup and the panel address the all issues which have been raised in the sendback letter, which include the consideration of alternatives to the proposed mod dealing with the same defect, but which may not have been raised as WACMs to date.*
3. *In considering these issues the panel is not bound by any particular interpretation of the*
   Authority's FMR letter on CMP 186.

[114] CUSC Panel chair email to Ofgem, 28 March 2017 (14:24)
[115] Ofgem reply to CUSC Panel chair, 30 March 2017 (22:03)

I would be grateful if you could let me know if this is an accurate representation of your view, or
Amend it if necessary. As the panel is meeting on \Friday your early advice would be appreciated.

Yours sincerely
Mike Toms
Panel Chair

Dear Mike

Thanks for your email (and sorry we seemed to get cut off when you called earlier). I think the points below are a fair reflection of what we discussed. It is now over to the Panel tomorrow to decide next steps. Nadir will be at the meeting, and one of Andrew's team will join for this part of the discussion.

Regards
Lesley

10.65 The Workgroup also wished to flag as previously discussed in the Report (paragraph 2.51) that when considering remedying an alleged breach, it also needs to consider the impact of lapsed time on the Proposals and thus the appropriateness of a mid-year tariff change in Charging Year 2017-2018.

10.66 Following the Panel discussion on the permissible nature of new WACM's following an Ofgem sendback, the Proposer obtained some legal advice which can be found in Annex 13. This legal advice was presented to the CUSC Panel and the following decision was made:

MT confirmed that this Special CUSC Panel meeting had originally been arranged to discuss the CMP261 Workgroup Report. Following a recent CMP261 Workgroup meeting on Friday 5 May 2017, the CMP261 Workgroup required the Panels' advice on the legal opinion produced by the Proposer (SSE) in relation to the permissible nature of Alternatives in the event of an Authority send back.

Therefore, the purpose of this Special CUSC Panel meeting was to review the legal opinion and for the Panel to take a view on whether it should amend the 'Terms of Reference' that had been set for the CMP261 Workgroup.

MT invited GG to share his view with the Panel. GG, as the Proposer of CMP261 provided a summary of the legal advice (which had been provided in writing beforehand to the Panel and the Workgroup) and referred to a presentation slide titled 'CMP261 Send Back CUSC Panel 1 Pager', which contained nine questions that the Workgroup sought guidance on and which had been discussed at the CUSC Panel meeting in March 2017. For the avoidance of doubt, at the March Panel meeting, questions one to six were addressed but not question seven, eight or nine. For reference, the nine questions are shown below;

1. Are legal text 'corrections' (as set out in the legal text section of the Ofgem send back letter dated 22 February) to the four existing Proposals permissible?
2. Are legal text 'corrections' not identified (i.e. the sign of the GDSadj term also needs to be corrected for the Original Proposal and WACM1) in the send back letter permissible to the four existing Proposals?
3. Are other changes to the Proposals presented in the FMR amendable under send back powers?

4. Are changes for the passage of time (shunting entire Proposals forward 1 year in legal text) related to the decision permissible?
5. Are changes for the passage of time (changing references from Charging Year 2016/2017 to 2017/2018 in legal text) related to the decision permissible?
6. Are new WACM's permissible that address what is in the send back letter?
7. Are new WACM's permissible that go beyond what is in the send back letter (passage of time)?
8. Are new WACM's permissible that go beyond what is in the send back letter?
9. If new WACM's are raised is a re-vote prudent on all Proposals?

GG noted that it had been helpful to get legal advice for CMP261 and that the summary of this advice had been shared verbally with the Workgroup at their meeting on 5 May 2017. The legal advice summary document had been checked by SSE's legal counsel and permitted to be shared with the Workgroup and Panel.

GG confirmed that based on the legal opinion provided and as the Proposer of CMP261, he was of the view that the raising of new WACM's would not be permissible in the event of a send back from the Authority.

MT asked GG to clarify if his concerns raised regarding the development of new WACMs in the event of a send back were broadly the same as those which GG had already raised at previous Panel meetings. GG confirmed that this was essentially the same point.

MT asked GG if, in his view as the Proposer of CMP261, the decision of the Panel, as well as that of Ofgem, could be subject to a judicial review in a court of law. GG was not able to confirm his view on the matter and noted that in reality a challenge could be raised by any party. MT highlighted that this was not about where the challenge came from but more about where it goes to. MT also assumed that the summary legal advice presented to the Panel may be limited and not contain the full advice prepared for SSE by their legal counsel.

MT confirmed that he had spoken with Lesley Nugent of Ofgem prior to this Special CUSC Panel meeting and that Lesley had confirmed that this matter was for the Panel to resolve and the Authority would not provide further guidance. With this in mind, MT asked the Panel if they wished to consider obtaining their own legal advice in addition to that provided by SSE. SL noted that the Panel was a body in its own right and should not rely on the advice provided by the SSE legal counsel. SL also stated that the only legal advice that the Panel should consider should be that commissioned by either the Panel or by National Grid. SL confirmed that he was uncomfortable with the present situation that the Panel had found themselves in, and asked the Panel to bear in mind that it might be setting a precedent which went beyond its powers.

MT asked the Panel members if they felt that they should seek their own legal advice. LS considered that if all Panel members sought their own legal advice then this would have limited value as it would be likely to lead to slight variations of the same response and slow the resolution of the matter in hand.

MT asked the Panel for their opinion of the SSE legal advice noting that this could be viewed in one of three ways. Firstly, that the legal advice should not be taken into account, or secondly that the SSE legal opinion was helpful and noted by the Panel but that the Panel was not inclined to change the advice it has already given to the Workgroup. The third option was that the Panel took on board the legal opinion and direct the Workgroup to not raise any new WACMs.

MT asked the Panel to confirm their views on these options.

PM did not believe that the legal opinion provided by SSE held any special status that seemed relevant to the original decision made by the Panel and therefore

supported the Panel's original March decision to allow additional WACMs to be raised.

CS stated he was inclined to take on board the legal advice provided by SSE and would prefer to re-direct the Workgroup to not to raise any new WACMs. JA noted that he shared the same view as CS. PJ confirmed that his original March view on the matter had not changed, and he considered that the reason for the send back had been to provide further clarity on the legal text and analysis and should not have been seen as an opportunity to change the essence of the proposal. PJ stated that in his view, the Panel should also be advising the Workgroup to not change any material aspects of any of the original WACMs or the original proposal. SL confirmed that he was of the same opinion as PJ and confirmed that the Panel should be advising the Workgroup to not raise any new WACMs or allow any material changes to any existing WACMs or the original. KM noted that at the March 2017 Panel meeting he had originally supported the Workgroup considering new WACMs however in light of the legal advice; he now supported the emerging view of the majority of the Panel. AP agreed with KM's assessment of the situation.

LS was undecided about which option she supported and asked if the Panel could recommend that Ofgem get a legal opinion on the matter prior to making its decision and that she was keen to move forward with this proposal.

As the Proposer of CMP261, GG declined the right to present a view as a Panel member. GG had spoken with MT prior to the meeting and agreed to recuse himself.

MT noted the shift in the balance of the Panel view in terms of not allowing new WACMs to be raised. PJ re-iterated that in his opinion this meant no material changes to options from the original report and this advice should apply to all future and existing modifications that had been sent back.

GG helpfully read out the questions from the Workgroup to the Panel in March (they were not immediately to hand for all Panel members to refer too). PJ and JA confirmed that the Panel's original March view of questions one and two remained and that any amendments to the legal text, whether they are highlighted within the send back letter or not, are permissible so long as the intention of the original solution and WACMs did not change.

GG confirmed that the Workgroup had considered other options that addressed some of the concerns set out by Ofgem in their send back letter with CMP261 and that these would be within the report but would not be crystallised into WACMs if no new WACMs were permitted.

PJ noted that the original proposal for CMP261 had changed and suggested that the Panel's advice would suggest that the Proposer should revert back to their original solution. LS highlighted that the Workgroup had identified deficiencies within the report which had achieved a Workgroup consensus and asked if the decision to make changes to the original or WACMs should be one for the Authority to make and not the Panel.

MT referred the Panel to review question three of the nine questions again and consider if other changes to the Proposals presented in the FMR were amendable under the send back powers. PJ, SL, CS, KM and JA did not believe they were. LS, PM and AP believed that changes should be permissible.

LS highlighted that if the Panel did not permit the Workgroup to make some changes, then in its current state, this could lead to recovering monies twice. LS also questioned whether this was an example of a deficiency, which should be addressed by the Workgroup by putting solutions to Ofgem. PJ responded confirming that an example such as this was an issue that fell under question 2 rather than question 3. MT noted that the Workgroup would therefore need to use

a degree of judgement in determining if issues fell under the category of Q2 rather than Q3 and should be permitted a level of discretion

The Panel discussed questions four and five and agreed that changes to the legal text due to the passage of time noted in those questions was permissible and concluded that these implementation dates were a matter for the Authority to address.

MT confirmed that the Panel had made its decision and that although they did not necessarily endorse the SSE legal opinion, they had taken it in to account in their revised advice and advised the Workgroup to only consider questions one, two, four and five, and that they would not encourage the Workgroup to promote any new WACMs to be raised or for any substantial changes to the original solution or existing WACMs to be made.

LS raised the subject of the Workgroup vote as voting took place by noon on 12 May prior to the Panel's discussion. PJ confirmed that in his view, after a modification has been sent back, the Workgroup would be required to vote again.

MT confirmed that in summary the Panel had agreed by a majority that the Workgroup should not consider further options to address the defect, which could lead to changes to the intent of the original or working group alternative proposals, or to new alternatives being raised.

MT concluded that although the Panel had changed its original March advice to the Workgroup following the legal opinion that had been shared with them, this had not been the sole reason for changes agreed and that the Panel had taken the exceptional step of revising its decision after careful consideration of all the relevant issues.

10.67 Following the 12th May 2017 Special CUSC Panel decision that in light of the Proposers legal opinion new WACMs were not permissible, the Workgroup rescinded the Workgroup 5th May 2017 vote on new options becoming formal WACM's. The discussion and final proposals voted on by the Workgroup can be found in paragraphs 11.11 to 11.15 of Section 11 of this report. The Workgroup vote can be found in Section 12 of this report.

Comments on the alleged financial interest of National Grid.

10.68 Discussion in the Workgroup turned towards the alleged financial interest National Grid Group may have had in not addressing the alleged breach of the €2.50 cap for Generators.

10.69 A Workgroup member felt, in the light of the apparent material financial interest that National Grid Group has in the outcome of CMP261 that there might be wider competition and Competition Law implications[116] that could be relevant, especially given no action had been taken by National Grid to address alleged Generator 'over-charging' since it had become clear in 2015/16 that an alleged breach of the Regulation was a distinct possibility.

10.70 The National Grid representative (System Operator) noted that the Company had limited financial interest in the matter as network charges are either paid by Generators or Suppliers. To suggest that National Grid was somehow acting impartially because it had a "stake" was not accurate. If a breach of EU Regulation 838/2010 was found, National Grid will return money to Generators and recover relevant sums from Suppliers as described in the Original and WACMs.

10.71 The Proposer noted the statement from the National Grid Representative (in paragraph [10.70] above) "*that the Company had limited financial interest in the matter as network chargers are either paid by Generators or Suppliers. To suggest that National Grid was somehow acting impartially because it had a "stake" was not accurate*". However, the Proposer noted that whilst this maybe the case with respect to National Grid's (GB) regulated (SO and TO) businesses, it did not appear to be the case with respect to National Grid's un-regulated businesses; and in particular it's interconnector businesses, the importance of which, to National Grid, was highlighted in the presentation of the company's 2015/16 results, when it was noted that *"….as we outlined at the half year results our interconnector, property and other businesses have performed strongly, demonstrating the growing importance of these businesses for our Group*"[117]. This growing importance, of the interconnector business, compared to the System Operator functions was also highlighted: "*So in terms of the system operator the operating profits are very modest, they're about 1% of our total operating profit. ….. National Grid is in a very good position in terms of the sources of growth. So we've got strong growth in our core business in both the UK and the US, and ….. we're targeting 5% to 7% growth across the Group. In addition to that we've got some exciting development opportunities with things like interconnectors …*"[118]

[116] Competition Law concerns might include the possibility of 'an abuse of a dominate position'. Further information on this can be found by reference to the European Commission's factsheet - http://ec.europa.eu/competition/publications/factsheets/antitrust_procedures_102_en.pdf
See, for example , the statement on page 1 of the factsheet about 'What is an Abuse'
"To be in a dominant position is not in itself illegal. A dominant company is entitled to compete on the merits as any other company. However, a dominant company has a special responsibility to ensure that its conduct does not distort competition. Examples of behaviour that may amount to an abuse include: ….charging excessive prices". [emphasis added]
In the context of the Workgroup discussions around 'detriment caused' (see, for example, paragraphs 10.13, 10.17-18 and 10.22) ,t the statement on page 2 of the factsheet maybe relevant:-
"Victims' claims for damages: Any citizen or business which suffers harm as a result of a breach of the EU competition rules should be entitled to claim compensation from the party who caused it. This means that the victims of competition law infringements can bring an action for damages before the national courts."

[117] Page 5, National Grid, Full Year Results Presentation, 19th May 2016 Transcript.
http://investors.nationalgrid.com/~/media/Files/N/National-Grid-IR/presentations/full-year-results-15-16-transcript.pdf

[118] Page 24, National Grid, Full Year Results Presentation, 19th May 2016 Transcript.

10.72 The Proposer noted that the Times newspaper report[119] of the National Grid announcement of its 2015/16 results (under the article headline "*French connection fuels £3bn profit for Grid*") stated that "*The company said the interconnector business benefited from a "high power price differential between France and the UK in the first half of the year*". This reflected what National Grid said in their announcement[120] of their 2015/16 results, such as: "*The Group's Other activities contributed £183m more to operating profit than last year on a constant currency basis, led by increased revenues in the French Interconnector business due to higher price arbitrage between the UK and mainland Europe*"[121] [emphasis added]. A similar statement was made, in the same National Grid announcement, in respect of the interconnector to Holland, "*National Grid's share of post-tax results of joint ventures for the year was £59m, an increase of £13m compared with 2014/15. This reflected a significant increase in the contribution from the BritNed Interconnector reflecting increased power price differentials between the Netherlands and the UK*"[122] [emphasis added]. In respect of the price differential(s), during 2015/16, which benefited interconnectors (see the underlined statements above) the Workgroup member noted that this would have included the amount of €0.65/MWh; which was over 25% higher than the legally permitted level of transmission charges (which out turned at €3.15/MWh[123] instead of the €2.50/MWh upper limit set in the Regulation) applicable to GB generators for 2015/16.

10.73 The Proposer noted that the profit, for National Grid, in respect of the French Interconnector increased 19%[124] in 2015/16 (compared to 2014/15), whilst the profit, for National Grid, on the BritNed Interconnector increased 61%[125] in 2015/16 (compared to 2014/15).

10.74 The Proposer further noted the part that the price differential(s) (between the GB market and, for example, those in France and Holland) play in terms of flows over, and thus revenue received (and profits obtained) by, the interconnectors was highlighted by three representatives[126] of the National Grid SO management team during their oral submissions to the House of Commons Energy & Climate Change Select Committee on 24th November 2015[127], in their answers to questions posed to them:-*[Q72] "What we typically see is that when there are lower prices on the continent there are higher flows through the interconnectors into our markets." [Q80] "a trend of increasing flows from the continent, which is linked to pricing".[Q88] "We believe that interconnectors do allow GB consumers to access the lower prices seen in the European market"*.

10.75 The Proposer pointed out that this was also in accordance with what the Commission had set out, when putting forward the 838/2010 Regulation itself, and the ranges set out within the Regulation, when it noted that: "….*generators will have to incorporate in their power pricing the costs arising from the network charges they have to pay, generators with low network charges will have a competitive advantage compared to those with high charges. Where a charge is placed on actual power generated and injected on the system, production will take place where charges are lower potentially leading to an inefficient use of the interconnected transmission system"* [emphasis added].

[119] Friday 20th May 2016, Business Section.
[120] http://investors.nationalgrid.com/~/media/Files/N/National-Grid-IR/results-centre/full-year-results-statement-2015-16.pdf
[121] Page 12, National Grid Results for the year ending 31st March 2016.
[122] Page 37, National Grid Results for the year ending 31st March 2016.
[123] See Figure 6, page 15, in the CMP261 Final Modification Report, 30th November 2016 version.
[124] 'Review of Other Activities' Table, Page 35 National Grid Results for the year ending 31st March 2016,
[125] 'Joint Ventures and Associates' Table, page 37, National Grid Results for the year ending 31st March 2016
[126] Cordi O'Hara, Director of the UK System Operator; Duncan Burt, Head of Operate the System for Electricity Transmission; and Ro Quinn, Head of UK Energy Strategy.
[127] https://www.parliament.uk/business/committees/committees-a-z/commons-select/energy-and-climate-change-committee/inquiries/parliament-2015/security-of-supply/publications/

10.76 The Proposer also noted that in addition to the 'short term' (2015/16) benefit to National Grid that would appear to have arisen; from the €0.65/MWh price differential effect arising from the alleged breaching, by over 25%, of the €2.50/MWh upper level; that there would also appear to be a 'medium-long term' benefit to the Interconnector business of National Grid from the higher than permitted level of the annual average transmission charges paid by Generators in 2015/16 in that around this time consideration was being given (both within National Grid and, separately, Ofgem[128]) to funding for new Interconnectors. For example, when announcing their 2015/16 results National Grid noted (i) that "*we're in advance stages of considering two further projects with France and with Denmark. I believe these interconnectors, together with metering, LNG, and property, present attractive opportunities for National Grid*."[129]; (ii) that "*We also see attractive prospects in our interconnectors, transmission and property businesses*…"[130]; and (iii) "*The economics and the desire to have interconnection between the UK and Europe exists so there are people on both sides that are keen to trade across that interconnector*"[131].

10.77 The Proposer wondered if the situation with respect to the actions (inactions?) of the System Operator function within National Grid; as regards the alleged breaching, by over 25%, of the €2.50/MWh upper limit, with the resulting €0.65/MWh effect in terms of the price differential(s) between the GB and the other Member States (as well as within the (UK) Member State) during 2015/16; would be within the locus of the requirement to prevent cross subsidies, which Ofgem has summarised, for 2015, as "*Each NRA, under Article 37(1)(f) of the Electricity Directive, is required to ensure that there are no cross-subsidies between transmission, distribution and supply activities. In GB, licensed electricity distribution, gas distribution and transmission network operators (including offshore licensees) are subject to licence conditions prohibiting regulated businesses from giving cross-subsidies to, or receiving cross-subsidies from, related undertakings*"[132]. Similarly, the Workgroup member wondered, in respect of the breach (and its non-timely correction) if there may also be a State Aid locus, in the context the Commission sets out that; "*State aid is defined as an* ***advantage*** *in any form whatsoever conferred on a* ***selective basis to undertakings*** *by national public authorities*" [the emphasis comes from the Commission's website][133].

10.78 The National Grid representative noted the very serious nature of the allegations made above and denied any wrong-doing or malpractice on the part of National Grid. The representative emphasised the strict business separation rules in place across National Grid.

10.79 A Workgroup member noted that no breach has yet been determined and disagreed with the suggestions put forward above in relation to the impact of the potential exceeding of the €2.50/MWh cap on cross border price differentials (and any consequential effect on National Grid). In the opinion of this Workgroup member, since TNUoS charges in GB are a fixed cost and not a short run marginal cost, they would not affect the price at which a Generator offers its production into the spot market and therefore would not affect the spot market price or cross border trade. This Workgroup member agreed with the conclusions set out in the ACER opinion provided in April 2014, namely that:

10.80 *In markets with a high level of competition, power-based G-charges have no effect on the dispatch of power plants, as they do not increase the generation costs of the generators and hence SRMC* [Short Run Marginal Costs] *are unchanged.*

[128] Ofgem published nine interconnector licence / funding related documents during 2015/16 which can be found at https://www.ofgem.gov.uk/electricity/transmission-networks/electricity-interconnectors?page=1#block-views-publications-and-updates-block

[129] Page 5, National Grid, Full Year Results Presentation, 19th May 2016 Transcript.

[130] Page 11, National Grid, Full Year Results Presentation, 19th May 2016 Transcript.

[131] Page 17, National Grid, Full Year Results Presentation, 19th May 2016 Transcript

[132] Page 23, 2016 Great Britain and Northern Ireland National Reports to the European Commission, published by Ofgem 3rd August 2016
https://www.ofgem.gov.uk/publications-and-updates/2016-national-report-european-commission

[133] http://ec.europa.eu/competition/state_aid/overview/index_en.html

10.81 The Proposer noted the Workgroup members' comment as regards short run marginal cost. However, whilst this may or may not be the case in respect of short run marginal cost, the Proposer (mindful of the Commission's statement[134]he'd noted above) felt that the effect of paying transmission charges in 2015/16 that were 25% / €0.65/MWh higher than the limit set in the Regulation would have been reflected in the medium and long term marginal cost of GB Generators. This point appeared (to the Proposer) to have been accepted previously by the Workgroup member who had pointed out that a significant proportion of generator output is contracted many months ahead. Given this, the Proposer believed that GB Generators offerings into the market would have reflected these costs which would, in turn have affected cross border trade. Furthermore, whilst not agreeing that a windfall to Generators would necessarily arise in this case, the Proposer noted that the Workgroup member has argued that to rebate GB Generators would amount to a 'windfall gain' – it was difficult to reconcile this with their argument above that "*since TNUoS charges in GB are a fixed cost and not a short run marginal cost, they would not affect the price at which a generator offers its production into the spot market*": if the fixed cost was incurred, but not recovered by GB Generators in their market price, then how would rebating them for this cost amount to a 'windfall gain'?

The Impact of 'K'

10.82 TNUoS revenue is the total amount recovered by the System Operator from Generator and Demand tariffs in order to pass through revenue to Transmission Owners (and other network operators through mechanisms such as the network innovation competition). It is a figure which is set annually in accordance with arrangements that are set out in Transmission Owners' licences[135]. The System Operator then makes further adjustments to the annual total based on prior Charging Years' under/ over recovery amounts. This adjustment is referred to as the 'K' factor and is set out in the Transmission Licence as explained below.

10.83 Special Condition 3A:14-22 of the National Grid Transmission Licence describe the calculation of the correction 'K'. It also states that any under or over recovery of TNUoS revenue is held by National Grid for two Charging Years. Depending on whether 'K' is an under or over recovery National Grid can either recover financing costs (in the case of under recovery), or has to pay back financing costs to transmission users (in the case of over recovery). This takes place via an adjustment to TNUoS tariffs two Charging Years later (i.e. 2015/16 under or over recovery is factored into 2017/18 TNUoS tariffs).

10.84 The calculation of the correction term 'K' is defined in the Transmission Licence and described by the formula below where:

- Kt is the revenue restriction correction term, whether positive or negative in value
- TOt is maximum allowed revenue in the relevant year t
- PRt is the interest rate adjustment of the relevant year calculated as specified in the licence
- "It" is defined as the average specified rate and is the average value of the Bank of England's Official Bank Rate during the relevant year
- TNR is transmission network revenue

Part E: Calculation of the correction term (K_t)

3A.14 For the purposes of the Principal Formula, subject to paragraph 3A.15 and 3A.16, K_t is derived in accordance with the following formula:

$$K_t = (TNR_{t-2} - TO_{t-2}) \times \left(1 + \frac{I_{t-2} + PR_t}{100}\right) \times \left(1 + \frac{I_{t-1} + 2}{100}\right)$$

Figure 7: Calculation of K

[134] "*generators will have to incorporate in their power pricing the costs arising from the network charges*"
[135] Defined in Part B of Special Condition 3A. Restriction of Transmission Network Revenue

10.85 As can be seen from the formula in 10.83 the Transmission Licence has no disaggregation of the 'K' term in relation to where the under/ over recovery may have arisen.

10.86 The above formula makes reference to an average specified rate (I_t). As explained earlier there are financing costs which are considered in the calculation of the 'K' term. 'The current conditions in the Transmission Licence state that[136]:

- *"as long as under or over recovery of revenue is less than 5.5% of allowed TNUoS revenue, National Grid recovers or pays back financing costs at a rate of 2% plus Bank of England base rate i.e. in 2015/16 this would have been 2 + 0.5%, a total of 2.5%.*

- *If, however the under or over recovery exceeds 5.5% of the allowed TNUoS revenue, these rates change for the first year that the under/over recovery is held.*

    - *For an under recovery greater than 5.5% of allowed revenue, the whole amount of the under recovery is recovered from transmission users in t+2 at base rate in year 1 and then base rate +2% f in year 2.*

    - *For an over recovery greater than 5.5% of allowed revenue, National Grid would return to users in t+2 with base rate + 4% added in year 1, and base rate + 2% in year 2."*

10.87 The National Grid representative noted that there could be unintended consequences impacting the 'K' factor as a result of the different mechanisms discussed by the Workgroup for providing a rebate to Generators and subsequent recovery of revenue from Demand tariffs. The Workgroup noted that there were a number of approaches that could be used when considering this, each with different impacts on 'K', these include:

1. Where a Generator rebate is paid in Charging Year T and Demand recovery is also in year T through the residual TNUoS tariffs then there are no impacts on 'K'; or

2. Where a Generator rebate is paid in Charging Year T and Demand recovery is in T+1 through the Demand residual, and no other amendments to the Transmission Licence are made, the under/ over recovery amounts take 4 years to 'unwind' (see table in below) ; or

3. Where a Generator rebate is paid in Charging Year T and the Demand recovery is in year T+2 through the Demand residual, and no other amendments to the Transmission Licence are made, the year the under recovery is recognised in K would be the same year it is 'over recovered' from Demand charges which mitigates the longer term impact on K; or

	t	t+1	t+2	t+3
	17/18	**18/19**	**19/20**	**20/21**
Under-recovery following Rebate	-120			
Over-recovery as rebate recovered (t+2)			+120	
Over-recovery as Suppliers invoiced (t+1)		+120		
Under-recovery to offset Supplier invoices (t+3)				-120

[136] Part F of Special Condition 3A. Restriction of Transmission Network Revenue of the NGET plc Electricity transmission licence special conditions.

4. The calculation of transmission network revenue could be adjusted to take account of the 'K' variance due to CMP261 implementation which would negate all K impacts, however this would require a Transmission Licence change; or

Table 3: the impact of K.

10.88 A Transmission Licence amendment may be required if Ofgem chose to approve a Proposal where an intentional over recovery happens as a result of carrying out a Generator rebate and subsequent Demand tariff adjustment in different Charging Years (options 2 and 3 from section 11). In order to mitigate the impact on 'K' the National Grid representative noted that the Transmission Licence change would need to reflect a reduction in the Maximum Allowed Revenue (MAR) for the amount of the approved rebate for the Charging Year where the rebate is carried out and an increase in the MAR for the amount of the approved rebate for the Charging Year when demand tariffs are increased to recover the rebate.

10.89 Under the current Transmission Licence where the rebate (to Generators) and recovery (from Suppliers and transmission connected customers.) is not undertaken in the same Charging Year (such as with CMP261 Original and WACM1), the National Grid representative noted that a further option to mitigate impacts on K is for invoices for the recovery through a charge on Demand to be based on forecasted and published values. One option would be to use known 2015/16 demand volumes so that the accounting process for the rebate and recovery could be matched an excluded from K. This discussion led to the development of options for solution involving independent invoicing processes from the standard transmission tariffs National Grid confirmed that in the event a rebate is made in year T and a recovery of monies established for year T+2 then the over and under recovery of revenue (K) would be more closely targeted than if the rebate was in year T and the recovery of monies in year T+1, however the recovery through the tariffs will never be 100% accurate due to the associated volume risk inherent in recovering revenue through a charge based on forecast use of system (option 3 from section 11)

10.90 Regarding (2) above, consider the following example: that the Generator rebate occurs in 2017/18 as a lump sum credit invoice and recovery is made through the Demand residual in 2018/19 then:.

- In 2017/18 National Grid under recovers by £119.5m - this under recovery is offset through 'K' two Charging Years later by a £119.5m increase in MAR in 2019/20
- In 2018/19 National Grid would over-recover £119.5m from the Demand residual and this would be offset by £119.5m decrease in MAR in 2020/21
- This option therefore takes four charging Years to unwind.

10.91 The National Grid representative considered that this as an unwarranted long term impact on all users of the transmission system and is wholly inefficient. The Proposer noted that had National Grid acted sooner this situation would not have occurred.

10.92 Further discussions by the Workgroup in reviewing options for Alternatives (see Section 11) established that the legal text as presented in the FMR may have unintended consequences for revenue recovery amounts.

10.93 Where a Generator rebate is made in year T and a residual tariff adjustment for Demand made in Year T+1 then (without a Transmission Licence amendment) the following situation (as previously described) will occur:

- National Grid will under recover its allowed revenue in Charging Year T.
- National Grid will add the amount to be recovered from Demand tariffs into the Demand residual after the total allowed revenue and K terms have been calculated and recovery the total amount from Demand tariffs in year T+1. In year T+2 the under recovery from Charging Year T will then be taken into account in the calculation of the K term, the revenue will then be recovered again through TNUoS tariffs.

- In year T+3 the over recovery from Charging Year T+1 will then be taken into account in the calculation of the K term and the revenue to be recovered will be automatically adjusted down.

10.94 Where a Generator rebate is made in year T and a residual tariff adjustment for Demand is made in Year T+2 then the following situation will occur:

- National Grid will under recover its allowed revenue in Charging Year T.
- In year T+2 National Grid will add the amount to be recovered from Demand tariffs into the Demand residual after the total allowed revenue and K terms have been calculated. This means that the under recovery amount from year T will already be in the K term and therefore the recovery amount will effectively be taken into account twice and be 'double' charged.

10.95 The National Grid representative noted that under (10.90 bullet 1 above), using debit invoices for Suppliers[137] as proposed by a Workgroup member would allow National Grid to establish a rate based on demand volumes and a monthly process across a future Charging Year could be used with the calculation of invoices based on the similar principles used in demand reconciliation processes which was a known and well understood process by all parties. National Grid confirmed that this tariff could be calculated in advance and published. This option was then debated further by Workgroup members to establish the arrangements put forward in Section 11 on options for Alternatives.

10.96 Where rebate and recovery are carried out through Generator and Demand residual tariffs (such as WACM 3) in the same Charging Year these issues relating to 'K' are not a concern for National Grid and the longer term consequences for tariffs do not arise.

Impacts on the Consumer.

10.97 In light of the introduction into the CUSC of considerations of 'consumer impacts' from 1st April 2017, the Code Administrator suggested at the 7th March Workgroup meeting it could be helpful if the Workgroup provided views on consumer impacts, although this is not a requirement for CMP261.

10.98 A Workgroup member believed that the overarching principle of the proposed modification and the WACM's is that demand users should pay for the remedy (if there has been a breach and a remedy is required) because demand can recover the costs to consumers. This assumption leads to significant adverse distributional impacts on suppliers as suppliers primarily have customers on 2 different types of Tariffs: Fixed and Variable. Suppliers are unable to increase the Fixed Tariffs of their existing customers, so have no way to recover the monies from them. This means that suppliers can only recover the money from their variable tariff customers. Incumbent suppliers have between 60-80% of their customers on SVT's, whereas new entrants have between 0% and 20% of customers on SVT's depending on how effectively they have engaged with their customers to ensure they move onto another fixed tariff when their current tariff expires and how long they have operated in the market. By way of example, for simplicity we will assume that the incumbent suppliers have 70% of their customer on an SVT and independent suppliers have 10%. In order to recover any monies paid, incumbent suppliers would have to increase their SVT tariff by 100/70 x the per customer amount to recover which becomes a factor of 1.42 x; independent suppliers however would have to increase their SVT by 100/10 x the per customer amount to recover which equates to a factor of 10 x. Customers of independent suppliers would be significantly adversely affected by this situation both commercially and from a PR perspective.

[137] And transmission connected customers.

10.99 In addition to the above, the Workgroup member believed all of the remedies proposed favour suppliers with declining customer portfolios and are unfavourable to suppliers with growing portfolios. If for example a supplier had supposedly underpaid by £1m in 2015/16 and subsequently grown 10 x since, then that supplier will currently be expected to pay and recover £10m according to the current "remedies". Yet, these suppliers as stated above have a much smaller proportion of customers whom they can recover these costs from, this worsens the situation even further for competition and consumer. Therefore, due to the combined effect of the above one workgroup member is concerned that the remedy for the proposed modification and all of the WACM's is more damaging to supply competition and therefore consumers than any alleged harm experienced by Generators.

10.100 Another Workgroup member disagreed with the suggestions put forward above in relation to the impact on Suppliers noting, for example, that the recovery of the rebate paid to Generators from charges paid by consumers would ensure that those consumers are merely placed back where they should have been had the legally correct charges been applied, by National Grid, in respect of 2015/16. Furthermore, the potential of a breach of the €2.50/MWh limit in 2015/16 was first identified in September 2011[138] and this was brought to the attention of market participants repeated after that, including in the 2015/16 timeframe[139]. In addition, whilst the erroneous charges related to 2015/16 have not been recovered, via Demand charges, in that Charging Year or the following Charging Year (2016/17) they may also not be recovered in the subsequent Charing Year (2017/18) but might, eventually (with, for example, WACM1 and WACM 3) be recovered in the Charging Year 2018/19 – three Charging Years later. The Workgroup member believed that Suppliers already accept, via the 'K factor' adjustment, changes to the Demand tariff that recover shortfalls in the subsequent Charging Year; that is 2017/18 for 2015/16; which is what the Original and WACM2 would achieve (and WACM1 and WACM 3 would go one year further still). Given this, the Workgroup member believed that Suppliers have had sufficient time and opportunity to take account of this matter when setting their tariffs (be that fixed or variable) and that it was not appropriate to immunise those Suppliers who did not act prudently to well signposted and understood risks, especially where they relate to a legally robust situation; namely that GB transmission charges paid by generators cannot exceed the €2.50/MWh upper limit.

10.101 Some Workgroup members believed that as set out in the Electricity Act 1989 (as amended) when considering Ofgem's principle objectives, in respect of existing and future consumers, those interests of existing and future consumers are their interests taken as a whole, include (specifically) their interests in the security of the supply of electricity to them and their interests in the fulfilment by the Authority, when carrying out its functions as designated regulatory authority for Great Britain, of the objectives set out in Article 36(a) to (h) of the Electricity Directive.

10.102 Taking these two items in reverse order, those Workgroup members believed that CMP261 corrects the alleged breach of Regulation 838/2010. This will ensure compliance with the laws and the Treaty on the Functioning of the European Union (TFEU). The breaching of the Regulation in 2015/16 (and it's continued non remedying in 2016/17) by having annual average Generator transmission charges that exceed the range €0-2.50/MWh, has, according to recital 10 of that Regulation, undermined the internal market and failed to ensure that the benefits of harmonisation are realised.

[138] See paragraph 2.9 (ii) of the CMP261 Final Modification Report (30th November 2016 version).
[139] See paragraph 2.34 of the CMP261 Final Modification Report (30th November 2016 version).

10.103 In respect of the internal market, those Workgroup members believed that it is important to be mindful of the reasoning for the upper limit (of €2.50/MWh) which was to not undermined the internal market and ensure that the benefits of harmonisation are realised. In this way a level playing field and fair competition in energy Generation across Europe is ensured. Fair competition means markets work efficiently to deliver the most economically efficient result/outcome/investment decision(s) which ultimately leads to lower cost to customers over the long term. If, by breaching the limit, GB fails to comply with the upper limit (of €2.50/MWh) then this creates a distortion to competition (both within the (UK) Member State and with other Member States) which leads to inefficient investment decisions and ultimately higher costs to consumers (i.e. GB plant closes in favour of non GB plant even if this result is out of economic merit) both within GB, the Member State (UK) and other Member States.

10.104 In addition, those Workgroup members believed that the alleged breach will affect cross border trade (in contravention of Regulation 714/2209 (Article 8(7)) and Articles 81 and 82 TFEU) as higher GB wholesale electricity prices will lead to increased imports, over the interconnectors, into GB (and lower exports from GB, over the interconnectors). This was shown to have happened, in 2015/16, with imports of electricity into GB from other Member States increased due, according to National Grid, to "*increased power price differentials between the Netherlands and the UK*" and "*higher price arbitrage between the UK and mainland Europe*"[140].

10.105 Those Workgroup members believed that this is hardly surprising. As the Commission noted, in their Impact Assessment; when concluding that they should proceed with the 838/2010 Regulation *"….generators will have to incorporate in their power pricing the costs arising from the network charges they have to pay, generators with low network charges will have a competitive advantage compared to those with high charges. Where a charge is placed on actual power generated and injected on the system, production will take place where charges are lower potentially leading to an inefficient use of the interconnected transmission system"* [141].

10.106 Furthermore, those Workgroup members believed that in the context of Article 81 and 82 TFEU, it was clearly possible for National Grid to foresee with a sufficient degree of probability the influence, direct or indirect, actual or potential, on the pattern of trade between Member States (and within the UK Member State) that would arise from GB generators paying annual average transmission charges that were out with the range of €0 to 2.5/MWh (by over 25%) during Charging Year 2015/16.

10.107 Those Workgroup members believed that given that the interests of existing and future consumers includes the fulfilment by the Authority, when carrying out its functions, the duties it has with respect to the EU laws and TFEU, then CMP261 will be a positive benefit to the interests of consumers in both GB, the rest of the Member State (UK) and other Member States.

10.108 Notwithstanding the above, those Workgroup members believed by returning demand transmission charges to the lawful level cannot be harmful to existing or future consumers as it merely returns them to where they rightly should have been (all be it three to four charging years later than 2015/16). To suggest otherwise; that returning consumers, some years later than they should have been, to their rightful lawful position is harmful to them; is plainly an absurd notion as it means that applying any applicable law to consumers harms them. It is therefore in the interest of existing and future consumers that they are returned to the correct lawful position.

[140] According to National Grid, in their 2015/16 results statement: http://investors.nationalgrid.com/~/media/Files/N/National-Grid-R/results-centre/full-year-results-statement-2015-16.pdf
[141] See page 12, Commission Impact Assessment

10.109 Furthermore, those Workgroup members believed it is in the interest of existing and future consumers that legal certainty is maintained. If industry cannot depend on Ofgem to apply (and enforce) the applicable laws then their only option is to take steps to reflect the resulting uncertainty into their prices (via higher risk premiums for (a) the possibility of a law being broken and (b) its 'replacement' by another - all be it non legal - arrangement that will be applied to them) as well as having this reflected in the cost of capital (as their shareholders, credit agencies and capital providers seek to address the increased risks associated with the underlying business). Both of these negative attributes lead to higher costs which are reflected onto consumers which, in turn, cannot be considered to be in the interest of those existing and future consumers.

10.110 In terms of Security of Supply, those Workgroup members believed that some 5GW of generation plant closed or announced its closure during 2015/16. This was detrimental to security of supply (as well as competition, as it reduced market participation which in turn will have led to higher GB market prices). Some of the closure in 2015/16 was attributed to the higher levels of generation transmission charges (in GB)[142]. This has been detrimental to security of supply (and competition). Therefore, in the view of some Workgroup members CMP261 in correcting the alleged breach, which is harmful to security of supply (and competition), protects the interests of existing and future consumers.

10.111 Finally, those Workgroup members believed that notwithstanding the statement by Ofgem to the Panel[143] and the Workgroup[144] (that as at 8th March 2017 they are not undertaking enforcement action with respect to the breaching by National Grid of the upper limit of €2.50/MWh in 2015/16) that if such action(s) were to be initiated by the appropriate authorities that this might result in an adjudication or determination (or voluntary agreement with National Grid) which results in the £119.5M amount, that is rebated to generators, not being recovered in demand charges. If such a situation arose then clearly the effect on consumers would change accordingly.

10.112 Another Workgroup member again disagreed with the suggestions put forward above in relation to the impact of the potential exceeding of the €2.50/MWh cap on cross border trade. This Workgroup member reiterated that since TNUoS charges in GB are based on capacity, and not on energy injected into the system, they are a fixed cost and not a short run marginal cost. Therefore, in their opinion, they would not affect the spot market price or cross border trade. The Proposer disagreed with this, for the reasons set out at paragraph 1.80

10.113 Other Workgroup members were of the opinion that implementation of CMP261 could provide windfalls to Generators and harm consumers. In their view, windfalls will be received by Generators if any rebate/tariff adjustment is made with insufficient notice to feed through and impact wholesale prices. This will especially be the case for the Original and WACM1 which simply provide Generators with a one-off lump sum payment, and to the extent that a significant portion of output will already have been contracted for 2017/18, it will also be true of WACM2. These Workgroup members considered consumers would be adversely affected in three ways:

- Consumers on pass-through contracts will be adversely affected by insufficient notice for the Demand charge adjustment.

- Consumers, as a body, will be adversely affected since they have already paid the appropriate amount of TNUoS charges for 2015/16 and CMP 261 will lead to consumers paying again through future demand charges, with no or limited offsetting reduction in wholesale prices.

[142] See, for example, the Scottish Power announcement, dated 18th August 2015, of the closure of Longannet: "The combination of high carbon taxes and high transmission charging means that running a thermal plant in Scotland is uneconomic. Longannet Power Station will now close on March 31st 2016," [emphasis added].
[143] CUSC Panel minute 5917 (and action 5865).
[144] Ofgem confirmed no action has been taken.

- Consumers may also be adversely affected by increased risk premia being applied due to the retrospective nature of the proposal.

10.114 One Workgroup member believed that solutions that adjust future tariffs (WACM2 and WACM3) rather than ones which provide lump sum payments are more likely to reduce the above negative impacts and in their view that the legal analysis received by the Workgroup was clear that options that adjust future tariffs could be considered[145].

10.115 One Workgroup member believed that to adhere to the 838/2010 Regulation, the €2.5/MWh cap should be applied with best endeavours at the time of trading, and that any ex-post adjustment and reduction in tariffs could lead to an unfair competitive advantage within Europe in later years. Furthermore there are severe problems with the delay in the Commission reviewing this cap. Their impact assessment did not foresee the current state where we are moving towards a world of transmission connected generator TNUoS benefits which could distort any cross-border trading in addition to the GB energy market, and so it could be argued that they are enforcing law based on flawed conclusions and that their failure to review is causing harm to the whole GB energy market.

10.116 The Workgroup member believed that within GB, Ofgem have already identified market distortions due to embedded TNUoS benefits. These are being addressed. In respect of European markets, interconnectors can still provide some additional security of supply subject to capacity and availability. By reduction in generator TNUoS to enable competition in Europe, the traded energy prices passed on to the consumer may become lower, but once the deferred TNUoS is factored back in then the total price paid by consumers will be higher.

10.117 Another Workgroup member voiced concerns that suppliers may have forecast an approval of a CMP261 proposal that recovers cost from suppliers in the 2018/19 charging year and factored this into their tariffs. Therefore by changing the recovery date from Suppliers defined in WACM1 could give a competitive advantage to some Suppliers over others.

10.118 A Workgroup member questioned whether a different demand adjustment mechanism should be considered as part of the send back process. They suggested that instead of setting demand tariffs for a known adjustment, should a breach be determined, a mechanism with additional monthly debits on Supplier bills calculated to reflect the exact impact on individual consumers in 2015/2016 volumes could be used.

10.119 Other Workgroup members did not consider this would provide any benefits to consumer compared to the tariff adjustment approach and would in fact be detrimental to Suppliers whose customer base may have evolved since the Charging Year 2015/2016, thus adding an unnecessary level of complexity and administrative cost.

[145] Paragraph 5 and footnote 80 of Addleshaw Goddard's Legal Analysis

10.120 A Workgroup member highlighted the Ofgem decision on the Volatility consultation published on the 17th October 2012 which flagged "*we [Ofgem] therefore intend to amend Licence requirements in order to limit network charge changes to once per year on 1st April*"[146]. The reason for this was Ofgem understood the risks faced to Suppliers and additional costs that a mid-year tariff change adds to the end Consumer when applied with no notice given. If Ofgem do not maintain this principle as set out in the Volatility consultation then Suppliers may feel the need to add additional costs to end Consumers to allow for such future changes where tariffs are changed and cannot be recovered from the end Consumer. Other Workgroup members were unsure whether this licence change has been implemented. Subsequently Ofgem confirmed that the change has been implemented with effect from 1st April 2013[147].

10.121 There was a Workgroup discussion (prior to the 31st March 2017 CUSC Panel meeting) on notice period to changes to demand tariffs. Since a new Charging Year of tariffs have been published during the time the Authority has been deliberating on CMP261, it could be seen that delaying the recovery of generator rebates in the demand tariffs by a Charging Year (for Original and all WACMs) would be in keeping with the original intention of these alternatives.

10.122 However, the proposers of the Original and all WACMs would be reluctant to make such a change if the additional Charging Year delay changes Ofgem's thinking and caused them to select a different option.

10.123 With this in mind, one Workgroup member believed that the option of delaying these demand tariff increases by an additional Charging Year should be put forward for Ofgem's consideration with whichever option they authorise, should they deem that a breach has taken place and that any of the options presented resolves such a breach better than baseline.

10.124 To clarify, this would mean that Demand tariffs would recover any generator rebate in 2018/19 instead of 2017/18 (Original and WACM2) and 2019/20 instead of 2018/19 (WACM1 and WACM3).

10.125 In addition to allowing Suppliers due notice of the change, this would

- Allow customers who pay TNUoS charges directly to budget better for any increased costs.

- Remove shocks from small Suppliers who may not add risk premia to National Grid forecasts of TNUoS.

- Ensure certainty is being provided to Suppliers to mitigate some of the risks around price shocks rather than having to increase risk premia. If three years notice could be provided on all changes impacting demand tariffs then not only would risk premia be smaller, but there would not be complications in discussions such as this where it is unclear how much risk has already been factored in by Suppliers. By adding the option to delay increases to demand tariffs by an additional Charging Year the risk premia applied by Suppliers should not increase, just get spread over the two years. The risk premia charged to customers is only increasing as a function of elapsed time while the uncertainty exists.

[146] https://www.ofgem.gov.uk/publications-and-updates/statutory-consultation-proposed-modifications-standard-conditions-electricity-transmission-licence

[147] https://www.ofgem.gov.uk/publications-and-updates/riio-et1-modifications-standard-conditions-electricity-transmission-licence-and-reasons-decision-pursuant-section-11a-and-49a-electricity-act-1989

11 Options Discussion and recorded WACM Voting

11.1 Following the send back of the Final Modification Report by Ofgem on 22nd February 2017 the Workgroup discussed further options and amendments to the original four proposals presented in the Final Modification Report submitted on 30th November 2016 in order to ensure the points set out in Ofgem's letter were addressed. The below figures detail these discussions along with the Workgroup vote on those options to be taken forward as WACM's.

11.2 For the readers benefit the original proposals presented in the 30th November 2016 Final Modification Report were:

Proposal Numbers	Generation Adjustment Mechanism	Generator Rebate Year	Demand Adjustment Mechanism	Supplier Charge Year	Cancellation Charge (£)	Cancellation Capacity (MW)	Rebate £/kW	Owner
Original	Rebate – one off lump sum	ASAP	Demand residual at Tariff setting	2017/18	Included in calculation of rebate	Included in calculation of £/kW rebate	£1.66/kW	Garth Graham – SSE
WACM1*	Rebate – one off lump sum	ASAP	Demand residual at Tariff setting	2018/19	Included in calculation of rebate	Included in calculation of £/kW rebate	£1.66/kW	Joe Underwood – Drax
WACM2	Generation residual at Tariff setting	2017/18	Demand residual at Tariff setting	2017/18	Included in calculation of rebate	Not applicable	Equivalent to £119.5m / 2018-2019 TEC	Nick Pittarello – National Grid
WACM3	Generation residual at Tariff setting	2018/19	Demand residual at Tariff setting	2018/19	Included in calculation of rebate	Not applicable	Equivalent to £119.5m / 2018-2019 TEC	George Moran – British Gas

* For WACM1 if Ofgem decide to approve this Alternative in Charging Year 2017/18, the proposed Demand adjustment mechanism would lead to an over recovery of revenue in Charging Year 2018/19. Therefore this would impact the calculation of K in Charging Year 2020/21 when this would be unwound, whilst in Charging Year 2019/20 the K factor under recovery through the rebate to Generator will be added into the recovery of charges.

11.3 The Workgroup confirmed following further analysis[148] conducted on the impact of K (as set out in paragraphs 10.81 to 10.95), that if the Original[149] or WACM1 was to be approved by Ofgem a Transmission Licence change would be required in order to implement the solution.

11.4 Changes were suggested to the original four proposals[150] and presented as revised options in light of the Ofgem send back letter. These amendments were put forward to reflect changes to the legal text flagged by the send back letter:

Option Numbers	Generation Adjustment Mechanism	Generator Rebate Year	Demand Adjustment Mechanism	Supplier Charge Year	Cancellation Charge (£)	Cancellation Capacity (MW)	Rebate £/kW	Owner
Option 1 (variant on WACM1)	Rebate – one off lump sum	ASAP	Demand residual at Tariff setting	T+2 (2019/20)[151]	Included in calculation of rebate	Included in calculation of £/kW rebate	£1.66/kW	Joe Underwood - Drax
Option 2 (variant on WACM 2)	Generation residual at Tariff setting	T+1 (2018/19)	Demand residual at Tariff setting	T+1 (2018/19)	Excluded in calculation of rebate	Excluded	Equivalent to £101.3m/ T+1 (2018/19) TEC	George Moran – British Gas

* legal text changes will ensure that new options have similar flexibility to WACM1 and Option 1 its variant.
Red denotes suggested changes from the Original and the three WACM's presented in the Final Modification Report submitted to Ofgem in November 2016.

- **Option 1** - WACM 1 with recovery from Demand occurring in year T+2 (i.e. 2019/20 if decision is made in the 2017/18 Charging Year). Interest is not being included in this option; if Ofgem approve this option industry have the ability to raise a further modification to claim an interest payment. A Transmission Licence change would be required to implement this Option as per WACM1 above.

- **Option 2** – WACM 2 with legal text corrections with adjustments occurring through Generator and Demand Tariffs in year T+1.

[148] Which was undertaken as part of the send back of CMP261.
[149] Assuming a change to the legal text due to the passage of time is permitted –see below in Section 11.
[150] Set out in the 30th November 2016 FMR.
[151] In tables in section 10 'T' refers to the Charging Year in which Ofgem publish their decision. For the purposes of this table it is illustrated that Ofgem will make a decision in Charging Year 2017/18.

11.5 Further new options were raised by Workgroup members:

Option Numbers	Generation Adjustment Mechanism	Generator Rebate Year	Demand Adjustment Mechanism	Supplier Charge Year	Cancellation Charge (£)	Cancellation Capacity (MW)	Rebate £/kW	Interest on Credit/Debits	Owner
Option 3	Rebate – one off lump sum	ASAP	K goes into the target revenue, no further adjustment to residuals	To recovered through K in T+2 for an under recovery	Excluded in calculation of rebate	Excluded in calculation of £/kW rebate	£1.45/kW	Not applicable	Simon Vicary - EDF
Option 4	Rebate – one off lump sum	ASAP	K goes into the target revenue, no further adjustment to residuals	To recovered through K in T+2 for an under recovery	Included in calculation of rebate	Included in calculation of £/kW rebate	£1.66/kW	Not applicable	Simon Vicary - EDF
Option 5	Rebate via one off lump sum using 2015/16 TEC	ASAP (year T of decision/ Ofgem implementation)	Recovery via 12 monthly debit invoices. Flat kW(h) demand recovery rate calculated from 2015/16 volumes and charged on 201/-16 reconciliation data	Year T+1 if decision in first 6 months of Year T. Year T+2 if decision in second 6 months of year T	Excluded	Excluded	£1.45/kW plus interest	Interest at base rate +2%	Louise Schmitz – National Grid
Option 6	Rebate via one off lump sum using 2015/16 TEC	ASAP (year T of decision/ Ofgem implementation)	Recovery via 12 monthly debit invoices. KW/KW(h) demand recovery rate calculated using forecast of HH and NHH volumes charged in relevant year based on standard Demand	Year T+1 if decision in first 6 months of Year T. Year T+2 if decision in second 6 months of	Excluded	Excluded	£1.45/kW plus interest	Interest at base rate +2%	Louise Schmitz – National Grid

			charging processes. This will be reconciled at the end of the relevant year with under/over recovery fed through to new Demand recovery rates calculated using forecast of HH and NHH volumes for the following Charging Year. The final Demand reconciliation process 'trues up' any remaining cost of the principle amount.	year T					
Option 7	Rebate via one off lump sum using 2015/16 TEC	ASAP (year T of decision/ Ofgem implementation)	Recovery via 12 monthly debit invoices. KW/KW(h) demand recovery rate calculated using forecast of HH and NHH volumes charged in relevant year based on standard Demand charging processes. This will be reconciled at the end of the relevant year with under/over recovery fed through to new Demand recovery rates calculated using forecast of HH and NHH volumes for the following Charging Year. The final Demand reconciliation process 'trues up' any	Year T+1 if decision in first 6 months of Year T. Year T+2 if decision in second 6 months of year T	Included	Included	£1.66/kW plus interest	Interest at base rate +2%	Simon Vicary – EDF Energy

			remaining cost of the principle amount.						

- **Option 3** – WACM1 without 2015/16 cancellation charges (£18.6M) and no CMP261 rebate payments to those Generators that paid those charges in respect of their MW cancellation capacity. Recovery from Demand will occur through K in year T+2 and rebate to Generators will occur in year T.

- **Option 4** – WACM1 with 2015/16 cancellation charges (£18.6M) and CMP261 rebate payments to those Generators that paid those charges in respect of their MW cancellation capacity. Recovery from Demand will occur in year T+2 and rebate to Generators will occur through K in year T. This would require a Transmission Licence change to be implemented.

- **Option 5 -** instant rebate via one off lump sum using 2015/16 TEC for Generation based on the rate of £1.45KW with a published reconciliation rate using a £ per KW(h) for Demand including interest as base rate +2%. Recovery via 12 monthly debit invoices with a KW/KW(h) demand recovery rate calculated using actual outturn 2015/16 system volumes and invoiced to Demand users based on the data at the initial demand reconciliation for charging year 2016. The year of recovery being dependent on the timing of Authority decision so that Demand customers receive advance notice of the charges.

- **Option 6 -** An instant rebate via one off lump sum using 2015/16 TEC for Generation based on the rate of £1.45KW including interest as base rate +2%. Recovery via 12 monthly debit invoices with a KW/KW(h) demand recovery rate, calculated using forecast of HH and NHH volumes charged in relevant year based on standard Demand charging processes. This will be reconciled at the end of the relevant year with under/over recovery fed through to new Demand recovery rates calculated using forecast of HH and NHH volumes for the following Charging Year. The final Demand reconciliation process 'trues up' any remaining cost of the principle amount (the GD Split Adjustment amount used to calculate the £1.45/kW rebate). The Demand recovery rates for this process will be published in line with standard TNUoS tariff setting timetable (i.e. December and January prior to the start (April) of the relevant Charging Year). The Recovery Rates will also be included in the Charging Statement and any further charging publications for customers to show overall impact of charges on customers in each demand zone. National Grid will issue separate backing sheet data to Demand customers for this independent revenue recovery mechanism which is an adjustment solely in respect of the 2015/16 G:D Split Adjustment. To this end it is the intention of this process that the full principle amount is ultimately recovered through a maximum of a two-year recovery process thereby excluding the possibility of future impact on TNUoS tariffs. Annex 8[152] provides an indication of the impact of this process.

- **Option 7** – An instant rebate via one off lump sum using 2015/16 TEC for Generation based on the rate of £1.45KW including interest as base rate +2%. Recovery via 12 monthly debit invoices with a KW/KW(h) demand recovery rate, calculated using forecast of HH and NHH volumes charged in relevant year based on standard Demand charging processes. This will be reconciled at the end of the relevant year with under/over recovery fed through to new Demand recovery rates calculated using forecast of HH and NHH volumes for the following Charging Year. The final Demand reconciliation process 'trues up' any remaining cost of the principle amount. The Demand recovery rates for this process will be published in line with standard TNUoS tariff setting timetable (i.e. December and January prior to the start (April) of the relevant Charging Year). The Recovery Rates will

[152] Annex 8 was prepared by National Grid for the Workgroup.

also be included in the Charging Statement and any further charging publications for customers to show overall impact of charges on customers in each demand zone. National Grid will issue separate backing sheet data to Demand customers for this independent revenue recovery mechanism which is an adjustment solely in respect of the 2015/16 G:D Split Adjustment. To this end it is the intention of this process that the full principle amount is ultimately recovered through a maximum of a two-year recovery process thereby excluding the possibility of future impact on TNUoS tariffs. Annex 8 provides an indication of the impact of this process.

11.6 Following further Workgroup deliberations arising from the send back; as recorded in Section 10 of this report; and prior to the feedback from the 12th May Special CUSC Panel meeting some of the proposers of the original four proposals presented in the Final Modification Report submitted in November 2016 made changes to the proposals as represented below:

Proposal Numbers	Generation Adjustment Mechanism	Generator Rebate Year	Demand Adjustment Mechanism	Supplier Charge Year	Cancellation Charge (£)	Cancellation Capacity (MW)	Rebate £/kW	Interest on Credit/Debits	Owner
Original	Rebate – one off lump sum	ASAP	Recovery via 12 monthly debit invoices. KW/KW(h) demand recovery rate calculated using forecast of HH and NHH volumes charged in relevant year based on standard Demand charging processes. This will be reconciled at the end of the relevant year with under/over recovery fed through to new Demand recovery rates calculated using forecast of HH and NHH volumes for the following Charging Year. The final Demand	2018/19	Excluded	Excluded	£1.45/kW	Interest at base rate +2% or such other level, if appropriate, set by Ofgem and paid by the party or parties determined by Ofgem, if appropriate, in due course.	Garth Graham – SSE

			reconciliation process 'trues up' any remaining cost of the principle amount.						
WACM 1	Rebate – one off lump sum	ASAP	Demand residual at Tariff setting	2018/19	Included in calculation of rebate	Included in calculation of £/kW rebate	£1.66/kW	Silent	Joe Underwood – Drax
WACM 2	Generation residual at Tariff setting	2017/18	Demand residual at Tariff setting	2017/18	Excluded in calculation of rebate	Not applicable	Equivalent to £101.3m / 2018-19 TEC	Interest at base rate +2% or such other level, if appropriate, set by Ofgem and paid by the party or parties determined by Ofgem, if appropriate, in due course.	Louise Schmitz – National Grid
WACM 3	Generation residual at Tariff setting	2019/20	Demand residual at Tariff setting	2019/20	Excluded in calculation of rebate	Not applicable	Equivalent to £101.3m / 2018-19 TEC	Silent	George Moran – British Gas

Red text denotes changes to the original proposals presented in the Final Modification Report in light of the Ofgem sendback.

- **Changes to the original proposal:** In order to address deficiencies in the Final Modification Report submitted to Ofgem in November 2016 and to seek to helpfully address the request for options as highlighted in the Ofgem send back letter, the Proposer suggested changes the solution to CMP261. The changes amended the Demand recovery mechanism, excluded cancellation charges and express the requirement to include interest charges at base rate +2, or another figures as directed by Ofgem.
- **Changes to WACM2:** In order to address deficiencies in the FMR submitted to Ofgem in November 2016 as highlighted in the Ofgem send back letter, the WACM2 proponent changed the detail of the solution to CMP261. The changes amended the amounts to be rebated to Generators, through the residual tariff, to exclude cancellation charges and express the requirement to include interest charges as base rate +2 % or another figure as directed by Ofgem.
- **Changes to WACM3:** In order to address deficiencies in the FMR submitted to Ofgem in November 2016 as highlighted in the Ofgem send back letter, the WACM2 proponent changed the detail of the solution to CMP261. The changes amended the amounts to be rebated to Generators, through the residual tariff, to exclude cancellation charges and rolled forward the Charging Years in which the rebate and recovery would take place to 2019-20.

11.7 Finally, the Workgroup discussed that any cap on consumer energy prices currently under political discussion[153] could be impacted by the proposed changes in costs to Suppliers through the amendments to Demand tariffs or inclusion of new Demand recovery rates for CMP261. That is, costs to Suppliers not assumed in the creation of a price cap could not be passed through to consumers and would be borne by the Suppliers themselves. The issue was acknowledged by all Workgroup members and National Grid highlighted its commitment to supporting Suppliers in discussion with Ofgem over the effect transmission network costs can have on consumer prices both within the context of CMP261 and more widely.

WACM Voting.

11.8 The Workgroup voted, on 5th May 2017, on the seven options presented in the table in paragraph 11.5 above and the following results were recorded.

Options	WACM Number	Yes (Y)	No (N)
1	Not taken forward	4	5
2	Not taken forward	3	6
3	Not taken forward	4	5
4	4	5	4
5	Not taken forward	1	8
6	5	5	4
7	6	5	4

Table 4: WACM Voting

11.9 The Proposer was of the opinion following obtaining a legal advice (a relevant summary of which can be found in Annex 7) that because new WACMs[154] are not permissible under send back powers they had to vote no to all seven options.

11.10 Following this 5th May 2017 Workgroup vote, the Workgroup proposed to take forward option 4 raised by EDF, option 6 raised by National Grid and option 7 raised by EDF forward as formal WACMs. Therefore, at this stage, it was proposed that option 4 become WACM4, option 6 become WACM5 and option 7 become WACM6. **These votes were subsequently rescinded (see paragraph 11.11 below).**

Discussions following the CUSC Panel decision on new WACM's.

11.11 As represented in paragraph 10.67 of Section 10, the CUSC Panel determined, at a Special Panel meeting held on 12th May 2017, following discussion of the Proposer's legal advice (a relevant summary of which can be found in Annex 11) that they did not believe the send back powers allowed for new WACM's to be raised during the send back phase of the CUSC change process. Furthermore, some Workgroup members felt the

[153] These discussions arose during May 2017, after media reports emerged of a possible cap.
[154] Over and above the three listed in the 30th November 2016 FMR.

intent of the four proposals presented in the Final Modification Report of 30th November 2016 could also not be changed any further than the errors highlighted by Ofgem in its 22nd February 2017 send back letter. **As a result, the Workgroup WACM voting presented in paragraphs 11.8 to 11.10 was rescinded however this has been kept in the report for completeness.**

11.12 Some Workgroup members felt that changing the existing three WACM's to reflect deficiencies in the original Final Modification Report, such as: addressing whether cancellation charges should be included or excluded and the recovery mechanism to ensure the right people get reimbursed the right money was in scope of send back powers, whilst some other Workgroup members felt that only legal text amendments could be made to address the feasibility of the implementation date and to ensure that the amount reimbursed is £1.66/kW.

11.13 Following some really good work by the Workgroup coming to a solution within the direction of the CUSC Panel, the options presented provide a really good reflection of different ways to ensure that the right parties are reimbursed the right amount of money in line with the sendback letter from Ofgem. As part of this, the Workgroup identified an issue with the recovery mechanism K where if the original proposal and WACM1 were implemented then it would result in double charging of demand. As a result, the Code Administrator wanted to ensure that all the discussions, options and even WACM voting is presented in the Final Modification Report so that both industry and Ofgem can have visibility of the good work that the Workgroup have completed to ensure that the right parties are reimbursed the right amount of money.

11.14 Following much deliberation the Workgroup, by majority, decided at the 15th May 2017 meeting that the Proposer and each 'owner' of the three existing WACMs would be allowed to change their proposal in whichever way they felt would address the deficiencies highlighted by Ofgem in their 22nd February 2017 send back letter. If the CUSC Panel subsequently[155] decided that the Workgroup Report and more specifically the four existing proposals, as amended, went beyond what is allowed as part of the send back process, the CUSC Panel have the opportunity to ask the Workgroup to reconsider its final findings.

11.15 Following on from the development of these alternatives the National Grid representative circulated a short summary of legal counsel obtained by National Grid regarding the development of permissible alternatives, at the request of the National Grid representative; this information is also included below:

This is provided without waiving any privilege we have in the legal advice we have received.

In summary, taking the Ofgem letter of 22 February 2017 and the wording at CUSC Paragraph 8.23.12 at face value, the scope of permissible changes by the Panel (and so the Work Group) is broad. Ofgem in its letter is requesting consideration of alternative options (see references at foot of page 1 and page 2) and CUSC Paragraph 8.23.12 refers to steps including drafting or amending drafting and also to revision. The panel should be able to rely on reading the letter and CUSC at face value and without needing to look behind as to the history of these or the consequences of doing so.

[155] This paragraph was written prior to the 26th May 2017 CUSC Panel meeting at which the post send back Workgroup Report was due to be discussed.

11.16 Workgroup members asked if the three providers of summary legal advice to the Workgroup; namely Ofgem (in August 2016), the Proposer (in May 2017) and National Grid (in May 2017); would be willing to share the briefs they provided to their respective Counsels' with the Workgroup. The Proposer [National Grid and Ofgem] note that it was not the convention to share such documentation externally and did not see merit in doing so on this occasion."

11.17 Please find below a table detailing the amendments to the original four proposals[156] voted on the by the Workgroup represented in Section 12 of this report.

Proposal Numbers	Generation Adjustment Mechanism	Generator Rebate Year	Demand Adjustment Mechanism	Supplier Charge Year	Cancellation Charge (£)	Cancellation Capacity (MW)	Rebate £/kW	Interest on credit/debits	Owner
Original	Rebate – one off lump sum	ASAP	Recovery via 12 monthly debit invoices. KW/KW(h) demand recovery rate calculated using forecast of HH and NHH volumes charged in relevant year based on standard Demand charging processes. This will be reconciled at the end of the relevant year with under/over recovery fed through to new Demand recovery rates calculated using forecast of HH and NHH volumes for the following	T+1	Included in calculation of rebate	Included in calculation of £/kW rebate	£1.66/kW	Not applicable	Garth Graham – SSE

[156] The Original and WACMs 1, 2 and 3 as set out in the 30th November 2017 FMR.

			Charging Year. The final Demand reconciliation process 'trues up' any remaining cost of the principle amount.						
WACM1*	Rebate – one off lump sum	ASAP	Recovery via 12 monthly debit invoices. KW/KW(h) demand recovery rate calculated using forecast of HH and NHH volumes charged in relevant year based on standard Demand charging processes. This will be reconciled at the end of the relevant year with under/over recovery fed through to new Demand recovery rates calculated using forecast of HH and NHH volumes for the following Charging Year. The final Demand reconciliation process 'trues up' any remaining cost of the principle amount.	T+2	Included in calculation of rebate	Included in calculation of £/kW rebate	£1.66/kW	Not applicable	Joe Underwood – Drax

WACM2	Rebate via one off lump sum using 2015/2016 TEC	ASAP	Recovery via 12 monthly debit invoices. KW/KW(h) demand recovery rate calculated using forecast of HH and NHH volumes charged in relevant year based on standard Demand charging processes. This will be reconciled at the end of the relevant year with under/over recovery fed through to new Demand recovery rates calculated using forecast of HH and NHH volumes for the following Charging Year. The final Demand reconciliation process 'trues up' any remaining cost of the principle amount.	T+1	Excluded in calculation of rebate	Not applicable	£1.45/kW plus interest	Interest at base rate +2% or such other level, if appropriate, set by Ofgem and paid by the party or parties determined by Ofgem, if appropriate, in due course.	Louise Schmitz – National Grid	Please note that redden otes change s to the original four proposals.
WACM3	Generation residual at Tariff setting	T+2	Demand residual at Tariff setting	T+2	Included in calculation of rebate	Not applicable	Equivalent to £119.5m / 2018/19 TEC		George Moran – British Gas	

12 Workgroup Vote Following Ofgem Sendback

12.1 The Workgroup believes that the Terms of Reference has been met and that CMP261 has been fully considered.

12.2 For reference the CUSC objectives are:

a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity;
b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection);
c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses;
d) compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency. These are defined within the National Grid Electricity Transmission plc License under Standard Condition C10, paragraph 1.).
e) promoting efficiency in the implementation and administration of the CUSC arrangements.

12.3 The Workgroup met on the 22nd May 2017 and voted on the Original Proposal and the three Workgroup Alternative CUSC Modifications. Two of the Workgroup members voted that the Baseline better facilitated the Applicable CUSC Objectives, one Workgroup member voted that the original better facilitated the Applicable CUSC Objectives, five Workgroup member voted that WACM1 better facilitated the Applicable CUSC Objectives and two Workgroup members voted for WACM2. The Workgroup member's votes and reasoning's are shown in the tables below:

National Grid view

Louise	Applicable CUSC Objectives					
Schmitz	(a)	(b)	(c)	(d)	(e)	Overall
	Vote 1 (proposal vs baseline)					
Original	Yes	Yes	Neutral	No	Yes	Yes
WACM1	Yes	Yes	Neutral	No	Yes	Yes
WACM2	Yes	Yes	Neutral	No	Yes	Yes
WACM3	Yes	No	Neutral	No	Yes	No
	Vote 2 (Each WACM vs original)					
WACM1	Neutral	Neutral	Neutral	Neutral	Neutral	Neutral
WACM2	Yes	Yes	Neutral	Neutral	Neutral	Yes
WACM3	Neutral	No	Neutral	Neutral	Neutral	No
	Vote 3 (Which best meets applicable CUSC objectives)					
WACM2						

Supporting Text for Voting:

As it is not clear there has been a breach of the EU regulation and as National Grid followed the approved CUSC process put in place through CMP244 via an industry-led approach to comply with Regulation 838/2010, I consider that the defect is yet to be proven. My position on the

solutions is given on the assumption that a defect does exist and a solution is required as I consider this a pragmatic way forward. Note that, I believe no solution can be said to meet applicable CUSC objective (d).

I consider the statement on finding solutions to the alleged breach of EU regulation that pay the right people the right amount of money means that those options which exclude cancellation charges from the rebate amount and include interest in some form to best meet this deficiency in the FMR as submitted to the Authority last December. This therefore means that solutions which meet this requirement do in my view better meet applicable CUSC objectives (b), furthermore I would propose that options that rebate swiftly are better meeting applicable CUSC objective (b).
The recovery through published rates whether exclusively for this process or tariffs that are set in advance of the recovery period will better meet applicable CUSC objective (a), in the event that breach is determined, a lack of notice period for tariffs or rates could be argued to be detrimental to competition, it is worthy of note though that this modification has been subject to industry debate for a significant period and Suppliers have already had adequate time to make appropriate provision.

Those solutions which allow the rebate and recovery mechanisms to be held separate from the longer term impacts on the K term and future years' tariffs are in my opinion more appropriate from a process and practicalities perspective. Options that therefore rebate and recover within the same charging year, or keep the recovery mechanism separate from ongoing tariffs are more efficient and better meet applicable CUSC objective (e). Whilst the recovery rates is a significant process for National Grid to follow, being one-off in nature this remains arguably more efficient and, equivalent to options that use existing tariff processes equally for generation and demand.

Garth	**Applicable CUSC Objectives**					
Graham	**(a)**	**(b)**	**(c)**	**(d)**	**(e)**	**Overall**
	Vote 1 (proposal vs baseline)					
Original	Yes	Yes	Neutral	Yes	Neutral	Yes
WACM1	Yes	Yes	neutral	Yes	Neutral	Yes
WACM2	[Yes]	[Yes]	[neutral]	[Yes]	[Neutral]	[Yes]
WACM2	[No]	[No]	[Neutral]	[No]	[Neutral]	[No]
WACM3	No	No	Neutral	No	Neutral	No
	Vote 2 (Each WACM vs original)					
WACM1	Neutral	Neutral	Neutral	Neutral	Neutral	Neutral
WACM2	[Neutral]	[Neutral]	[Neutral]	[Neutral]	[Neutral]	[Neutral]
WACM2	[No]	[No]	[Neutral]	[No]	[Neutral]	[No]
WACM3	No	No	Neutral	No	Neutral	No
	Vote 3 (Which best meets applicable CUSC objectives)					
ORIGINAL						

Supporting Text for Voting:

ORIGINAL:

(A)	(B)	(C)	(D)	(E)	(Overall)
Yes It (i) removes the uncertainty / risk of infraction proceedings; and (ii) it removes uncertainty / risk of changes to charges at a later date. These uncertainties / risks undermine generators/ suppliers commercial positions and therefore interfere with the correct functioning of the markets in generation and supply of electricity.	Yes By ensuring that the charges are set in accordance with the Regulation this will ensure they are more reflective of costs than if this change were not undertaken.	Neutral	Yes The Regulation (EC) No 714/2009 and Commission Regulation 838/2010 are binding for all Transmission licensees across Europe. We believe that this proposal ensures that GB remains compliant with the European legislation and properly reflects National Grid's duties in the development of its transmission business.	Neutral	Yes As has been set out in detail in the Workgroup report, and in accordance with the legal advice obtained by National Grid, the breach of the Regulation in 2015/16 has occurred and must be addressed and rectified immediately. The harm that has arisen from the breach of Regulation in 2015/16 is ongoing and is being further compounded by the lack of it's rectification at the earliest possible opportunity. The CMP261 Original ensures compliance with the Regulation and, accordingly, both better facilitates competition whilst also ensuring that cost reflective charges are applied.

WACM1:

(A)	(B)	(C)	(D)	(E)	(Overall)
Yes It (i) removes the uncertainty / risk of	Yes By ensuring that the charges are set in	Neutral	Yes The Regulation (EC) No 714/2009 and Commission	Neutral	Yes This WACM (1) has the positive attributes of the CMP261

infraction proceedings; and (ii) it removes uncertainty / risk of changes to charges at a later date. These uncertainties / risks undermine generators/ suppliers commercial positions and therefore interfere with the correct functioning of the markets in generation and supply of electricity.	accordance with the Regulation this will ensure they are more reflective of costs than if this change were not undertaken.		Regulation 838/2010 are binding for all Transmission licensees across Europe. We believe that this proposal ensures that GB remains compliant with the European legislation and properly reflects National Grid's duties in the development of its transmission business.		Original. For the same reasons as noted above with respect to the Original, and as has been set out in detail in the Workgroup report, and in accordance with the legal advice obtained by National Grid, the breach of the Regulation in 2015/16 has occurred and must be addressed and rectified immediately. The harm that has arisen from the breach of the Regulation in 2015/16 is ongoing and is being further compounded by the lack of it's rectification at the earliest possible opportunity. This WACM (1) (along with the CMP261 Original) ensures compliance with the Regulation and, accordingly, better facilitates competition whilst also ensuring that cost reflective charges are applied.

WACM2:
In light of the CUSC Panel instruction to the CMP261 Workgroup at the 19th May 2017 Panel meeting, the proposed changes to WACM2, from the version set out in the 30th November 2016 Final Modification Report; in terms of (i) paying an immediate rebate (ii) paying that rebate to 2015/16 generators (ii) excluding

Connection Charges and (iv) paying interest; that these changes do amount to "*substantial changes to the original solution*", it would "*lead to changes to the intent of the original*" and, therefore, the revised WACM2 has "*changed significantly*".
If the Panel believes this to be the case; and therefore WACM2 reverts back to the 30th November 2016 Final Modification Report construct of WACM2; then my vote (in respect of WACM2) would be as per the **BLUE** text.
However, if the changes to WACM2 are not believed by the Panel to be thus; and therefore WACM2 remains as per this latest (19th May 2017) construct; then my vote (in respect of WACM2) would be as per the **RED** text.

For the avoidance of doubt, the default voting position is detailed in **RED** text.

WACM2:

(A)	(B)	(C)	(D)	(E)	(Overall)
Yes It (i) removes the uncertainty / risk of infraction proceedings; and (ii) it removes uncertainty / risk of changes to charges at a later date. These uncertainties / risks undermine generators/ suppliers commercial positions and therefore interfere with the correct functioning of the markets in generation and supply of electricity.	Yes By ensuring that the charges are set in accordance with the Regulation this will ensure they are more reflective of costs than if this change were not undertaken.	Neutral	Yes The Regulation (EC) No 714/2009 and Commission Regulation 838/2010 are binding for all Transmission licensees across Europe. We believe that this proposal ensures that GB remains compliant with the European legislation and properly reflects National Grid's duties in the development of its transmission business.	Neutral	Yes This WACM (2) has the positive attributes of the CMP261 Original. For the same reasons as noted above with respect to the Original, and as has been set out in detail in the Workgroup report, and in accordance with the legal advice obtained by National Grid, the breach of the Regulation in 2015/16 has occurred and must be addressed and rectified immediately. The harm that has arisen from the breach of the Regulation in 2015/16 is ongoing and is being further compounded by the lack of it's rectification at the earliest possible opportunity. This

					WACM (2) (along with the CMP261 Original) ensures compliance with the Regulation and, accordingly, better facilitates competition whilst also ensuring that cost reflective charges are applied. In terms of the payment of interest that forms part of this WACM(2) and being mindful of press reports on 18th May 2017 in respect of the Supreme Court's judgement in the Lehman Brothers case, it may be argued that *statutory interest* (which, according to the press reports amounts to 8%) is the legally correct level given that a breach of the law has occurred in this 838/2010 situation.

WACM2:

(A) No A significant proportion of Generator Users who paid TNUoS in 2015/16 will not receive any rebate from the breach of the Regulation in 2015/16	(B) No A significant proportion of Generator Users who paid TNUoS in 2015/16 will not receive any rebate from the breach of the Regulation in 2015/16	(C) Neutral	(D) No A significant proportion of Generator Users who paid TNUoS in 2015/16 will not receive any rebate from the breach of the Regulation in 2015/16 whilst other	(E) Neutral	(Overall) No. This WACM (2) would, if implemented, not correct the defect identified in the proposal; as a significant proportion of the Generator Users who paid, during 2015/16, on average in

whilst other Generator Users (in a later charging year) will receive a rebate this WACM (2) does not better facilitate effective competition.	whilst other Generator Users (in a later charging year)will receive a rebate this WACM (2) this will not be cost reflective and thus not better facilitate the applicable objective.		Generator Users (in a later charging year) will receive a rebate. Furthermore, even those Generator Users who did pay TNUoS in 2015/16 who remain on the system in 2017/18 will not receive a speedy rectification, in the form of a rebate, for in excess of two years after the breach of the Regulation was identified. Therefore this WACM (2) does not better facilitate compliance with the Regulation.		excess of the €2.50/MWh upper limit would not receive any rebate, whilst others, who were non Generator Users during 2015/16 would (as Generator Users in 2017/18) receive a 'windfall gain'.

WACM3:

(A) No A significant proportion of Generator Users who paid TNUoS in 2015/16 will not receive any rebate from the breach of the Regulation in 2015/16 whilst other Generator Users (in a later charging year) will receive a rebate this WACM (3) does not better facilitate effective	(B) No A significant proportion of Generator Users who paid TNUoS in 2015/16 will not receive any rebate from the breach of the Regulation in 2015/16 whilst other Generator Users (in a later charging year)will receive a rebate this WACM (3) this will not be cost reflective and	(C) Neutral	(D) No A significant proportion of Generator users who paid TNUoS in 2015/16 will not receive any rebate from the breach of the Regulation in 2015/16 whilst other Users (in a later charging year) will receive a rebate. Furthermore, even those Generator Users who did pay TNUoS in 2015/16 who	(E) Neutral	(Overall) No. This WACM (3) would, if implemented, not correct the defect identified in the proposal; as a significant proportion of the Generator Users who paid, during 2015/16, on average in excess of the €2.50/MWh upper limit would not receive any rebate, whilst others, who were non Generator Users during 2015/16 would (as Generator

competition.	thus not better facilitate the applicable objective.		remain on the system in 2019/20 will not receive a speedy rectification, in the form of a rebate, for in excess of three years after the breach of the Regulation was identified. Therefore this WACM (3) does not better facilitate compliance with the Regulation.		Users in 2019/20) receive a 'windfall gain'.

Joseph Underwood	Applicable CUSC Objectives (a)	(b)	(c)	(d)	(e)	Overall
	Vote 1 (proposal vs baseline)					
Original	Yes	Neutral	Neutral	Yes	Neutral	Yes
WACM1	Yes	Neutral	Neutral	Yes	Neutral	Yes
WACM2	Neutral	Neutral	Neutral	Neutral	Neutral	No
WACM3	Neutral	Neutral	Neutral	Neutral	Neutral	No
	Vote 2 (Each WACM vs original)					
WACM1	Yes	n/a	n/a	n/a	n/a	Yes
WACM2	n/a	n/a	n/a	n/a	n/a	No
WACM3	n/a	n/a	n/a	n/a	n/a	No
	Vote 3 (Which best meets applicable CUSC objectives)					
WACM 1						

Supporting Text for Voting:

I consider that there has been a material breach of the €2.50/MWh average transmission charges cap and affected generators should be immediately remitted for the overcharge. In the 15/16 charging year, generators were overcharged for transmission charges against the €2.50/MWh cap. This represents a breach of the technical requirements of the guidelines regulation. This position has been supported by legal advice from Addleshaw Goddard, procured by National Grid for the workgroup.

It is my view that the generator rebate should occur as soon as practical, where a delay would be detrimental to those businesses. Recouping revenue from suppliers, however, should allow sufficient time for them to correct their pricing methodology for future charging years, in order to avoid a detrimental effect on those businesses.

I consider both the CMP261 Original and WACM 1 to better facilitate the Applicable CUSC Objectives (a) and (d) with respect to the baseline with WACM 1 being the superior of these two options. WACM 1 best facilitates the Applicable CUSC Objectives as recovery from suppliers in the charging year T+2 provides sufficient time for suppliers to correct their pricing methods for future charging years.

I believe the changes to WACM 2 have fundamentally changed the intent of the alternative as follows:

- Generators will now be paid via a rebate rather than a tariff change
- Cancellation charges are now excluded
- The ability to make interest adjustments are now included

Due to this, WACM 2 goes beyond the latest guidance provided by the Panel following the send back. As a result this modification should not be considered a legitimate proposal.

For the avoidance of doubt, the changes to the Original and WACMs 1 and 3 are allowable following the latest guidance provided by the Panel following send back. The changes made to these proposals act to preserve the original intention of those proposals, i.e. changes which address incorrect legal texts and issues arising from passage of time due to the send back.

Notwithstanding the above, I do not believe that WACM 3 properly meets the defined defect. A tariff adjustment will not reimburse generators affected by the overcharge that have closed since the 15/16 charging year. This also means that transmission connected generators that have entered the market since the 15/16 charging year will be getting payed for an overcharge they were not subject to.

Karl	Applicable CUSC Objectives					
Maryon	(a)	(b)	(c)	(d)	(e)	Overall
	Vote 1 (proposal vs baseline)					
Original	Yes	Neutral	Neutral	Yes	Neutral	Yes
WACM1	Yes	Neutral	Neutral	Yes	Neutral	Yes
WACM2	Neutral	Neutral	Neutral	Neutral	Neutral	No
WACM3	Neutral	Neutral	Neutral	Neutral	Neutral	No
	Vote 2 (Each WACM vs original)					
WACM1	Yes	n/a	n/a	n/a	n/a	Yes
WACM2	n/a	n/a	n/a	n/a	n/a	No
WACM3	n/a	n/a	n/a	n/a	n/a	No
	Vote 3 (Which best meets applicable CUSC objectives)					
WACM 1						

Supporting Text for Voting:

We consider that there has been a material breach of the €2.50/MWh average transmission charges cap and affected generators should be immediately remitted for the overcharge. In the 15/16 charging year, generators were overcharged for transmission charges against the €2.50/MWh cap. This represents a breach of the technical requirements of the guidelines regulation. This position has been supported by legal advice from Addleshaw Goddard, procured by National Grid for the workgroup.

It is our view that the generator rebate should occur as soon as practical, where a delay would be detrimental to those businesses. Recouping revenue from suppliers, however, should allow sufficient time for them to correct their pricing methodology for future charging years, in order to avoid a detrimental effect on those businesses.

We consider both the CMP261 Original and WACM 1 better facilitate the Applicable CUSC Objectives (a) and (d) with respect to the baseline with WACM 1 being the superior of these two options. WACM 1 best facilitates the Applicable CUSC Objectives as recovery from suppliers in the charging year T+2 provides sufficient time for suppliers to correct their pricing methods for future charging years.

Peter Bolitho	Applicable CUSC Objectives					
	(a)	(b)	(c)	(d)	(e)	Overall
	Vote 1 (proposal vs baseline)					
Original	Yes Competition is facilitated through compliance with EU law	Neutral	Neutral	Yes This proposal ensures compliance with EU law but there is some detrimental impact to suppliers as pass through in customer tariffs T+1 is difficult	Neutral	**Yes** This change goes some way towards addressing the harm to generators by NGET's failure to comply with the Regulation. Rebate payments to generators covering the 'overcharge' amount as specified in the CMP261 legal text (clarified following send back) will address this and provide confidence to the market that the Regulation, which was enacted to promote competition through facilitating cross-border trade and a single electricity market, is complied with Unfortunately, this proposal does not compensate for the loss of revenue of generators from reduced operating hours in 2015/16, because of displacement by cheaper imported power that did not pay GB transmission charges. A failure of Ofgem to approve the original proposal or WACM1, will increase regulatory uncertainty and reduce confidence in the very EU laws enacted for the purpose of supporting an efficient, competitive market. Such an outcome would also undermine the reasonable expectation of market participants that previous regulatory decisions (including the implied settled policy position as to what constitutes a "transmission tariff charge" under CMP244) will remain unchanged.

WACM1	Yes Competition is facilitated through compliance with EU law	Neutral	Neutral	Yes This proposal ensures compliance with EU law but, supplier charge impact can more reasonably be passed through in customer tariffs in T+2.	Neutral	**Yes +** This change goes some way towards addressing the harm to generators by NGET's failure to comply with the Regulation. Rebate payments to generators covering the 'overcharge' amount as specified in the CMP261 legal text (clarified following send back) will address this and provide confidence to the market that the Regulation, which was enacted to promote competition through facilitating cross-border trade and a single electricity market, is complied with. Unfortunately, this proposal does not compensate for the loss of revenue of generators from reduced operating hours in 2015/16, because of displacement by cheaper imported power that did not pay GB transmission charges. In most cases the adjustment to supplier charges in T+2 will allow suppliers to pass the costs through to customers in tariffs, thus avoiding some distortion to competition in the supply market. A failure of Ofgem to approve the original proposal or WACM1, will increase regulatory uncertainty and reduce confidence in the very EU laws enacted for the purpose of supporting an efficient, competitive market. Such an outcome would also undermine the reasonable expectation of market participants that previous regulatory decisions (including the implied settled policy position as to what constitutes a "transmission tariff charge" under CMP244) will remain unchanged.
WACM2	No Competition is hindered	Neutral	Neutral	No This proposal	No Misuse of the send	**No** This new formulation of WACM2

	as this proposal fails to comply with EU law.			fails to comply with EU law. Exclusion of connection charges rebates the wrong value.	back process under-mines the efficiency of the modification process.	proposed by NGET goes beyond the scope of the changes permitted by the send back process This is because a rebate mechanism, the exclusion of cancellation charges, and interest adjustments were clearly not within the scope of the intent for this proposal as set out in the original FMR dated 30/11/16, see also comments in paragraphs 10.44 to10.45 of this revised FMR. Allowing this NEW ALTERNATIVE to be progressed and voted upon by the workgroup and Panel might lead Ofgem to believe it can approve this sub-optimal, illegitimate proposal. Depending on the Panel vote rights for materially affected parties to appeal an Ofgem 'rejection' of legitimate proposals (original, WACM1 and WACM3) at the CMA could be prejudiced.
WACM3	No A different set of generators receives the tariff benefit resulting from the 2015/16 overcharge amount.	No Poor targeting of costs is not cost reflective	Neutral	No This proposal fails to comply with EU law. A different set of generators receives the tariff benefit resulting from the 2015/16 overcharge amount.	Neutral	**No** The Regulation deals with "annual average transmission charges" paid by producers" in a particular year (in this case 2015/16). Any 'overcharge' must be targeted via a rebate, otherwise generators that have since closed or operate less will lose out financially and those that have just started operating, or operate more, in the specified year will receive a windfall reduction in charges. Such reallocation of costs between users across different timeframes is not cost reflective and overall is detrimental to competition.
	Vote 2 (Each WACM vs original)					
WACM1	Yes	n/a	n/a	Yes	n/a	**Yes –** for the reasons stated under vote 1.
WACM2	n/a	n/a	n/a	n/a	n/a	**No** This is not a legitimate proposal so by definition cannot be better the

						proposal that is legitimate.
WACM3	No	No	n/a	No	n/a	No - for the reasons stated under vote 1.
	Vote 3 (Which best meets applicable CUSC objectives)					
WACM1 best meets the applicable CUSC objectives. It is better than the original as the potential adverse impact on supply competition is mitigated to some extent as suppliers are better able to pass through tariff changes to customers in T+2 rather than in T+1.						

Supporting Text for Voting:

My rationale for voting on the revised formulation of the original and the WACMs is based on my comments noted in paragraphs 10.44 and 10.45 of the revised FMR covering the scope of changes following send back and a reasonable, but appropriately narrow, interpretation of intent. It is understood that this is consistent with the latest guidance provided by the Panel, following its 12 May 2017 meeting on what is "within the spirit" of proposals described in the FMR of 30/11/16. In excising a "degree of judgment", it is my opinion that the new **WACM2 cannot, by any reasonable stretch of the imagination be considered a legitimate proposal**. This is because WACM2's original formulation, included cancellation charges, specifically envisage tariff adjustments rather than a rebate for the generator 'overcharge' and was intentionally silent on interest adjustments.

In my view however, it is reasonable to address the following other deficiencies namely: the K factor anomaly (column 4 in the table); and the passage of time issue arising from the delay to the CMP261 decision. On the K factor issue it was never the intention of the proposals to distort how costs were to be recovered from suppliers and it is right that this is corrected (this issue was only discovered during the send back assessment and it seems prudent to address it).
Despite the above, the sponsor of WACM2 (National Grid) decided, to make fundamental changes to WACM2 - therefore I have had no choice but to vote on the basis of this proposal as presented, even though I consider the reformulated WACM2 to no longer be a legitimate proposal. However, the CUSC Panel could still decide not to accept fundamental changes to WACM2 and refer it back to the workgroup for it to be amended to reflect clarifications that are within the scope of the send back process.

Process concerns

It is particularly concerning that that there have been unnecessary and avoidable delays in assessing this modification, indeed post send back this has, so far, involved seven workgroup meetings and two references back to the CUSC Panel. This delay and much nugatory work could have been avoided, if a focused, more disciplined process had been followed from the start, consistent with Ofgem's guidance set out in its CAP186 decision and the published legal opinion of the proposer's legal counsel. Note counsel's view broadly reflects the points made by the proposer and I at the first few workgroup meetings following send-back.

With clearer direction, the workgroup could have sensibly limited its assessment and the outcome would have simply delivered clarifications to the original and WACMs 1 to 3, to address deficiencies, consistent with the intent as described in the original FMR dated 30/11/16. There should ideally have been no need for a new workgroup v
ote or Panel vote, as by definition, changes would be "in the spirit" of the proposals that parties had originally voted on.

The raising of a new alternative proposal outside the scope Ofgem's send-back powers (i.e. the revised formulation of WACM2), raises serious procedural concerns which are highly likely to have a material impact on market participants. This new formulation of WACM2 has a lower generator rebate value of £1.45/kW compared to £1.66/kW for the original, WACM1 and WACM3. If the CUSC Panel chooses to consider such an illegitimate proposal, parties' rights of appeal to the CMA under the statutory, merits based, industry code appeals process may be prejudiced, (see paragraphs 10.43 to 10.49 of the report for a detailed explanation as to why this is the case). It should also be noted that WACM2 only exists because the National Grid code administrator chair chose to 'save' it, when it had already been rejected as a potential alternative

by the workgroup – it is concerning that this power was used given it is National Grid itself that has allegedly breached the Regulation, and its representatives have argued strongly that if a breach has occurred it should be smaller.

Could these procedural irregularities have been avoided?

In my view, it is the actions and inactions, of Ofgem that are the root cause of the above procedural problems. Although, Ofgem has not directed the workgroup to raise new alternatives as part of its send back decision, it has nevertheless, sought to 'steer' the process in that direction through inviting new 'options' and via its workgroup representative stating preferences at workgroup meetings. This has resulted in National Grid (the sponsor of WACM2) wanting to provide a new formulation of this proposal going beyond the scope of what is permitted under Ofgem's send back powers.

I believe, Ofgem knows full well the scope of its send back powers, but has intentionally chosen not to provide further guidance to the CUSC Panel on what revisions are, or are not permitted, because it wants to achieve a more politically expedient outcome. Its apparently deliberate ambiguity in turn initially resulted in the CUSC Panel being reluctant to restrict the type of changes permitted following send back; and National Grid as code administrator, being too 'accommodating' in managing the modification process to facilitate consideration of new alternatives (despite the problem of this prejudicing statutory appeal rights and endangering its own impartially).

In my opinion, Ofgem has not, to date, approached its evaluation of CMP261 with an open mind. It seems reluctant to make a timely decision, or indeed one that would allow for a merits-based appeal at the CMA. If Ofgem were to approve WACM2 (which is now fundamentally different from its original formulation, including the lower rebate value of £1.45/kW and a feature that it appears to favour) following its recommendation by the CUSC Panel, then a CMA appeal will have been frustrated. This will have been due to Ofgem's conduct in allowing such fundamental changes following send back, which it should have intervened to prevent.

It would be helpful if the CUSC Panel could further seek to further limit the proliferation of alternatives for future modifications, e.g. by discouraging workgroup members from proposing alternatives that they do not genuinely support. For example, under CMP261, it seems absurd that National Grid has sponsored WACM2, because by implication it appears to acknowledge that a breach of the Regulation has occurred, something it vehemently rejects.

Lessons for the future

Some damage may have already been done to the integrity of the CUSC modification process in relation to CMP261, but good governance with appropriate 'checks and balances' could be restored for future modifications by the CUSC Panel building on its 12 May 2017 meeting guidance on the scope of changes permitted following an Ofgem send back decision. The following suggested improvements might include:

1. Providing detailed guidance on the exact scope of changes that can be considered following an Ofgem send back decision;
2. Only permitted workgroup members to propose potential WACMs that they genuinely support and they consider are better than the original;
3. The criteria for taking forward a WACM should be a) it better meets the applicable CUSC objectives and b) it is better than the original; and
4. Not permitting the chair of the workgroup to designate a National Grid proposed option as an alternative, when it has already been rejected by the workgroup.

George Moran	Applicable CUSC Objectives					
	(a)	(b)	(c)	(d)	(e)	Overall
	Vote 1 (proposal vs baseline)					
Original	NO	NO	NEUTRAL	NEUTRAL	NEUTRAL	NO
WACM1	NO	NO	NEUTRAL	NEUTRAL	NEUTRAL	NO
WACM2	NO	NO	NEUTRAL	NEUTRAL	NEUTRAL	NO
WACM3	NO	NO	NEUTRAL	NEUTRAL	NEUTRAL	NO
	Vote 2 (Each WACM vs original)					
WACM1	YES	NEUTRAL	NEUTRAL	NEUTRAL	NEUTRAL	YES
WACM2	NEUTRAL	YES	NEUTRAL	NEUTRAL	NEUTRAL	YES
WACM3	YES	NEUTRAL	NEUTRAL	NEUTRAL	NEUTRAL	YES
	Vote 3 (Which best meets applicable CUSC objectives)					
The Baseline best meets the applicable CUSC objectives.						

Supporting Text for Voting:

Vote 1 (proposal vs baseline)
The CMP261 Original Proposal and all of the WACMs do not better facilitate the CUSC objectives.

Applicable Objective (a)
Under CMP224, compliance with the relevant EU Regulation is managed via an ex-ante approach with no reconciliation. This was the accepted expectation of the market. The examples presented in paragraph 2.34 of the workgroup consultation show that National Grid and market participants were aware that the €2.50/MWh limit might have been exceeded during 2015/16. This demonstrates that the accepted expectation of the market was that there would be no mid-year tariff change or reconciliation in respect of the cap. This expectation was also affirmed at both the May 2015 and August 2015 CUSC Panel meetings – by National Grid in May 2015, who were clear that there was no intention of reviewing the CMP224 solution and by the proposer of CMP 251 in August 2015, who was clear that any solution should not be applied retrospectively to 2015/16.

National Grid did not, at any point, propose any mid-year tariff change to address the potential exceedance – which would have been fully visible to it.

Therefore the Original and all of the WACMs perform worse against applicable objective (a) as the unexpected nature of this modification would damage competition because the impact on parties, and parties' ability to manage those impacts, will vary. The retrospective nature of the changes could also lead to increased risk premiums applied to future tariffs.

Applicable Objective (b)
The principles underpinning the charging methodology, including the default proportion of revenue to be recovered from generators in 2015/16, were approved as meeting objective (b).

Therefore, any unnecessary restrictions or changes to how these principles are translated into charges are detrimental to meeting objective (b). To the extent that the proposed change retrospectively moves Generation tariffs from the default position in the methodology for 2015/16, the Original and all of the WACMs perform worse against applicable objective (b).

Applicable Objective (d)
CMP261 has no impact on Objective (d) as the current methodology is compliant with the relevant EU Regulation. This is clear as:

- There has been no enforcement action taken or (as far as we are aware) being considered.
- The legal advice does not conclude that National Grid is not compliant.

Until such time as non-compliance is found, and given the uncertainty surrounding whether such a finding would be achievable, no impact can be assessed against objective (d).

Vote 2 (Each WACM vs Original)

WACM 1: Worse than the baseline but better than the (modified) Original. WACM1 performs better against applicable objective (a) as the Demand reconciliation includes more notice for suppliers and customers on pass-through contracts.

WACM 2: Worse than the baseline but better than the (modified) Original. WACM2 performs better against applicable objective (b) as the distortion of the cost reflective proportion of revenue to be recovered from generators in 2015/16 is reduced by the exclusion of Cancelation Charges.

WACM 3: Worse than baseline but better than the (modified) Original. WACM3 performs better against applicable objective (a), as the delay in the Generation adjustment provides more opportunity for the adjustment to pass through to wholesale prices (and to consumers), limiting any windfall to Generators (and detriment to consumers/suppliers). Also, the Demand reconciliation includes more notice for suppliers and customers on pass-through contracts.

George Douthwaite	Applicable CUSC Objectives (a)	(b)	(c)	(d)	(e)	Overall
	Vote 1 (proposal vs baseline)					
Original	No	No	Neutral	Neutral	No	No
WACM1	No	No	Neutral	Neutral	No	No
WACM2	No	No	Neutral	Neutral	No	No
WACM3	No	No	Neutral	Neutral	No	No
	Vote 2 (Each WACM vs original)					
WACM1	Yes	Yes	Neutral	Neutral	Neutral	Yes
WACM2	Yes	Yes	Neutral	Neutral	Neutral	Yes
WACM3	No	No	Neutral	Neutral	Yes	No
	Vote 3 (Which best meets applicable CUSC objectives)					
WACM1						

Supporting Text for Voting:

Firstly, we do not believe that a breach has occurred, as reflected in vote 1, comparing to baseline. However, our voting on Vote 2, WACMs against the original, are based on the scenario that Ofgem determine that a breach has occurred.

We consider that a breach has not occurred for a number of reasons, including but not limited to:

- The generation volumes used to calculate the average TNUoS paid by generators does not include the volumes of embedded generation, who are also producers of electricity. We feel this should be considered by Ofgem when determining whether a breach has taken place and we are considering raising a Modification Proposal to address error in the CUSC.

- What is considered Transmission charges is currently contaminated to an extent by socialised unrecovered historic connection charges. Regardless of analysis undertaken by National Grid at Ofgem's behest we consider OFTO spurs to be connection charges and furthermore the socialisation of these or any other Generation connection charge should not be applied to the broader socialised Transmission charges, but rather a separate socialised connection charge levied to generators. We will be looking into this further and also the scope of the Targeted Code Review to decide whether it is necessary to raise a modification proposal to address this issue.

- There are still questions around the year that should be used in any such calculation, and the exchange rate used since this is continually fluctuating. For such an important

regulation, one might expect the risk of any possible breach to have been hedged by an option on the forward exchange rate. This could mean that a future rate of exchange, once agreed upon at the point of tariff setting, the rate becomes valid for the relevant charging year. This risk could easily have been managed by either one of the regulated TOs or by any of the impacted generators. Are Ofgem aware if this type of financial hedge has taken place? Under CMP224, best endeavours were assumed, and exchange rate was not included within the error margin. We take this as a tacit understanding that at the point of fixing the exchange rate to be used in setting the TNUoS tariffs a notional hedge has been performed by the SO whereby the risk between the Generators on the one hand and the TOs on the other have offset one another. This has meant that the SO has two perfectly offsetting sets of counterparties and therefore a net zero position to manage externally in the currency markets. At any point of reforecasting an updated exchange rate need only apply to any new offsetting notional hedge to cover those new Euros not already within an existing notional hedge. CMP261 would imply that other parties do not share our view, so we are considering raising a modification proposal to avoid similar confusion in the future. We would be keen to discuss this with Ofgem at the earliest opportunity.

Regarding (a) competition and (b) cost reflectivity from a demand tariff perspective, there is less market distortion and a more level playing field between suppliers if greater notice of tariff changes is provided. This facilitates competition and more notice in changes to costs allows for more consistency in customer pricing and better cost-reflectivity. Those WACMs giving greater notice therefore will generally better facilitate both objectives although WACM3 is worse for generation predictability and cost reflectivity.

From a generation perspective, Ofgem have already highlighted their concern that the correct generators should be reimbursed should a breach be determined to have taken place. Again, as this cost-reflectivity relates to customer charging it also relates to competition, since unfair charging is a barrier to a competitive market. Whilst we do not recognise a breach, since a process approved under CMP224 has been adhered to, we understand that this voting is based on the pretext that Ofgem have determined a breach has taken place. In that instance, it would appear correct to reimburse against the tariffs charged in the year 2015/16 giving rise to that alleged breach, and thus against the generators and TEC present at that time. To reimburse a different set of generators or alter a different set of tariffs could not rectify such an alleged breach, and this appears to be the main weakness of WACM 3.

Whilst cancellations to TEC are not directly charged as TNUoS tariffs, the two are related and so while we may feel cancellation charges should be excluded from the calculation, we believe Ofgem should determine whether they form part of the overall transmission costs when determining whether a breach has occurred.

The additional year's notice on demand tariffs aids predictability and therefore cost-reflectivity in consumer contracts from a supplier, and so is better for competition. **We therefore favour WACM1.**

When considering these proposals, Ofgem need to be aware of the reason behind notice being provided to suppliers for the demand recovery. To pass those costs onto customers in a cost reflective manner for future charging years, suppliers need notice of the decision. Suppliers typically price for a 1, 2 or 3 year contract. The new changes can only be passed through when the decision is known. Our underlying principal is therefore to have the implementation of any change extended out 2-3 years after any decision date rather than having to apply risk premia. Ignoring new sites and closures, and changes to consumption levels, the same national set of demand customers will ultimately be charged. A consumer will get the same charge through final published charges regardless of their supplier at the time. By approving the change, Ofgem would therefore be recognising the documented discussions of the CMP261 working group and that CMP261 demand recovery charge should be passed through to customers in their overall TNUoS rate. We would therefore assume that Ofgem would ensure that changes to format of the final published TNUoS tariffs were also approved to facilitate this. The actual TNUoS rates, inclusive of any approved CMP261 recovery charge, should not contain any ambiguity around what customers are liable for in the tariff statement i.e. this liability includes any retrospective CMP261 recovery charges approved.

Jeremy	Applicable CUSC Objectives					
Guard	(a)	(b)	(c)	(d)	(e)	Overall
	Vote 1 (proposal vs baseline)					
Original	No	No	Neutral	Neutral	Neutral	No
WACM1	No	No	Neutral	Neutral	Neutral	No
WACM2	No	No	Neutral	Neutral	Neutral	No
WACM3	No	No	Neutral	Neutral	Neutral	No
	Vote 2 (Each WACM vs original)					
WACM1	Yes	Neutral	Neutral	Neutral	Neutral	Yes
WACM2	No	Neutral	Neutral	Neutral	Neutral	No
WACM3	Yes	Neutral	Neutral	Neutral	Neutral	Yes
	Vote 3 (Which best meets applicable CUSC objectives)					
The baseline.						

Supporting Text for Voting:

Vote 1:
In our view a breach has not occurred.

Applicable CUSC Objective (a)
The Original and all of the WACM's present adverse distributional impacts between those suppliers that have and those suppliers that do not have generation in their portfolio (those that are vertically integrated and those that are not). All of the options will require suppliers who were not even operating in the year 2015/16 to pay the demand adjustment; this is also adverse for competition.

Applicable CUSC Objective (b)
The CUSC as it stands today was agreed through the workgroup modification process that comprised of workgroup meetings and industry consultation. This modification attempts to opportunistically undermine this process and set a dangerous precedent by retrospectively changing the charging mechanism and create more cost uncertainty for the industry in the years to come.

Applicable CUSC Objective (d)
The original and WACM's have no impact on this objective as the CUSC is already compliant with EU regulation.

Vote 2:
Note: WACMs 1 & 3 are the least worst of the options presented; however even they provide inadequate notice for suppliers to take into account the retrospective charges proposed as some suppliers offer 3 year tariffs.

Vote 3:
The best option by far is the baseline as this is how industry agreed compliance is ensured.

Simon	Applicable CUSC Objectives					
Vicary	(a)	(b)	(c)	(d)	(e)	Overall
	Vote 1 (proposal vs baseline)					
Original	neutral	yes	neutral	yes	neutral	yes
WACM1	neutral	yes	neutral	yes	neutral	yes
WACM2	neutral	yes	neutral	yes	neutral	yes
WACM3	no	neutral	neutral	no	neutral	no

	Vote 2 (Each WACM vs original)					
WACM1	neutral	neutral	neutral	neutral	neutral	neutral
WACM2	neutral	neutral	neutral	yes	neutral	yes
WACM3	no	no	neutral	no	neutral	no
	Vote 3 (Which best meets applicable CUSC objectives)					
WACM2 best meets applicable CUSC objectives.						

Supporting Text for Voting:

Given the legal opinion supporting the view that there is a breach of the €2.50/MWh annual average limit for TNUoS paid by Generators in GB in Charging Year 2015/16, as set in EU Regulation 838/2010 Part B (3), we believe that an ex post reconciliation must be carried out.

The revised CMP261 Original, WACM1 and WACM2 would ensure compliance with the EU Regulation 838/2010 Part B (3).

The adjustment of future generation tariffs proposed in WACM3 will not ensure the generators that overpaid TNUoS in 2015/16 receive adjustments that correctly reverse their overpayments. As these fail to pay the correct parties the correct amount of money they do not address this issue which was specifically highlighted by Ofgem in their sendback letter.

The proposed implementation approach in the revised WACM2, with Generator rebates as soon as practicable, recovery through Demand charges in year T+1, flexibility for Ofgem to determine the appropriate interest rate and the exclusion of rebates in respect of cancellation charges seems to be the best solution for both generators and consumers.

Matthew	Applicable CUSC Objectives					
Hulks	(a)	(b)	(c)	(d)	(e)	Overall
	Vote 1 (proposal vs baseline)					
Original	YES	YES		YES		
WACM1	YES	YES		YES		
WACM2	YES	YES		YES		
WACM3	YES	YES		YES		
	Vote 2 (Each WACM vs original)					
WACM1	YES	YES		YES		
WACM2	NEUTRAL	NEUTRAL		NEUTRAL		
WACM3	NEUTRAL	NEUTRAL		NEUTRAL		
	Vote 3 (Which best meets applicable CUSC objectives)					
WACM1						

Supporting Text for Voting:

WACM 1 allows generators to be paid back as soon as possible, whilst limiting any damage caused and ensuring compliance with the 838/2010 regulation quickly and efficiently. Further, suppliers should be given sufficient time to correct their pricing strategies for future charging years to ensure that these costs can be recovered appropriately from customers via TNUoS tariffs.

13 How to Respond

13.1 If you wish to respond to this Code Administrator Consultation, please use the response pro-forma which can be found under the 'Industry Consultation' tab via the following link: http://www2.nationalgrid.com/UK/Industry-information/Electricity-codes/CUSC/Modifications/CMP261/

13.2 Responses are invited to the following questions;

1. Do you believe CMP261 or any of the alternative solution better facilitates the Applicable CUSC Objectives? Please include your reasoning.

2. Do you support the proposed implementation approach? If not, please state why and provide an alternative suggestion where possible.

3. Do you have any other comments?

13.3 Views are invited on the proposals outlined in this consultation, which should be received by **5pm** on **9 June 2017**. Please email your formal response to: CUSC.team@nationalgrid.com

13.4 If you wish to submit a confidential response, please note the following; Information provided in response to this consultation will be published on National Grid's website unless the response is clearly marked 'Private & Confidential', we will contact you to establish the extent of this confidentiality. A response marked 'Private & Confidential' will be disclosed to the Authority in full by, unless agreed otherwise, will not be shared with the CUSC Modifications Panel or the industry and may therefore not influence the debate to the same extent as a non-confidential response. Please note an automatic confidentiality disclaimer generated by your IT System will not in itself, mean that your response is treated as if it had been marked 'Private & Confidential.

CUSC Modification Proposal Form (for Charging Methodology Proposals) CMP261

nationalgrid

Connection and Use of System Code (CUSC)

Title of the CUSC Modification Proposal

Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3).

Submission Date

8th March 2016

Description of the Issue or Defect that the CUSC Modification Proposal seeks to address

Having due regard for Regulation (EC) No 714/2009, the Commission Regulation (EU) No 838/2010157 entitled "Guidelines for a Common Regulatory Approach to Transmission Charging" was introduced to provide a common regulatory approach to transmission charging across all the Member States.

This Regulation, in Part B (paragraph 3), restricts the annual average transmission charges paid by electricity generators in Great Britain to the range of €0/MWh to €2.50/MWh.

The methodology for generation transmission charges in Great Britain is defined in Section 14 of the CUSC.

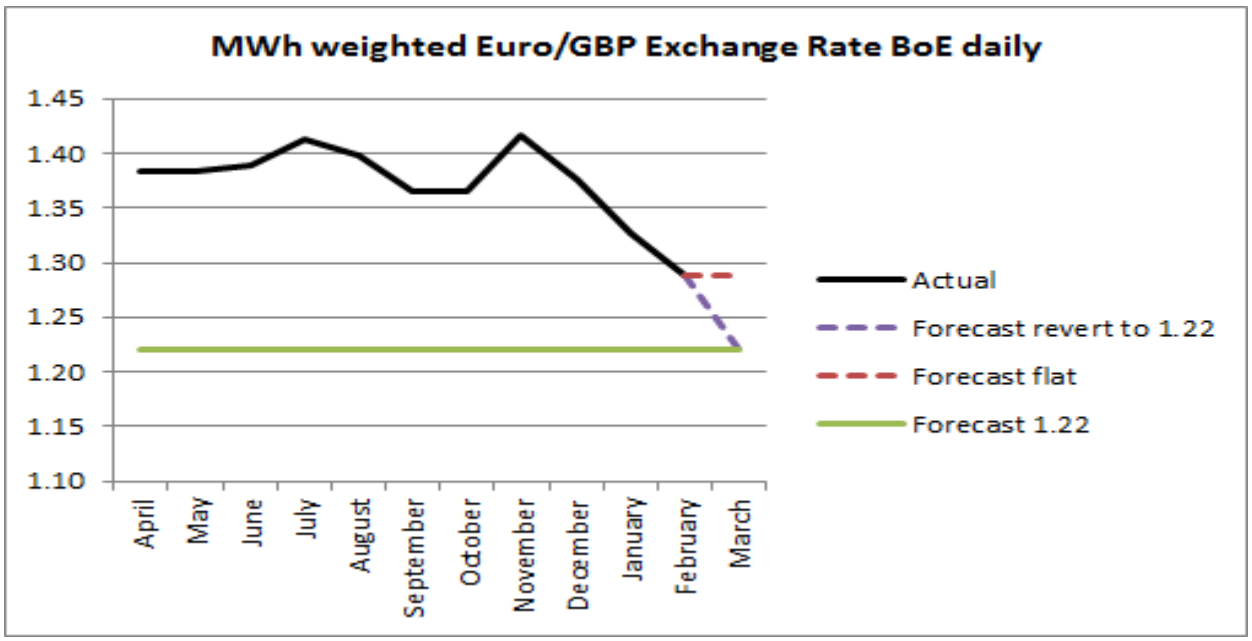
In order to asses the appropriate level of generation transmission charges to be paid by generators in GB in any given charging year National Grid must forecast the following:-

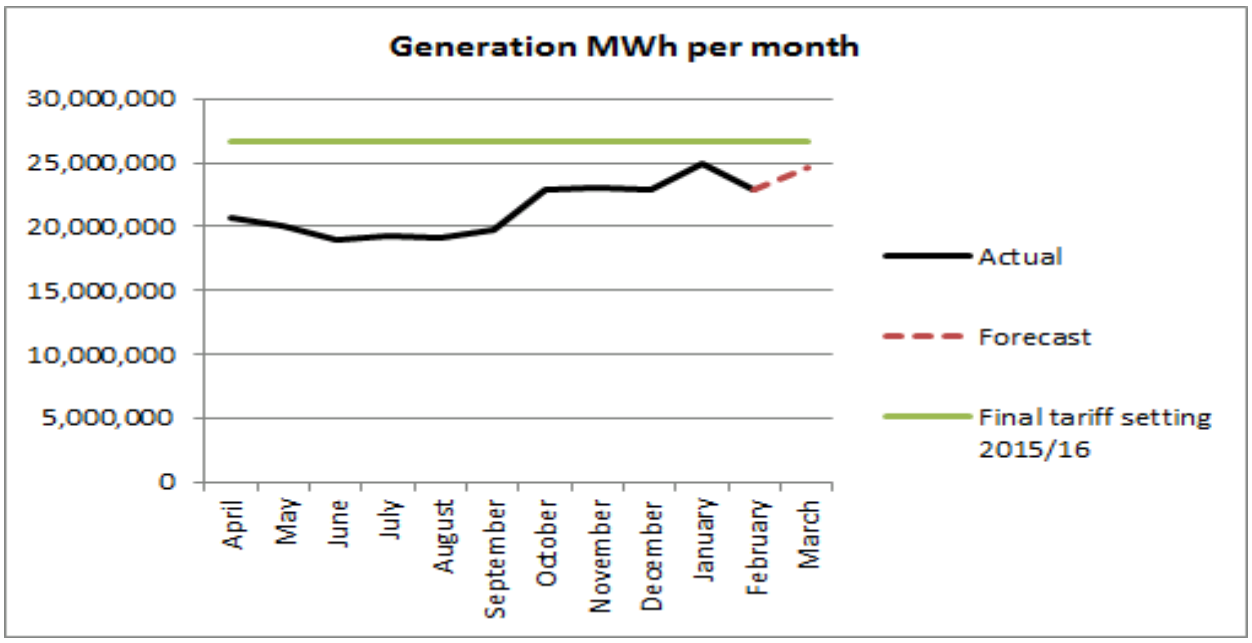
Total TNUoS cost in GB (£) to be recovered from Generators;
£/€ exchange rate for the year in question; and
Total MWh from generating stations which pay TNUoS

These three values allow National Grid to establish a forecast average GB generation transmission cost in €/MWh. If the upper limit of €2.50/MWh is to be exceeded, then National Gird vary the proportion of (1) - the Total TNUoS cost in GB (£) to be recovered from Generators - in order to bring the charges below the upper limit of €2.50/MWh.

It is apparent now that deviations over time from the original (January 2015) forecast of the €/£ exchange rate and the total MWh from generating stations will be such that the average annual generation cost for GB generators in charging year 2015/16 will be substantially in excess of the €2.50/MWh upper limit set in the Regulation.
The following two graphs illustrate these deviations. As can clearly be seen, at no point from the 1st April 2015 to 29th February 2016 have either of the two variables reached the levels forecast in January 2015 (when the charges for 2015/16 were set).

157 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:250:0005:0011:EN:PDF





If this defect is not corrected, it will result in an exceedance of the upper limit set in EU Regulation 838/2010 Part B (paragraph 3) of €2.50/MWh for the average annual amount to be recovered from generators in Great Britain in charging year 2015/16.

Our indicative estimate, based on publically available information (as at the end of February) is that this exceedance could result in the average annual TNUoS charges paid by generators in GB, in charging year 2015/16, amounting to circa €3.25 /MWh, which is approximately €0.75/MWh, or 30%, in excess of the €2.50/MWh upper limit in the Regulation.

		NG published Jan final 2015/16	March 2016 €/£ revert to 1.22	March 2016 €/£ flat
		Jan-2015	Mar-2016	Mar-2016
Cap Euro/MWh	*€/MWh*	2.50		
Target Euro/MWh	*€/MWh*	2.34		
Expected Exchange Rate	*€:£*	1.22		
Expected Cap Sterling	*£/MWh*	1.92		
Expected Output	*TWh*	320		
Expected Revenue	*£M*	613	613	613
Expected Outturn Exchange Rate	*€:£*		1.357	1.366
Expected Outturn Generation	*TWh*		259	259
Expected Revenue collected from generators	*€m*		832	837
Expected Outturn unit revenue	*€/MWh*		3.21	3.23
Excess Unit Revenue	*€/MWh*		0.71	0.73
Excess Revenue	*€m*		184	190
Generation Capacity	*GW*		71.5	71.5
Reduction in TNUoS generation charge	*€/kW*		2.58	2.66
Exchange Rate	*€:£*		1.360	1.360
Reduction in TNUoS generation charge	*£/kW*		1.89	1.95

As can be seen from the table above, if the proposal were to taken forward and the numbers we have used here are broadly in line with the year-end outturn(s) then GB generators would, in spring 2016, receive a reconciliation payment, via the residual, in the order of £2/kW.

If there were no mechanism within the CUSC / Transmission Licence to change the TNUoS charges paid by GB generators in a given charging year once they had been set (in January of any particular year) for a charging year (starting 1st April till the following 31st March) then it would not be possible to make a reconciliation payment to generators.

However, this is not the case in GB. A 'mid-year'158 tariff change mechanism does exist and has been used before - in charging year 2010/11 (with respect to costs associated with offshore transmission) – and can thus, if required, be used again.)

Given that a method exists to avoid exceeding the €2.50MWh upper limit set out in EU law (by way of a 'mid-year' tariff change) it is appropriate to act urgently to bring about a tariff change which will ensure that the GB generation charges conform with the limits set in the Regulation.

Description of the CUSC Modification Proposal

Based on the solution set out in the CMP251 Workgroup Consultation (dates 29th February 2016) an *ex post* reconciliation of the TNUoS paid by GB generators during charging year 2015/16 would take place in spring 2016 with any amount in excess of the €2.50MWh upper limit being paid back, via a negative generator residual levied on all GB generators who have paid TNUoS during the period 1st April 2015 to 31st March 2016 inclusive. In other words each generator would receive a credit of '£X' for each MW of TEC they held during the period in question.

The high level detail for this was noted in paragraph 4.12 (of the CMP251 consultation) accordingly:-

"*In the event an ex post process was adopted, National Grid confirmed that a good enough set of data for Generator reconciliation is available at D+23 as per the existing standard metering settlement timescales. Presently a generation reconciliation process is carried out at the end of April (in t+1) to take account of power station demand and generation in negative TNUoS charging zones in the preceding Charging Year t*."

If this new proposal were to be approved then this reconciliation, for charging year 2015/16, would thus occur in a similar timeframe.

[158] Note 'mid-year' does not mean the mid-point in the charging year – a change could occur on, for example, the 2nd April or 30th March or anytime in between during the charging year.

In respect of the reconciliation payments made to generators in spring 2016 (for charging year 2015/16) there would also need to be a corresponding payment made, via demand TNUoS charges, from suppliers.

The CMP251 Workgroup has considered (as set out in their February Consultation) three options (paragraphs 4.8-4.22). For the sake of brevity we do not repeat the details here – but those matters should be read as being incorporated here.

Of those three options we believe that Option 1 should apply, which means that with this proposal the generator reconciliation payments (for charging year 2015/16) are made in spring 2016 and would be recovered from suppliers (along with any financing cost, if applicable) during charging year 2017/18.

Impact on the CUSC

CUSC Section 14 – Part 2 – The Statement of the Use of System Charging Methodology,
Section 1 – The Statement of the Transmission Use of System Charging Methodology

Do you believe the CUSC Modification Proposal will have a material impact on Greenhouse Gas Emissions? Yes / No

No

Impact on Core Industry Documentation. Please tick the relevant boxes and provide any supporting information

BSC ☐

Grid Code ☐

STC ☐

Other ☐

(please specify)

This is an optional section. You should select any Codes or state Industry Documents which may be affected by this Proposal and, where possible, how they will be affected.

Urgency Recommended: Yes / No

Yes.

Justification for Urgency Recommendation

This proposal should be treated as urgent as it is linked to an imminent date related issue; namely that the average annual amount to be recovered from generators in Great Britain in charging year 2015/16 will exceed the €2.50/MWh limit set out in EU law (Commission Regulation (EU) No 838/2010, Part B paragraph 3) that if not urgently addressed may cause:

One or more parties to be in breach of relevant legal requirement(s); and / or
A significant commercial impact on generator parties.

If this proposal is not treated as urgent then we believe the only alternative, to ensure GB generation costs are compliance with the €2.50/MWh limit, will be for a retrospective change to the 2015/16 generator TNUoS tariffs to occur after the end of the 2015/16 charging year.

Notwithstanding that, we note that the Ofgem Urgency Criteria does permit a retrospective modification in exceptional circumstances, on a case by case basis, and including:

"where the possibility of a retrospective action had been clearly flagged to the participants in advance, allowing the detail and process of the change to be finalised with retrospective effect"

For the avoidance of doubt given: (i) that the €2.50/MWh upper limit has been known since the Regulation was brought into effect (in 2010); (ii) that the possibility of GB exceeding this €2.50/MWh limit during charging year 2015/16 was brought to the attention of the industry previously, such as in January 2015[159], May 2015[160] and August 2015[161]; and (iii) that the possibility of corrective action being required to be taken, in the form of a 'mid-year' tariff change, was also highlighted (in, for example, January 2015 and May 2015 as referenced above); we believe that this current proposal (if judged as being 'retrospective') would fully conform with the 'retrospective' elements stated in the Ofgem Urgency Criteria.

Self-Governance Recommended: Yes / No

No

Justification for Self-Governance Recommendation

N/A

Should this CUSC Modification Proposal be considered exempt from any ongoing Significant Code Reviews?

Yes

Impact on Computer Systems and Processes used by CUSC Parties:

N/A

[159] CUSC Panel minutes 4409-4411.
[160] CUSC Panel minutes 4597-4600.
[161] in the CMP251 proposal form 'description of defect' (dated 19th August 2015)

Details of any Related Modification to Other Industry Codes

N/A

Justification for CUSC Modification Proposal with Reference to Applicable CUSC Objectives for Charging:

Please tick the relevant boxes and provide justification for each of the Charging Methodologies affected.

Use of System Charging Methodology

☒ **(a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity;**

☒ **(b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection);**

☐ **(c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses.**

☒ **(d) compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency.**

These are defined within the National Grid Electricity Transmission plc Licence under Standard Condition C10, paragraph 1.

Objective (c) refers specifically to European Regulation 2009/714/EC. Reference to the Agency is to the Agency for the Cooperation of Energy Regulators (ACER).

Full justification:

In respect of (a) it (i) removes the uncertainty / risk of infraction proceedings; and (ii) it removes uncertainty / risk of changes to charges at a later date. These uncertainties / risks undermine generators/suppliers commercial positions and therefore interfere with the correct functioning of the markets in generation and supply of electricity.

In respect of (b) by ensuring that the charges are set in accordance with the regulation this will ensure they are more reflective of costs than if this change were not undertaken.

In respect of (d) Regulation (EC) No 714/2009 and Commission Regulation 838/2010 are binding for all Transmission licensees across Europe. We believe that this proposal ensures that GB remains compliant with the European legislation and properly reflects National Grid's duties in the development of its transmission business.

Additional details

Details of Proposer: (Organisation Name)	SSE
Capacity in which the CUSC Modification Proposal is being proposed: (i.e. CUSC Party, BSC Party or "National Consumer Council")	CUSC Party
Details of Proposer's Representative: Name: Organisation: Telephone Number: Email Address:	**Angus MacRae** **SSE** **01738 456000** **angus.macrae@sse.com**
Details of Representative's Alternate: Name: Organisation: Telephone Number: Email Address:	Garth Graham SSE 01738 456000 garth.graham@sse.com
Attachments (Yes/No): **If Yes, Title and No. of pages of each Attachment:**	

Contact Us

If you have any questions or need any advice on how to fill in this form please contact the Panel Secretary:

E-mail cusc.team@nationalgrid.com

Phone: 01926 653606

For examples of recent CUSC Modifications Proposals that have been raised please visit the National Grid Website at http://www2.nationalgrid.com/UK/Industry-information/Electricity-codes/CUSC/Modifications/Current/

Submitting the Proposal

Once you have completed this form, please return to the Panel Secretary, either by email to jade.clarke@nationalgrid.com copied to cusc.team@nationalgrid.com, or by post to:

Jade Clarke
CUSC Modifications Panel Secretary, TNS
National Grid Electricity Transmission plc
National Grid House
Warwick Technology Park
Gallows Hill
Warwick
CV34 6DA

If no more information is required, we will contact you with a Modification Proposal number and the date 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, the Proposal can be rejected. You will be informed of the rejection and the Panel will discuss the issue at the next meeting. The Panel can reverse the Panel Secretary's decision and if this happens the Panel Secretary will inform you.

Annex 2 – CMP261 Terms of Reference

CMP261 aims to ensure that there is an ex post reconciliation of the TNUoS paid by GB Generators during charging year 2015/16 which will take place in Spring 2016 with any amount in excess of the €2.5/MWh upper limit being paid back, via a negative Generator residual levied on all GB Generators who have paid TNUoS during the period 1st April 2015 to 31st March 2016 inclusive.

Responsibilities

1. **The Workgroup is responsible for assisting the CUSC Modifications Panel in the evaluation of CUSC Modification Proposal** CMP261 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015

2. /16 are in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'. **tabled by British Gas at the CUSC Modifications Panel meeting on 28th August 2015.**

3. **The proposal must be evaluated to consider whether it better facilitates achievement of the Applicable CUSC Objectives. These can be summarised as follows:**

   Use of System Charging Methodology

   (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity;

   (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection);

   (c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses.

   (d) compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency.

4. **It should be noted that additional provisions apply where it is proposed to modify the CUSC Modification provisions, and generally reference should be made to the Transmission Licence for the full definition of the term.**

Scope of work

5. **The Workgroup must consider the issues raised by the Modification Proposal and consider if the proposal identified better facilitates achievement of the Applicable CUSC Objectives.**

6. **In addition to the overriding requirement of paragraph 4, the Workgroup shall consider and report on the following specific issues:**

   a) *Implementation*
   b) *Review draft legal text*
   c) *Consider the legality of breaching the regulation then reconciling the difference the following year.*
   d) *Assess impact on competition*
   e) *Assess impact on Suppliers*
   f) *Assess impact on consumers*
   g) *Consider any interaction with related CUSC Modification Proposals.*
   h) *Consider when €2.50 is to be calculated.*
   i) *Consider two year delay in funds being transferred between Generators and Suppliers.*

7. The Workgroup is responsible for the formulation and evaluation of any Workgroup Alternative CUSC Modifications (WACMs) arising from Group discussions which would, as compared with the Modification Proposal or the current version of the CUSC, better facilitate achieving the Applicable CUSC Objectives in relation to the issue or defect identified.

8. **The Workgroup should become conversant with the definition of Workgroup Alternative CUSC Modification which appears in Section 11 (Interpretation and Definitions) of the CUSC. The definition entitles the Group and/or an individual member of the Workgroup to put forward a WACM if the member(s) genuinely believes the WACM would better facilitate the achievement of the Applicable CUSC Objectives, as compared with the Modification Proposal or the current version of the CUSC. The extent of the support for the Modification Proposal or any WACM arising from the Workgroup's discussions should be clearly described in the final Workgroup Report to the CUSC Modifications Panel.**

9. Workgroup members should be mindful of efficiency and propose the fewest number of WACMs possible.

10. All proposed WACMs should include the Proposer(s)'s details within the final Workgroup report, for the avoidance of doubt this includes WACMs which are proposed by the entire Workgroup or subset of members.

11. There is an obligation on the Workgroup to undertake a period of Consultation in accordance with CUSC 8.20. The Workgroup Consultation period shall be for a period of 15 days as determined by the Modifications Panel.

12. Following the Consultation period the Workgroup is required to consider all responses including any WG Consultation Alternative Requests. In undertaking an assessment of any WG Consultation Alternative Request, the Workgroup should consider whether it better facilitates the Applicable CUSC Objectives than the current version of the CUSC.

    As appropriate, the Workgroup will be required to undertake any further analysis and update the original Modification Proposal and/or WACMs. All responses including any WG Consultation Alternative Requests shall be included within the final report including a summary of the Workgroup's deliberations and conclusions. The report should make it clear where and why the Workgroup chairman has exercised his right under the CUSC to progress a WG Consultation Alternative Request or a WACM against the majority views of Workgroup members. It should also be explicitly stated where, under these circumstances, the Workgroup chairman is employed by the same organisation who submitted the WG Consultation Alternative Request.

13. The Workgroup is to submit its final report to the Modifications Panel Secretary on 20th May 2016 for circulation to Panel Members. The final report conclusions will be presented to the CUSC Modifications Panel meeting on 23rd May 2016.

Membership

14. It is recommended that the Workgroup has the following members:

Role	Name	Representing
Chairman	Nikki Jamieson	Code Administrator
*National Grid Representative**	Nick Pittarello	National Grid
*Industry Representatives**	Garth Graham	SSE
	Matthew Hulks	Intergen
	Lucas Lilja	Intergen
	Guy Phillips	EON/Uniper
	Paul Jones	EON/uniper
	Peter Bolitho	Waters Wye
	Jeremy Guard	First Utility
	George Douthwaite	Npower
	Daniel Hickman	Npower
	Joe Underwood	Drax power
	Binoy Dharsi	EDF
	Simon Vicary	EDF
	George Moran	British Gas
	Karl Maryon	Haven Power
	Jeremy Guard	First Utility
Alternatives		
Authority Representatives	Donald Smith	Ofgem
Technical secretary	Ryan Place	Code Administrator
Observers		

NB: A Workgroup must comprise at least 5 members (who may be Panel Members). The roles identified with an asterisk in the table above contribute toward the required quorum, determined in accordance with paragraph 14 below.

15. The Chairman of the Workgroup and the Modifications Panel Chairman must agree a number that will be quorum for each Workgroup meeting. The agreed figure for CMP261 is that at least 5 Workgroup members must participate in a meeting for quorum to be met.

16. A vote is to take place by all eligible Workgroup members on the Modification Proposal and each WACM. The vote shall be decided by simple majority of those present at the meeting at which the vote takes place (whether in person or by teleconference). The Workgroup chairman shall not have a vote, casting or otherwise. There may be up to three rounds of voting, as follows:

- Vote 1: whether each proposal better facilitates the Applicable CUSC Objectives;
- Vote 2: where one or more WACMs exist, whether each WACM better facilitates the Applicable CUSC Objectives than the original Modification Proposal*;*
- Vote 3: which option is considered to BEST facilitate achievement of the Applicable CUSC Objectives. For the avoidance of doubt, this vote should include the existing CUSC baseline as an option.

The results from the vote and the reasons for such voting shall be recorded in the Workgroup report in as much detail as practicable.

17. It is expected that Workgroup members would only abstain from voting under limited circumstances, for example where a member feels that a proposal has been insufficiently developed. Where a member has such concerns, they should raise these with the Workgroup chairman at the earliest possible opportunity and certainly before the Workgroup vote takes place. Where abstention occurs, the reason should be recorded in the Workgroup report.

18. Workgroup members or their appointed alternate are required to attend a minimum of 50% of the Workgroup meetings to be eligible to participate in the Workgroup vote.

19. The Technical Secretary shall keep an Attendance Record for the Workgroup meetings and circulate the Attendance Record with the Action Notes after each meeting. This will be attached to the final Workgroup report.

20. The Workgroup membership can be amended from time to time by the CUSC Modifications Panel.

Appendix 1 – Indicative Workgroup Timetable

The following timetable is indicative for CMP261:

16th March 2016	Deadline for comments on Terms of Reference / nominations for Workgroup membership
23rd March 2016	Workgroup meeting 1
29th April 2016	Workgroup meeting 2
17th May 2016	Workgroup meeting 3
26th May 2016	Workgroup meeting 4
6th June 2016	Workgroup meeting 5
5th July 2016	Workgroup Consultation issued
26th July 2016	Deadline for comment
8th Aug 2016	Workgroup meeting 6
9th Aug 2016	Workgroup meeting 7
5th September 2016	Workgroup meeting 8
12th September 2016	Workgroup meeting 9
16th September 2016	Workgroup meeting 10
3rd October 2016	Workgroup meeting 11
11th October 2016	Workgroup meeting 12
17th October 2016	Submit final Workgroup Report to Panel
25th October 2016	Present Workgroup Report at Special CUSC Panel
7th March 2017	Workgroup meeting 13 following sendback
8th March 2017	Workgroup meeting 14 following sendback
16th March 2017	Workgroup meeting 15 following sendback
27th March 2017	Workgroup meeting 16 following sendback
12th April 2017	Workgroup meeting 17 following sendback
24th April 2017	Workgroup meeting 18 following sendback
5th May 2017	Workgroup meeting 19 following sendback
15th May 2017	Workgroup meeting 20 following sendback
26th May 2017	Present Workgroup Report at CUSC Panel

Post Workgroup modification process

26th May 2017	Code-Administrator Consultation published
9th June 2016	Deadline for responses
12th June 2017	Draft Final Modification Report published
12th June 2017	Draft Final Modification Report issued to CUSC Panel

15th June 2017	Deadline for comments
16th June 2017	Special CUSC Panel Recommendation vote
21st June 2017	Final CUSC Modification Report submitted to Authority

Annex 3 – Workgroup attendance register

A – Attended
X – Absent
O – Alternate
D – Dial-in

Name	Organisation	Role	23rd March 2016	29th April 2016	17th May 2016	26th May 2016	6th June 2016	8th Aug 2016	9th Aug 2016	5th Sept 2016	12th Sept 2016	16th Sept 2016
Nikki Jamieson	National Grid	Chair	A	X	A	D	A	A	X	D	D	D
Andy Wainwright	National Grid	Chair	X	X	X	X	X	X	A	X	X	X
Wayne Mullins	National Grid	Chair	X	A	X	X	X	X	X	X	X	X
Ryan Place	Code Administrator	Technical Secretary	A	A	A	D	A	A	A	D	D	D
Donald Smith	Ofgem	Authority Representative	A	A	A	D	A	A	A	D	D	D
Garth Graham	SSE	Proposer	A	A	A	D	A	A	A	D	D	D
Nick Pittarello	National Grid	Workgroup member	A	A	A	D	A	A	A	D	D	D
Damian Clough	National Grid	Workgroup member	X	X	X	X	X	X	A	D	X	D
Stuart Boyle	National Grid	Workgroup Technical Expert	A	X	X	X	X	X	X	X	X	X
George Douthwaite	RWE Npower	Workgroup member	A	X	A	D	A	X	D	X	X	D
Daniel Hickman	RWE Npower	Workgroup alternate	X	OA	X	X	X	X	X	OD	X	X
Peter Bolitho	Waters Wye (on behalf of Eggborough Power).	Workgroup member	A	A	A	D	A	A	A	D	X	D
George Moran	British Gas	Worgroup member	A	A	A	D	A	A	A	D	D	D
Guy Phillips	Uniper/EON	Workgroup member	X	A	A	X	A	X	X	X	X	X
Paul Jones	Uniper/EON	Workgroup alternate	OA	X	X	X	X	X	X	X	X	X
Joseph Underwood	Drax	Workgroup member	A	A	X	D	A	A	A	X	X	X
Karl Maryon	Haven Power	Workgroup member	D	A	A	D	A	A	A	D	D	X
Binoy Dharsi	EDF Energy	Workgroup member	D	A	X	X	X	X	X	X	X	X
Simon Vicary	EDF Energy	Workgroup alternate	X	X	A	D	A	A	A	D	D	D
Matthew Hulks	Intergen	Workgroup member	D	X	X	X	X	X	X	X	D	X
Lucas Lilja	Intergen	Workgroup alternate	X	OD	X	OD	OD	OD	OD	X	X	D
Jeremy Guard	First Utility	Workgroup member	A	A	A	D	A	A	X	X	D	X

A – Attended
X – Absent
O – Alternate
D – Dial-in

Name	Organisation	Role	3rd Oct 2016	11th Oct 2016	7th March 2017	8th March 2017	16th March 2017	27th March 2017	12th April 2017	24th April 2017	5th May 2017	15th May 2017
Nikki Jamieson	National Grid	Chair	A	D	A	A	A	A	A	A	A	A
Andy Wainwright	National Grid	Chair	X	X	X	X	X	X	X	X	X	X
Wayne Mullins	National Grid	Chair	X	X	X	A	X	X	X	X	X	X
Ryan Place	Code Administrator	Technical Secretary	A	D	A	A	A	A	A	A	A	A
Donald Smith	Ofgem	Authority Representative	A	X	D	D	D	D	D	D	D	D
Garth Graham	SSE	Proposer	A	D	A	A	A	A	A	A	A	D
Nick Pittarello	National Grid	Workgroup member	A	D	A	A	A	A	X	X	X	X
Louise Schmitz	National Grid	Workgroup alternate	A	D	X	X	X	X	A	A	A	A
Damian Clough	National Grid	Workgroup member	X	X	X	X	X	X	X	X	X	X
Stuart Boyle	National Grid	Workgroup Technical Expert	A	D	X	X	X	X	X	X	X	X
George Douthwaite	RWE Npower	Workgroup member	X	X	A	A	A	D	A	A	A	A
Daniel Hickman	RWE Npower	Workgroup alternate	A	X	X	X	X	X	X	X	X	X
Peter Bolitho	Waters Wye (on behalf of Eggborough Power).	Workgroup member	A	X	A	A	A	A	A	A	A	A
George Moran	British Gas	Workgroup member	X	X	A	A	A	A	D	A	A	D
Guy Phillips	Uniper/EON	Workgroup member	X	D	X	X	X	X	X	X	X	X
Paul Jones	Uniper/EON	Workgroup alternate	A	X	A/O	A/O	X	X	X	X	X	D
Joseph Underwood	Drax	Workgroup member	A	D	A	A	A	X	A	A	A	D
Karl Maryon	Haven Power	Workgroup member	X	X	D	A	X	A	A	X	X	X
Binoy Dharsi	EDF Energy	Workgroup member	A	D	A	A	X	X	X	X	X	X
Simon Vicary	EDF Energy	Workgroup alternate	D	D	A	A	A	D	A	A	A	A
Matthew Hulks	Intergen	Workgroup member	X	X	D	D	D	D	D	X	D	X
Lucas Lilja	Intergen	Workgroup alternate	A	X	X	X	X	X	X	D/O	X	X
Jeremy Guard	First Utility	Workgroup member	A	X	X	X	A	A	A	X	A	X

Annex 4 – Workgroup Consultation Responses

CUSC Workgroup Consultation Response Proforma

CMP261 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'

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

Please send your responses by **28th July 2016** to cusc.team@nationalgrid.com Please note that any responses received after the deadline or sent to a different email address may not receive due consideration by the Workgroup.

Any queries on the content of the consultation should be addressed to Ryan Place at ryan.place@nationalgrid.com

These responses will be considered by the Workgroup at their next meeting at which members will also consider any Workgroup Consultation Alternative Requests. Where appropriate, the Workgroup will record your response and its consideration of it within the final Workgroup Report which is submitted to the CUSC Modifications Panel.

Respondent:	*George Moran* *George.moran@britishgas.co.uk*
Company Name:	*British Gas*
Please express your views regarding the Workgroup Consultation, including rationale. **(Please include any issues, suggestions or queries)**	For reference, the Applicable CUSC objectives are: **Use of System Charging Methodology** (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity; (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection); (c) that, so far as is consistent with sub-paragraphs (a)

	and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses. (d) Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency.

Standard Workgroup consultation questions

Q	Question	Response

Q	Question	Response
1	**Do you believe that CMP261 Original Proposal or either of the potential options for change better facilitates the Applicable CUSC Objectives? Please give your reasoning.**	We do not believe CMP261 Original Proposal or any of the potential options identified better facilitate the CUSC objectives. **Applicable Objective (a)** Under CMP224, compliance with the relevant EU Regulation is managed via an ex-ante approach with no reconciliation. This was the accepted expectation of the market. The examples presented in paragraph 2.34 of the consultation show that National Grid and market participants were aware that the €2.50/MWh limit might have been exceeded during 2015/16. This demonstrates that the accepted expectation of the market was that there would be no mid-year tariff change or reconciliation in respect of the cap. National Grid did not, at any point, propose any mid-year tariff change to address the potential exceedance – which, as has been shown, would have been fully visible to it. Therefore all of the options perform worse against applicable objective (a) as the unexpected nature of this modification would damage competition because the impact on parties, and parties' ability to manage those impacts, will vary. The retrospective nature of the changes could also lead to increased risk premiums applied to future tariffs. **Applicable Objective (b)** The principles underpinning the charging methodology, including the default proportion of revenue to be recovered from generators, are approved as meeting objective (b). Therefore, any unnecessary restrictions on how these principles are translated into charges are detrimental to meeting objective (b). To the extent that the proposed retrospective change moves Generation tariffs yet further from the default position in the methodology, CMP261 performs worse against applicable objective (b). **Applicable Objective (d)** CMP261 has no impact on Objective (d) as the current methodology is compliant with the relevant EU Regulation. This is clear as: • There has been no enforcement action taken or (as far as we are aware) being considered. • The legal advice does not conclude that National Grid is not compliant. Until such time as non-compliance is found, and given the uncertainty surrounding whether such a finding would be achievable, no impact can be assessed against objective (d).

Q	Question	Response
2	**Do you support the proposed implementation approach?**	We do not support the modification. However, any implementation should seek to limit or avoid windfalls. This will require options which delay the reconciliations to G&D tariffs.
3	**Do you have any other comments?**	The workgroup should consider more fully the impact on consumers.
4	**Do you wish to raise a WG Consultation Alternative Request for the Workgroup to consider?**	No

Specific questions for CMP261

Q	Question	Response
5	**Do you have any comments on the legal opinion?**	The legal opinion in 9a and 9b states: a. there is a *strong argument* that a material breach of the €2.50/MWh G Charges limit in respect of the 2015/16 charging year equates to non-compliance with the Guidelines Regulation; b. as a result, we are of the view that reconciliation of G Charges for the 2015/16 charging year *would be prudent*; It is not clear for whom it would be prudent to make reconciliation, and we disagree that it is the prudent course of action. National Grid has not been found to be in breach of the Regulation. It is also highly uncertain whether it could be found to be in breach of the Regulation. In such circumstances it does not make sense to make any reconciliation payment since to do so would provide a windfall of up to £119m to generators simply in order to avoid the risk of National Grid actually being found in breach of the Regulation and being required to reconcile up to £119m to generators. We consider the 'prudent' course of action would be to consider approval of CMP261 only if National Grid is found to be in breach of the Regulation.
6	**Is ex ante certainty preferred over ex post accuracy?**	Ex-ante certainty was believed to have been provided by CMP224. Having identified defects in the CMP224 methodology, the appropriate response is to improve the methodology going forward, as is proposed by CMP251, not to retrospectively change the methodology as is now proposed by CMP261.

Q	Question	Response
7	**Do you believe a breach of the Regulation has occurred for Charging Year 2015/16? If so do you believe that an ex post reconciliation should be carried out?**	Regardless of whether the €2.50 limit has been breached (which is unclear at this stage) we do not believe a breach of the Regulation has occurred. We agree that the nature of the Regulation is purposive and National Grid acted with the purpose of complying with the Regulation, as is clearly demonstrated by the use of an error margin. At the very least, there is significant uncertainty as to whether a breach of the Regulation has occurred. It is also highly uncertain that National Grid, even if found to be non-compliant, would be required to take retrospective actions. It is potentially more likely, given the purposive nature of EU Regulation, that action would only be required prospectively (in line with CMP251). In figure six of the consultation six calculations are presented using different potential interpretations of generation output, exchange rate and the strict/broad interpretation relating to local circuits. In only two of these potential interpretations do 2015/16 generation charges exceed €2.50/MWh. We agree with the position presented by the Ofgem representative that the CMP224 decision was based on the view that the words "charges in respect of assets required to connect to the system" were ambiguous. Ofgem, therefore, approved a CMP224 option that would comply with either the 'strict' or the 'broad' interpretation, whichever was correct, on the grounds of legal risk. This ambiguity would be required to be resolved (and would require the conclusion that the 'strict' interpretation was correct) before a breach of the €2.50 limit can be established. We would also highlight that no consideration has been given as to whether the 'actual' generation output being used in the analysis is consistent with the Regulation. It is plausible that "*Generation Output for generation liable for Transmission charges*", as is being used in the analysis, is not consistent with the Regulation definition which requires "*total measured energy injected annually by producers to the transmission system*". It is a statement of fact that National Grid has not been found to be in breach of the Regulation. As highlighted above, it is also uncertain whether it could be found to be in breach of the Regulation and further whether this would require retrospective action. In such circumstances it does not make sense to make a reconciliation payment of up to £119m to avoid the risk of being compelled to make a reconciliation payment of £119m. As this also leads to windfalls, it should be considered an imprudent course of action.

Q	Question	Response
8	**If an ex post reconciliation was to be adopted how quickly should the reconciliation be completed?**	We also note that the Legal advice states: *"The G Charges Guidelines do not mandate how such a reconciliation should be performed, and therefore the way in which (and the speed at which) such a reconciliation is performed under the CUSC is a matter for wider policy and financial consideration, as opposed to the G Charge Guidelines mandating an approach."* We consider that options which delay the reconciliation are preferable to adjustments with shorter notice periods. In this exceptional circumstance, given the unexpected nature of any additional costs to be passed onto suppliers, we believe any reconciliation affecting suppliers should not occur before 2018/19 at the earliest. For any generator reconciliation, we consider that the regulation applies more generally to the charging regime and to this extent we see no issues with the G adjustments being made via general tariff adjustments. Delaying the adjustment by two years would also be in line with the accepted charging approach for other elements of TNUoS – for example: • over/under recoveries of allowed revenue • Incentive payments/penalties • Pass-through cost true-ups In each of the above examples, the required adjustments to revenues are recovered via general tariffs in year t+2, i.e. not applied to the specific generators/suppliers in year t who may have over/under paid or who may have received the 'performance'. There would seem to be a strong rationale and precedence for taking such an approach to any reconciliation under CMP261 also. Delaying the G reconciliation to 2017/18, or even 2018/19 in this exceptional circumstance, would increase the likelihood of some of the windfall to generators being passed back to consumers.
9	**Are there trade-offs between speed of reconciliation and the most appropriate process?**	We believe that any reconciliation that may be required should seek to limit or avoid windfalls to generators and losses to suppliers and consumers. This will require options which delay the reconciliations to G&D tariffs.
10	**Do you believe any harm has been done in the spirit of the defect identified?**	No – tariffs were set for 2015/16 under a methodology which was accepted as an ex-ante methodology. Therefore there has been no over-charging of TNUoS to generators above that which they expected once tariffs were set. Until such time as National Grid are found to be actually 'in breach' of the regulation, the concept of 'harm' is not relevant.

Q	Question	Response
11	**Do you believe that Generators contracting to sell output or set market prices do so at a level that assumes the €2.50MWh CAP will be complied with regardless of the tariffs set by National Grid? If you have any supporting information please provide this directly to Ofgem directly.**	Under CMP224 compliance with the relevant EU Regulation is managed via an ex-ante approach with no reconciliation. This was the accepted expectations of the market. The examples presented in paragraph 2.34 of the consultation which show that National Grid and market participants were aware that the €2.50/MWh limit might have been exceeded during 2015/16 simply serve as evidence that the accepted expectations of the market was that there would be no mid-year tariff change or reconciliation in respect of the cap since at no point during 2015/16 did National Grid propose any mid-year tariff change to address the potential exceedence – which, as has been demonstrated, would have been visible to it and market participants. Indeed, in two of the examples presented in the consultation it was explicitly expressed that there would be no revisiting of 2015/16 charges: In the May CUSC Panel minutes: *4598. PH* [of National Grid] *noted the CMP224 Workgroup came up with the solution and there* ***was no intention of reviewing this****.* In the August CUSC Panel minutes: *4690. GG noted that if the Urgent timetable was followed; with, potentially, implementation in late December 2015; that there would be an impact on Suppliers in January 2016 in terms of reconciling the €0.15 'overcharge' identified in the Proposers' presentation for calendar year 2015.* ***GM disagreed with this. GM Clarified that the intention was that the change would not be applied retrospectively for the 2015/16 charging year*** *but would amend the methodology from 2016/17 onwards. The Panel agreed to include this within the Terms of Reference for the Workgroup.*

CUSC Workgroup Consultation Response Proforma

CMP261 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'

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

Please send your responses by **28th July 2016** to cusc.team@nationalgrid.com Please note that any responses received after the deadline or sent to a different email address may not receive due consideration by the Workgroup.

Any queries on the content of the consultation should be addressed to Ryan Place at ryan.place@nationalgrid.com

These responses will be considered by the Workgroup at their next meeting at which members will also consider any Workgroup Consultation Alternative Requests. Where appropriate, the Workgroup will record your response and its consideration of it within the final Workgroup Report which is submitted to the CUSC Modifications Panel.

Respondent:	*Lucas Lilja*
Company Name:	*InterGen*
Please express your views regarding the Workgroup Consultation, including rationale. **(Please include any issues, suggestions or queries)**	For reference, the Applicable CUSC objectives are: **Use of System Charging Methodology** (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity; (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection); (c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far

	as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses. (d) Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency.

Standard Workgroup consultation questions

Q	Question	Response
1	**Do you believe that CMP261 Original Proposal or either of the potential options for change better facilitates the Applicable CUSC Objectives? Please give your reasoning.**	We believe there has been a breach of the €2.50/MWh CAP set by EU Regulation 838/2010, which requires a reconciliation or rebate equal to £1.71/kW, as per the SSE approach in Figure 10, Annex 5 of the workgroup report. In our opinion, either the Original Proposal or Option A best facilitates CUSC objectives a) b) d). As InterGen does not own a supply side business we are not in a position to comment on whether suppliers would prefer a tariff adjustment in 2017/18 or 2018/19. Regarding objective a) it reduces future uncertainty and risks of tariff changes. Regarding objective b), as there has been an over-recovery from GB generators, the proposal would ensure charges are more reflective of costs. Regarding objective d) this modification would ensure that the GB remains compliant with EU Regulation 838/2010.
2	**Do you support the proposed implementation approach?**	Yes, the proposed options outlined in section 5 of the workgroup report seem logical.
3	**Do you have any other comments?**	
4	**Do you wish to raise a WG Consultation Alternative Request for the Workgroup to consider?**	*If yes, please complete a WG Consultation Alternative Request form, available on National Grid's website[1], and return to the CUSC inbox at cusc.team@nationalgrid.com*

Specific questions for CMP261

[1] http://www.nationalgrid.com/uk/Electricity/Codes/systemcode/amendments/forms_guidance/

Q	Question	Response
5	**Do you have any comments on the legal opinion?**	The legal opinion, in our view, supports that there has been a material breach of the €2.50/MWh CAP and that an ex-post reconciliation is therefore required to ensure compliance with the regulation.
6	**Is ex ante certainty preferred over ex post accuracy?**	No, ex-post accuracy is a requirement in this situation. TNUoS paid by generators must remain within the 0 - €2.50/MWh range, to ensure compliance with the regulation. In principle, we prefer ex ante certainty, providing that there exists a reconciliation element (as per CMP251) that would, for example, take place the following charging year, should the TNUoS paid by generators not fall within the 0 - €2.50./MWh in a given charging year.
7	**Do you believe a breach of the Regulation has occurred for Charging Year 2015/16? If so do you believe that an ex post reconciliation should be carried out?**	Yes, we believe there has been a material breach of the €2.50/MWh cap in the 2015/16 charging year, amounting to a generator rebate of £1.71/kW.

Q	Question	Response
8	**If an ex post reconciliation was to be adopted how quickly should the reconciliation be completed?**	An ex-post reconciliation should be adopted as soon as is practically possible.
9	**Are there trade-offs between speed of reconciliation and the most appropriate process?**	In our opinion the €2.50/MWh has been exceeded, and a rebate of £1.71/kW is required to be compliant with the regulation. The most appropriate process must therefore carry out this rebate as soon as is practically possible to ensure compliance.
10	**Do you believe any harm has been done in the spirit of the defect identified?**	We do not believe that the concept of harm is in the scope of this modification as it currently stands, as the modification seeks to ensure that transmission charges remain within the €0 - €2.50/MWh range, so as to remain compliant with the regulation. We do, however, believe that harm has been caused to GB generators, who funded the £119.5m over-recovery, and the longer it takes for this rebate to be carried out the greater the harm done is.
11	**Do you believe that Generators contracting to sell output or set market prices do so at a level that assumes the €2.50MWh CAP will be complied with regardless of the tariffs set by National Grid? If you have any supporting information please provide this directly to Ofgem directly.**	Yes, InterGen operates on the assumption that National Grid will not exceed the €2.50/MWh Cap set by the EU regulation. National Grid have the ability to make a mid-year tariff change. InterGen has also operated on the assumption that the current charging methodology had sufficient safe guards, such as the error margin, to ensure compliance.

CUSC Workgroup Consultation Response Proforma

CMP261 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'

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

Please send your responses by **28th July 2016** to cusc.team@nationalgrid.com Please note that any responses received after the deadline or sent to a different email address may not receive due consideration by the Workgroup.

Any queries on the content of the consultation should be addressed to Ryan Place at ryan.place@nationalgrid.com

These responses will be considered by the Workgroup at their next meeting at which members will also consider any Workgroup Consultation Alternative Requests. Where appropriate, the Workgroup will record your response and its consideration of it within the final Workgroup Report which is submitted to the CUSC Modifications Panel.

Respondent:	*Joe Underwood*
Company Name:	*Drax Power Limited and Haven Power Limited*
Please express your views regarding the Workgroup Consultation, including rationale. **(Please include any issues, suggestions or queries)**	The CMP261 Original and all Potential Alternatives better facilitate the Applicable CUSC Objectives. We believe that the Potential Option for Change A will best facilitate the Objectives. Please see the answers to the Workgroup Consultation questions below for reasoning.

Standard Workgroup consultation questions

Q	Question	Response

Q	Question	Response
1	**Do you believe that CMP261 Original Proposal or either of the potential options for change better facilitates the Applicable CUSC Objectives? Please give your reasoning.**	Yes. We believe that the CMP261 Original and the potential options for change all better facilitate Applicable CUSC Objectives (ACOs) (a), and (d). In the 15/16 charging year, generators were overcharged for transmission charges against the €2.50/MWh cap. This represents a breach of the technical requirements of the guidelines regulation. This position has been supported by legal advice from Addleshaw Goddard, procured by National Grid for the workgroup. Therefore, with respect to ACO (d), CMP261 realigns GB transmission charging for 15/16 with European regulation that takes precedence over the CUSC. Approving CMP261 will reduce the risk of infraction proceedings and remove the uncertainties of future changes to charges that will undermine commercial positions of suppliers and generators thereby better facilitating ACO (a). It is our view that the generator rebate should occur as soon as practical. Recouping revenue from suppliers, however, should allow sufficient time for them to correct their pricing methodology for future charging years. We therefore believe that the potential option A would best facilitate the ACOs with respect to the other options.
2	**Do you support the proposed implementation approach?**	There are a number of potential options for change currently on the table. Generators should be paid back as soon as possible to limit the damage and ensure that we comply with the 838/2010 regulation as soon as possible. Further, suppliers should be given sufficient time to correct their pricing strategies for future charging years to ensure that these costs can be recovered appropriately from customers via TNUoS tariffs.
3	**Do you have any other comments?**	Not at this time.
4	**Do you wish to raise a WG Consultation Alternative Request for the Workgroup to consider?**	Not at this time.

Specific questions for CMP261

Q	Question	Response
5	**Do you have any comments on the legal opinion?**	The legal opinion is heavily weighted in support of reimbursing generators for the 15/16 overcharge. We believe that the generator rebate should take place as soon as possible. Recouping revenue from suppliers, however, should allow sufficient time for them to correct their pricing methodology for future charging years.
6	**Is ex ante certainty preferred over ex post accuracy?**	The current methodology better facilitates efficient trading in the market and provides certainty to market participants. An ex post approach will detrimentally impact the predictability of TNUoS charges and will clearly result in a risk premia being factored into wholesale prices. The increased uncertainty will result in higher costs to the consumer. An ex post reconciliation process will damage competition across generators. The requirement for generators to factor in fluctuations in exchange rate would hinder smaller parties to a greater extent than larger ones, who may have the resources to better manage the risk. An ex post approach will be detrimental to Applicable CUSC Objective (a). We note that the legal opinion provided by Addleshaw Goddard states that "we are of the view that there is a robust argument that the Current Approach ensures compliance with the purpose of the Guidelines Regulation and therefore is not vulnerable to legal challenge by dint of taking [Sic] using ex-ante calculations" Further, "the issues in 2015/16 have arisen from a unique set of circumstances (rather than a fundamental deficiency in the approach to forecasting generation output and €/£ exchange rates, in combination with the use of the Error Margin)". The legal opinion concludes that there is a "robust legal arguments for maintaining the current ex-ante approach going forward." We take the view that there is no legal basis under which an ex-post methodology would better comply with the EU Regulation 838/2010. The current ex ante approach is preferred. However, there may be merit in reviewing the approach to the application of the error margin to reduce the risk of non-compliance. For the avoidance of doubt, this would need to be undertaken separately to CMP261.

Q	Question	Response
7	**Do you believe a breach of the Regulation has occurred for Charging Year 2015/16? If so do you believe that an ex post reconciliation should be carried out?**	The regulation clearly states that average generation transmission charges should not exceed €2.50/MWh. The workgroup has shown that average generation transmission charges for the 15/16 charging year were €3.22/MWh and therefore we believe that a breach has occurred and should be remedied as soon as possible in order to be compliant with EU Regulation.
8	**If an ex post reconciliation was to be adopted how quickly should the reconciliation be completed?**	The legal response states that "The G Charges Guidelines do not mandate how such a reconciliation should be performed" and we therefore believe that a reconciliation that will cause minimal distortion should take place. However, the reconciliation should not be delayed too far. We believe that a suppliers should pay the difference between €2.50/MWh and €3.22/MWh in the 18/19 charging year.
9	**Are there trade-offs between speed of reconciliation and the most appropriate process?**	If the reconciliation process was done in the 17/18 charging year this would seriously impact suppliers, in particular smaller suppliers who may not be able to properly respond to the impact in time. Suppliers generally fix costs within their contracts and many of these contracts covering future years and in particular 2017/18 will already have been signed meaning that increases in costs cannot be recovered directly from customers. However, it is recognised that if the reconciliation was to be delayed, there would be additional costs incurred by National Grid for holding the debt. Therefore a correct balance should be found. We believe that a reconciliation should take place in the 18/19 charging year.
10	**Do you believe any harm has been done in the spirit of the defect identified?**	Impact on market economics. Due to generators being overcharged in the 15/16 charging year, generators have higher costs to recover during period of low market spreads. There may have been an impact to the economic basis of energy flows between Europe and GB which would be detrimental to competition. We believe that the scope of the defined defect should only be to reconcile generators the amount they have been overcharged to bring GB back into alignment with EU regulation and not to address any harm caused.
11	**Do you believe that Generators contracting to sell output or set market prices do so at a level that assumes the €2.50MWh CAP will be complied with regardless of the tariffs set by National Grid? If you have any supporting information please provide this directly to Ofgem directly.**	There are many different variables that affect a generator TNUoS bill which generators have minimal/no visibility of. The difficulties are only amplified by the fact parties are only given 2 months' notice of the final charges. There are lots of variable elements and therefore year on year we don't know how it will change. We therefore rely on National Grid forecasts and therefore can only assume the €2.5/MWh cap will not be breached. It states in EU Regulation 838/2010 that UK generators should not be charged over €2.50/MWh so this is a fair assumption.

CUSC Workgroup Consultation Response Proforma

CMP261 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'

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These responses will be considered by the Workgroup at their next meeting at which members will also consider any Workgroup Consultation Alternative Requests. Where appropriate, the Workgroup will record your response and its consideration of it within the final Workgroup Report which is submitted to the CUSC Modifications Panel.

Respondent:	*Simon Vicary (simon.vicary@edfenergy.com)*
Company Name:	*EDF Energy*
Please express your views regarding the Workgroup Consultation, including rationale. **(Please include any issues, suggestions or queries)**	For reference, the Applicable CUSC objectives are: **Use of System Charging Methodology** (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity; (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection); (c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses. (d) Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency.

Standard Workgroup consultation questions

Q	Question	Response
1	**Do you believe that CMP261 Original Proposal or either of the potential options for change better facilitates the Applicable CUSC Objectives? Please give your reasoning.**	We believe that CMP261 Original Proposal for change better facilitates the CUSC Objectives, in particular (d) "Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency". There is evidence, and in particular a legal opinion supporting the view that there is a breach of the €2.50/MWh annual average limit for TNUoS paid by Generators in GB in Charging Year 2015/16 as set in EU Regulation 838/2010 Part B (3). CMP261 (Original) would ensure compliance with the EU Regulation 838/2010 Part B (3).
2	**Do you support the proposed implementation approach?**	We support the proposed implementation approach preferring Option A, Generator rebates in 2016/17 and the Adjustment of Demand tariffs in 2018/19.
3	**Do you have any other comments?**	Commission Regulation (EU) No 838/2010 Part B restricts annual average transmission charges paid by electricity Generators in Great Britain to the range of €0/MWh to €2.50/MWh. The Regulation is legally binding for all Transmission licensees across Europe so it is reasonable to expect National Grid to ensure demonstration of compliance.
4	**Do you wish to raise a WG Consultation Alternative Request for the Workgroup to consider?**	*No* *If yes, please complete a WG Consultation Alternative Request form, available on National Grid's website[1], and return to the CUSC inbox at cusc.team@nationalgrid.com*

[1] http://www.nationalgrid.com/uk/Electricity/Codes/systemcode/amendments/forms_guidance/

Specific questions for CMP261

Q	Question	Response
5	**Do you have any comments on the legal opinion?**	The legal opinion provided to the workgroup is clear that where a forecast proves (despite the Error Margin) to have been inaccurate for a given year, and therefore takes the average Generator Charge above the €2.50/MWh limit, this exceedance of the Guidelines Regulation limit represents a breach of the technical requirements of the Guidelines Regulation.
6	**Is ex ante certainty preferred over ex post accuracy?**	In most cases ex-ante certainty in network charges is preferred over an ex-post change to ensure accuracy. However, in this particular case there appears to be a legal requirement to undertake an ex-post reconciliation as the average Generator Charge is above the €2.50/MWh limit, a clear breach of the EU Regulation. As EU Regulation 838/2010 sets a €2.50/MWh limit, not a target, for the average Generator Charge, it may be appropriate to amend the formula that currently sets the Error Margin to ensure any future breach is very unlikely to occur.
7	**Do you believe a breach of the Regulation has occurred for Charging Year 2015/16? If so do you believe that an ex post reconciliation should be carried out?**	Using actual data and the strict interpretation of EU Regulation 838/2010, there has clearly been a material breach for Charging Year 2015/16. Moreover this is the view provided by expert legal opinion. Given the legal opinion, we believe that an ex post reconciliation must be carried out and support the proposed implementation approach preferring Option A, with Generator rebates in 2016/17 and the Adjustment of Demand tariffs in 2018/19.

Q	Question	Response
8	**If an ex post reconciliation was to be adopted how quickly should the reconciliation be completed?**	We support an implementation approach preferring Option A, with Generator rebates paid as soon as practicable in 2016/17 and the Adjustment of Demand tariffs in 2018/19. The adjustment of demand tariffs after the current charging year is very important to Suppliers and Consumers who have committed to contracts with an expectation that Final tariffs would not change in 2016/17. Significant numbers of Suppliers and Consumers have already committed to contracts for 2017/18, based on the latest TNUoS forecast information from National Grid, so we think Applicable CUSC objectives (a) and (b) would be better facilitated by any adjustment of Demand tariffs delayed until 2018/19.
9	**Are there trade-offs between speed of reconciliation and the most appropriate process?**	We consider the best implementation approach is Option A, with Generator rebates paid as soon as practicable in 2016/17 and the Adjustment of Demand tariffs in 2018/19. Please see our answer to Q8 above.
10	**Do you believe any harm has been done in the spirit of the defect identified?**	Generators contracting to sell output and setting market prices for 2015/16 before Draft and Final tariffs were published would have built into their cost base forecasts of TNUoS costs on the expectation that the EU Regulation 838/2010 €2.50MWh cap would be complied with. As Final 2015/16 tariffs were set that actually had an average Generator Charge in excess of the EU Regulation 838/2010 €2.50MWh cap they will have under-forecast the TNUoS cost, suffering additional unexpected costs.
11	**Do you believe that Generators contracting to sell output or set market prices do so at a level that assumes the €2.50MWh CAP will be complied with regardless of the tariffs set by National Grid? If you have any supporting information please provide this directly to Ofgem directly.**	Generators were contracting to sell output and setting market prices for 2015/16 before Draft and Final tariffs were published. It was reasonable for Generators to build into their cost base a forecast of TNUoS costs on the expectation that the EU Regulation 838/2010 €2.50MWh cap would be complied with. As Final 2015/16 tariffs were set that actually had an average Generator Charge well in excess of the EU Regulation 838/2010 €2.50MWh cap, they will have under-forecast the TNUoS cost.

CUSC Workgroup Consultation Response Proforma

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Please send your responses by **28th July 2016** to cusc.team@nationalgrid.com Please note that any responses received after the deadline or sent to a different email address may not receive due consideration by the Workgroup.

Any queries on the content of the consultation should be addressed to Ryan Place at ryan.place@nationalgrid.com

These responses will be considered by the Workgroup at their next meeting at which members will also consider any Workgroup Consultation Alternative Requests. Where appropriate, the Workgroup will record your response and its consideration of it within the final Workgroup Report which is submitted to the CUSC Modifications Panel.

Respondent:	*Herdial Dosanjh*
Company Name:	*RWE npower on behalf of the RWE companies in the UK.*
Please express your views regarding the Workgroup Consultation, including rationale. **(Please include any issues, suggestions or queries)**	For reference, the Applicable CUSC objectives are: **Use of System Charging Methodology** (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity; (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection); (c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far

	as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses. (d) Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency.

Standard Workgroup consultation questions

Q	Question	Response

Q	Question	Response
1	**Do you believe that CMP261 Original Proposal or either of the potential options for change better facilitates the Applicable CUSC Objectives? Please give your reasoning.**	We do not believe the original change proposal facilitates the CUSC as outlined below: *(a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity;* This change would introduce uncertainty of costs where customers have already been contracted and priced. Energy contracts would also be impacted in a similar manner which could lead to windfall gains and losses for industry parties. Overall this would lead to increased costs for the end consumer. *(b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection);* No this does not better reflect the costs as these are being skewed by EU legislation. Less cost reflective as customers have been priced on an ex ante basis and we believe the generators would have priced on published tariffs rather than an accurate forecast of the exchange rate. This would lead to windfall gains for generators. We feel this is an arbitrary change to the model output which we can't see as being more cost reflective. *(c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses.* Worse against the objective as it is taking the output of the tariff & transport model, all CUSC code and making an adjustment to it. Adjusting it on the basis of developments that are not related to the transmission network. *(d) Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency.* We believe it is neutral against this objective as the agreed ex ante approach complies with the spirit of the EU legislation. Overall we believe this change is worse against the CUSC objectives than baseline.

Q	Question	Response
2	**Do you support the proposed implementation approach?**	We do not support the ex post reconciliation but should Ofgem choose to award this money. In the event of Ofgem awarding this money we believe that 3 years notice would be required from the date of the decision for these costs to be included in customer contracts / prices.
3	**Do you have any other comments?**	It is unclear whether any CUSC changes are required as no legal text changes have been provided. This can only mean that the current arrangement (money is not given back to generators) remains in place. Reference made to section 14 of the CUSC however no legal text changes have been included.
4	**Do you wish to raise a WG Consultation Alternative Request for the Workgroup to consider?**	*If yes, please complete a WG Consultation Alternative Request form, available on National Grid's website*[1]*, and return to the CUSC inbox at* *cusc.team@nationalgrid.com* 3 years notice for implementation of recovery from suppliers / consumers post the decision.

Specific questions for CMP261

Q	Question	Response
5	**Do you have any comments on the legal opinion?**	Legal opinion may be misled as certain local connection charges for offshore generation are included in the total costs recovered through the tariff & transport model. If these costs were excluded from the calculation as shown in section 2.45 then there is no breach of the EU legislation.
6	**Is ex ante certainty preferred over ex post accuracy?**	Yes this is preferred as it provides competitive certainty. Provides cost reflectivity for future customer / energy contracts and pricing of generation. Ex post reconciliation of prices leads to the potential need for risk premia being applied. This in turn increases costs for the end consumer. Windfall gains can also occur leading to additional costs for consumers.

[1] http://www.nationalgrid.com/uk/Electricity/Codes/systemcode/amendments/forms_guidance/

Q	Question	Response
7	**Do you believe a breach of the Regulation has occurred for Charging Year 2015/16? If so do you believe that an ex post reconciliation should be carried out?**	We do not believe a breach has occurred as certain local connection charges for offshore generation are included in the total costs recovered through the tariff & transport model. If these costs were excluded from the calculation as shown in section 2.45 then there is no breach of the EU legislation. Ex post reconciliation of prices leads to the potential need for risk premia being applied. This in turn increases costs for the end consumer. Windfall gains can also occur leading to additional costs for consumers. The current methodology uses best endeavours, and an ex-ante approach. This has been agreed as the basis for the charging methodology, with no mention in the CUSC of ex-post reconciliation and so on that basis no breach has occurred. This modification does not propose that this methodology should change. In fact this modification does not suggest any changes to the CUSC and on that basis is not a true modification proposal and so would appear to be an inappropriate route to dispute historic tariffs.

Q	Question	Response
8	**If an ex post reconciliation was to be adopted how quickly should the reconciliation be completed?**	3 years notice for implementation of recovery from suppliers / consumers post the decision.
9	**Are there trade-offs between speed of reconciliation and the most appropriate process?**	Should Ofgem choose to award this money we believe that 3 years notice would be required from the date of the decision for recovery from the demand side of tariffs. We recognise the same timescales would need to apply to the generator reconciliation, given this would be a windfall gain for them.
10	**Do you believe any harm has been done in the spirit of the defect identified?**	We do not believe any harm has been done as generators will have priced in the short term based on published tariffs rather than an accurate forecast of the exchange rate. There is harm to suppliers and customers on pass through TNUoS contracts if this modification is approved. As a result of the windfall gains to generators.
11	**Do you believe that Generators contracting to sell output or set market prices do so at a level that assumes the €2.50MWh CAP will be complied with regardless of the tariffs set by National Grid? If you have any supporting information please provide this directly to Ofgem directly.**	Both the supply and generation businesses use the published tariff where available and do not expect ex post variations. We wouldn't have the information to be able to anticipate, nor would we expect, any other outcome.

CUSC Workgroup Consultation Response Proforma

CMP261 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'

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

Please send your responses by **28th July 2016** to cusc.team@nationalgrid.com Please note that any responses received after the deadline or sent to a different email address may not receive due consideration by the Workgroup.

Any queries on the content of the consultation should be addressed to Ryan Place at ryan.place@nationalgrid.com

These responses will be considered by the Workgroup at their next meeting at which members will also consider any Workgroup Consultation Alternative Requests. Where appropriate, the Workgroup will record your response and its consideration of it within the final Workgroup Report which is submitted to the CUSC Modifications Panel.

Respondent:	*Colin Prestwich*
Company Name:	*SmartestEnergy*
Please express your views regarding the Workgroup Consultation, including rationale. **(Please include any issues, suggestions or queries)**	For reference, the Applicable CUSC objectives are: **Use of System Charging Methodology** (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity; (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection); (c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far

	as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses. (d) Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency.

Standard Workgroup consultation questions

Q	Question	Response
1	**Do you believe that CMP261 Original Proposal or either of the potential options for change better facilitates the Applicable CUSC Objectives? Please give your reasoning.**	No. The whole point about the current arrangements is that there is an error margin to try to avoid breaching the cap. If a breach were illegal there would have been no point to the error margin; the whole calculation would have had to include a reconciliation.
2	**Do you support the proposed implementation approach?**	No
3	**Do you have any other comments?**	Yes – if the proposal is to go ahead then the reconciliation should be two ways; if generators have been given an additional discount beyond that which is necessary for the €2.50 cap, it should be refunded to suppliers.
4	**Do you wish to raise a WG Consultation Alternative Request for the Workgroup to consider?**	No

Specific questions for CMP261

Q	Question	Response
5	**Do you have any comments on the legal opinion?**	We agree with the NGT interpretation that “a pure ex ante approach, by its nature, is never guaranteed to be 100% precise or accurate and is the approved GB approach to compliance with the Regulation.”

Q	Question	Response
6	**Is ex ante certainty preferred over ex post accuracy?**	In this instance, yes.
7	**Do you believe a breach of the Regulation has occurred for Charging Year 2015/16? If so do you believe that an ex post reconciliation should be carried out?**	No
8	**If an ex post reconciliation was to be adopted how quickly should the reconciliation be completed?**	Before the end of the calendar year.
9	**Are there trade-offs between speed of reconciliation and the most appropriate process?**	Yes. There must be an element of pricing certainty for suppliers.
10	**Do you believe any harm has been done in the spirit of the defect identified?**	No
11	**Do you believe that Generators contracting to sell output or set market prices do so at a level that assumes the €2.50MWh CAP will be complied with regardless of the tariffs set by National Grid? If you have any supporting information please provide this directly to Ofgem directly.**	We do not believe that commercially astute generators would have been so foolish as to take this risk. The current arrangements are perfectly clear: an ex ante approach with an error margin (but no agreed reconciliation) would always imply the possibility of exceeding the €2.50MWh cap.

CUSC Workgroup Consultation Response Proforma

CMP261 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'

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

Please send your responses by **28th July 2016** to cusc.team@nationalgrid.com Please note that any responses received after the deadline or sent to a different email address may not receive due consideration by the Workgroup.

Any queries on the content of the consultation should be addressed to Ryan Place at ryan.place@nationalgrid.com

These responses will be considered by the Workgroup at their next meeting at which members will also consider any Workgroup Consultation Alternative Requests. Where appropriate, the Workgroup will record your response and its consideration of it within the final Workgroup Report which is submitted to the CUSC Modifications Panel.

Respondent:	*Garth Graham (garth.graham@sse.com)*
Company Name:	*SSE*
Please express your views regarding the Workgroup Consultation, including rationale. **(Please include any issues, suggestions or queries)**	For reference, the Applicable CUSC objectives are: **Use of System Charging Methodology** (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity; (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection); (c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far

	as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses. (d) Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency.

Standard Workgroup consultation questions

Q	Question	Response
1	**Do you believe that CMP261 Original Proposal or either of the potential options for change better facilitates the Applicable CUSC Objectives? Please give your reasoning.**	See [A] below.
2	**Do you support the proposed implementation approach?**	We believe that the implementation of the Original and potential option A[1] can be undertaken within 14 calendar days from an Authority decision. Or to put it another way, if Ofgem approved CMP261 Original (or potential option A) on the 1st day of the month that generators would receive the appropriate paperwork and funds for the reconciliation from National Grid on the 15th day of the month. In this respect we note that National Grid has already issued monthly bills / credit notes etc., at least thirteen times to all the generator parties concerned (monthly for the period April 2015 to March 2106 plus the end of year Generator Reconciliation Statement). As such the processes, procedures and systems already existing within National Grid to perform this task; it being a repeat of the Generator Reconciliation Statement processes and procedures already undertaken (in April 2016) prepared; in accordance with 3.13.2 of the CUSC; for charging year 2015/16 with the sole amount in question being the £/kW of TEC to be reconciled which, as we set out in answer to Question 3, amounts to £1.97/kW .

[1] As set out in paragraph 5.4 of the CMP261 Workgroup consultation document.

Q	Question	Response
3	**Do you have any other comments?**	See [B] below.
4	**Do you wish to raise a WG Consultation Alternative Request for the Workgroup to consider?**	*No*

Specific questions for CMP261

Q	Question	Response
5	**Do you have any comments on the legal opinion?**	We strongly agree with the legal opinion in respect of the fact that there has been a breach of the Regulation and that a remedy is required. Reference is made elsewhere in this response in respect of certain elements contained within the legal opinion received by the CMP 261 Workgroup from Addleshaw Goddard. We reserve our position in relation to the legal opinion as a whole at this time but would comment that there is no express requirement for any breach of the Regulations to be a material breach before it constitutes a breach.

Q	Question	Response
6	**Is ex ante certainty preferred over ex post accuracy?**	Whilst we appreciate the desirability of having ex ante certainty when compared with ex post accuracy, the overriding requirement must be to comply with the law. If either an ex ante or an ex post approach would (in both cases) ensure compliance with the law (in this case that GB generators did not pay, in charging year 2015/16, in excess of the €2.50/MWh figure) then, an ex ante approach would seem preferable. However, this is not the case here. As confirmed by the legal opinion from Addleshaw Goddard[2] the ex ante approach did not ensure compliance with the €2.50/MWh figure and therefore steps have to be taken to correct this and ensure compliance. In this regard we note that had CMP261 been dealt with in accordance with the urgent timetable we were seeking in March 2016 that the generator TNUoS tariffs for 2015/16 would have been changed ('mid-year') within 2015/16 such that compliance (on an ex ante basis) would have been achieved. It is a cornerstone of the GB regulatory regime and market arrangements that parties will act in accordance with their legal obligations. In this respect we are mindful of the Authority's statement in the recent 'Enforcement Overview 2015/16'[3] that their "*vision [is] for enforcement to achieve a culture where businesses put energy consumers first and act in line with their obligations*" [emphasis added] It is not an option to sacrifice legal compliance for 'ex ante certainty' as this is both misguided and wrong. Furthermore, all market participants and National Grid have been fully aware of the possibility of a breach of the €2.50/MWh limit up to five years prior to the start of charging year 2015/16[4] and since the start of charging year 2015/16 the increasing probability that a breach, in 2015/16, would occur (and later in the charging year, had occurred) based on the evidence set out in paragraphs 2.34 and 2.35 plus Figures 3-5 in the CMP261 Workgroup consultation document.

[2] 22nd April 2016 see, for example, the Introduction plus paragraphs 2, 4, and 9 (a).

Q	Question	Response
7	**Do you believe a breach of the Regulation has occurred for Charging Year 2015/16? If so do you believe that an ex post reconciliation should be carried out?**	See [C] below.

[3] https://www.ofgem.gov.uk/system/files/docs/2016/07/ofg839_ofgem_enforcement_overview_2015_16_web.pdf

[4] As detailed in paragraph 2.9 (i)-(v) of the CMP261 Workgroup consultation document.

Q	Question	Response
8	**If an ex post reconciliation was to be adopted how quickly should the reconciliation be completed?**	As we set out in response to Question 2 above, the reconciliation should be undertaken within 14 calendar days from an Authority decision (noting that the processes, procedures and systems already existing within National Grid to perform this task; it being a repeat of the Generator Reconciliation Statement processes and procedures already undertaken (in April 2016) for charging year 2015/16 in accordance with 3.13.2 and 3.13.3 of the CUSC. The longer the delay after the 31st March 2016 that the reconciliation takes to remedy the breach, the greater the harm being done to GB generators, the internal market and the greater the distortionary affects on cross border trade as we detail in our answer to Question 10. We are also mindful that, according to the Authority, where (as in this case) a breach has occurred that "*in all cases the [breaching] company's priority should be to compensate customers adversely affected by the breach*[5]." We concur with the Authority and believe that the priority of National Grid should be the reconciliation of the GB generators affected by the breach of the €2.50 /MWh limit set in the EU Regulation by way of the earliest possible reconciliation of the exceedance (of the €2.50 /MWh limit).

5 https://www.ofgem.gov.uk/sites/default/files/docs/guidance_on_the_allocation_of_voluntary_redress_payments_open_letter_14_december_2015.pdf

Q	Question	Response
9	**Are there trade-offs between speed of reconciliation and the most appropriate process?**	For the reasons we outlined in our answers to Questions 2 and 8 above, the most appropriate process is that already approved by the Authority (as set out in 3.13.2[6] and 3.13.3[7] of the CUSC). There is no need for another process – any suggestion otherwise is a '*red herring*'. Given that National Grid has, by virtue of undertaking this process annually for many years we see there being no practical 'trade-off' between 'speed' and 'process' – the existing process can be undertaken quickly (within 14 calendar days of an Authority decision). Under the CUSC (3.13.2 and 3.13.3) National Grid has already determined (in April 2016) the TEC held by all those generators who paid TNUoS in charging year 2015/16. Indeed these numbers; from Abernedd to Wylfa power stations; have been published in Annex 5 of the CMP261 Workgroup consultation document. These TEC figures, on a per generator basis for charging year 2015/16, will not have changed between April 2016 (or indeed there publication in July 2016) and the date of the Authority decision on CMP261. Having determined, in a straightforward way, the £/kW over recovery figure on the basis of the calculation approach illustrated in Figure 6 of the consultation document (and detailed in Annex 5) it is then a very simple exercise to multiply the published TEC figure held, per generator, in 2015/16 by the £/kW figure and then to issue the Generator Reconciliation Statement accordingly to the parties concerned. This is a process National Grid has done on numerous other occasions. As we set out in our answer to Question 3, we calculate the amount to be reconciled to GB generators for charging year 2015/16 as totalling £137M or circa £1.97/kW for TEC held during that period.

[6] "As soon as reasonably practicable and in any event by 30 April in each **Financial Year The Company** shall prepare a generation reconciliation statement (the "**Generation Reconciliation Statement**") in respect of generation related **Transmission Network Use of System Charges** and send it to the **User**. Such statement shall specify the **Actual Amount** and the **Notional Amount** of generation related **Transmission Network Use of System Charges** for each month during the relevant **Financial Year** and, in reasonable detail, the information from which such amounts were derived and the manner in which they were calculated."

[7] "Together with the **Generation Reconciliation Statement**, **The Company** shall issue a credit note in relation to any sums shown by the **Generation Reconciliation Statement** to be due to the **User** or an invoice in respect of sums due to **The Company** and in each case interest thereon calculated pursuant to Paragraph 3.13.6 below."

Q	Question	Response
10	**Do you believe any harm has been done in the spirit of the defect identified?**	See [D] below.
11	**Do you believe that Generators contracting to sell output or set market prices do so at a level that assumes the €2.50MWh CAP will be complied with regardless of the tariffs set by National Grid? If you have any supporting information please provide this directly to Ofgem directly.**	See [E] below.

[A]

Question 1

Do you believe that CMP261 Original Proposal or either of the potential options for change better facilitates the Applicable CUSC Objectives? Please give your reasoning.

We believe that the Original Proposal better facilitates the Applicable CUSC Objectives.

We set out, in the proposal itself, the reasoning for this.

In addition, with respect to Applicable Objective (a) we note that CMP261 would better facilitate effective competition by correcting the third and fourth examples of harm (regarding competition and market distortions) that we identify in our answer to Question 10.

In addition, with respect to Applicable Objective (d) we note that CMP261 would better facilitate compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency by correcting the first and second examples of harm (regarding the internal market and cross border trade affect) that we identify in our answer to Question 10.

We note that there are five potential options (A to E[8]) identified in section 5 of the CMP261 Workgroup consultation document.

However, as per footnotes 34, 35 and 36 in the consultation document, four of those potential options (B to E) would entail the reconciliation of the excess amount paid by generators in charging year 2015/16 being returned via a change to the Generator TNUoS tariff in subsequent charging years.

[8] Set out in Paragraphs 5.4-5.8 respectively.

This would mean (with potential options B to E) that any Generators who had paid TNUoS in 2015/16 but who had during the period or subsequently closed (such as the circa 5GW of plant which closed during, or shortly after, charging year 2015/16) would receive no reconciliation for having paid in excess of €2.50/MWh in 2015/16. This would therefore not ensure compliance with the Regulation. Neither would it facilitate effective competition or be cost reflective. For example, it introduces the precedent that a legal obligation does not have to be complied with. This will in turn lead to fundamental undermining of the regulatory certainty which will have negative consequences for competition. It would also lead to participants questioning the basis of costs that have been signalled in the future and this in turn lead to an undermining of participants belief in cost reflectivity going forward.

This would therefore not better facilitate Applicable Objective (d) (and neither would it better facilitate Applicable Objectives (a) and (b).

Furthermore, those generators who paid no TNUoS in 2015/16 but connected (or increased their TEC) after the end of charging year 2015/16 (31st March 2016) would (in respect of options B to E) receive a windfall gain. This would distort competition and would not be cost reflective.

This would therefore not better facilitate Applicable Objectives (a) and (b).

In terms of potential option A, this has all the positive attributes of the Original (all be it with an extra year for the recovery of the reconciliation amount from demand in 2018/19) and as such we agree that this option A does better facilitate the Applicable CUSC Objectives (a), (b) and (d) for the same reasoning as we have given for the Original.

However, of the two (the Original and potential option A) the Original is best.

[B]

Question 3

Do you have any other comments?

We wish to make a number of other pertinent comments.

1) Alternative Recourse and Double Recovery

Notwithstanding this response to the CMP261 Workgroup consultation document of 7th July 2016, we fully reserve our rights to seek alternative recourse in relation to this breach of the Regulation and any losses we have suffered. This is also without prejudice to any further comments we may make at a future date.

In the event that we (or indeed any other party) takes and is successful in respect of an alternative recourse, we wish to make clear as the proposer of CMP261 that no party for whom a rebate is due in accordance with CMP261 for charging year 2015/16 should be able to 'double recover' any amount due in respect of the breach of the Regulation.

2) Treatment of Small Generator Discount

We note that the analysis presented in Figure 6 is (as set out in paragraph 2.47[9]) is based on an amount of £578M having been recovered, in respect of transmission charges, from GB generators in charging year 2015/16. However, this amount (£578M) excludes the 'small generator discount'[10] . We believe this is an error and that the small generator discount of £18.3M should be included, taking the total (from £578M) to £596M which equates to an exceedance of the €2.50/MWh by €0.75/MWh (to €3.25/MWh in total) or £1.97/kW for charging year 2015/16.

The reason for this is that the discount is an indirect reduction in the costs paid by certain generators and does not directly reduce the amount paid by GB generators during charging year 2015/16.

If the Small Generator Discount were to be taken off the calculation of the average generator charge within the €2.50/MWh upper limit, then this would result in higher TNUoS costs for all TNUoS paying generators such that the cost of collecting the Small Generator Discount would be paid for by generators, not demand.

This would run counter to the Transmission Standard License Condition 13 and the Ofgem decision (of 22nd January 2016) to modify this condition, which are both clear that the intention is the opposite; i.e. the licence condition states that the cost of funding the Small Generator Discount should be borne by demand and not generation and applied after the charges for use of system have already been calculated subject to condition C4:

"When calculating use of system charges (other than charges relating to the provision of balancing services) to customers who are taking demand from the national electricity transmission system the licensee shall set charges in conformance with the use of system charging methodology in accordance with standard condition C4 (Charges for use of system) plus a unit amount…" [emphasis added] (Transmission Standard License Condition 13 paragraph 2)

"The level of the small generator discount was determined by Ofgem in 2005 and is 25% of the sum of the generation and demand residual5 Transmission Network Use of System (TNUoS) tariffs in a given charging year. This is recovered from demand consumers across GB." [emphasis added] (Ofgem Decision to modify Standard Licence Condition C13 of the electricity transmission licence (Adjustment to use of system charges (small generators)) January 2016.

When National Grid determine TNUoS tariffs, they do not deduct the value of the Small Generator Discount from generation charges when they calculated compliance with the €2.50/MWh upper limit, as illustrated in the National Grid, Final TNUoS tariffs for 2016/17 table 10. It would therefore be inconsistent with the way the TNUoS tariffs are calculated to do the reverse and deduct the value of the Small Generator Discount from generator costs when ensuing compliance with the €2.50/MWh after the event.

[9] Of the CMP261 Workgroup consultation document

[10] As set out in Special Licence Condition 13 of the Transmission Licence.

For the avoidance of doubt, the figure of £596M (or indeed £578M) and the total exceedance of £137M for charging year 2015/16 excludes any interest payment due for the period 1st April 2016 to the date when National Grid finally issues the revised Generator Reconciliation Statements (for charging year 2015/16) to the GB generators. In regard to interest due, we expect this to be calculated in accordance with the principles set out in paragraph 3.13.6 (b)[11] of the CUSC, and paid by National Grid to those generators in the same Generator Reconciliation Statements.

3) Generation Only Spurs

We note the CMP261 Workgroup deliberations with respect to generation only spurs, as set out in paragraphs 2.17, 2.18, 2.43 and 2.44 of the consultation document .

It is important to recognise a number of factors.

First, it is clear from the Addleshaw Goddard legal opinion specifically commissioned by the CMP261 Workgroup in, for example, paragraph 20, which identifies that:-

> *"… we [*Addleshaw Goddard*] agree with the conclusions reached in respect of the CMP224 that it is reasonable that such spurs should be included within the average G charge calculation*".

Second, related to the first item, the conclusion reached in respect of CMP224 took account of the detailed arguments that fully justified including generation only spurs. We have provided some of those detailed arguments in our response to the CMP224 Workgroup consultation of 23rd January 2014 and to assist the Workgroup, CUSC Panel and Ofgem, in considering CMP261, we reproduce that response in **Annex 1 to this CMP261 consultation response**.

Third, these detailed arguments in support of including generation only spurs stand in stark contrast to any counter arguments that would, in some way, justify excluding generation only spurs - despite CUSC parties having at least four separate opportunities[12] to provide such justification. As Addleshaw Goddard (in their legal opinion for the CMP261 Workgroup, at the end of the same paragraph 20) highlighted:-

> "*In contrast, it is not clear on what basis the exclusion of "charges paid by producers for physical assets required for connection to the system" justifies the exclusion of TNUoS charges (as opposed to connection charges) in respect of generation only spurs, and therefore the justification for such a specific carve-out appears lacking*".

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[11] "Interest on all amounts due under this Paragraph 3.13 shall be payable by the paying **CUSC Party** to the other on such amounts from the date of payment applicable to the month concerned until the date of actual payment of such amounts and such interest shall be calculated on a daily basis at a rate equal to the **Base Rate** during such period."

[12] At the CMP224 Workgroup consultation, the CMP224 Code Administrator consultation, the Ofgem CMP224 RIA consultation, and the CMP251 Workgroup Consultation.

Fourth, as noted in paragraph 2.43[13], this *apparent* uncertainty around the inclusion of generator only spurs has not been present when stakeholders (and the CMP251 Workgroup) were assessing / considering CMP251, even though CMP251 and CMP261are comparable Modifications in this regard.

[C]

Question 7

Do you believe a breach of the Regulation has occurred for Charging Year 2015/16? If so do you believe that an ex post reconciliation should be carried out?

Yes, we do firmly believe that a breach of the Regulation has occurred in charging year 2015/16 as transmission charges paid by GB generators during the period were in excess of the permitted range of €0-2.50/MWh.

To us this is self-evident by the detailed analysis we have presented (i) to the CUSC Panel (during 2015 and 2016) and (ii) to the CMP261 Workgroup (during 2016) as well as the analysis others have presented, such as British Gas in their CMP251 Proposal and presentation to the CUSC Panel (which identified – as at the end of June 2015 – that the figure stood then at €2.65/MWh).

Indeed, as the CMP261 Workgroup consultation document makes clear at paragraphs 2.34-2.35 and illustrates in Figures 3-5 this breach was not some form of '*sudden*' occurrence ,or '*a bolt out of the blue*' if you will, but rather the breach was very well signposted (throughout 2015 and 2016) prior to it occurring and indeed since it occurred such that steps could (and should) have been taken to firstly prevent it occurring and, once it occurred, to secondly rectify it with the utmost alacrity and without any undue delay.

Furthermore, that a breach has occurred is confirmed by the legal opinion commissioned specifically for that purpose by the CMP261 Workgroup from Addleshaw Goddard.

> *"….it has become apparent that the generation output and €/£ exchange rate forecasts which underpin the Current Approach are inaccurate in respect of the 2015/16 TNUoS charging year and that, consequently, if they are unmodified the resulting G Charges actually paid are likely to significantly exceed the cap set out in the Guidelines Regulation*."[14]
>
> *"Where a forecast proves (despite the Error Margin) to have been inaccurate for a given year, and therefore takes the average G Charge above the €2.5/MWh limit, this exceeding of the Guidelines Regulation limit represents a breach of the technical requirements of the Guidelines Regulation.[15] "* [emphasis added]

[13] Of the CMP261 Workgroup consultation document.

[14] Addleshaw Goddard, 22nd April 2016, Introduction

[15] Addleshaw Goddard, 22nd April 2016, paragraph 2

> *"…the outturn figures for a charging year demonstrate average €/MWh G Charges which are materially above the G Charge Guidelines limit (as is the case for the 2015/16 charging year)…."*[16]

> *"there is a strong argument that a material breach of the €2.5/MWh G Charges limit in respect of the 2015/16 charging year equates to non compliance with the Guidelines Regulation "*[17]

It being the case that a breach has occurred it therefore follows that a remedy such as an ex post reconciliation must take place and must do so at the earliest possible opportunity in order to minimise the harm which has occurred, due to the breach, and the harm which is continuing to occur pending the timely remedy. Examples of the harm that have arisen, and continue to this day, are detailed in our answer to Question 10.

That an ex post reconciliation must take place in respect of the breach for charging year 2015/16 is confirmed by the legal opinion commissioned specifically by the CMP261 Workgroup from Addleshaw Goddard.

> *"….in circumstances where the outturn figures for a charging year demonstrate average €/MWh G Charges which are materially above the G Charge Guidelines limit (as is the case for the 2015/16 charging year), on balance we would suggest that the G Charges paid for the relevant year should be adjusted on a backward looking basis in order to bring them materially in line with the €2.5/MWh limit and in order to demonstrate compliance with the Guidelines Regulation.* "[18]

> *"[a]. there is a strong argument that a material breach of the €2.5/MWh G Charges limit in respect of the 2015/16 charging year equates to non compliance with the Guidelines Regulation;*
> *[b]. as a result, we are of the view that reconciliation of G Charges for the 2015/16 charging year would be prudent;* "[19]

> "*In circumstances where the outturn G Charge level for a charging year has materially exceeded the G Charges limitation in the Guidelines Regulation, we are of the view that the G Charge level for the relevant year should be reconciled on a backward looking basis.*"[20]

For the avoidance of doubt, any such reconciliation should be with respect to only those parties who paid generator TNUoS during charging year 2015/16 and should not, for example, be paid to parties who (either as new generators or as generators who increased their level of TEC in a subsequent charging year) paid TNUoS in a charging year(s) after 2015/16.

[D]

Question 10

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[16] Addleshaw Goddard, 22nd April 2016, paragraph 4

[17] Addleshaw Goddard, 22nd April 2016, paragraph 9 (a).

[18] Addleshaw Goddard, 22nd April 2016, paragraph 4.

[19] Addleshaw Goddard, 22nd April 2016, paragraph 9.

[20] Addleshaw Goddard, 22nd April 2016, paragraph 10.

Do you believe any harm has been done in the spirit of the defect identified?

As we set out in detail in our answer to Question 7 above there has been a clear breach of the EU Regulation 838/2010 Part B.

That being the case it is self-evident that where the law has been broken that harm has arisen. Whilst there maybe discussion to be had as to the quantum of the harm, it cannot be denied that breaking the law (any law) causes harm.
In terms of the harm arising as a result of the breach (in this case; of the recovery, from GB generators, on average, of an amount in excess of the €2.50/MWh upper limit set out in the Regulation for charging year 2015/16 together with its non-rectification, to date, during 2015/16); it takes a number of forms including but not limited to those that we have highlighted here.

The **first** example of harm is that this breach undermines the internal market in electricity which, National Grid are duty bound to facilitate and support (rather than, as in this case, undermine).

As Addleshaw Goddard makes clear (in paragraph 15 (b)[21] of their advice to the CMP261 Workgroup) "*the recitals setting out the objectives of the Guidelines Regulation have weight and are relevant to interpreting the requirements of the G Charge Guidelines as a whole*".

Recital 10[22] of the Regulation states that the reason for average charges for access to the network in Member States being kept within a range (of €0-2.5/MWh for GB) is so that charges paid by generators for accessing the transmission system do not undermine the internal market whilst also helping to ensure that the benefits of harmonisation are realised.

It therefore follows that by failing to comply with the Regulation during and after charging year 2015/16 (by breaching the €2.50/MWh upper limit without remedying it) that the first harm has arisen in this case.

The **second** example of harm, which is related to the first, is that this breach affects cross border trade.

On the basis of the calculation approach illustrated in Figure 6 of the consultation document (and detailed in Annex 5 of the consultation document) we calculate that GB generators paid, in charging year 2015/16, in the region of £137M of TNUoS in excess of what they should have, had the €2.50/MWh upper limit been complied with .

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[21] "*…the European Court of Justice takes a purposive approach to the interpretation of EU law (an approach which has in turn been adopted by the Courts of England and Wales when they consider compliance with EU law). The result of this is that the courts will look to the broader purpose and objectives of EU legislation in interpreting the meaning of the specific provisions. In particular, the recitals setting out the objectives of the Guidelines Regulation have weight and are relevant to interpreting the requirements of the G Charge Guidelines as a whole*."

[22] ''*Variations in charges faced by producers of electricity for access to the transmission system should not undermine the internal market. For this reason average charges for access to the network in Member States should be kept within a range which helps to ensure that the benefits of harmonisation are realised*.''

This will result in GB wholesale prices being greater than they should have been because, for example, GB generators will have to factor in the increased risk of regulatory non-compliance when forward planning their trading activities this will, in turn lead to greater electricity imports into GB (plus lower GB generator production and fewer electricity exports from GB) which affects cross border trade.

This is evidenced by, for example, Ofgem comments on interconnectors[23] in a recent blog[24] as well as three representatives of National Grid during their oral submissions to the House of Commons Energy & Climate Change Select Committee on 24th November 2015[25]:-

> *[Q72] "What we typically see is that when there are lower prices on the continent there are higher flows through the interconnectors into our markets."*[26]
>
> *[Q80] "a trend of increasing flows from the continent, which is linked to pricing".*[27]
>
> *[Q88] "We believe that interconnectors do allow GB consumers to access the lower prices seen in the European market".* [28]

This effect, of higher GB wholesale prices leading to greater imports into GB (and thus, lesser GB generator production and lower exports from GB) was also echoed by National Grid in their 2015/16 results statement[29]:-

> *"The Group's Other activities contributed £183m more to operating profit than last year on a constant currency basis, led by increased revenues in the French Interconnector business due to higher price arbitrage between the UK and mainland Europe".* [emphasis added]
>
> "*National Grid's share of post-tax results of joint ventures for the year was £59m, an increase of £13m compared with 2014/15. This reflected a significant increase in the contribution from the BritNed Interconnector reflecting increased power price differentials between the Netherlands and the UK."* [emphasis added]

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[23] "generally importing electricity into GB when our price is higher, and exporting electricity when the price in neighbouring countries is higher."

[24] https://www.ofgem.gov.uk/news-blog/our-blog/what-drives-wholesale-electricity-prices-britain

[25] https://www.parliament.uk/business/committees/committees-a-z/commons-select/energy-and-climate-change-committee/inquiries/parliament-2015/security-of-supply/publications/

[26] Cordi O'Hara, Director of the UK System Operator, National Grid

[27] Duncan Burt, Head of Operate the System for Electricity Transmission, National Grid

[28] Ro Quinn, Head of UK Energy Strategy, National Grid

[29] http://investors.nationalgrid.com/~/media/Files/N/National-Grid-IR/results-centre/full-year-results-statement-2015-16.pdf

It therefore follows that by failing to comply with the Regulation during and after charging year 2015/16 (by breaching the €2.50/MWh upper limit without remedying it) that the second harm has arisen in this case.

In considering the quantum of the effect in this particular case, where GB generators paid in the region of £137M (during charging year 2015/16) in excess of the legal upper limit (of €2.50/MWh) set by the Regulation we are reminded that the EU '*Guidelines*[30] *on effect of trade concept*' quantifies that an affect arises where the amount involved is greater than a threshold of €40M[31], which is certainly the case here (where the £137M, using the average €/£ exchange rate of 1.37 during 2015/16 equates to some €187M or more than four times greater than the €40M threshold figure used in EU law in respect of an affect on cross border trade).

[30] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al26113

[31] "Analysis of the concept of affecting trade requires that three aspects in particular be addressed:

- **the concept of "trade between EU countries"**: the concept of "trade" is not limited to traditional exchanges of goods and services across borders. It is a wider concept, covering all cross-border economic activity including establishment. This interpretation is consistent with the fundamental objective of the Treaty to promote free movement of goods, services, persons and capital. The requirement that there must be an effect on trade "between EU countries" implies that there must be an impact on cross-border economic activity involving at least two EU countries;
- **the notion "may affect"**: the function of the notion "may affect" is to define the nature of the required impact on trade between EU countries. According to the standard test developed by the Court of Justice, the notion "may affect" implies that it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between EU countries. In cases where the agreement or practice is liable to affect the competitive structure inside the EU, EU law jurisdiction is established;
- **the concept of "appreciability"**: the effect on trade criterion incorporates a quantitative element, limiting EU law jurisdiction to agreements and practices that are capable of having effects of a certain magnitude. Appreciability can be appraised in particular by reference to the position and the importance of the relevant undertakings on the market for the products concerned. The assessment of appreciability depends on the circumstances of each individual case, in particular the nature of the agreement and practice, the nature of the products covered and the market position of the undertakings concerned. In its notice on agreements of minor importance, the Commission states that agreements between small and medium-sized enterprises rarely affect trade between EU countries to a significant degree. The Commission holds the view that in principle agreements are not capable of appreciably affecting trade between EU countries when the following cumulative conditions are met:

The **threshold of EUR 40 million** [emphasis added] is calculated on the basis of total EU sales excluding tax during the previous financial year by the undertakings concerned, of the products covered by the agreement (the contract products). Sales between entities that form part of the same undertaking are excluded. In order to apply the market share threshold, it is necessary to determine the relevant market.

The Commission will apply the negative presumption to the application of the concept of affecting trade to all agreements, including agreements that by their very nature are capable of affecting trade between EU countries as well as agreements that involve trade with undertakings located in non-EU countries. Outside the scope of negative presumption, the Commission will take account of qualitative elements relating to the nature of the agreement or practice and the nature of the products that they concern.

The positive presumption relating to appreciability in the case of agreements also takes into account whether and how agreements and practices cover several EU countries, whether they are confined to a single EU country or to part of a single EU country. Agreements and practices involving non-EU countries are also dealt with. In the case of agreements and practices whose object is not to restrict competition inside the EU, it is normally necessary to proceed with a more detailed analysis of whether or not cross-border economic activity inside the EU, and thus patterns of trade between EU countries, are capable of being affected."

The **third** example of harm, linked to the second harm, is in respect of competition (both within the GB market and between the GB market and other Member States[32]).

The harm, in competition terms, arises from the affect on cross border trade that paying TNUoS charges greater than the legal limit (of €2.50/ MWh, totalling in the region of £137M[33]) has for GB generators.

As a result of paying in excess of €2.50/ MWh, which totals in the region of £137M, during charging year 2015/16 generators in GB have been less competitive in the provision of, for example, balancing services within GB to the System Operator when compared with other non-generation providers of those services.

Furthermore, as a result of paying in excess of €2.50/ MWh, which totals in the region of £137M, during charging year 2015/16 generators in GB have been less competitive in the provision of, for example, electricity within GB to the (GB) System Operator and other market participants when compared with imports from other Member States (and within the UK in terms of Northern Ireland) and have been less competitive, in terms of the exporting of the provision of electricity to System Operators and other market participants in other Member States (and within the UK in terms of Northern Ireland).

It therefore follows that by failing to comply with the Regulation during and after charging year 2015/16 (by breaching the €2.50/MWh upper limit without remedying it) that the third harm has arisen in this case.

The **fourth** example of harm is in respect of market distortions. As Ofgem highlighted in their CMP224 decision letter[35]:-

> "*Bringing transmission charges for GB generators more closely into line with those of their EU counterparts should reduce market distortions, which, in principle, should result in more efficient competition between GB and other EU member states and improved competition in the generation of electricity compared with the current baseline*."

However, far from 'bringing transmission charges for GB generators more closely into line with those of their EU counterparts' and thus 'reduc[ing] market distortions' the failure to comply with the €2.50/MWh upper limit has resulted in GB generators being more out of line (to the tune of in excess of £137M) with those of their EU counterparts which should increase market distortions. This, in turn, should result in less efficient competition between GB and other EU Member States and be detrimental to competition in the generation of electricity.

It therefore follows that by failing to comply with the Regulation during and after charging year 2015/16 (by breaching the €2.50/MWh upper limit, without remedying it) that the fourth harm has arisen in this case.

[E]

Question 11

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[32] The GB market being linked directly to France, Ireland and the Netherlands (via electricity interconnectors) and, indirectly, via France and the Netherlands, to many other Member States.

[33] As we set out in our response to Question 3.

[35] Ofgem CMP224 decision letter 8th October 2014, page 4.

Do you believe that Generators contracting to sell output or set market prices do so at a level that assumes the €2.50MWh CAP will be complied with regardless of the tariffs set by National Grid? If you have any supporting information please provide this directly to Ofgem directly.

All parties must operate on the basis that they and all other parties will fully comply with the prevailing law at all time.

To do otherwise would not only be irrational and call into question a central tenant of how both business and the regulatory arrangements work (and indeed those of the wider society) but would also invite the party (a) who believes that party (b) will not comply with a certain law to then themselves (party (a)) instead 'substitute' what level or standard of 'law' (rather than the prevailing law itself) that party (b) would comply with.

Such an approach can only lead to illogical and unreasonable outcomes as various parties seek to apply their 'substitute' level(s) or standard(s) of 'law' that, in their individual view, would be applied (in our simple example) by party (b), rather than the prevailing law itself.

It is for this reason that Generators will have operated, in charging year 2015/16, on the basis that the €2.50/MWh upper limit set out in the Regulation will be complied with by National Grid, as charges would have remained within the €0-2.50/MWh range (set in the Regulation) by, for example, either (i) a mid-year tariff change[36] as has happened before[37] with GB TNUoS tariffs or (ii) National Grid itself[38] complying with its legal obligations, not applying the charges to GB generators in a way that resulted in those generators paying in excess of the €2.50/MWh annual average upper limit.

Notwithstanding the above, Ofgem clearly indicated, in their 8th October 2014 CMP224 decision letter[39], that the intention of CMP224 was to restrict the average transmission charges recovered from GB generators in a year period so as to ensure compliance with the Regulation.

> "*CMP224 proposes to limit the total costs recovered from generators in Great Britain (GB) through Transmission Network Use of System (TNUoS) charges in a given year. This is to comply with European Commission Regulation (EU) No. 838/2010 (the Regulation), which restricts the average transmission charges paid by generators in European Union (EU) member states*."

The Ofgem decision letter clearly outlined that the upper limit was €2.50/MWh.

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[36] In this regard, it should be remembered that when CMP261 was submitted 'urgency' was sought for the proposal such that the TNUoS tariffs for charging year 2015/16 would have been changed within charging year 2015/16 ('mid-year') such that the tariffs would have been in compliance with the €2.50/MWh upper limit.

[37] Autumn / Winter 2010.

[38] See, for example, paragraph 2.1 of the CMP261 Workgroup consultation document and the CMP224 proposal submitted by National Grid which makes clear the legal obligations, with respect to complying with Regulation 838/2010, applying to National Grid in its own right.

[39] http://www2.nationalgrid.com/UK/Industry-information/Electricity-codes/CUSC/Modifications/CMP224/

"*The Regulation sets ranges of allowable average transmission charges paid by electricity generators in the EU. For GB, the allowable range is €0-2.5/MWh. The average charge for each member state is the total transmission charges collected from generators in that member state in a given year divided by the total output of those generators in that year*."

The Ofgem decision letter also outlined that there is a risk of breach that should be mitigated by the use of an error margin in the calculation.

"*CMP224 proposes making changes to the methodology so that the proportion of revenue recovered from generation is set each year to the lower of either:*

- *the current level of 27% or*
- *the maximum amount that results in the average transmission charge for GB not exceeding*
  the upper limit set by the Regulation."

"*The proposals would set the G:D split ahead of the relevant charging year based on forecasts of the relevant variables. So there is a risk that charges exceed the upper limit of the Regulation because of forecast error. To mitigate this risk, the proposals include an 'error margin', ie the G:D split would be set with the target of an average transmission charge for generation that is below (rather than equal to) the upper limit allowed by the Regulation. The error margin would be set by NGET each year based on its historical forecast*."

Ofgem directed that of the CMP224 options available the option with the shortest lead time was implemented – shortest lead time – smallest error margin.

However, Ofgem felt that the option with the largest error margin best facilitated the competition objective of the CUSC.

" *Based on the evidence available, we consider that the effects on competition of better aligning charges for GB generators with charges in other EU member states are likely to be more significant than the increased risk associated with changing the G:D split from year to year. Taking this into account, we consider that all the proposals submitted to us better facilitate this objective compared to the current baseline and that WACM1 best achieves this objective followed by the original proposal, WACM2 and WACM3.*"

This indicates that Ofgem felt that a breach of the €2.50/MWh upper limit was an impediment to competition. From this one can clearly infer that generators competitive position was compromised by the breach in 2015/16 of the €2.50/MWh upper limit.

Generators have been in a position where they have been led to believe that the €2.50/MWh upper limit cannot be breached right back from when the Regulation was itself first enacted back in 2010[40].

[40] The possibility of a breach of the €2.50/MWh upper limit was highlighted to GB market participants over many years, examples of which are listed in paragraph 2.9 of the CMP261 Workgroup consultation.

More recently, from the time of the original CMP224 proposal[41], it was also clear that generators could have been expected to assume that the average charge would not breach the limit:-

> "*European Commission Regulation 838/2010 applies a range of 0 - 2.5 €/MWh that average annual transmission charges payable by generators in GB must remain within. If in any given year the average annual generation transmission charges do not fall within this range, National Grid runs the risk of being non-compliant with the regulation. This range applies until the end of December 2014. ACER is currently carrying out a review of the appropriateness of this range for the period beyond December 2014 and will provide its opinion to the Commission by 1st January 2014. Therefore it is important that the average annual generation transmission charges remain within the current prescribed range until December 2014, and within the revised range (if modified after ACER's review) that may come into force from 1st January 2015*."

The CMP224 proposal goes on to further strengthen this position.

> "*This proposal suggests putting a cap on the annual generation TNUoS revenue so that theaverage annual transmission charges payable by generators always stay within the range specified by the EC regulation.*"

Further into the proposal the notion that the average generator charge is capped is reinforced.

> "*Linking this cap to the range specified by the regulation mitigates risk of any future revisions to this range. This would ensure that National Grid always remains compliant with the EC Regulation*."

CMP224 industry consultation[42] outlines the modification aim as:-

> "*This proposal seeks to introduce a cap on the annual generation TNUoS revenue so that the annual average transmission charges payable by generators in GB* ***always*** *stay within the range specified by the European Commission Regulation 838/2010*." [emphasis added]

The use of **always** suggests that the limit will never be breached. CMP224 industry consultation[43] gives further detail:-

> "*The Proposer's solution is to introduce a cap on the proportion of TO allowed revenue recovered through GB generation transmission charges, to* ***ensure*** *that the €2.5 /MWh upper limit specified in European Commission Regulation 838/2010 Part B (paragraph 3) or any subsequent EC Regulation that applies a revision to that limit is not exceeded. Such a cap would be applied in a way that would fix the proportion of TO allowed revenues recovered through GB generation transmission charges at*

[41] 19th September 2013

[42] 28 March 2014, subtitle, page 1

[43] 28 March 2014, section 3.2

> *the minimum of either (i) 27% of TO allowed revenues or (ii) such a lower amount as set to recover as close to 27% of TO allowed revenues as possible from GB generation Users whilst **ensuring** no breach of the aforementioned EC Regulation range.*" [emphasis added]

The use of **ensuring** also suggests that the aim here is to ensure that, not try to prevent, the charge exceeding the €2.50/MWh upper limit.

Both these elements of the consultation outline that parties would be acting reasonably if they counted on charges not exceeding the €2.50/MWh upper limit.

The Ofgem CMP224 decision letter outlines the distortive impact of a breach of the limit as it is clear that breach of the limit drives generation charges for GB generators further away from their EU counterparts.

> "*Bringing transmission charges for GB generators more closely into line with those of their EU counterparts should reduce market distortions, which, in principle, should result in more efficient competition between GB and other EU member states and improved competition in the generation of electricity compared with the current baseline*."

In summary it is clear from the CMP224 modification proposal and from Ofgem's decision letter of 8th October 2014 that the interpretation of the 838/2010 Regulation was unequivocal – the limit of €2.50/MWh should not be breached and the charging regime should be designed to **ensure** that this limit was not breached. It is on this basis that generators, in charging year 2015/16 (and indeed other charging years) presumed that their charges would not breach the €2.50/MWh upper limit, and acted accordingly.

Annex 1

The SSE response to the CMP224 Workgroup consultation (dated 23rd Janaury 2014)

CMP224 - Cap on the total TNUoS target revenue to be recovered from Generation Users

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

Please send your responses by **23 January** to cusc.team@nationalgrid.com Please note that any responses received after the deadline or sent to a different email address may not receive due consideration by the Workgroup.

Any queries on the content of the consultation should be addressed to Tushar Singh at tushar.singh@nationalgrid.com.

These responses will be considered by the Workgroup at their next meeting at which members will also consider any Workgroup Consultation Alternative Requests. Where appropriate, the Workgroup will record your response and its consideration of it within the final Workgroup Report which is submitted to the CUSC Modifications Panel.

Respondent: Garth Graham (garth.graham@sse.com)

Company Name: SSE

Please express your views regarding the Workgroup Consultation, including rationale. (Please include any issues, suggestions or queries)

We express our views regarding this Workgroup Consultation (including our rationale) in our responses to the specific questions posed in this consultation by the Workgroup (as set out below).

However, we do have some additional observations:-

i) since the calculation approach currently **includes** local charges, it would look odd to the European Commission to find that GB, when faced with breaching the €2.5 upper limit, changes the calculation approach itself. Furthermore since it is a 'Regulation' it is binding on all relevant parties; and not just the Member State; including National Grid and Ofgem and it would be open to anyone raising the issue with the European Commission.

ii) since the interpretation can only be tested at the European Commission, it would seem sensible to err on the safe side, continue with existing calculation approach and cap GB average annual transmission charges at less than €2.5/MWh. Doing otherwise would seem to highlight the issue and ask for it to be taken to the European Commission.

ii) has anyone considered the position that Ofgem could put National Grid in if they approve a calculation approach that would put National Grid in breach of the Regulation?

Do you believe that the proposed original or any of the alternatives better facilitate the Applicable CUSC Objectives? Please include your reasoning.

As we understand the CMP224 Original proposal, as set out by the Proposer at the 6th December 2013 Workgroup meeting, it means that all local charges currently applied, by National Grid, to generators would be **included** in the calculation of the annual average transmission charges paid by generators in GB.

Given this we believe that CMP224 (as its currently set out by the Proposer) does better meet Applicable CUSC (Charging) Objective (c) in so far as it is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, and as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses. Furthermore, it would also be consistent, in our view, with the terms of EU Regulation 838/2010 Part B (the 'Regulation'), and in particular paragraphs 1, 2 (1) and 3 thereof.

However, if at a later stage in the proceedings with this Modification (as per the Proposer Ownership principle) the Proposer were to redefine CMP224 Original so as to **exclude** some or all elements of the local charges currently applied, by National Grid, to generators in the calculation of the annual average transmission charges paid by generators in GB then this would, in our view, mean that CMP224 Original (in this scenario[44]) would not better meet Applicable CUSC (Charging) Objective (c) nor would it be consistent, in our view, with the terms of EU Regulation 838/2010 Part B, and in particular paragraphs 1, 2 (1) and 3 thereof.

Standard Workgroup consultation questions

1 Do you support the proposed implementation approach? If not, please state why and provide an alternative suggestion where possible.

We note the proposed implementation timescale set out in paragraph 7.1 and, at this stage, we concur in principle with what is being proposed.

We note that the Workgroup has considered the potential implementation issues that could arise with CMP224 given that the date of any change in the €2.5 upper limit (which is subject to a review by ACER at the moment) may come into effect on 1st January 2015; i.e. during the (GB) Charging Year 2014/15. Of the two options set out in paragraph 7.8 we would, at this stage, support the second option as this should ensure that, over the calendar year 2015, the average annual transmission charges paid by GB generators will be in compliance with Regulation (all be it that it may not do so over the first three months up to 31st March 2015).

2 Do you have any other comments?

We are mindful that CMP224 is directly related to the terms of EU Regulation 838/2010 (Part B). A key element of that Regulation is the matter of harmonisation of transmission charges amongst the Member States. Currently, according to the Regulation, 21 of the Member

[44] Or any Workgroup Alternative(s), if raised, which excluded some or all local elements.

States have generation transmission charges that are within a range €0 - €0.5 with the remaining six countries having a higher range of either (i) €0-€1.2 (Denmark, Sweden and Finland) or (ii) €0-€2 (Romania) or (iii) €0-€2.5 (UK and Ireland).

We are aware of a recent detailed independent study[45] undertaken into generator transmission charges across four countries in Europe[46] on the matter of harmonisation. The conclusions of that report are shown below and these clearly show that harmonisation of generator transmission charges is the economically correct thing to do.

> *A lack of harmonisation or changes to generator transmission charges which reduce harmonisation between countries for reasons other than to reflect differences in forward looking costs can have three different types of impact on economic welfare.*
>
> *First, they can result in distorted operational decisions. If a low cost generator in country A faces high transmission charges, it may not produce electricity, with demand instead being satisfied by a higher cost generator in country B where transmission charges are lower. This reduces economic welfare, because demand is not met using the lowest cost combination of resources.*
>
> *Second, they can result in distorted investment decisions. If generator transmission charges are high in country A, investors may opt to locate in country B and export power to country A. This would be inefficient if other aspects of cost (e.g. land, labour) were higher in country B.*
>
> *Third, they may increase investors' perceptions of risk. If generation transmission charges increase in country A for reasons unrelated to cost reflectivity and generators cannot pass through all of the cost increase, it will reduce returns on investment. Investors may take the view that the same or similar changes could take place in the future and will therefore demand a higher return on investment to compensate this regulatory risk. This will tend to reduce investment in the country's power sector, resulting in demand not being met in the most efficient way (e.g. overreliance on older, less efficient plant). It will also tend to result in under-consumption of electricity over time (e.g. through larger, more mobile customers locating in other markets).*

We endorse these conclusions. It is clear to us that the higher range of average annual transmission tariffs paid for by generators in GB (plus Northern Ireland and Ireland) are having a distorting effect on the GB[47] generation market.

In our view rather than seeking to 'fiddle' with the way the calculation is done (to seek to give the 'appearance' that GB is complying with the current €2.5 upper limit) as some stakeholders appear to want, more effort should be given to seeking to reduce the €2.5 limit

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[45] The study has been provided to us in confidence. We have provided the reference etc., to the Authority under separate cover in response to their recent consultation on "Impact assessment on CMP201 - proposal to remove balancing charges from generators".

[46] France, Germany, Belgium and the Netherlands.

[47] plus Northern Ireland and Ireland

itself to bring the transmission charges paid by GB[48] generation more into line with the rest of continental Europe with whom, in a very short space of time, we will be actively coupled with via the planned 'Target Model' arrangements and the associated European Network Codes (such as those covering Capacity Allocation & Congestion Management, Forward Capacity Allocation and Balancing).

It appears to us that some stakeholders seem to believe that CMP224 should be used to 'gerrymander' the average annual transmission tariff figure paid by generators in GB such that they seem (for the sake of 'appearance) to remain within the €2.5 upper limit (even when, in reality, they do not).

The way this 'gerrymandering' manifests itself is in the efforts to seek to exclude various charges paid by generators from the calculation of the annual average transmission charges paid by (GB) generators. This is most clearly shown by the various options set out in Table 1 of the Workgroup consultation.

3 Do you wish to raise a WG Consultation Alternative Request for the Workgroup to consider?

No.

4 Do you believe that the Workgroup has considered all potential interpretations of "charges paid by producers for physical assets required for connection to the system or the upgrade of the connection" to be excluded from the annual average transmission charge referred to under EC Regulation 838/2010?

Yes. In our view the interpretation of "charges paid by producers for physical assets required for connection to the system or the upgrade of the connection" to be excluded from the annual average transmission charge referred to under EC Regulation 838/2010 is clear – it does not mean excluding some or all charges for the local network.

5 Do you believe that any Local Generation TNUoS Charges (or a subset thereof listed in Table 1 or otherwise) should be excluded from the annual average transmission charge as part of defining a cap on the proportion of TNUoS charges paid by generation under the proposed solution?

No. In our view the correct legal interpretation of EU Regulation 838/2010 Part B, and in particular paragraphs 1, 2 (1) and 3 thereof, is that <u>all</u> local generation TNUoS charges should be **included** within the annual average transmission charges as part of defining a cap on the proportion of TNUoS charges paid by generation in GB under the proposed solution. We have provided compelling reasons as to why this should be the case in our answer to Question 6 below.

6 Do you believe that based upon the summary legal opinion from National Grid it would be sensible to include assets subject to local TNUoS charges within the calculation of the annual average transmission charges for GB for the reason set out?

[48] plus Northern Ireland and Ireland

In our view it would be wholly sensible based on (a) National Grid's summary legal opinion and (b) our view of the legal matters that arise from CMP224 to **include** all assets subject to local TNUoS charges within the calculation of the annual average transmission charges when calculating the GB position with respect to €2.5 limit.

In our view this would be consistent with the terms of EU Regulation 838/2010 Part B, and in particular paragraphs 1, 2 (1) and 3 thereof.

The Regulation imposes a limit on the annual average transmission charges which are paid by producers (generators) in each Member State. The issue that the CMP224 Workgroup has been considering relates to the interpretation of what constitutes "transmission charges" within the Regulation and the exclusions therefrom.

We considers that the CUSC is the most relevant document to consult when seeking to determine, in the context of GB, the practical application of Regulation 838/2010 Part B as it deals, explicitly, with the connection to and charges arising from the connection to and use of the transmission system in GB.

In order to assist the Workgroup to consider this matter, National Grid provided (at the first Workgroup meeting) an illustrative example of the GB electricity transmission system. The relevant slide is number 12 ('Local Charges').

It is common ground amongst the Workgroup members that (i) the red 'Local' network and the black 'Wider' network (shown on slide 12) are, collectively, known as the National Electricity Transmission System (or 'NETS') and that the 'Wider' network, as illustrated on the slide, is the Main Integrated Transmission System (or 'MITS') and that (ii) the green Generator specific assets are neither part of the NETS or MITS.

Part B of the Regulation includes the following pertinent passages:-

> *"Annual average transmission charges paid by producers is annual total transmission tariff charges paid by producers divided by the total measured energy injected annually by producers to the transmission system of a Member State." [Statement 1]*

> *"For the calculation set out at Point 3[Statement 3], transmission charges shall exclude:*
> *charges paid by producers for physical assets required for connection to the system or the upgrade of the connection" [Statement 2]*

> *"The value of the annual average transmission charges paid by producers shall be within a range of 0 to 0,5 EUR/MWh, except those applying in ..... Great Britain.... Annual average transmission charges paid by producers in ... Great Britain... shall be within a range of 0 to 0,25 EUR/MWh..." [Statement 3]*

[emphasis added]

It is common ground amongst the Workgroup members that it is necessary for GB to ensure that the average transmission charges paid by generators in GB remain within a range of €0-€2.5 (as per paragraph 3 [Statement 3] of Part B of the Regulation) or such other figure as maybe amended from time to time by the European Commission.

The question which has arisen within the Workgroup is what item(s) does or does not make up the definition of "transmission charges" and in particular which aspects, if any, of those charges should be treated as **excluded** as '*charges*' for '*connection'* to '*the system*', as set out in Statement 2.

We believe there are clear reasons to **include** (rather than **exclude**) all assets subject to local TNUoS charges within the calculation of the annual average transmission charges when calculating the GB position with respect to the €2.5 limit.

These reasons include:-

(a) It is our contention that it is possible to determine (in the context of GB) what is (i) meant by '*connection*', including by reference to the CUSC definition[49] of it and (ii) the '*system*', by noting that Statement 2 is written to ensure the calculation set out in Statement 1 is undertaken in order to determine the range set out in Statement 3 is not exceeded. Those who drafted the Regulation must have given specific consideration to what was included in the definition of "transmission charges" within each Member State and the GB system in particular, in order to arrive at the different caps provided for each Member State.

(b) It is our contention that it cannot sensibly be concluded that Statement 2 of the Regulation has no meaning within the GB system since the Regulation would, in effect, be rendered unenforceable. On the contrary, read in the context of both Statement 1 and Statement 3, the only reasonable conclusion is that the '*system*' referred to in Statement 2 is one and the same as the '*transmission system*' in Statement 1.

(c) It is our contention that as the CUSC currently defines[50] (i) what is meant by 'Connection Charges' and (ii) that National Grid produces invoices and issues these to generators for the said 'Connection Charges' (in accordance with CUSC Section 2.14.1[51]) that it is possible today to complete the calculation required in Statement 2 by reference to said 'Connection Charges' paid by GB generators to connect to said '*system*' in GB.

(d) It is our contention that the section of the CUSC[52] which deals with "Connections" (Section 2) refers only to NETS[53] and does so on no less than 26 occasions, whilst there is (in Section 2) no reference to MITS. Therefore, it is contended that the only sensible interpretation is to view '*connection*', in a GB context, in terms of the '*system*' being the

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[49] This is shown in Appendix 1 to this response.

[50] This is shown in Appendix 1 to this response.

[51] This is shown in Appendix 1 to this response.

[52] This is shown in Appendix 1 to this response.

[53] 2.1.1 x**1**, 2.1.2 x**2**, 2.2.1 x**1**, 2.2.2 (b) x**1**, 2.2.3 x**1**, 2.2.4 x**2**, 2.3.1 x**2**, 2.3.2 x**2**, 2.4 x**1**, 2.5 x**1**, 2.7 x**1**, 2.12.1 (a) x**1**, 2.12.1 (b) x**2**, 2.12.1 (c) x**1**, 2.12.1 (d) x**1**, 2.12.2 x**1**, 2.13.7 x**1**, 2.13.11 (a) x**2**, 2.13.11 (b) (i) x**1** and 2.13.12 x**1.**

NETS (and not the MITS).

(e) Furthermore, it is our contention that the matter of where a generator connects to the '*system*' should be clear to National Grid as, for example, it was recently the subject of an opinion by the Authority in its decision letter of CAP189[54] where it was noted that:-

> *"A generator or a distribution network is generally connected to the transmission network through a substation to provide both protection and control to the transmission network. The substation assets form an electrical boundary. The CUSC (section 2.12) defines the standard boundary and sets out how ownership of the assets at the boundary is split between the connecting user and the National Electricity Transmission System (NETS) for different types of asset."*

The Authority's decision letter goes on to note that CAP189 was raised by National Grid itself (in July 2010) and that *"[t]he proposal seeks to amend the CUSC so that a user requesting a connection to the NETS through a GIS substation can elect to do so using either of two standard ownership boundaries*".

(f) It is our contention that National Grid has already set a precedent in how to undertaken the calculation in Statement 2 when it undertook that same calculation to inform the Authority's Project Transmit Technical Working Group as witnessed by its presentation[55] to that group in August 2011 and in particular slides 5, 6, 7, 9, 10 and 11 which were calculated, by National Grid, "*in accordance with the European Tarification Guidelines*"[56] .

For these reasons we strongly believe that the legal position is clear that it is appropriate for CMP 224 to be adopted such that all charges paid by producers for connection to the "local" network are **included** in the calculation of the "annual average transmission charges" for the purposes of Part B of the Regulation.

7 Do you believe that the application of an additional bandwidth to manage the risk of potential breaches of the limit set out in EC Regulation 838/2010 is appropriate?

Yes. We note the Workgroup deliberations on option (c) outlined in paragraph 4.37 and explored, in detail, in paragraphs 4.43-4.56.

In our view there is a case for a bandwidth to be adopted to ensure that GB does not breach the Regulation. This, in our view is appropriate given the inherent variability of the three elements that go into calculating the annual average transmission charges paid for by GB generators; namely:-

i) the total level of generation output;
ii) TO Allowed Revenue; and
iii) the £/€ exchange rate.

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[54] http://www.nationalgrid.com/NR/rdonlyres/7BE14FC7-7AE6-409F-82F6-1A8A117D0B8B/51173/CAP189D.pdf

[55] https://www.ofgem.gov.uk/sites/default/files/docs/2011/08/transmit-wg-postmtg4_eu-tarification-guidelines.pdf

[56] page 9 of the group's minutes 18th August 2011 https://www.ofgem.gov.uk/sites/default/files/docs/2011/09/minutes---working-group-meeting-4-%28version-1.0%29.pdf

Not having a bandwidth could lead to repeated breaching by GB of the limit (be that, as currently, €2.5 or some other higher or lower figure depending on the outcome of the ongoing ACER review and the European Commission determination). This would not be desirable, both in terms of compliance with the law but also in terms of the increase in regulatory risk that would arise if this were to happen as parties would be unsure what, if any, rectification to the GB transmission charges might be required to rectify the breach for the rest of the year in question.

8 Do you believe that the G/D split should revert back to 27:73 in charging years following the application of the proposed cap (assuming no breach of the EC Regulation)?

Yes. Assuming there is no breach of the limit set in the Regulation then, in our view, it would appear correct to return to the situation we have today.

However, that having been said, we note the compelling economic case which we set out in response to our answer to Question 2 above that harmonisation of the annual average transmission tariffs paid by generators in GB with those for neighbouring areas, such as Holland and France, is highly desirable. Given this we could see a case being made for the GB G:D split not reverting back to 27:73 if that would run counter to the creation and ongoing operation of the Internal Market in electricity.

Annex 1 CMP224 Legal aspects – extracts from relevant documents

[1] EU Regulations

COMMISSION REGULATION (EU) No 838/2010 [57]

of 23 September 2010

on laying down guidelines relating to the inter-transmission system operator compensation mechanism and a common regulatory approach to transmission charging

PART B

Guidelines for A Common Regulatory Approach to Transmission Charging

1. Annual average transmission charges paid by producers in each Member State shall be within the ranges set out in point 3.

2. Annual average transmission charges paid by producers is annual total transmission tariff charges paid by producers divided by the total measured energy injected annually by producers to the transmission system of a Member State.

For the calculation set out at Point 3, transmission charges shall exclude:

(1) charges paid by producers for physical assets required for connection to the system or the upgrade of the connection;
(2) charges paid by producers related to ancillary services;

(3) specific system loss charges paid by producers.

3. The value of the annual average transmission charges paid by producers shall be within a range of 0 to 0,5 EUR/MWh, except those applying in Denmark, Sweden, Finland, Romania Ireland, Great Britain and Northern Ireland.

The value of the annual average transmission charges paid by producers in Denmark, Sweden and Finland shall be within a range of 0 to 1,2 EUR/MWh.

Annual average transmission charges paid by producers in Ireland, Great Britain and Northern Ireland shall be within a range of 0 to 2,5 EUR/MWh, and in Romania within a range of 0 to 2,0 EUR/MWh.

4. The Agency shall monitor the appropriateness of the ranges of allowable transmission charges, taking particular account of their impact on the financing of transmission capacity needed for Member States to achieve their targets under the Directive 2009/28/EC (1) of the European Parliament and of the Council and their impact on system users in general.

[57] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:250:0005:0011:EN:PDF

5. By 1 January 2014 the Agency shall provide its opinion to the Commission as to the appropriate range or ranges of charges for the period after 1 January 2015.

DIRECTIVE 2009/72/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL[58]
of 13 July 2009
concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC

Article 2

3 'transmission' means the transport of electricity on the extra high-voltage and high-voltage interconnected system with a view to its delivery to final customers or to distributors, but does not include supply;

4 'transmission system operator' means a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity;

[2] CUSC

Section 11 – Definitions[59]

"**Attributable Works**"

those components of the **Construction Works** which are required (a) to connect a **Power Station** which is to be connected at a **Connection Site** to the nearest suitable **MITS[60] Node**; or (b) in respect of an **Embedded Power Station** from the relevant **Grid Supply Point** to the nearest suitable **MITS Node** (and in any case above where the **Construction Works** include a **Transmissio**n substation that once constructed will become the **MITS Node**, the **Attributable Works** will include such **Transmission** substation) and which in relation to a particular **User** are as specified in its **Construction Agreement**;

"Connection"

a direct connection to the **National Electricity Transmission System** by a **User**;

[58] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0055:0093:EN:PDF

[59] **http://www.nationalgrid.com/NR/rdonlyres/FC669161-44F9-4FE6-90A2-1B59CC855107/62918/CUSCSection11_v155_CMP218_16_Oct_2013.pdf**

[60] References to 'MITS' and 'NETS' are highlighted here for ease of identification.

"Connection Application"

an application for a **New Connection Site** in the form or substantially in the form set out in Exhibit B to the **CUSC**;

“Connection Boundary”

shall be the boundary defined by Paragraph 14.2.6 of the Statement of the Connection Charging Methodology;

"Connection Charges"

charges made or levied or to be made or levied for the carrying out (whether before or after the date on which the **Transmission Licence** comes into force) of works and provision and installation of electrical plant, electric lines and ancillary meters in constructing entry and exit points on the **National Electricity Transmission System**, together with charges in respect of maintenance and repair of such items in so far as not otherwise recoverable as **Use of System Charges**, all as more fully described in the **Transmission Licence**, whether or not such charges are annualised, including all charges provided for in the statement of **Connection Charging Methodology** (such as **Termination Amounts** and **One-off Charges**);

"Connection Conditions" or "CC"

that portion of the **Grid Code** which is identified as the **Connection Conditions**;

"Connection Entry Capacity"

the figure specified as such for the **Connection Site** and each **Generating Units** as set out in Appendix C of the relevant **Bilateral Connection Agreement**;

"Connection Offer"

an offer or (where appropriate) the offers for a **New Connection Site** in the form or substantially in the form set out in Exhibit C including any revision or extension of such offer or offers;

"Connection Site"

each location more particularly described in the relevant **Bilateral Agreement** at which a **User's Equipment** and **Transmission Connection Assets** required to connect that **User** to the **National Electricity Transmission System** are situated. If two or more **Users** own or operate **Plant** and **Apparatus** which is connected at any particular location that location shall constitute two (or the appropriate number of) **Connection Sites**;

"Connection Site Demand Capability"

the capability of a **Connection Site** to take power to the maximum level forecast by the **User** from time to time and forming part of the **Forecast Data** supplied to **The Company** pursuant to the **Grid Code** together with such margin as **The Company** shall in its reasonable opinion consider necessary having regard to **The Company's** duties under its **Transmission Licence;**

"MITS Connection Works"

means those **Transmission Reinforcement Works** (inclusive of substation works) that are required from the **Connection Site** to connect to a **MITS Substation** (and in the context of an **Embedded Power Station**, "connection site" shall mean the associated **Grid Supply Point** identified as such in the relevant **Bilateral Agreement**);

"National Electricity Transmission System" or "NETS"

the system consisting (wholly or mainly) of high voltage electric wires owned or operated by transmission licensees within **Great Britain** and **Offshore** and used for the transmission of electricity from one **Power Station** to a sub-station or to another **Power Station** or between sub-stations or to or from any **External Interconnection** and includes any **Plant** and **Apparatus** or meters owned or operated by any transmission licensee within **Great Britain** and **Offshore** in connection with the transmission of electricity but shall not include **Remote Transmission Assets**;

"New Connection Site"

a proposed **Connection Site** in relation to which there is no **Bilateral Agreement** in force between the **CUSC Parties**;

"Site Specific Maintenance Charge"

the element of the **Connection Charges** relating to maintenance and repair calculated in accordance with the **Connection Charging Methodology**;

"Site Specific Requirements"

those requirements reasonably required by **The Company** in accordance with the **Grid Code** at the site of connection of a **Relevant Embedded Medium Power Station** or a **Relevant Embedded Small Power Station**;

"Termination Amount"

in relation to a **Connection Site**, the amount calculated in accordance with the **Charging Statements**;

"Transmission"

means, when used in conjunction with another term relating to equipment, whether defined or not, that the associated term is to be read as being part of or directly associated with the **National Electricity Transmission System** and not of or with the **User System**;

"Transmission Business"

the authorised business of **The Company** or any **Affiliate** or **Related Undertaking** in the planning, development, construction and maintenance of the **National Electricity Transmission System** (whether or not pursuant to directions of the Secretary of State made under section 34 or 35 of the **Act**) and the operation of such system for the transmission of electricity, including any business in providing connections to the **National Electricity Transmission System** but shall not include (i) any other **Separate Business** or (ii) any other business (not being a **Separate Business**) of **The Company** or any **Affiliate** or **Related Undertaking** in the provision of services to or on behalf of any one or more persons;

"Transmission Connection Assets"

the **Transmission Plant** and **Transmission Apparatus** necessary to connect the **User's Equipment** to the **National Electricity Transmission System** at any particular C**onnection Site** in respect of which **The Company** charges **Connection Charges** (if any) as listed or identified in Appendix A to the **Bilateral Connection Agreement** relating to each such **Connection Site**;

"Transmission Connection Asset Works"

in relation to a particular **User**, as defined in its **Construction Agreement**;

“Transmission Licensees Assets”

The Plant and Apparatus owned by Transmission Licensees necessary to connect the User's Equipment to the **National Electricity Transmission System** at any particular Connection Site in respect of which **The Company** charges Connection

"User's Equipment"

the **Plant** and **Apparatus** owned by a **User** (ascertained in the absence of agreement to the contrary by reference to the rules set out in Paragraph 2.12) which: (a) is connected to the **Transmission Connection Assets** forming part of the **National Electricity Transmission System** at any particular **Connection Site** to which that **User** wishes so to connect, or (b) is connected to a **Distribution System** to which that **User** wishes so to connect but excluding for the avoidance of doubt any **OTSUA**;

"User System"

any system owned or operated by a **User** comprising **Generating Units** and/or **Distribution Systems** (and/or other systems consisting (wholly or mainly) of electric lines which are owned or operated by a person other than a **Public Distribution System Operator** and **Plant** and/or **Apparatus** connecting **Generating Units**, **Distribution Systems** (and/or other systems consisting wholly or mainly of electric lines which are owned or operated by a person other than a **Public Distribution System Operator** or **Non-Embedded Customers** to the **National Electricity Transmission System** or (except in the case of **Non-**

Embedded Customers) to the relevant other **User System**, as the case may be, including any **Remote Transmission Assets** operated by such **User** or other person and any **Plant** and/or **Apparatus** and meters owned or operated by such **User** or other person in connection with the distribution of electricity but does not include any part of the **National Electricity Transmission System**;

Section 14 – Charging Methodologies[61]

Connection/Use of System Boundary

14.2.4 The first step in setting charges is to define the boundary between connection assets and transmission system infrastructure assets.

14.2.5 In general, connection assets are defined as those assets solely required to connect an individual User to the National Electricity Transmission System, which are not and would not normally be used by any other connected party (i.e. "single user assets").

For the purposes of this Statement, all connection assets at a given location shall together form a connection site.

14.2.6 Connection assets are defined as all those single user assets which:

a) for Double Busbar type connections, are those single user assets connecting the User's assets and the first transmission licensee owned substation, up to and including the Double Busbar Bay;

b) for teed or mesh connections, are those single user assets from the User's assets up to, but not including, the HV disconnector or the equivalent point of isolation;

c) for cable and overhead lines at a transmission voltage, are those single user connection circuits connected at a transmission voltage equal to or less than 2km in length that are not potentially shareable.

14.2.7 Shared assets at a banked connection arrangement will not normally be classed as connection assets except where both legs of the banking are single user assets under the same Bilateral Connection Agreement.

14.2.8 Where customer choice influences the application of standard rules to the connection boundary, affected assets will be classed as connection assets. For example, in England & Wales The Company does not normally own busbars below 275kV, where The Company and the customer agree that The Company will own the busbars at a low voltage substation, the assets at that substation will be classed as connection assets and will not automatically be transferred into infrastructure.

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[61] http://www.nationalgrid.com/NR/rdonlyres/8FFA9408-9DC7-44C2-AF68-93E684A176D8/59890/CUSC_Section_14_v15combined_CMP203_1April2013.pdf

14.2.9 The design of some connection sites may not be compatible with the basic boundary definitions in 14.2.6 above. In these instances, a connection boundary consistent with the principles described above will be applied.

Section 2 – Connection[62]

2.12 PRINCIPLES OF OWNERSHIP

2.12.1 Subject to the **Transfer Scheme** or any contrary agreement in any **Bilateral Agreement** or any other agreement the division of ownership of **Plant** and **Apparatus** shall be at the electrical boundary, such boundary to be determined in accordance with the following principles:

In the case of air insulated switchgear:

(a) in relation to **Plant** and **Apparatus** located between the **National Electricity Transmission System** and a **Power Station**, the electrical boundary is at the busbar clamp on the busbar side of the busbar isolators on
Generators and **Power Station** transformer circuits;

(b) save as specified in Paragraph 2.12.1(c) below, in relation to **Plant** and **Apparatus** located between the **National Electricity Transmission System** and a **Distribution System**, the electrical boundary is at the busbar clamp on the busbar side of the **Distribution System** voltage busbar selector isolator(s) of the **National Electricity Transmission System** circuit or if
a conventional busbar does not exist, an equivalent isolator. If no isolator exists an agreed bolted connection at or adjacent to the tee point shall be
deemed to be an isolator for these purposes;

(c) in relation to **Transmission Plant** and **Transmission Apparatus** located between the **National Electricity Transmission System** and a **Distribution System** but designed for a voltage of 132KV or below in England and Wales and below 132kV in Scotland, the electrical boundary is at the busbar clamp on the busbar side of the busbar selector isolator on the **Distribution System**
circuit or, if a conventional busbar does not exist, an equivalent isolator. If no isolator exists, an agreed bolted connection at or adjacent to the tee point shall be deemed to be an isolator for these purposes;

(d) in relation to **Plant** and **Apparatus** located between the **National Electricity Transmission System** and the system of a **Non-Embedded Customer**, the electrical boundary is at the clamp on the circuit breaker side of the cable disconnections at the **Non-Embedded Customer's** sub-station; and In the case of metal enclosed switchgear, that is not **Gas Insulated Switchgear:**

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[62] http://www.nationalgrid.com/NR/rdonlyres/D1B64625-6919-4001-A90A-62AAEAF1C56F/62916/CUSC_Section_2_CMP218_V112_16Oct_2013.pdf

(e) the electrical boundary will be the equivalent of those specified in this Paragraph 2.12.1 save that for rack out switchgear, the electrical boundary will be at the busbar shutters.

In the case of **Gas Insulated Switchgear**:

(f) the electrical boundary will be the equivalent of those specified in this Paragraph 2.12.1 save that the electrical boundary will be at:

(i) the first component on the outside of the **Gas Insulated Switchgear Circuit Breaker** gas zone on the **User's** side of that gas zone or, where a circuit disconnector is fitted, the first component on the outside of the **Gas Insulated Switchgear** circuit disconnector gas zone, on the **User's** side of that gas zone; or

(ii) the first gas zone separator on the busbar side of the busbar selection devices, and in such case the busbar selection devices' gas zone
may contain a single section of the busbar as agreed between **The Company** and the **User** and a diagram showing these electrical boundaries is attached
at Schedule 1 to this Section 2.

2.12.2 If a **User** wants to use transformers of specialised design for unusual load characteristics at the electrical boundary, these shall not be owned by the **User** and shall form part of the **National Electricity Transmission System** but the **User** shall pay **The Company** for the proper and reasonable additional cost thereof as identified by **The Company** in the **Offer** covering such transformers. In this Paragraph 2.12.2 "unusual load characteristics" means loads which have characteristics which are significantly different from those of the normal range of domestic, commercial and industrial loads (including loads which vary considerably in duration or magnitude).

2.12.3 For the avoidance of doubt nothing in this Paragraph 2.12 shall
effect any transfer of ownership in any **Plant** or **Apparatus**.

2.14 CONNECTION CHARGES

2.14.1 Introduction

Subject to the provisions of the **CUSC**, and the relevant **Bilateral Connection Agreement,** each **User** shall, as between **The Company** and that **User**, with effect from the relevant date set out in the relevant **Bilateral Connection**
Agreement, be liable to pay to **The Company** the **Connection Charges** calculated and applied in accordance with the **Statement of the Connection Charging Methodology** and as set out in the relevant **Bilateral Connection Agreement**. The **User** shall make those payments in accordance with the
provisions of the **CUSC**. **The Company** shall apply and calculate the **Connection Charges** in accordance with the **Statement of the Connection Charging Methodology**.

2.14.3 (b)

The Company shall be entitled to invoice each **User** for **Connection Charges** payable in accordance with the **CUSC** in respect of any **Plant** and **Apparatus** installed as part of the **Transmission Connection Asset Works**
on the basis set out in the **Statement of the Connection Charging Methodology**, until the final cost of carrying out the said **Transmission Connection Asset Works** shall have been determined.

(c) As soon as practicable after the **Completion Date** and in any event within one year (or such later period as **The Company** and the relevant **User** shall agree) thereof. **The Company** shall, as between **The Company** and that **User**, provide to the **User** a written statement specifying the **Connection Charges** calculated in accordance with the **Charging Statements** based on the cost of carrying out the **Transmission Connection Asset Works** (the "**Cost Statement**"). **The Company** shall be entitled to revise Appendix B to the relevant **Bilateral Connection Agreement** accordingly.

2.14.5 Connection Charges – Site Specific Maintenance Charge

(a) **The Company** shall be entitled to invoice each **User** for the indicative **Site Specific Maintenance Charge** in each **Financial Year** as set out in the **Statement of the Connection Charging Methodology**.

2.17 REPLACEMENT OF TRANSMISSION CONNECTION ASSETS

2.17.1 **The Company** will provide information to each **User** on an ongoing basis with regards to its long term intentions and any programme for the replacement of any **Transmission Connection Assets** at a **Connection Site**.

2.17.2 Where in **The Company's** reasonable opinion to enable **The Company** to comply with its statutory and licence duties and\or to enable any **Relevant Transmission Licensee** to comply with its statutory and licence duties it is necessary to replace a **Transmission Connection Asset The Company** shall give written notice of this (a "**Replacement Notice**") such notice to be given (subject to Paragraph 2.17.7) as soon as practicable.

2.17.3 Following the issue of the **Replacement Notice The Company**
shall provide an explanation of the economic and engineering reasons to asset replace and the parties shall meet as soon as practicable to consider options, programme and costs associated with the replacement.

2.17.4 **The Company** shall make an offer to the **User(s**) (subject to Paragraph 2.17.7) no earlier than 6 months after the date of the **Replacement Notice** detailing the variations it proposes to make to Appendices A and B of and any other changes required to the **Bilateral Connection Agreement** and if appropriate enclosing a **Construction Agreement** in respect of the replacement of the **Transmission Connection Assets**.

2.17.5 If after a period of 3 months from receipt of the offer or such longer period as the parties might agree the **User(s)** and **The Company** have failed to reach agreement on the offer then either party may make an application to the **Authority** under Standard Condition C9 of the **Transmission Licence** to settle any dispute about the replacement of the **Transmission Connection Assets**.

2.17.6 Subject to Paragraph 2.17.7, **The Company** shall not replace the **Transmission Connection Assets** until the offer has been accepted by the **User(s)** or until the determination of the **Authority** if an application to the **Authority** has been made.

2.17.7 **The Company** shall take all reasonable steps to avoid exercising its rights pursuant to this Paragraph but in the event that **The Company** has reasonable grounds to believe, given its licence and statutory duties or the statutory and licence duties of a **Relevant Transmission Licensee** that a **Transmission Connection Asset** should be replaced prior to or during the process outlined above then **The Company** shall consult with the **User(s)** as far as reasonably practicable and shall be entitled to replace such **Transmission Connection Asset** and shall advise the **User(s)** of this and as soon as practicable make an offer for such replacement which can be accepted or referred in accordance with Paragraph 2.17.5 above.

2.17.8 Subject to Paragraph 2.17.9 **Connection Charges** shall be payable in respect of such replaced **Transmission Connection Assets** in accordance with the **Statement of the Connection Charging Methodology** and **The Company** shall give the **User(s)** not less than 2 months prior written notice of such varied charges and specify the date upon which such charges become effective. **The Company** shall be entitled to invoice the **Connection Charges** based on an estimate of the cost and the provisions of Paragraphs 2.14.3 and 2.14.4 shall apply.

2.17.9 Where **Transmission Connection Assets** have been replaced pursuant to Paragraph 2.17.7 **The Company** shall not be entitled to vary the **Connection Charges** until the offer has been accepted or the matter has been determined by the **Authority** and until such time the **User(s)** shall continue to pay **Connection Charges** as if the **Transmission Connection Assets** had not been replaced. If the matter is determined in **The Company's** favour then **The Company** shall be entitled to issue a revised Appendices A and B and the **User(s)** shall pay to **The Company** the difference between the two amounts plus interest at **Base Rate** on a daily basis from completion of the replacement to the date of payment by the **User(s)**. if the matter is not determined in **The Company's** favour **Connection Charges** shall be payable as directed by the **Authority**.

(CUSC) EXHIBIT B[63]

THE CONNECTION AND USE OF SYSTEM CODE CONNECTION APPLICATION

Please note that certain terms used in the application form are defined in the Interpretation and Definitions (contained in Section 11 to the **CUSC**) and when this occurs the expressions have capital letters at the beginning of each word and are in bold.

[63] **http://www.nationalgrid.com/NR/rdonlyres/70F60213-EC10-42C1-BB21-7F604AAB71C6/51399/CUSC_Exhb_B_V113_CAP189_30Jan12.pdf**

11 **The Company's Offer** will be based upon its standard form terms of **Connection Offer** and the **Charging Statements** issued by **The Company** under Standard Conditions C4 and C6 of the **Transmission Licence**.

Section B

1. Please identify (preferably by reference to an extract from an Ordnance Survey Map for **Onshore** locations, or with the latitude and longitude or some other corresponding equivalent for **Offshore** locations) the intended location (the "**Connection Site**") of the **Plant** and **Apparatus** (the "**User Development**") which it is desired should be connected to the **National Electricity Transmission System** and where the application is in respect of a proposed **New Connection Site** other than at an existing sub-station. Please specify the proposed location and name of the **New Connection Site** (which name should not be the same as or confusingly similar to the name of any other **Connection Site**) together with details of access to the **Connection Site** including from the nearest main road.

2. Please provide a plan or plans of the proposed **Connection Site** indicating (so far as you are now able) the position of all buildings, structures, **Plant** and **Apparatus** and of all services located on the **Connection Site**.

3. Give details of the intended legal estate in the **Connection Site** (to include leasehold and freehold interests and in the case of **Connection Sites** in Scotland legal interests and heritable or leasehold interests including servitudes or other real rights and in the case of **Connection Sites** located **Offshore** leaseholds granted by the Crown Estate) in so far as you are aware.

4. Who occupies the **Connection Site** in so far as you are aware?

5. If you believe that a new sub-station will be needed, please indicate by reference to the plan referred to in Section B question 2 above the **Applicant's** suggested location for it - giving dimensions of the area.

6. If you are prepared to make the land necessary for the said sub-station available to **The Company** or, for **Connection Sites** in Scotland or **Offshore**, make the land or **Offshore Platform** available to the **Relevant Transmission Licensee** ` please set out brief proposals for their interest in it including (if relevant) such interest and the consideration to be paid for it.

7. Is space available on the **Connection Site** for working storage and accommodation areas for **The Company** contractors or, for **Connection Sites** in Scotland, the contractors of the **Relevant Transmission Licensee**? If so, please indicate by reference to the plan referred to in Section B question 2 above the location of such areas, giving the approximate dimensions of the same.

8. For **Connection Sites** located **Onshore**, please provide details (including copies of any surveys or reports) of the physical nature of land in which you

have a legal estate or legal interest at the proposed **Connection Site** including the nature of the ground and the sub-soil.

9. Please give details and provide copies of all existing relevant planning and other consents (statutory or otherwise) relating to the **Connection Site** and the **User Development** and/or details of any pending applications for the same.

10. Is access to or use of the **Connection Site** for the purposes of installing, maintaining and operating **Plant** and **Apparatus** subject to any existing restrictions? If so, please give details.

11. If you are aware of them, identify by reference to a plan (if possible) the owners and (if different) occupiers of the land adjoining the **Connection Site**. To the extent that you have information, give brief details of the owner's and occupier's estates and/or interests in such land.

APPLICATION FOR A NEW CONNECTION

8. Do you wish to suggest an ownership boundary different from that set out in **CUSC** Paragraph 2.12?

9. Please confirm which ownership boundary at **CUSC** Paragraph 2.12.1 (f) you would want in the event that the **Transmission** substation at which the **Applicant** is to be connected is to be of a **Gas Insulated Switchgear** design:

(a) **CUSC** Paragraph 2.12.1 (f) (i) [ ]

(b) **CUSC** Paragraph 2.12.1 (f) (ii) [ ]

Please note that in the case where the ownership boundary is in accordance with **CUSC** Paragraph 2.12.1 (f) (i) restrictions on availability as described within **CUSC** Schedule 2 Exhibit 1 will apply in the event of a **GIS Asset Outage**.

10. Are you considering building any assets that would be identified as **Transmission Connection Assets**? If you indicate yes **The Company** will contact you to discuss further details.

CONNECTION APPLICATION

1. We hereby apply to connect our **Plant** and **Apparatus** to the **National Electricity Transmission System** at a **New Connection Site**. We agree to pay **The Company's** Engineering Charges on the terms specified in the **Notes** to the **Connection Application**.

[end]

CUSC Workgroup Consultation Response Proforma

CMP261 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'

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

Please send your responses by **28th July 2016** to cusc.team@nationalgrid.com Please note that any responses received after the deadline or sent to a different email address may not receive due consideration by the Workgroup.

Any queries on the content of the consultation should be addressed to Ryan Place at ryan.place@nationalgrid.com

These responses will be considered by the Workgroup at their next meeting at which members will also consider any Workgroup Consultation Alternative Requests. Where appropriate, the Workgroup will record your response and its consideration of it within the final Workgroup Report which is submitted to the CUSC Modifications Panel.

Respondent:	*Mary Teuton (mteuton@vpi-i.com; 0207 312 4469)*
Company Name:	*VPI Immingham*
Please express your views regarding the Workgroup Consultation, including rationale. **(Please include any issues, suggestions or queries)**	For reference, the Applicable CUSC objectives are: **Use of System Charging Methodology** (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity; (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection); (c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far

	as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses. (d) Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency.

Standard Workgroup consultation questions

Q	Question	Response
1	**Do you believe that CMP261 Original Proposal or either of the potential options for change better facilitates the Applicable CUSC Objectives? Please give your reasoning.**	Yes, we believe that CMP261 better facilitates the applicable CUSC objectives. Most obviously, it better delivers objective (d) - Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency. There has clearly been a breach of Regulation 838/2010 in year 2015/16 with zero effort from National Grid to rectify the issue once it became apparent that the Regulation was going to be breached. This modification would rectify the breach and hence better facilitate objective (d). In addition, we also believe that the modification better delivers applicable objective (a) – better facilitation of competition. With some companies using their TNUoS as set by NGET before the charging year and other companies potentially limiting their TNUoS to €2.5/MWh, there would be a natural distortion of competition due to the different approaches.
2	**Do you support the proposed implementation approach?**	We would support option A in terms of implementation. We think it is right that generators who held TEC in 2015/16 are given an immediate rebate whereas the costs are recovered from suppliers further in the future. This is on the basis that a large amount of generation that paid TEC in 2015/16 is no longer operational so any future reconciliation would not recompense the affected parties. Given that one of these non-operational plant stated TNUoS as a key factor in their decision making, we think it right that these also be recompensed. However, given that suppliers already have contracts in place for 17/18, we think it more fair that the costs are recovered further in the future to allow for the costs to be included in tariffs as opposed to suppliers taking a hit against already agreed fixed price contracts.

Q	Question	Response
3	**Do you have any other comments?**	We do not support the argument that CMP261 creates a windfall payment for generators. Looking at thermal generators' profits over the last few years, it becomes obvious that most have been suffering from serious financial issues. One such reason for this has been the inability for generators to recover their fixed costs, including TNUoS, via the wholesale market. Given very few generators made a profit in these years, rather than be a windfall profit, any rebate would in fact be a contribution to fixed costs and reduce operating losses. It will not be known whether the plant that had closed would have made a different decision had their TNUoS been lower. However, the impact of these plants closing and subsequent impact on the costs of ancillary services, namely blackstart and SBR, would seem to far outweigh the cost of the rebate to generators.
4	**Do you wish to raise a WG Consultation Alternative Request for the Workgroup to consider?**	No

Specific questions for CMP261

Q	Question	Response
5	**Do you have any comments on the legal opinion?**	We are in full agreement with the Legal opinion. Despite the ex-ante approach being in place, it is clear that Regulation 838/2010 has been breached, and a material breach at that. As a result, National Grid are non-compliant with the law and we believe that immediate recompense should be made to affected parties. Furthermore, to prevent the situation happening in future years, it may be appropriate for the variables that feed into the ex-ante approach to be reassessed as to whether they are appropriate.

Q	Question	Response
6	**Is ex ante certainty preferred over ex post accuracy?**	We support the principle of ex-ante certainty over ex-post accuracy, however not at any cost. Ex-ante certainty must also be compliant with the relevant Regulations (in this case Regulation 838/2010) and therefore the error margin included in the ex-ante approach must be appropriate to ensure compliance. Whilst we support the current approach, a review of the error margin and variables, such as exchange rate should take place to ensure that it remains accurate and compliant. Variable, volatile costs are a key issue when it comes to longer term investment in generating assets so the principle of certainty, as far as is possible, is key for future investment and hence security of supply.
7	**Do you believe a breach of the Regulation has occurred for Charging Year 2015/16? If so do you believe that an ex post reconciliation should be carried out?**	Yes, we believe a significant breach, close to 30%, has occurred which has resulted in a huge over-payment by generators and National Grid being non-compliant with EU law. Given the significance of this breach, we think it appropriate that an immediate ex-post reconciliation take place to rectify the situation.

Q	Question	Response
8	**If an ex post reconciliation was to be adopted how quickly should the reconciliation be completed?**	Immediately. All of the data is available to assess the size of the breach and to calculate monies owed to generators. Given that there has been a clear breach of the law and that all necessary information is available, we see no reason to delay such payments.
9	**Are there trade-offs between speed of reconciliation and the most appropriate process?**	There is a trade off between payments to generators and when these costs can be recovered from suppliers and the costs associated with bearing this debt. However, given the increasing volatility of charges and the volume of unexpected short notice charges hitting market participants, we do think that recovery from suppliers should be delayed to allow the costs to be factored into future tariffs. However, given National Grid have been aware of this issue for some time and have taken no steps to rectify it, and given National Grid have a lower cost of capital than other market participants, we do not think it unreasonable for National Grid to bear the costs for a further year.
10	**Do you believe any harm has been done in the spirit of the defect identified?**	Yes, we do believe that there has been harm as a result of this defect. Most obviously is the impact on higher transmission charges on GB thermal generators compared to their competitors on the continent, many of whom do not pay transmission charges and those that do, pay considerably lower charges. The capping of GB Generation transmission charges was introduced to help mitigate this discrepancy and disadvantage. The ongoing discrepancy make it ever hard to harmonise the EU Energy market. In addition, we do not think that transmission costs can be looked at in isolation as the impacts can be felt in other areas. Arguably, with higher TNUoS being one factor of coal plant closing, the burden of costs of balancing the system (BSUoS costs) is borne by fewer generators so short run marginal costs are higher. This would impact the cost of GB generation versus imported electricity from the BritNed and IFA interconnectors, hence impacting the merit order and volume of generation from GB plant.

Q	Question	Response
11	**Do you believe that Generators contracting to sell output or set market prices do so at a level that assumes the €2.50MWh CAP will be complied with regardless of the tariffs set by National Grid? If you have any supporting information please provide this directly to Ofgem directly.**	We are not in a position to comment on our own or other generators' approach to contracting in the market or setting prices. However, given that this issue has been flagged to National Grid and a corresponding modification raised, it would not be unreasonable to assume that some parties actively monitor TNUoS against the €2.5/MWh limit.

CUSC Workgroup Consultation Response Proforma

CMP261 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'

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

Please send your responses by **28th July 2016** to cusc.team@nationalgrid.com Please note that any responses received after the deadline or sent to a different email address may not receive due consideration by the Workgroup.

Any queries on the content of the consultation should be addressed to Ryan Place at ryan.place@nationalgrid.com

These responses will be considered by the Workgroup at their next meeting at which members will also consider any Workgroup Consultation Alternative Requests. Where appropriate, the Workgroup will record your response and its consideration of it within the final Workgroup Report which is submitted to the CUSC Modifications Panel.

Respondent:	*James Anderson* *james.anderson@scottishpower.com*
Company Name:	*ScottishPower Energy Management*
Please express your views regarding the Workgroup Consultation, including rationale. **(Please include any issues, suggestions or queries)**	For reference, the Applicable CUSC objectives are: **Use of System Charging Methodology** (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity; (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection); (c) that, so far as is consistent with sub-paragraphs (a)

	and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses. (d) Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency.

Standard Workgroup consultation questions

Q	Question	Response
1	**Do you believe that CMP261 Original Proposal or either of the potential options for change better facilitates the Applicable CUSC Objectives? Please give your reasoning.**	We believe that the Original Proposal and Option A overall better meet the Applicable CUSC Charging Objectives than the baseline principally by ensuring compliance with Electricity Regulation 838/2010 and ensuring that the average charge paid by GB generators does not exceed €2.50/MWh. Options B, C, D and E do not better meet the Applicable CUSC Charging Objectives as they describe a reconciliation process which makes reconciliation payments to generators which were not impacted by the original "overcharge" (i.e. they have increased TEC between charging years) and fails to make payments to others affected by the "overcharge" (i.e. they have reduced TEC between charging years). Such an arrangement would represent an unjustified redistribution.
2	**Do you support the proposed implementation approach?**	We support the implementation approaches outlined in Section 5 for the Original Proposal and Option A. As outlined above we do not support implementation of Options B, C, D & E.
3	**Do you have any other comments?**	No
4	**Do you wish to raise a WG Consultation Alternative Request for the Workgroup to consider?**	No

Specific questions for CMP261

Q	Question	Response

Q	Question	Response
5	**Do you have any comments on the legal opinion?**	We agree with the legal opinion in Annex 4 that; - the average generation charge has materially exceeded the G Charge Guidelines limit (Key Conclusion 4) - that taking the average G Charge above €2.50/MWh and exceeding the Guidelines Regulation limit represents a breach of the technical requirements of the Guidelines Regulation (Key Conclusion 3) - that reconciliation of G Charges for the 2015/16 charging year would be prudent (paragraph 9 (b)) - that the breach in respect of the 2015/16 charging year does not automatically mean the methodology for future charging years requires amending
6	**Is ex ante certainty preferred over ex post accuracy?**	There will always be a trade-off between the certainty provided by ex-ante charge-setting and ex-post accuracy and the current charging methodology allows for ex-post reconciliation of demand charges and charges payable to generators in negative charging zones. However, CMP261 is concerned with remedying a material breach of Regulation 838/2010 which has exceeded any reasonable expectations of accuracy.
7	**Do you believe a breach of the Regulation has occurred for Charging Year 2015/16? If so do you believe that an ex post reconciliation should be carried out?**	As outline in our response to question 5 we believe that there has been a material breach of Regulation 838/2010 and that an ex-post reconciliation should be carried out.

Q	Question	Response
8	**If an ex post reconciliation was to be adopted how quickly should the reconciliation be completed?**	For the parties which have been adversely affected by the breach, namely generators paying TNUoS charges during charging year 2015/16, the reconciliation should be completed as soon as reasonably practicable. Any unwarranted delay only continues the breach, prolongs the harm to generators and increases the likelihood of enforcement action. For demand TNUoS payees who will be required to pay addition sums, sufficient time should be allowed to enable them to factor the increased cost into their forward tariff offerings and therefore we would recommend that Option A be adopted.
9	**Are there trade-offs between speed of reconciliation and the most appropriate process?**	We do not foresee the need for any trade-off between the speed of reconciliation and the most appropriate process. National Grid now has access to all the data required to perform the calculation of how much on average generators paid in charging year 2015/16 (TNUoS costs, generation output, exchange rate) and so there should be no compromise on accuracy. Reconciliation payments should therefore be made to generators without undue delay. Subsequent recovery of the under-recovered sums from demand should then follow according to the option approved by the Authority.
10	**Do you believe any harm has been done in the spirit of the defect identified?**	Yes. The intent of regulation 838/2010 is to promote a common approach to transmission charging with a view to supporting the internal energy market through competition. Breach of Regulation 838/2010 has resulted in GB generators suffering an undue burden of transmission charges relative to other European generators and is detrimental to competition.
11	**Do you believe that Generators contracting to sell output or set market prices do so at a level that assumes the €2.50MWh CAP will be complied with regardless of the tariffs set by National Grid? If you have any supporting information please provide this directly to Ofgem directly.**	In examining the costs to be recovered through electricity contracts, GB generators will consider, amongst other factors, the anticipated level of TNUoS tariffs. Each generator has access to the TNUoS tariff model and is able to use its own assumptions to determine its own view of TNUoS tariffs not only for the current charging year but for future charging years for which tariffs have not yet been set. One of the key assumptions has been that future generation tariffs will be constrained by the cap contained within Regulation 838/2010. Therefore, to the extent that generators contract forward, their assumption is that the €2.50/MWh cap will be complied with both in years for which TNUoS tariffs have not formally been published and in the current charging year.

Annex 5 – Code Administrator Consultation Responses

CUSC Code Administrator Consultation Response Proforma

CMP261 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'

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

Please send your responses by **5:00pm** on **16 November 2016** to cusc.team@nationalgrid.com. Please note that any responses received after the deadline or sent to a different email address may not be included within the Final Report to the Authority.

Any queries on the content of the consultation should be addressed to Ryan Place at ryan.place@nationalgrid.com

These responses will be included within the Draft CUSC Modification Report to the CUSC Panel and within the Final CUSC Modification Report to the Authority.

Respondent:	*Simon Vicary (simon.vicary@edfenergy.com)*
Company Name:	*EDF Energy*
Please express your views regarding the Code Administrator Consultation, including rationale. **(Please include any issues, suggestions or queries)**	**Use of System Charging Methodology** (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity; (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection); (c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses. (d) compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the

	Agency. (e) to promote efficiency in the implementation and administration of the Grid Code arrangements. These are defined within the National Grid Electricity Transmission plc Licence under Standard Condition C10, paragraph 1. ***Objective (d) refers specifically to European Regulation 2009/714/EC. Reference to the Agency is to the Agency for the Cooperation of Energy Regulators (ACER).***

Code Administrator Consultation questions

Q	Question	Response
1	**Do you believe that CMP261 better facilitates the Applicable CUSC objectives? Please include your reasoning.**	Yes, we believe that the CMP261 proposal for change better facilitates the CUSC Objectives, in particular (d) "Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency". There is evidence, and in particular a legal opinion supporting the view that there is a breach of the €2.50/MWh annual average limit for TNUoS paid by Generators in GB in Charging Year 2015/16 as set in EU Regulation 838/2010 Part B (3). CMP261 would ensure compliance with the EU Regulation 838/2010 Part B (3).
2	**Do you support the proposed implementation approach? If not, please provide reasoning why.**	Yes, we support the proposed implementation approach preferring WACM1, Generator rebates in 2016/17 and the Adjustment of Demand tariffs in 2018/19.
3	**Do you have any other comments?**	Commission Regulation (EU) No 838/2010 Part B restricts annual average transmission charges paid by electricity Generators in Great Britain to the range of €0/MWh to €2.50/MWh. The Regulation is legally binding for all Transmission licensees across Europe so it is reasonable to expect National Grid to ensure demonstration of compliance.

CUSC Code Administrator Consultation Response Proforma

CMP261 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'

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

Please send your responses by **5:00pm** on **16 November 2016** to cusc.team@nationalgrid.com. Please note that any responses received after the deadline or sent to a different email address may not be included within the Final Report to the Authority.

Any queries on the content of the consultation should be addressed to Ryan Place at ryan.place@nationalgrid.com

These responses will be included within the Draft CUSC Modification Report to the CUSC Panel and within the Final CUSC Modification Report to the Authority.

Respondent:	*Jeremy Guard* *jeremy.guard@first-utility.com*
Company Name:	*First Utility Limited*
Please express your views regarding the Code Administrator Consultation, including rationale. **(Please include any issues, suggestions or queries)**	**Use of System Charging Methodology** (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity; (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection); (c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses.

	(d) compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency. (e) to promote efficiency in the implementation and administration of the Grid Code arrangements. These are defined within the National Grid Electricity Transmission plc Licence under Standard Condition C10, paragraph 1. ***Objective (d) refers specifically to European Regulation 2009/714/EC. Reference to the Agency is to the Agency for the Cooperation of Energy Regulators (ACER).***

Code Administrator Consultation questions

Q	Question	Response
1	**Do you believe that CMP261 better facilitates the Applicable CUSC objectives? Please include your reasoning.**	a) (Facilitation of effective competition) CMP261 attempts to implement significant distributional impacts across all electricity suppliers in the market. Organisations with more generation than demand would benefit, organisations with less generation than demand would lose out. CMP261 would significantly worsen applicable CUSC objective a. b) (Cost reflectivity) CMP261 would implement a charge that has absolutely no reflection on cost whatsoever. Generators were asked to provide evidence that they had priced in the proposed ex-post reconciliation into their business plans; not one generator provided such evidence. This can only indicate that generators had not priced in an ex-post reconciliation, this suggests that generators are attempting to be paid twice through this modification proposal. If suppliers are charged twice, then this could leave some suppliers with no choice other than to indirectly charge their customers a second time in future years through higher prices. This cannot be a good outcome for the market as a whole or the consumer. CMP261 would significantly worsen applicable CUSC

		objective b. c) (developments in transmission licensees' transmission businesses) We see the impact on this objective as being neutral. d) (compliance) There is a constitutional law presumption against changes in law that have retrospective effect. CMP261 undermines this presumption, without any valid justification. First Utility has concern that should CMP261 be approved then a worrying precedent would have been set that could lead to further retrospective modifications being put forward. This cannot be a good outcome for the market as a whole or the consumer. e) (efficiency in the implementation and administration of the Grid Code arrangements) As previously mentioned, should CMP261 be approved then a worrying precedent would have been set that could lead to further retrospective modification proposals being put forward, this would adversely affect the efficiency in administering the CUSC. CMP261 would worsen this applicable CUSC objective.
2	**Do you support the proposed implementation approach? If not, please provide reasoning why.**	No. If CMP261 were to be approved (and we strongly believe it should be rejected), we would rather see the charges to suppliers (and payments to generators) commencing in a period that has not yet been sold into. We would rather see the retrospective reconciliation commence in 3 years time and run for a duration of 3 years to minimise the negative impacts on competition.
3	**Do you have any other comments?**	CMP224 implemented the mechanism for dealing with the €2.50 cap, this costing mechanism should have been used by parties to determine their prices. We are open to the mechanism being changed on a forward-looking basis only.

CUSC Code Administrator Consultation Response Proforma

CMP261 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'

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

Please send your responses by **5:00pm** on **16 November 2016** to cusc.team@nationalgrid.com. Please note that any responses received after the deadline or sent to a different email address may not be included within the Final Report to the Authority.

Any queries on the content of the consultation should be addressed to Ryan Place at ryan.place@nationalgrid.com

These responses will be included within the Draft CUSC Modification Report to the CUSC Panel and within the Final CUSC Modification Report to the Authority.

Respondent:	*Colin Prestwich*
Company Name:	*SmartestEnergy*
Please express your views regarding the Code Administrator Consultation, including rationale. **(Please include any issues, suggestions or queries)**	**Use of System Charging Methodology** (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity; (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection); (c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses. (d) compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the

	Agency. (e) to promote efficiency in the implementation and administration of the Grid Code arrangements. These are defined within the National Grid Electricity Transmission plc Licence under Standard Condition C10, paragraph 1. ***Objective (d) refers specifically to European Regulation 2009/714/EC. Reference to the Agency is to the Agency for the Cooperation of Energy Regulators (ACER).***

Code Administrator Consultation questions

Q	Question	Response
1	**Do you believe that CMP261 better facilitates the Applicable CUSC objectives? Please include your reasoning.**	No. We are not convinced there is a defect. The whole point about the current arrangements is that there is an error margin to try to avoid breaching the cap. If a breach were illegal and in need of remedying there would have been no point to the error margin; the whole process would have had to include a reconciliation. We agree with the NGT interpretation that "a pure ex ante approach, by its nature, is never guaranteed to be 100% precise or accurate and is the approved GB approach to compliance with the Regulation." The current arrangements are perfectly clear: an ex ante approach with an error margin (but no agreed reconciliation) would always imply the possibility of exceeding the €2.50MWh cap.
2	**Do you support the proposed implementation approach? If not, please provide reasoning why.**	Notwithstanding our view that a change should not take place, if this were to happen, then between the original and the WACMs, we would prefer WACM1 or WACM3 (which may be preferable to NGT) i.e. recover the monies through the tariffs in 2018/2019
3	**Do you have any other comments?**	No

CUSC Code Administrator Consultation Response Proforma

CMP261 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'

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

Please send your responses by **5:00pm** on **16 November 2016** to cusc.team@nationalgrid.com. Please note that any responses received after the deadline or sent to a different email address may not be included within the Final Report to the Authority.

Any queries on the content of the consultation should be addressed to Ryan Place at ryan.place@nationalgrid.com

These responses will be included within the Draft CUSC Modification Report to the CUSC Panel and within the Final CUSC Modification Report to the Authority.

Respondent:	*Joe Underwood – Joseph.Underwood@drax.com*
Company Name:	*Drax Power Limited and Haven Power Limited*
Please express your views regarding the Code Administrator Consultation, including rationale. **(Please include any issues, suggestions or queries)**	We believe that the CMP261 Original Proposal and WACM 1 better facilitate the Applicable CUSC Objectives. Please see the answers to the questions below for more information.

Code Administrator Consultation questions

Q	Question	Response
1	**Do you believe that CMP261 better facilitates the Applicable CUSC objectives? Please include your reasoning.**	Yes. The Original Proposal and WACM 1 better facilitate the Applicable CUSC Objectives (ACOs) (a), (b) and (d). Approving CMP261 will reduce the risk of infraction proceedings and remove the uncertainties of future changes to charges that will undermine commercial positions of suppliers and generators thereby better facilitating ACO (a).

		The remuneration proposed under the Original Proposal and WACM 1 ensures that the 15/16 generator charges are more reflective of the actual costs incurred by the transmission licensees than under the Baseline. Therefore CMP261 and WACM 1 better facilitate ACO (b). With respect to ACO (d), CMP261 realigns GB transmission charging for 15/16 with European regulation that takes precedence over the CUSC. In the 15/16 charging year, generators were overcharged for transmission charges against the €2.50/MWh cap. This represents a breach of the technical requirements of the guidelines regulation. This position has been supported by legal advice from Addleshaw Goddard, procured by National Grid on behalf of the CMP261 workgroup. We do not consider that WACM 2 or 3 are appropriate. An adjustment to future tariffs will not reimburse the correct generators, therefore the rebate approach is not reflective of the overcharges incurred. Those generators that have closed since the 15/16 charging year will be left out of pocket, whilst those generators that have entered the market since the 15/16 charging year will receive a payment for an overcharge they did not incur. Overall, we believe that WACM 1 best facilitates the ACOs with versus the Original and the Baseline. It is our view that the generator rebate should occur as soon as practical, with the timeline for recouping costs from suppliers being delayed to enable efficient recovery in line with future contracting periods.
2	**Do you support the proposed implementation approach? If not, please provide reasoning why.**	Yes.
3	**Do you have any other comments?**	For the avoidance of doubt, we also feel it necessary to note that we do not support the exclusion of generation only spurs from the TNUoS charging methodology, as per the Addleshaw Goddard legal response (para. 19): *"As was concluded during the CMP224, we would agree with the view that it is a reasonable interpretation of the Guidelines Regulation for TNUoS in respect of generation only spurs to be included within the TNUoS charges subject to the*

		Guidelines Regulation G Charge limits (as implemented under the CUSC).”

CUSC Code Administrator Consultation Response Proforma

CMP261 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'

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

Please send your responses by **5:00pm** on **16 November 2016** to cusc.team@nationalgrid.com. Please note that any responses received after the deadline or sent to a different email address may not be included within the Final Report to the Authority.

Any queries on the content of the consultation should be addressed to Ryan Place at ryan.place@nationalgrid.com

These responses will be included within the Draft CUSC Modification Report to the CUSC Panel and within the Final CUSC Modification Report to the Authority.

Respondent:	*Elizabeth Allkins (elizabeth.allkins@ovoenergy.com)*
Company Name:	*OVO Energy*
Please express your views regarding the Code Administrator Consultation, including rationale. **(Please include any issues, suggestions or queries)**	**Use of System Charging Methodology** (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity; (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection); (c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses. (d) compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the

	Agency. (e) to promote efficiency in the implementation and administration of the Grid Code arrangements. These are defined within the National Grid Electricity Transmission plc Licence under Standard Condition C10, paragraph 1. ***Objective (d) refers specifically to European Regulation 2009/714/EC. Reference to the Agency is to the Agency for the Cooperation of Energy Regulators (ACER).***

Code Administrator Consultation questions

Q	Question	Response
1	**Do you believe that CMP261 better facilitates the Applicable CUSC objectives? Please include your reasoning.**	OVO does not support the passage of this modification. We do not think the evidence provided by the workgroup sufficiently proves that TNUoS charges for generators exceeded €2.50/MWh in 2015/16.
2	**Do you support the proposed implementation approach? If not, please provide reasoning why.**	If it is decided that generators paid in excess of €2.50 /MWh in TNUoS charges for the charging year 2015/16, OVO's preference would be that suppliers would not be charged until at least TNUoS charging year 18/19 for the cost of compensating generators, if not later. We would therefore support either WACM 1 or 3 under these circumstances, or a further alternative that would delay the recovery of compensation for generators until charging year 2019/20.
3	**Do you have any other comments?**	

CUSC Code Administrator Consultation Response Proforma

CMP261 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'

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

Please send your responses by **5:00pm** on **16 November 2016** to cusc.team@nationalgrid.com. Please note that any responses received after the deadline or sent to a different email address may not be included within the Final Report to the Authority.

Any queries on the content of the consultation should be addressed to Ryan Place at ryan.place@nationalgrid.com

These responses will be included within the Draft CUSC Modification Report to the CUSC Panel and within the Final CUSC Modification Report to the Authority.

Respondent:	*Garth Graham (garth.graham@sse.com)*
Company Name:	*SSE*
Please express your views regarding the Code Administrator Consultation, including rationale. **(Please include any issues, suggestions or queries)**	**Use of System Charging Methodology** (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity; (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection); (c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses. (d) compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the

	Agency. (e) to promote efficiency in the implementation and administration of the Grid Code arrangements. These are defined within the National Grid Electricity Transmission plc Licence under Standard Condition C10, paragraph 1. ***Objective (d) refers specifically to European Regulation 2009/714/EC. Reference to the Agency is to the Agency for the Cooperation of Energy Regulators (ACER).***

Code Administrator Consultation questions

Q	Question	Response
1	**Do you believe that CMP261 better facilitates the Applicable CUSC objectives? Please include your reasoning.**	[see below]
2	**Do you support the proposed implementation approach? If not, please provide reasoning why.**	[see below]
3	**Do you have any other comments?**	[see below]

1 Do you believe that CMP261 better facilitates the Applicable CUSC objectives? Please include your reasoning.

Introduction

1. CMP261 was raised by SSE, on 8th March 2016, with a reasoned justification that it be treated as 'urgent' in order to change the TNUoS tariffs during Charging Year 2015/16 such that the annual average transmission charges paid by generators in GB would be within the range of €0-2.50/MWh. As SSE noted in the proposal, if this matter was "*not*

urgently addressed [it] may cause (1) One or more parties to be in breach of relevant legal requirement(s); and / or (2) A significant commercial impact on generator parties"[1].

2. **As SSE detail in this response to the CMP261 Code Administrator Consultation, (1) a breach of a relevant legal requirement has occurred and (2) this has resulted in significant commercial impacts on SSE (and other GB generators). CMP261 Original and WACM 1[2] seek to rectify the breach.**

3. When SSE raised the CMP261 proposal it set out the reasoning for it in the following broad terms:

a. *"Having due regard for Regulation (EC) No 714/2009, the Commission Regulation (EU) No 838/2010 entitled "Guidelines for a Common Regulatory Approach to Transmission Charging" was introduced to provide a common regulatory approach to transmission charging across all the Member States. This Regulation, in Part B (paragraph 3), restricts the annual average transmission charges paid by electricity generators in Great Britain to the range of €0/MWh to €2.50/MWh.*

b. *The methodology for generation transmission charges in Great Britain is defined in Section 14 of the CUSC. In order to asses the appropriate level of generation transmission charges to be paid by generators in GB in any given charging year National Grid must forecast the following:-*

   - Total TNUoS cost in GB (£) to be recovered from Generators;
   - £/€ exchange rate for the year in question; and
   - Total MWh from generating stations which pay TNUoS

c. *These three values allow National Grid to establish a forecast average GB generation transmission cost in €/MWh. If the upper limit of €2.50/MWh is to be exceeded, then National Gird vary the proportion of (1) - the Total TNUoS cost in GB (£) to be recovered from Generators - in order to bring the charges below the upper limit of €2.50/MWh.*

d. *It is apparent now that deviations over time from the original (January 2015) forecast of the €/£ exchange rate and the total MWh from generating stations will be such that the average annual generation cost for GB generators in charging year 2015/16 will be substantially in excess of the €2.50/MWh upper limit set in the Regulation.*

[1] See CMP261 Proposal 'Justification for Urgency Recommendation'.

[2] But WACM2 and WACM3 do not, for the reasons SSE set out below.

e. *If this defect is not corrected, it will result in an exceedance of the upper limit set in EU Regulation 838/2010 Part B (paragraph 3) of €2.50/MWh for the average annual amount to be recovered from generator in Great Britain in charging year 2015/16"*[3].

4. For the avoidance of doubt, those items that form 'Connection Charges' in GB (as defined in the baseline CUSC) should be excluded[4] when, for the purposes of the Commission Regulation 838/2010 (the 'Guidelines Regulation'[5]), the calculation of the annual average transmission charges paid by generators (in GB) is performed in order to determine the applicable level in conformance with the Guidelines Regulation during Charging Year 2015/16. This is also the case in the proposal that is CMP261[6].

5. Urgency was not granted by Ofgem[7], in their letter of 17th March 2016, and the proposal proceeded accordingly through the non-urgent CUSC change process, on the accelerated timetable proposed by the Panel[8], and later extended.

6. The defect within the Connection and Use of System Code ('CUSC'), and in particular Section 14 (see 14.14 …), which CMP261 seeks to address is the clear breach of the upper level within the range set in Guidelines Regulation 838/2010 Part B, Paragraph 2, whereby the annual average transmission charges paid by generators in GB must be within the range of €0 to 2.50/MWh.

7. The fact is that an exceedance of the €2.50/MWh level exists has been accepted by National Grid in their 'View'[9], provided in the CMP261 Code Administrator Consultation, where they state that:

> *"Using ex post data applied to the CMP224 methodology, an exceedance of €2.50/MWh can be shown".*

8. As shown in Figure 6 of the CMP261 Code Administrator Consultation document[10] the actual annual average transmission charges paid by generators in GB during Charging Year 2015/16 was €3.15/MWh. This clear exceedance of the €2.50/MWh upper level set in the Guidelines Regulation amounts to €0.65/MWh during Charging Year 2015/16.

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[3] http://www2.nationalgrid.com/UK/Industry-information/Electricity-codes/CUSC/Modifications/CMP261/

[4] For the reasons SSE have set out previously, such as in its response to the CMP261 Workgroup Consultation, see pages 111-151 (of the 202 page) CMP261 Code Administrator Consultation document.

[5] SSE follows the approach of using 'Guidelines Regulation' to mean the Commission Regulation 838/2010 in this response.

[6] See paragraphs 2.56-2.57, page 19, CMP261 Code Administrator Consultation document.

[7] The use of the word 'Ofgem' and 'The Authority' (meaning the 'Gas and Electricity Markets Authority') are used interchangeably in this response to mean one and the same organisation.

[8] See page 3 of the Ofgem letter.

[9] See paragraph 7.2, page 43, CMP261 Code Administrator Consultation.

[10] Published on 26th October 2016.

9. There are a number of detrimental consequences[11] that arise as a result of this breach. SSE sets these out below in terms of the Applicable CUSC Objectives. SSE also notes that there are other detrimental consequences; such as its effect on trade[12] between Member States and within the (UK) Member State; which have arisen as GB generators have had to pay an extra €0.65 MWh during Charging Year 2015/16 than they should have done according to the applicable law. SSE expands upon this further in the answer to Question 3 below.

10. As the evidence in the CMP261 Code Administrator Consultation document makes clear, the possibility, which became the probability and then the actuality, of the breaching of the €2.50/MWh upper level set in the Guidelines Regulation was brought to the attention of both National Grid[13] and Ofgem (including by themselves[14] to themselves) multiple times before 2015 and then during[15] 2015 and 2016.

11. Notwithstanding the numerous clear warnings before and during Charging Year 2015/16 regarding breaching the €2.50/MWh upper level set in the Guidelines Regulation; and the explicit obligation, in Transmission Licence Condition C5(1), for National Grid to "*keep the use of system charging methodology at all times under review*"; it is clear that National Grid, if it had been exercising 'good industry practice'[16], could (and should) have seen that a breach of the €2.50/MWh upper level was occurring during Charging Year 2015/16. They could (and should) have done this even with just a cursory examination of the two main information variables; namely the €/£ exchange rate and the GB generation output; both of which were freely available to them. As the graphs in Figures 3, 4 and 5[17] of the CMP261 Code Administrator Consultation clearly show, at no point during Charging Year 2015/16 did either of these items (the black lines on the three graphs) match the levels (the green lines on the three graphs) needed to ensure compliance with the €2.50/MWh upper level set in the Guidelines Regulation either on an individual item basis (Figures 3 and 4) or cumulatively (Figure 5).

Applicable CUSC Objectives – summary

12. **SSE believes that CMP261 Original and WACM1[18] do both better facilitate the Applicable CUSC Objectives**[19]; for the detailed reasons SSE has set out in the

[11] Examples of which SSE set out in its response to the CMP261 Workgroup Consultation, at Question 10.

[12] In contravention of European law, including Article 81(1) of the Treaty.

[13] SSE follow the approach of the CMP261Code Administrator Consultation document when referring to 'National Grid'.

[14] See the examples listed (i)-(vi) in paragraph 2.9 page 6, CMP261 Code Administrator Consultation document.

[15] See the examples shown in paragraph 2.34 pages 10-11, CMP261 Code Administrator Consultation document.

[16] As defined in the Grid Code – see footnote 56 / paragraph 2.76, page 23 of the CMP261 Code Administrator Consultation document.

[17] See pages 12-13, CMP261 Code Administrator Consultation document.

[18] Summarised at paragraphs 4.3 and 4.4 respectively, page 28, CMP261 Code Administrator Consultation document.

modification proposal itself and, more recently, in its response to the Workgroup Consultation[20] (which it made with respect to the Original, but which are also applicable with respect to WACM1[21]) namely that both would rectify the breach [(d)], leading to better cost reflective prices [(b)], leading to better competition [(a)].

13. For the avoidance of doubt SSE wishes to import here its full response to the CMP261 Workgroup Consultation[22]as if set out fully herein.

14. **SSE believes that (CMP261) WACM2 and WACM3[23] do <u>not</u> better facilitate the Applicable CUSC Objectives**, for the following reasons.

15. In respect of **objective (d)**, these two WACMs do not ensure compliance with the Electricity Regulation, and any relevant legally binding decision of the European Commission and/or the Agency; and in particular Commission Regulation 838/2010.

16. Also, in respect of **objective (d)**, because generation plant that was connected to the GB transmission system in Charging Year 2015/16 which reduced their level of TEC (MW) holding or closed[24] during either 2015/16 or 2016/17 (with WACM2) or 2017/18 (with WACM3) will have paid, on average, an excess level of transmission charges that are in the region of £1.71/kW in 2015/16 and will (with either WACMs 2 or 3) receive no reconciliation, for this excess they have incurred. Collectively this amounts to around £8.6M[25].

17. In respect of **objective (a)**, these two WACMs give rise to this loss (in the order of £8.6M) which places those generators who have reduced their TEC, but continue in business in 2017/18 (for WACM2) or 2018/19 (for WACM3), in a less competitive position when compared to, for example, new generators which have connected after 2015/16 (see paragraph 18 below) which is detrimental to competition.

18. Also, in respect of **objective (a)**, these two WACMs result in this loss (in the order of £8.6M) being paid back, as a 'windfall gain' (nay unjustified enrichment) to (1) circa 70GW of transmission connected generation plant that existed in 2015/16 (who remain connected to the GB transmission system in 2016/17 and 2017/18 (with WACM2) and, also 2018/19 (with WACM3); and, (2) any other new generation plant which connect to the GB transmission system in 2016/17 or 2017/18 (with WACM2) or, also, 2018/19 (with WACM3) which is detrimental to competition.

19. In respect of **objective (b)**, these two WACMs will result in non-cost reflective TNUoS tariffs in 2017/18 (for WACM2) or 2018/19 (for WACM3).

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[19] SSE note that CUSC Applicable Objective (e) was introduced after (1) the modification proposal and (2) the Workgroup Consultation. For the avoidance of doubt, SSE believe that CMP261 Original and WACM1 are both 'neutral' with respect to objective (e).

[20] See pages 111-151 (of the 202 page) CMP261 Code Administrator Consultation document.

[21] Noted as 'Option A' in the CMP261 Workgroup Consultation document

[22] Which can be found on pages 111-151 (of the 202 page) CMP261 Code Administrator Consultation document.

[23] Summarised at paragraphs 4.5 and 4.9 respectively, pages 28-29, CMP261 Code Administrator Consultation. Document.

[24] Which currently SSE understands to be in the order of 5GW (but this could rise further between now and 31st March 2017 (with WACM2) or 31st March 2018 (with WACM3)

[25] ~5GW x £1.71/kW

Applicable CUSC Objectives – (d) compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency.

20. In addition to its views, summarised above, that SSE has provided with respect to the Applicable CUSC Objectives **SSE wishes, in particular, to focus on Applicable Objective (d).**

21. As SSE clearly sets out in the modification proposal form for CMP261, then elaborated on in detail as part of the Workgroup discussions and further set out in its response[26] to the Workgroup Consultation of 28th July 2016, the '*primus inter pares'* Applicable CUSC Objective with respect to CMP261 is **(d) as it is by correcting the breach of Regulation 838/2010 that CMP261 Original and WACM1 ensure that GB transmission charges are more cost reflective (which demonstrably better facilitates Applicable CUSC Objective (b)) and ensures the functioning of the market and competition (which therefore better facilitates Applicable CUSC Objective (a))**.

22. In this respect SSE is in agreement with Ofgem's Principal Legal Advisor "*that the rationale for CMP261 turns on whether there has been a breach of the Regulation which requires to be rectified*"[27].

23. Ofgem set out its reasoning for this within Section 2 of the Code Administrator Consultation document in the parts entitled '*Ofgem Guidance on the Content of the Report*[28]' and, in particular, '*Discussion with Ofgem's Principal Legal Advisor on CMP261*[29]' which was augmented by advice that Ofgem received from Counsel.

Legal Background

24. **SSE has sought advice from leading Counsel** in respect of this matter. Counsel has identified, with respect to the issue of '*whether there has been a breach of the Regulation which requires to be rectified'* the following aspects which, **in summary**, show (1) **that a breach of the Guidelines Regulation has occurred during Charging Year 2015/16 by virtue of the annual average transmission charges paid by generators in GB exceeding the €2.50/MWh upper limit set in the Guidelines Regulation**; **and (2) that any exclusion of non-connection charge items; such as those items which are in fact 'use of transmission system' charge items, so as to recalibrate the measure by which it is determined if the breach has occurred, would be unlawful**.

[26] See pages 111-151 (of the 202 page) CMP261 Code Administrator Consultation document.

[27] See paragraph 2.79, page 24, CMP261 Code Administrator Consultation document.

[28] See paragraphs 2.61-2.74, pages 20-23, CMP261 Code Administrator Consultation document.

[29] See paragraphs 2.79-2.88, pages 24-25, CMP261 Code Administrator Consultation document.

25. Without waiving any privilege it has in the legal Advice it has received, SSE is prepared to offer the following summary of the legal arguments that can or will be deployed in support of the above contentions. This is augmented by a further contextual setting for the legal aspects of transmission charging which is summarised in the additional comments provided under Question 3.

Introduction

26. It is clear that SSE (and any other GB generator(s) who paid transmission charges during Charging Year 2015/16) have an enforceable right to recover unduly levied sums paid by them to National Grid in breach of EU law[30].

27. The CMP261 Code Administrator Consultation document[31] prepared by the CMP261 Workgroup, and published[32] by the CUSC Code Administrator, suggests that Ofgem is being asked to consider whether or not a breach of the Guidelines Regulation can in fact be established. This is so, notwithstanding the clear opinion of Addleshaw Goddard that a breach had been established, based on the facts provided to them[33]. Indeed, in paragraph 7.2 of the CMP261 Code Administrator Consultation document, National Grid states that: "*Using ex post data applied to the CMP224 methodology, an exceedance of €2.50MWh can be shown*".

28. National Grid then goes on to say in the paragraph that "*if the ex ante principle is disregarded*"[34], whether a breach can be shown depends on a construction of the Guidelines Regulation. But that suggests that a different construction would be applied to "excluded" costs under the Guidelines Regulation, depending on whether or not the approach taken is *ex ante* or *ex post*. There is no rational basis for amending the construction of Regulation 838/2010 in this way. If costs based on local circuits were not excluded from the CMP224 changes, there is no rational basis for excluding them from the analysis of breach at this stage.

29. The position that Ofgem is now being asked to contemplate; with the proposition to reject CMP261 by virtue of no breach having occurred; involves a fresh determination of whether or not the terms of Part B to the Annex to the Guidelines Regulation have been

[30] See Case 199/82 Amministrazione delle Finanze dello Stato v. SpA San Giorgio [1983] ECR 359, CJEU at [12]; and Case C-94/10 Danfoss A/S [2011] ECR I-9963, CJEU at [20].

[31] To which this document is its response to that consultation.

[32] On 26th October 2016.

[33] See its opinion attached as Annex 5 to the CMP261 Code Administrator Consultation document, page 161.

[34] See paragraph 7.2, page 42, CMP261 Code Administrator Consultation document.

breached in 2015/16. There are two principal reasons why it is not open to Ofgem to make such a fresh determination and find that no breach has occurred. First, to do so would be to resile from an existing and unappealed regulatory decision and confirmed policy approach with retrospective effect. Ofgem would thereby be in breach of a number of principles of public law, as set out below. This will be referred to as the "Procedural Objection." Secondly, Ofgem can only conclude that there has been no breach of the Guidelines Regulation if it adopts a construction of Article 2 of Part B of the Annex of the Guidelines Regulation which is wrong in law. This will be referred to as the "Substantive Objection".

Relevant legal provisions

30. The relevant provisions of the Annex to the Guidelines Regulation are as follows:

> *"PART B*
>
> *Guidelines for A Common Regulatory Approach to Transmission Charging*
>
> *Annual average transmission charges paid by producers in each Member State shall be within the ranges set out in point 3.*
>
> *Annual average transmission charges paid by producers is annual total transmission tariff charges paid by producers divided by the total measured energy injected annually by producers to the transmission system of a Member State.*
>
> > *For the calculation set out at Point 3, transmission charges shall exclude:*
> > *(1) charges paid by producers for physical assets required for connection to the system or the upgrade of the connection;*
> > *(2) charges paid by producers related to ancillary services;*
> > *(3) specific system loss charges paid by producers.*
>
> *The value of the annual average transmission charges paid by producers shall be within a range of 0 to 0,5 EUR/MWh, except those applying in Denmark, Sweden, Finland, Romania Ireland, Great Britain and Northern Ireland.*
>
> *The value of the annual average transmission charges paid by producers in Denmark, Sweden and Finland shall be within a range of 0 to 1,2 EUR/MWh.*
>
> *Annual average transmission charges paid by producers in Ireland, Great Britain and Northern Ireland shall be within a range of 0 to 2,5 EUR/MWh, and in Romania within a range of 0 to 2,0 EUR/MWh.*
>
> *The Agency shall monitor the appropriateness of the ranges of allowable transmission charges, taking particular account of their impact on the financing of transmission capacity needed for Member States to achieve their targets under the Directive 2009/28/EC (1) of the European Parliament and of the Council and their impact on system users in general.. . ."* [Emphasis added]

Analysis

31. As set out above, there are two different objections (Procedural and Substantive) which SSE now make to the attempted re-characterisation of the breach of the maximum cap set by the Guidelines Regulation.

(1) Procedural Objection: Ofgem has already taken a binding decision as to which costs are excluded, which National Grid has applied. That approach has been confirmed by the policy which Ofgem has adopted and put into practice. The approach can only be changed, if at all, with prospective effect, and not retrospectively for Charging Year 2015/16.

32. It is correct that the exclusion of certain charges under Article 2 of Part B of the Annex to the Guidelines Regulation is mandatory. But as the CMP261 Workgroup's legal advisers, Addleshaw Goddard, have made clear in a legal opinion dated 22nd April 2016, the excluded charges are not defined with precision within the Guidelines Regulation. Rather, it is left for the national regulatory authorities in the Member States (like Ofgem for GB) to consider what costs under the relevant framework should be excluded as connection costs, within the overall objective of identifying the amount of transmission costs to be used in the calculation set out in paragraph 3 of the Guidelines Regulation.

33. In the absence of a precise definition, it must be a matter for regulatory judgment as to what charges should be excluded based on the circumstances pertaining in the UK and the established costs methodology adopted to date. Ofgem have in fact put charging methodologies in place since at least December 2004 which have consistently treated the costs associated with, for example, generation only spurs and local circuits or local substations etc., beyond the 'NETS'[35] as being use of transmission system costs (or 'non-connection costs') rather than connection costs.

34. National Grid itself has been applying those methodologies in the transmission charges it raises against generators in GB. Non-connection costs have been included in the invoices for use of the transmission system costs, not in the invoices for connection costs that National Grid issued to generators in GB during (plus before and after) Charging Year 2015/16. As paragraph 7.1 of the CMP261 Code Administrator Consultation document observes:

[35] The 'National Electricity Transmission System', as defined in the CUSC, see page 143, CMP261 Code Administrator Consultation document.

> *"National Grid has followed an industry-agreed process to set the G:D split, established by the CMP 224 industry working group, and subsequently ratified by the Regulator, to comply with EU Regulation 838/2010".* [Emphasis added]

35. Ofgem, as the national regulatory authority responsible for the supervision of GB transmission, has been supervising the proper implementation of the Guidelines Regulation since its entry into force. As set out later in this response[36], they were also a member of the body (ERGEG) that was instrumental in the development of the Guidelines Regulation and it is credible to conclude that it (Ofgem) was the body that was instrumental in identifying the €2.50/MWh cap (within the Guidelines Regulation) being applicable to GB, Throughout that time, since the entry into force of the Guidelines Regulation, Ofgem has approved the application by National Grid of the maximum cap on transmission costs in GB by adopting an *ex ante* framework for charging. In order to derive the necessary ratio for the G:D calculation, Ofgem (and National Grid) must necessarily have considered which costs should be excluded from the basket of transmissions costs by virtue of paragraph 2 of Annex Part B to the Guidelines Regulation. It is only by determining which were the relevant costs to include as transmission costs that the appropriate formula could have been set. Furthermore, irrespective of the annual occasion(s) when GB transmission charges are prepared, Ofgem has, for example, on a number of occasions[37] [38], since entry into force of the Guidelines Regulation, been involved with calculations, as to what the charges would be, for the purpose of forecasting. This calculation must necessarily have also considered which costs should be excluded from the basket of transmissions costs by virtue of paragraph 2 of Annex Part B to the Guidelines Regulation.

36. At no stage prior to the SSE initiation of CMP261[39] did Ofgem suggest it had been adopting a flawed approach to the Guidelines Regulation. It does not appear that Ofgem has ever recognised in any way that it has been mis-applying the Guidelines Regulation up until this point despite, as noted in the CMP261 Code Administrator

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[36] See 'The Expected Situation in GB' section below.

[37] In the September 2011 Ofgem Project Transmit Technical Working Group Initial Report, which noted that "*Analysis was presented to the Working Group to ascertain when the EU €2.5/MWh guideline would be likely to be breached. It was estimated that, in the context of GB, the EU Tarification Guidelines could be breached as early as 2015/16 using 'worse case' assumptions and by 2018/19 using assumptions considered to be a 'central case'* ".

[38] It was recognised in Ofgem's October 2014 CMP224 Decision Letter that "*Based on current forecasts and the current G:D split of 27:73, average transmission charges for Generators in Great Britain are expected to exceed the €2.5/MWh upper limit at some point over the five years from 2015/16 to 2020/21*".

[39] The submission date for CMP261 was 8th March 2016.

Consultation document, there having been numerous opportunities[40] for Ofgem to do so. It has been exercising its regulatory judgment validly to authorise the recovery of non-connection costs as 'use of transmission system' costs, rather than connection costs. In the absence of any challenge to the regulatory judgment exercised by Ofgem in deciding what charges should be included, the exercise of that judgment is binding on the regulated parties, including National Grid.

37. Ofgem's suggestion[41] that the Guidelines Regulation defines the terms of the exclusion is correct, but the application of that exclusion is a matter for Ofgem. They have faithfully applied it up until now. The fact that the Guidelines Regulation is directly applicable does not tell you anything about what type of assets fall within this definition.

38. Moreover, there have in fact been specific decisions taken by Ofgem to include non-connection items, such as generation spur charges, as 'use of transmission system' costs. It is apparent, for example, that the issue of whether to include generation spur costs in the formula was taken as part of CMP 224. Indeed, the Addleshaw Goddard opinion for CMP261 at [20] noted that there was no justification advanced for excluding generation spur charges levied as part of the TNUoS charges from falling within the definition of transmission costs.

39. This is hardly a surprising outcome, since as long ago as 2004, National Grid itself had proposed that recovery of costs associated, for example, with generation spur circuits through TNUoS charges rather than through connection charges, since this "*results in greater consistency in treatment between users*"[42].

40. CMP 224 was approved by the Authority on 8th October 2014 and implemented on 22nd October 2014. By that decision, the CUSC was modified to seek to comply with the Guidelines Regulation and the Network Access Regulation[43] by introducing an "error margin" to adjust the total TNUoS revenue from GB generators to ensure compliance with Part B of the Guidelines Regulation, and especially the €2.50/MWh upper limit. There was no appeal brought or judicial review commenced in respect of that decision by Ofgem. In explaining its approval of the CMP 224 modification proposal on 8th October 2014, Ofgem stated:

[40] Detailed in (a) to (g) of paragraph 2.66, page 21, CMP261 Code Administrator Consultation document.

[41] See page 25 CMP261 Code Administrator Consultation document.

[42] See paragraph 5.15, p. 44 of "The Proposed Transmission Use of System Charging Methodology of the GB System Operator, an Impact Assessment", February 2005 (Document 25/05) published by Ofgem in February 2005.

[43] Regulation (EC) No 1228/2003.

> *"The total costs that transmission network owners are allowed to recover each year via TNUoS charges are set by us using the price control process.*
> *. . .*
> *Charges for electricity transmission losses, ancillary services and charges for physical assets required for connection to the system or the upgrade of the connection are excluded from this calculation, and so are not restricted by the Regulation".*

41. Ofgem's decision on CMP 224 also dealt with what was then termed "the strict interpretation" and "the broad interpretation". In its decision dated 8th October 2014, Ofgem confirmed that proposals based on these different definitions had been submitted to Ofgem for "decision." The broad interpretation would have seen the exclusion not only of connection charges under Article 2 of Part B of the Guidelines Regulation, but also of "*local charges for radial circuits that supply generators only (Generation Only Spurs)*"[44]. In fact, Ofgem decided not to exclude these local charges as non-connection costs. Having made that decision, National Grid did not seek to challenge it or appeal it. National Grid has to therefore apply annual total transmission tariff charges which include non-connection charges ever since including, in particular, Charging Year 2015/16.

42. It is to be noted in particular that the original proposal for CMP 224 was made by National Grid itself. That original proposal favoured the so-called "strict" interpretation[45] of "connection charges". Ofgem in its decision dated 8th October 2014 directed that the original proposal should be implemented. At page 5 of that decision, Ofgem stated:

> *"As discussed in the 'Impact and Legal Interpretation' section of our July consultation, we consider that Paragraph 2(1) in Annex Part B of the Regulation is ambiguous and that there is a risk that charges under options that use the broad interpretation are successfully challenged by generators. We therefore consider the options that use the strict interpretation (the original proposal and WACM1) better meet this objective when compared to the options that use the broad interpretation (WACM2 and WACM3)".*

43. Appendix 1[46] noted that one consultation respondent to the consultation exercise that preceded the CMP224 decision had favoured the broad interpretation. But that did not find favour with Ofgem. It was also rejected by the majority of consultation responses. A decision was made to proceed with the so-called "strict interpretation" and a legally binding decision was taken, by Ofgem, to that effect. There was no challenge to that

[44] See 'Interpreting the Regulation' section, page 2 of the Ofgem 8th October 2014 CMP224 decision letter.
[45] Stated by Ofgem on page 2 of their CMP224 decision letter as: "'Strict Interpretation' – only connection charges are excluded from the calculation of the average charge".
[46] Of the Ofgem 8th October 2014 CMP224 decision letter.

decision and the use of transmission system costs used in the formula set by the Guidelines Regulation were determined accordingly.

44. It would be an abuse of process on the part of Ofgem to seek to resile from the CMP224 decision now. Any final determination which is unappealed ought, generally speaking, to be binding on both the regulator and the regulated entity[47]. The reason why it is important for administrative decisions to be challenged within the appropriate time limits is because "[t]he principle of finality and legal certainty is important" even if facts subsequently come to light which show that the decision was unsatisfactory for some reason[48].

45. Ofgem cannot re-open a decision so as to provide for a different regulatory treatment retrospectively[49]. If it wishes to change its approach now, it should consult on it and apply any changes with prospective effect only[50].

46. Moreover, It would be capricious to change that established approach now, simply because it is necessary to have an *ex post* 'truing up' of values. There is no rational basis for distinguishing between the definition of the costs *ex post* and the definition *ex ante*. The Guidelines Regulation does not prescribe whether or not an *ex ante* or an *ex post* approach should be adopted generally. Indeed, that is a point which Ofgem itself has repeatedly made. There is no logical connection therefore between the construction of paragraph 2(1) of Part B dealing with excluded costs and the particular mechanism by which the €2.50/MWh requirement is implemented in Great Britain.

47. Moreover, Ofgem must treat like cases alike. Any decision which treats comparable costs differently without objective justification is vitiated by the inconsistency of treatment. [51] There is no objective justification for changing the construction of excluded

[47] See, by analogy, Case C-310/97 P Commission v AssiDoman Kraft Products AB [1999] ECR I-5363, CJEU at [53] to [55] and [57] to [61].

[48] See the judgment of Vos LJ in Somerfield Stores Ltd v Office of Fair Trading [2014] EWCA Civ 400, CA at [41]-[43].

[49] See, by analogy, Vodafone Ltd v British Telecommunications Plc [2010] EWCA Civ 391, per Richards LJ at [42] to [46].

[50] See R (Homesun) v. Secretary of State for Energy and Climate Change [2011] EWHC 3575 (Admin), per Mitting J at [42]-[44].

[51] See R (Middlebrook Mushrooms Ltd) v. Agricultural Wage Board of England and Wales [2004] EWHC 1447 (Admin), per Stanley Burnton J at [74]; and R v. Inland Revenue Commissioners *ex parte* National Federation of Self-Employed and Small Businesses [1982] AC 617, per Lord Scarman at pp. 651-652.

costs simply because the regulatory focus changes from an *ex ante* to an *ex post* analysis.

48. Indeed, by CMP251[52], the issue of which transmission charges were to be included in the calculation had been taken as read[53]. It is only now that a breach has been established on the basis of the existing methodology that National Grid appears to be seeking to back-track and unpick that methodology to suit its aim of avoiding liability for its breach of EU law. On the face of it, it would appear to amount to '*fudging*'[54] in the way identified by the Judge in the Nuclear Decommissioning Authority case[55]. The combination of the decision taken by Ofgem in CMP224 and the same policy or practice adopted in CMP251 establishes a consistent and unambiguous policy statement of which costs were properly to be included in the G:D margin calculation.

49. Ofgem, as a public body decision-maker, must follow its stated policy unless there are good reasons for not doing so[56]. Ofgem cannot have a privately stated policy which is at odds with a publicly stated policy and which it follows in preference to the public statement of principle: see R (Lumba) v. Secretary of State for the Home Department [2011] UKSC 12; [2012] 1 AC 245, SC per Lord Dyson at [20] and [26]. In the latter paragraph, Lord Dyson stated:

> *". . [a] decision-maker must follow his published policy (and not some different unpublished policy) unless there are good reasons for not doing so. The principle that policy must be consistently applied is not in doubt: see Wade & Forsyth, Administrative Law, 10th ed (2009), p 316. As it is put in De Smith's Judicial Review, 6th ed (2007), para 12-039: "there is an independent duty of consistent application of policies, which is based on the principle of equal implementation of laws, non-discrimination and the lack of arbitrariness." The decision of the Court of Appeal in R (Nadarajah) v Secretary of State for the Home Department [2004] INLR 139 is a good illustration of the principle. At para 68, Lord Phillips MR, giving the judgment of the court, said that the Secretary of State could not rely on an aspect of his unpublished policy to render lawful that which was at odds with his published policy".*

50. In addition, to the extent that Ofgem has given any unambiguous and unequivocal statement to regulated entities or to industry participants as to how it intends to behave,

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[52] Raised by British Gas, 19th August 2015.

[53] As per the CMP251 Final Modification Report submitted to Ofgem on 14th October 2016.

[54] "*By the word "fudging" I mean choosing an outcome, and manipulating the evaluation to reach that outcome*."

[55] As noted in paragraph 2.65 of the CMP261 Code Administrator Consultation document.

[56] See R (Kambadzi) v. Secretary of State for the Home Department [2011] UKSC 23, [2011] 1 WLR 1299, per Lord Hope at [36] and [41]; and R (Davies and Gaines-Cooper) v. HMRC [2011] UKSC 47, [2011] 1 WLR 2625 per Lord Wilson at [27]-[29] and Lord Mance at [70].

it is required to follow such a statement[57]. In such circumstances, Ofgem has engendered a procedural or a substantive legitimate expectation which it is required, as a matter of fairness, to respect[58].

51. A legitimate expectation may be recognised in public law even where no detrimental reliance on any unequivocal representation is shown[59]. Of course if the assurances given as to certain treatment raise serious macro-economic or political issues, a government body may well be entitled to resile from them by changing its policy approach, but only prospectively[60].

52. SSE (and any GB generator who paid transmission charges during Charging Year 2015/16) has a directly applicable right not to pay more than the cap of €2.50/ MWh, set by the Guidelines Regulation, on an average annual basis. SSE has done so, having paid in the order of €3.15/MWh[61], based on the GB average, during Charging Year 2015/16. SSE must be entitled to claim the overpayment back in order to ensure the effective protection of its EU law rights. It is incumbent on Ofgem, as the National Regulatory Authority ('NRA'), to give effect to those rights. The modification suggested to Ofgem in the CMP 261 Original and WACM1 proposal(s) is a convenient and easy way to give effect to those rights. Ofgem should therefore sanction that approach. A failure to do so would require SSE to reserve its right to bring legal proceedings to vindicate its EU law rights.

53. The EU law requirements of equivalence and effectiveness, which embody the general obligation on the Member States to ensure judicial protection of an individual's rights under EU law, apply equally to the designation of the courts and tribunals having jurisdiction to hear and determine actions based on EU law[62]. In order to avoid a multiplicity of proceedings, it would be appropriate for SSE (and any GB generator who

[57] See R v North and East Devon Health Authority, *Ex p* Coughlan [2001] QB 213 CA, per Lord Woolf MR at [57]; R (Bancoult No 2) v. Secretary of State for Foreign and Commonwealth Affairs [2008] UKHL 61, [2009] 1 AC 453, HL per Lord Hoffmann at [60]; Paponette v. AG of Trinidad and Tobago [2010] UKPC 32, [2012] 1 AC 1, per Lord Dyson at [37]-[38] and the case law cited therein.

[58] See R (Hely Hutchison) v. HMRC [2015] EWHC 3261 (Admin) per Whipple J at [42]-[43]. See also R (Nadarajah) v. Secretary of State for the Home Department [2005] EWCA Civ 1363, per Laws LJ at [68] and [69]; and R (BAPIO) v. Secretary of State for the Home Department [2008] UKHL 27, [2008] 1 AC 1003, per Lord Mance at [60].

[59] See R (Bancoult No 2) v. Secretary of State for Foreign and Commonwealth Affairs (*supra*) per Lord Hoffmann at [60].

[60] See The United Policyholders Group v. AG for Trinidad and Tobago [2016] UKPC 17 per Lord Neuberger at [39].

[61] See figure 6, page 15, CMP261 Code Administrator Consultation document.

[62] See Case C-268/06 Impact [2006] ECR I-2483, CJEU at [47].

paid transmission charges during Charging Year 2015/16) to reserve its right to bring judicial review proceedings against Ofgem, joining National Grid as an interested party, and seeking a determination of damages or re-payment of sums unduly levied by National Grid in the course of the same proceedings.

(2) Substantive Objection: The proposed re-characterisation of the excluded costs is wrong in law

54. The excluded charges set out in paragraph 2(1) of Part B of the Guidelines Regulation are not defined by reference to specific charges within the GB regulatory framework. An autonomous EU law meaning will be applied to the exclusions, but the terms will also be given a purposive construction. The Commission Guidelines Regulation was adopted to (i) harmonise the approach to Inter Transmission System Operator Compensation ('ITC') and (ii) to adopt a measure of some harmonisation of transmission tariffs. It is worth considering the *travaux préparatoires* which accompanied that measure.

55. The Commission's Staff Working Document Impact Assessment (the "Commission Impact Assessment") that accompanied the draft proposed Guidelines Regulation made clear that:

    a. It was recognised that the Guidelines Regulation needed to address the question of tariff harmonisation. The Guidelines Regulation formed part of the Third Energy Package[63], whose aim was to establish a single electricity market, by facilitating the cross-border supply of electricity (p. 5);

    b. The fact that a transmission network represents a natural monopoly means that strict rules on pricing, overseen by the NRA, governing access and pricing of network use are necessary (p. 6-7);

    c. Differential charges faced by generators for using the transmission system can affect the effective functioning of the internal market (p. 7);

    d. A key aspect of the regulatory regime is that non-discriminatory and transparent prices for network access should be approved in advance by NRAs (p. 7);

[63] Summarised on the Commission website at: https://ec.europa.eu/energy/en/topics/markets-and-consumers/market-legislation

e. The ITC was intended to compensate TSOs for the costs engendered by users of the transmission system who are in fact importing or exporting electricity to or from another national network (p. 7);

f. The full rationale for the ITC model involved the core element that TSOs should be compensated for the "*clearly specific costs incurred by transits*" (p. 9);

g. Tariff harmonisation was aimed at the charges for local system users for the "*use of the transmission system*." [Emphasis added] "*Tariffs are paid to the TSO to whose system the user is connected*" (p. 12). This implies strongly that the use of transmission system charges are distinct from the connection charges paid in order to gain access to the transmission system in the first place. The burdens placed on the transmission system arise from costs allocated to the transmission of generated electricity (a cost to be allocated to generators); and from costs allocated to the consumption of electricity (a cost to be allocated to demand). This entails the G:D allocation found in the Guidelines Regulation. In order to achieve "*neutrality between generators in different countries*"[64], a harmonisation procedure for the G:D allocation was needed;

h. The harmonisation of G Charges had been proposed in Guidelines developed by the European Regulators Group for Electricity and Gas ('EGREG') (p. 13). These Guidelines already permitted a specific range of G Charges distinctly for Great Britain and Northern Ireland[65] (as separate energy markets). In respect of ERGEG it is important to note two points in particular. First, ERGEG was, by virtue of an explicit Decision[66] of the Commission itself (until, subsequently dissolved, by the Commission, in a separate Decision[67]) a formally constituted EU level body, rather than, say, some form of 'informal' body. Second, the Commission specifically asked[68] [69] ERGEG to develop the draft Guidelines. It was not an 'informal' piece of work 'randomly' entered into by ERGEG. Rather it

[64] See page 12, the Commission's Impact Assessment.

[65] Plus Ireland.

[66] Decision 2003/796/EC

[67] Commission Decision of 16 May 2011 repealing Decision 2003/796/EC

[68] See page 23, Commission Consultation Document.

[69] This is also, for example, enunciated by ERGEG in the opening paragraph of its public consultation of 2nd May 2005.

was a formal task (from the Commission to ERGEG) that arose from the preceding working together of ERGEG and the Commission on these draft Guidelines;

i. The adoption of legally binding levels (in the Guidelines Regulation) for G Charges in place of voluntary (ERGEG) Guidelines was considered appropriate by the Commission[70]. It was all part of a co-ordinated measure to compensate TSOs "*in relation to costs they incur as a result of hosting cross-border flows of electricity on their network*" (p. 14);

j. A case had not been made out for departing from the range of allowable G-Charges set by the EGREG Guidelines (p. 36). The adoption of those Guidelines by a formal legal measure would improve legal certainty. Beyond that, national regulators were best placed to set the appropriate level of transmission tariff for the systems which they oversee; and

k. In terms of connection charges, "shallow charging" was often preferred to "deep charging" because it reduced the risk of the initial connector to the system bearing an undue level of costs for the system as a whole, which would encourage free-riding of investments by subsequent connectors. Shallow charging meant "*only costs which are exclusively associated with the new connection*" should be charged as connection charges (p. 52) [Emphasis added]. This would then suggest that the bulk of the network infrastructure costs incurred by a TSO should be recovered through use of transmission system charges, rather than connection charges.

56. The Commission consulted on its proposed approach to adopt binding Guidelines on transmission charges, including imposing a legal requirement that average transmission charges fall within a narrow band (p. 4). The EGREG Guidelines[71] which the Commission proposed should be adopted included a cap on the annual national average G Charge. That was calculated by summing the "*annual total transmission tariff charges paid by generators*" and dividing them by the "*total measured energy injected*

[70] The Commission's own conclusion, with respect to tariff harmonisation, was summarised in their Impact Assessment [at page 37] as follows:*"In light of the significant support for the adaptation of the 2005 [ERGEG] draft guidelines, and the extensive consultation processes involved in their development, it is appropriate to formally adopt these guidelines along with those relating to the ITC mechanism".*

[71] Dated 18th July 2005.

annually by generators to the transmission network." (p. 34) But the former Guidelines also stated:

> *"Annual average G shall exclude any charges paid by generators for physical assets required for the generators connection to the system (or the upgrade of the connection) as well as any charges paid by generators related to ancillary services or any specific network loss charges paid by generators".*

57. It can be seen that this ERGEG text is virtually identical to the text subsequently adopted, by the Commission, in the Guidelines Regulation itself. On one reading of that text, it would exclude from the G Charge amounts paid by generators for the ownership or possession of physical assets they use for connection. On a slightly broader reading, it would exclude connection charges levied by TSOs on generators as a precursor to gaining access to the network. What, on any view, it does not naturally cover is 'use of transmission system' charges levied by the TSOs on generators. As the subsequent Commission staff working document (SEC (2010) XXX Final) made clear at paragraph 2.3, use of transmission tariffs were the "*charge for local system users for use of the transmission system*".

58. That Commission Impact Assessment confirmed that the objective of what became the Guidelines Regulation was "*to achieve a certain degree of harmonisation to avoid distortions of trade, to facilitate the efficient utilisation of the interconnected transmission system across Europe and avoid the distortion of investment decisions*" (p. 4). The Commission Impact Assessment found that there was not sufficient evidence to support the adoption of a different range of average annual G charges than those established by the EGREG Guidelines of July 2005. It therefore proposed the incorporation of those ERGEG Guidelines in a binding legal measure; namely the Guidelines Regulation itself.

59. Since the EU measure was accordingly intended to give effect to the EGREG Guidelines, it is convenient to look at the rationale for the adoption of those Guidelines[72]. This is set out in EGREG's Explanatory Note to the Guidelines on Transmission

[72] In passing SSE note that Ofgem highlighted to the CMP261 Workgroup the importance of the Commission Impact Assessment, and the preceding Commission Consultation Document of 9th December 2008 [paragraph 2.85 CMP261 Code Administrator Consultation document] in regard to '*what does 'physical assets required to connect to the system' mean within the context of generator transmission charging in GB'* [paragraph 2.82, CMP261 Code Administrator Consultation document]. Ofgem did not point the Workgroup to <u>any</u> quotation(s) or section(s) or paragraph(s) or page(s) within either of these two Commission documents that support, directly or indirectly, what Ofgem noted around the word 'physical' in the context of *'physical assets required to connect to the system'*. Upon closer examination of these two documents, whilst SSE can find 38 references to 'physical' (listed in Appendix 1 to this response) only one of these is relevant to the harmonisation of transmission tariffs – and that is as a direct copy of the ERGEG Guidelines of 2005 (reproduced in Annex 2 of the Commission's Consultation Document). The Commission makes no explicit reference to 'physical' assets required for connection in its two documents – rather it adopts the position set out by ERGEG in their draft Guidelines of 2005.

Tarification dated 18th July 2005. The focus of those Guidelines was on putting the majority of the burden of the fixed costs of transmission on consumption rather than generation. So the G Charge regime was intended to put G "*at or very near to zero*." The Explanatory Note added (p. 2):

> *"As well as the fixed costs of the transmission network in the short run, ie capital and operation costs, transmission tariffs often include specific charges for losses, congestion and other ancillary services.*
>
> *Generators and consumers may also be required to pay a one-off charge for their initial connection to the grid usually called "connection charge." Charges related to losses, congestion and other ancillary services are also an important feature. These charges are not, however, considered to be part of the G Charge for the purpose of these Guidelines".* [Emphasis added]

60. In other words, the EGREG Guidelines themselves drew a distinction between the initial (i.e. one-off) charge of connection to the transmission system and the subsequent use of transmission charges that a TSO would levy. Only the latter would be included in the calculation of the G Charge according to ERGEG's Guidelines (later adopted by the Commission).

61. The reason for having a higher permissible range for GB transmission (of up to €2.50/MWh) was expressly identified by ERGEG in their evaluation[73] of two responses; one from a GB organisation[74] the other from a pan European organisation[75]; to their consultation of May 2005 on the draft Guidelines, when they stated that *"the figure corresponds to the expected situation in the UK and Ireland (average charge for generators), and allows for currency risk*"). [emphasis added]. SSE shall return later to how ERGEG may have come to this conclusion on the '*the expected situation in the UK and Ireland (average charge for generators)*'. The Guidelines ultimately contained text that is strikingly similar to that found in Article 2 of Part B of the Appendix to Regulation 838/2010.

62. The overarching purpose behind Article 2 of Part B of the Guidelines Regulation can therefore be seen to be the attempt to remove from inclusion in the G Charge those one-

[73] http://www.ceer.eu/portal/page/portal/EER_HOME/EER_CONSULT/CLOSED%20PUBLIC%20CONSULTATIONS/ELECTRICITY/Transmission%20Tarification%20Guidelines/CD/E05-PC-02-19b_Guidelines%20on%20transmission%20tarification_evaluation%20of%20comments.pdf

[74] "[AEP] We believe that an average G charge of €2.5/MWh for the UK, which is far higher than for any other Member State except Ireland, is inequitable".

[75] "[Eurelectric] The value of the 'annual national average G' within the GB system will be at maximum 2.5 €/MWh."

off costs associated with the connection of the generator to the transmission system in the first place.

63. The decision which Ofgem took in October 2014, with respect to CMP224, to adopt the so-called "strict interpretation" of the excluded costs received the *ex post* blessing of the CMP261 Workgroup's legal advisers, Addleshaw Goddard, in a legal opinion dated 22nd April 2016[76]. At paragraph 19, the opinion concluded that it was a reasonable approach for charges in respect of "generation only spurs" to be included *within* the TNUoS charges. At paragraph 20, the opinion stated:

> *"We say this on the basis of the wording at Part B of the Annex to the Guidelines Regulation, which refers to the Guidelines Regulation's G Charge limits applying to 'total transmission tariff charges' and taking into account the exclusions (including in respect of 'charges paid by producers for physical assets required for connection to the system or the upgrade of the connection') set out in paragraph 2 of the same Part B. While these terms are not given specific definitions within the Guidelines Regulation, given that generation only spurs are treated as part of the transmission system in GB and TNUoS charges include charges for the use of such spurs, we agree with the conclusions reached in respect of the CMP224 that it is reasonable that such spurs should be included within the average G charges calculation. In contrast, it is not clear on what basis the exclusion of 'charges paid by producers for physical assets required for connection to the system justifies the exclusion of TNUoS charges (as opposed to connection charges) in respect of generation only spurs and therefore the justification for such a specific carve-out appears lacking".* [Emphasis added]

64. The rationale relied upon by Addleshaw Goddard mirrored the response that had been given by SSE to the CMP224 Workgroup consultation dated 23rd January 2014[77]. There, SSE noted in terms that the calculation of charges established under CUSC had included the non-connection charges in the charging structure. They had been charged by National Grid to SSE as part of the use of transmission system (TNUoS) charges and not connection charges. It would look odd, indeed perverse, for those charges then to fall outside the scope of the charges properly to be considered to be subject to the cap set by the Guidelines Regulation. In truth, if the charges were to be excluded from the ambit of the €2.50/MWh cap, they should not have been levied by National Grid as TNUoS charges in the first place. As that response noted, National Grid itself had proposed that these local charges should be included within the scope of TNUoS charges in its CMP224 proposal. Indeed, National Grid had routinely invoiced SSE separately for "connection charges" and for "transmission charges" and, for clarity, the

[76] Which can be found at Annex 5, pages 161-168, CMP261 Code Administrator Consultation document.

[77] Which SSE included in its response to the CMP261 Workgroup Consultation - it can be found at pages 132-151 of the CMP261 Code Administrator Consultation document.

generator only spurs charges have been included within "transmission charges" rather than "connection charges." Indeed, that approach is based on definitions found within the CUSC baseline itself.

65. The non-connection charges are charges for the transmission of electricity across a particular and defined aspect of the network. They are not charges associated with connecting the generator to the National Grid operated transmission network. The suggestion that they should be excluded from the definition of transmission costs by virtue of Article 2(1) of Part B of the Guidelines Regulation is accordingly vitiated by an error of law.

66. In contrast, the SSE construction of transmission charges as including non-connection charges is consistent with a teleological approach to construction of the Guidelines Regulation. The non-connection charges do not relate to the initial connection to the transmission system. They are variable charges levied by National Grid on the basis of the use of its transmission network. Any other generator could also branch into the transmission network at the same node point as SSE and they would be subject to the non-connection charges. That demonstrates that the charges relate to transmission and not connection, since two distinct connections would then be charged the same amount for transmission across that particular part of the National Grid operated transmission network.

The 'expected situation' in GB

67. As SSE noted above[78], ERGEG set the upper limit for GB (plus Ireland and Northern Ireland) at €2.50/MWh as *"the figure corresponds to the expected situation in the UK and Ireland (average charge for generators), and allows for currency risk"*[79].

68. However, this begs the question, how did ERGEG come by that 'expectation' of what the situation would be in GB when setting the €2.50/MWh figure?

69. In theory there are three possible sources: (1) using ERGEG's internal resources or (2) using the membership of ERGEG or (3) external consultants. In respect of (1) SSE understands that then (and now) ERGEG[80] was a 'light touch' organisation, with few staff which suggests that option (1) was not the source of this 'expectation' of the situation in GB.

[78] Under the 'Substantive Objection' part of the 'Legal Background'.

[79] See ERGEG 'Evaluation of the Comments Received, 18th July 2005, point 8, page 6 and point 9 page 12.

[80] Now ACER - "The forerunner to ACER was the European Regulators Group for Electricity and Gas (ERGEG)", see CEER website: http://www.ceer.eu/portal/page/portal/EER_HOME/EER_ABOUT

70. In respect of (2) SSE notes that the national regulatory authorities (who constitute the membership of ERGEG) are eminently qualified to provide ERGEG with the '*expected situation*' for their Member State. As Ofgem noted in their 2005/06[81] Annual Report[82], "*Throughout the year, Ofgem contributed extensively to CEER and ERGEG and has taken a lead role in developing policy proposals for submission to the Commission's energy and competition directorates"* [emphasis added]. Certainly in the case of GB, one of Ofgem's main purposes was to regulate monopoly providers, of which transmission networks are a core part. As part of the exercising of this purpose Ofgem has to approve the costs components that go into the annual transmission charges in GB and then how those costs components will be then recovered; via the annual transmission charges; from generators and demand. In addition, via their regulatory powers and persuasive engagement with the transmission organisations, if (notwithstanding the above) Ofgem was perhaps lacking in some aspects of knowledge about what the '*expected situation*' might be, they could of course seek all the relevant information from those transmission organisations, such as National Grid.

71. Plus it should not be forgotten that only a few months prior to the ERGEG May 2005 consultation and July 2005 draft Guidelines, Ofgem had been heavily engaged in work associated, specifically, with connection charges and transmission use of system charges, when they approved changes to (i) the GB connection charges methodology and (ii) the GB use of system charges methodology in December 2004 (and for BETTA, in early 2005).

72. In respect of (3) SSE notes firstly that there is no evidence within the ERGEG documentation[83], that any such advice, that could support ERGEG's view of the '*expected situation*' in GB, was obtained from external consultants. Secondly; given the undoubted expertise, knowledge and complete access (directly or indirectly) to all the necessary information needed to come to the '*expected situation*' view which members of ERGEG (such as Ofgem) had (for the reasons noted under (2) above); why would ERGEG go to the expense and trouble to engage with external consultants for this task, when those consultants would have 'inferior' access to the necessary information compared to the 'superior' accessibility afforded to ERGEG members (such as Ofgem).

73. Therefore SSE believes that the only logical inference is that the '*expected situation in the UK'*; which warranted the setting of the upper limit (for GB) of €2.50/MWh in the ERGEG draft Guidelines, which went on to be replicated within the Guidelines Regulation itself; came from Ofgem and must, for the reasons SSE set out in this answer to Question 1, have been based on the GB 'baseline' at that time; which was (and remains) that 'connection charges' are those defined in the CUSC and are not those associated with the use of the system (be that 'local' or 'wider' – not least because the approach to using 'local' (substations and circuits) or 'wider' in terms of GB transmission was not developed until three years after Ofgem and ERGEG had come to their view, in late spring / early summer 2005, on the '*expected situation in the UK'*; when National Grid raised, in 2008, and Ofgem approved[84] GB ECM-11) .

[81] Covering the timeframe 1st April 2005-31st March 2006 which includes the period of ERGEG's work on its draft Guidelines.

[82] On page 25, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/231684/1304.pdf

[83] Of 2nd May and 18th July 2005.

[84] In its decision letter dated 15th December 2008.

What was the ERGEG view on '*assets required for the generators connection to the system*'

74. Let us assume, for one moment, that notwithstanding the position in law, SSE could somehow suspend the clear legal rationale set out above and Ofgem could, after all, decide on the matter of what constituted '*physical assets required for the generators connection to the system'*.

75. Even in that hypothetical situation the result would be the same outcome.

76. This is because Ofgem, in that situation would not have a free hand in determining what constitutes *'physical assets required for the generators connection to the system*'' in the context of the Guidelines Regulation. Rather, it would be bound to follow what was in the minds of the drafters of the wording in the Guidelines Regulation when those drafters used the words *'physical assets required for the generators connection to the system*''.

77. As noted above, the Commission adopted the ERGEG draft Guidelines for the wording in the Guidelines Regulation. Closer examination of the ERGEG documentation; from late spring to early summer 2005, that related to their development of the draft Guidelines; clearly shows what ERGEG meant by '*physical assets required for the generators connection to the system*' which should be excluded from the calculation of the annual average transmission charges paid by generators (in GB) is performed in order to determine the applicable level in conformance with the Guidelines Regulation.

78. This clarity is found in the (ERGEG) Explanatory Note[85] which states:

> *"Generators and consumers may also be required to pay a one-off charge for their initial connection to the grid usually called "connection charge". Charges related to losses, congestion and other ancillary services are also an important feature. These charges are not, however, considered to be part of the G charge for the purpose of these Guidelines".* [emphasis added][86]

79. This is key: the ERGEG 18th July 2005 draft Guidelines on Transmission Tarification identifies[87] three items that, for the purposes of the Guidelines, are not to be part of G charges[88], namely:

> *"Annual average G shall exclude any [1] charges paid by generators for physical assets required for the generators connection to the system (or the upgrade of the connection) as well as [2] any charges paid by generators related to ancillary*

[85] See page 2.

[86] It is, at this point, important to note that significant and material parts of this (ERGEG) wording[86]; which went onto form key elements of the ERGEG draft Guidelines and, in turn, the Regulation itself; were clearly drafted by ERGEG as set out in the 2nd May 2005 draft of the 'Explanatory Note', where the underlined words were added (by ERGEG): *"Generators and consumers may also be required to pay a one-off charge for their initial connection to the grid usually called "connection charge". Charges related to losses, congestion and other ancillary services are also an important feature. These charges are not, however, considered to be part of the G charge for the purpose of these Guidelines."* [emphasis added].

[87] See paragraph 1.1, page 4.

[88] When calculating the €/MWh annual average transmission charges figure (for GB) in the context of the €0-2.5/MWh range set out in the Regulation.

services or [3] any specific network loss charges paid by generators." [emphasis added]

80. These three items accord with the items in the (ERGEG) Explanatory Note SSE identifies above and, crucially, are themselves mirrored within the 838/2010 Guidelines Regulation[89] itself[90], in the following terms:

> *"transmission charges shall exclude:*
> *(1) charges paid by producers for physical assets required for connection to the system or the upgrade of the connection;*
> *(2) charges paid by producers related to ancillary services;*
> *(3) specific system loss charges paid by producers".*

81. Therefore it is clear to SSE that what the drafters meant by '*physical assets required for connection to the system*' is to be '*one-off charge[s] for their initial connection to the grid usually called "connection charge*"'.

History of 'Connection Charges' in GB

82. When considering what constitutes 'Connection Charges' in GB it is also relevant to take account of the contemporaneous work being undertaken in parallel by Ofgem and ERGEG[91] in 2004-2005. As noted in the Commission Consultation Document[92]:

> *"Following the formation of ERGEG, the Commission asked the group to comment on and further develop the draft guidelines. A more refined draft was produced following joint work and this was presented in the Florence Forum in September 2004. Participants asked for further work to be done. Taking account of the comments made in the Florence Forum, ERGEG prepared a revised draft which was put out for public consultation in early 2005 and a number of comments were received from key stakeholders. In July 2005, amended Guidelines on Transmission Tarification were submitted to the Commission by ERGEG".*

83. During the autumn of 2004 Ofgem considered a proposal from National Grid on the charging methodologies for connection to, and use of, the high voltage transmission system in GB which concludes, in December 2004, with a decision from the Authority.

84. These GB documents from that time (that Ofgem was instrumental in either drafting or approving) set out what was meant by 'connection charges' within GB and it is clear, from them, that the SSE (long held) view remains correct; namely that it is only the CUSC defined 'Connection Charges' that should be excluded when, for the purposes of

[89] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:250:0005:0011:EN:PDF

[90] Regulation 838/2010, Part B, paragraph 2.

[91] The UK representative member of ERGEG was Ofgem.

[92] At page 23.

the Guidelines Regulation, the calculation of the annual average transmission charges paid by generators (in GB) is performed in order to determine the applicable level in conformance with the Guidelines Regulation. As noted above, this is what happens with respect to CMP261.

85. In support of this SSE highlights various statements made, for example, in The Authority's December 2004 decision on National Grid's proposed GB electricity transmission charging methodologies which SSE has listed in Appendix 2 of this response.

86. The primary (but not only) relevance, of this 2004-2005 documentation, from Ofgem et al, with respect to 'connection charges' is that it was over three years after the ERGEG draft Guidelines were published that, late in 2008[93], Ofgem provided a decision[94] on a National Grid's proposed modification to its Use of System Charging Methodology (and not its Connection Charging Methodology[95]) in respect of 'charging arrangements for generator local assets' which introduced (i) 'Local' circuit charges; (ii) 'Local' substation charges; (iii) 'Wider' locational charges; and (iv) the Residual charge.

87. It is to these charges and in particular the 'Local' circuit charges and the 'Local' substation charges, that Ofgem (with its request for further analysis to support the additional legal advice that they are seeking from their Counsel in respect of CMP261) considers to be of relevance in the context of *'physical assets required to connect to the system'*.

88. However, such an approach (of considering the exclusion; for the purposes of calculating the GB annual average transmission charges in the context of the €2.50/MWh upper level set in the Guidelines Regulation; some or all 'Local' circuit charges and / or the 'Local' substation charges) is further flawed because, as Ofgem clearly states in its GB ECM-11 decision letter:

> *"We [Ofgem] also note that the [GB ECM-11] modification is not proposing any change to the current charging boundary between assets charged under NGET's Connection and TNUoS charging methodologies. Hence, all transmission assets which are currently shared, or could be potentially shared, by more than one user will continue to be defined as transmission infrastructure assets and their costs will continue to be recovered via TNUoS charges".* [emphasis added]

[93] 15th December 2008.

[94] https://www.ofgem.gov.uk/sites/default/files/docs/2008/12/151208-ecm-11-decision-letter_0.pdf

[95] In this regard, it is important to note the Addelshaw Goddard advice of April 2016 to the CMP261 Workgroup, as follows: "*In contrast [to 'inclusion'], it is not clear on what basis the exclusion of "charges paid by producers for physical assets required for connection to the system" justifies the exclusion of TNUoS charges (as opposed to connection charges) in respect of generation only spurs, and therefore the justification for such a specific carve-out appears lacking*". [emphasis added] which clearly highlighted the difference between 'TNUoS charges' (which are subject to a separate charging methodology) and 'connection charges' (which are subject to a separate charging methodology to the TNUoS methodology).

89. This (Ofgem approved) approach is echoed, even today[96], by National Grid in their 'Guide to Connection Assets'[97] which states, at the start, that:

> *"**1 Connection Charges***
> *Connection charges enable National Grid to recover, with a reasonable rate of return the costs of installing and maintaining assets which connect individual users to the GB Transmission Network. Connection assets are non-sharable assets installed for and only capable of use by an Individual user and hence represent a shallow charging regime (known as PLUGs). All sharable assets are classed as Infrastructure assets and the costs associated with them are recovered through TNUoS charges".* [emphasis added]

90. It is SSE's strong contention that to 'exclude' [98] '*transmission infrastructure assets*' '*which are currently shared, or could be potentially shared, by more than one user',* the costs of which are '*recovered via TNUoS charges'* (and thus are not 'connection charges') is both flawed and wholly unjustified.

91. Furthermore, such a treatment of these transmission charges paid by generators would run directly counter to Ofgem's previously stated position on this matter and gives rise to issues of Legal certainty (which SSE explored further in its answer to Question 3 below) and regulatory certainty.

2 Do you support the proposed implementation approach? If not, please provide reasoning why.

1. SSE note the proposed implementation approach set out in Section 4 of the Code Administrator Consultation document and SSE support that approach with respect to CMP261 Original and WACM1 (namely that any reconciliation amount SSE are due would be received by it within 14 calendar days).

3 Do you have any other comments?

1. Yes, SSE does have other comments that it wishes to make. These are focussed on (i) the wider legal contextual setting associated with the transmission charges applied to GB generators during Charging Year 2015/16; (ii) responding to the 'National Grid View' which was (as is normal) only available at this Code Administrator Consultation stage in

[96] Dated 11th April 2012, but still on the relevant part of the National Grid website as at 16th November 2016.

[97] Available at http://www2.nationalgrid.com/UK/Industry-information/System-charges/Electricity-transmission/Connection-Charges/

[98] For the purposes of the calculation of the annual average transmission charges paid by generators (in GB) in order to determine the applicable level in conformance with the Regulation during Charging Year 2015/16.

the CUSC change process; (iii) Trade; (iv) the Treatment of Overcharged Customers; and (v) the draft legal text

Legal Context

2. As SSE has set out in the answer to Question 1 of this Code Administrator Consultation, there are significant points of law associated with CMP261. In addition to those points SSE wishes to ensure that the legal contextual setting is recorded here.

3. The Connection and Use of System Code (CUSC) is part of the Transmission Licence under which National Grid operates. It is established by paragraph 2 of Standard Condition C10. It is made contractually binding between National Grid as the licensee and CUSC users, such as SSE, by a CUSC Framework Agreement. It provides in Part 2 of Section 14[99] the methodology for the calculation of TNUoS charges.

4. An element in that methodology involves the use of forecasts of future demand. The CUSC also sets out the means by which the TNUoS charges are to be recovered from Generators (and Suppliers). At the end of each charging year (ending on 31 March) National Grid, in accordance with CUSC condition 3.13.2, undertakes a reconciliation of forecast versus achieved usage to take account of data needed to apply charges in the charging year which are only available at the end of that year (i.e. after 31st March).

5. It has been apparent for some time that, for Charging Year 2015/16, the upper limit (of €2.50/MWh) set out in the Guidelines Regulation would be exceeded in respect of 2015/16. The generic possibility of breach of that threshold was first raised in Ofgem's 'Project Transmit Technical Working Group' initial report, published in September 2011. The report predicted the threshold might be exceeded in Charging Years 2017/18 or 2018/19. It was precisely to address the risk of this breach that National Grid proposed a modification to the CUSC on 19th September 2013 (CMP224).

6. The modification proposal stated:

> *"If in any given year the average annual generation transmission charges do not fall within this range [€0-2.5/MWh], National Grid runs the risk of being non-compliant with the regulation ... Therefore it is important that the average annual generation transmission charges remain within the current prescribed range … The driver for this [CMP224] proposal is to counter the risk of non-compliance with the EC regulation if indeed a breach of the range applied on generation transmission charges becomes a possibility in future".*

7. The CMP224 proposal also stated:

> *"As specified in the EC regulation, the value for average annual transmission charges payable by generators is calculated by dividing the <u>total revenue</u>*

[99] Of the CUSC.

> *collected from generation users through Transmission Network Use of System (TNUoS) charges by the total measured energy injected into the Transmission Network or simply the total demand for that year. The total demand for any given year is an absolute number. However, the total generation TNUoS revenue can be adjusted to a level so that the average annual transmission charges payable by generators do not exceed the prescribed limit".* [Emphasis in original]

8. It is therefore open to National Grid to ensure compliance with the Guidelines Regulation in a given year by adopting the mechanism of adjusting the total transmission revenue collected from GB generation. The CMP224 proposal also noted that the fixed rate of 27% recovery of TNUoS charges from Generators risked putting National Grid in breach of the threshold given the trend of year on year increases in the overall TNUoS revenue. It[100] therefore proposed putting a cap on the annual generation TNUoS revenue, so that average annual transmission charges payable by Generators in GB would "*always stay within the range specified by the EC Regulation*." The CMP224 proposal was that the Generation/Demand revenue split ("G/D split") ratio would be modified for any year accordingly. In other words, the G/D split ratio would be changed in Generators' favour in any year where it was forecast that otherwise the Guidelines Regulation threshold would be exceeded.

9. Ofgem directed that this proposed modification be made by a decision dated 8th October 2014. Ofgem observed that, based on the then current G/D split of 27:73, the average transmission charges for Generators were expected to exceed the €2.5/MWh upper limit at some point in the five years from 2015/16 to 2020/21. The Decision also noted:

> *"The proposals would set the G:D split ahead of the relevant charging year based on forecasts of the relevant variables. So there is a risk that charges exceed the upper limit of the Regulation because of forecast error. To mitigate this risk, the proposals include an 'error margin', i.e. the G:D split would be set with the target of an average transmission charge for generation that is below (rather than equal to) the upper limit allowed by the Regulation. The error margin would be set by NGET[[101]] each year based on its historical forecast".*

10. Having assessed a series of different options from the original proposal developed by the industry workgroup assessing CMP224, Ofgem directed that the original proposal should be implemented. It took effect from 22nd October 2014.

11. Thereafter, on a number of occasions during 2015 and 2016 the possibility that a breach of the limit set in the Guidelines Regulation could occur were raised by SSE and others with National Grid. The Code Administrator Consultation lists[102] no fewer than eight occasions on which the real risk of an infringement of the threshold was brought to National Grid's attention.

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[100] National Grid, with CMP224.

[101] At the time 'National Grid' was commonly referred to as 'NGET'.

[102] See paragraph 2.34, page 10-11.

12. In March 2016, SSE raised CMP261 which proposed a modification to allow a mid-year tariff modification to enable a reconciliation payment in spring 2016. Urgency was requested and rejected by Ofgem but an accelerated timeline was agreed. The proposal has not yet been determined by Ofgem. A Workgroup consultation document was issued[103]. In addition, National Grid sought a further opinion from Addleshaw Goddard in April 2016. It suggested that the Guidelines threshold had been exceeded because of the cumulative effect of a series of exceptional factors. It did, however, appear to recognise a breach of the Guidelines Regulation and suggested strongly that reconciliation of over-charges should take place for the 2015/16 charging year.

13. To date[104], National Grid has not done anything to rectify this breach[105]. No account was taken of the overpayments in the course of the reconciliation process undertaken by National Grid in accordance with CUSC 3.13.2 for Charging Year 2015/16 in spring 2016.

14. Turning from National Grid to Ofgem, it should be noted that since the regulation of the supply of electricity falls within the scope of EU law, Ofgem is subject to the general requirements of EU law, such as the need to comply with the principles of proportionality and the protection of legal certainty[106]. These general principles of EU law are also applicable by virtue of Article 6(3) TEU[107].

15. The jurisprudence of the Court of Justice of the European Union (ECJ) establishes that these general principles will require Ofgem when acting as a National Regulatory Authority (NRA) to respect the principle of legal certainty[108]. This will also mean that licence conditions with which a licensed entity is expected to comply should be prescribed by law in a clearly ascertainable manner[109]. As regards the principle of legal certainty, it must be observed all the more strictly in the case of rules liable to entail

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[103] On 7th July 2016.

[104] As at 16th November 2016.

[105] See, for example, paragraph 2.22 of the CMP261 Code Administrator Consultation "*The Proposer asked National Grid to confirm if it had asked Ofgem for approval for a mid-year tariff change in Charging Year 2015/16 in accordance with its Licence; and to confirm the outcome of that request; in terms of was it still pending or had it been approved or rejected by the Authority? National Grid confirmed, at the third Workgroup meeting that no approach to Ofgem had been made…".*

[106] See Joined Cases C-20/00 and C-64/00 Booker Aquaculture [2003] ECR I-7411, ECJ at [46], [64] to [67], [88].

[107] See R (Zagorski & Baze) v Secretary of State for Business, Innovation and Skills [2010] EWHC 3110 (Admin), Lloyd Jones J at [70] and [73].

[108] See Case C-384/04 Federation of Technological Industries and others [2006] ECR I-4191, ECJ at [29].

[109] See Fleming t/a Bodycraft v. HMRC [2008] UKHL 2, HL per Lord Hope at [10], Lord Scott at [21]-[22], Lord Walker at [64] and [68]; and Lord Neuberger at [79]. This would also follow from the obligation imposed on GEMA to comply with Article 1 of Protocol 1 to the European Convention on Human Rights, which prevents the imposition of heavy financial sanctions except in accordance with law. Law for these purposes implies qualitative requirements, notably those of accessibility and foreseeability. See Hentrich v France (1994) 18 EHRR 40, ECtHR at [42]; and Spacek v. Czech Republic (2000) 30 EHRR 1010, at paragraph 54.

financial consequences, in order that those concerned may know precisely the extent of the obligations which such rules impose on them[110].

16. National Regulatory Authorities must additionally respect the principle of proportionality. The measures adopted must be appropriate to secure the attainment of the objective which they pursue and not go beyond what is necessary in order to attain it[111].

17. Any national measure or action which is capable of undermining or affecting the objectives of a provision of EU law is reviewable on grounds of compatibility with the general principles[112]. It is also a general requirement of EU law that rights derived from EU law should be given effective protection.

18. Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13th July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (the 'Network Access Regulation') aims, by Article 1(1), to set fair rules for cross-border exchanges in electricity. Recital (11) recognises that transmission system operators should be compensated for costs incurred as a result of hosting cross-border flows of electricity on their networks. Recital (12) then notes that payments and receipts from compensation should be taken into account when setting national network tariffs. Recital (13) confirms that a degree of harmonisation is required in charges for cross-border access in order to avoid distortions to trade. Recital (23) notes that the NRAs should ensure compliance with the rules contained in this Regulation and the Guidelines adopted pursuant thereto.

19. Article 14 of the Network Access Regulation requires charges for access to networks to be transparent and to reflect the actual costs incurred insofar as they correspond to those of an efficient and structurally comparable network operator. They have to be applied in a non-discriminatory manner. Article 14(3) requires the charges for network access to take account of "*actual payments made and received as well as payments expected for future periods of time, estimated on the basis of past periods*".

20. Article 19 of the Network Access Regulation requires the NRA to ensure compliance with this Regulation and with the Guidelines adopted pursuant to Article 18. By Article 18(2), those Guidelines may seek to achieve a measure of harmonisation in relation to national tariff systems for producers and consumers.

21. Commission Regulation (EU) No 838/2010 of 23rd September 2010 on laying down guidelines relating to the inter-transmission system operator compensation mechanism and a common regulatory approach to transmission charging (the Guidelines

[110] See Case C-409/04 Teleos plc and others v. The Commissioners of Customs and Excise [2007] ECR I-7797, ECJ at [48]. This also chimes with the principle of good regulation of encouraging "regulatory certainty."

[111] See Joined Cases C-1/90 and C-176/90 Aragonesa de Publicidad Exterior and Publivía [1991] ECR I-4151, ECJ at [16]; Joined Cases C-369/96 and C-376/96 Arblade and Others [1999] ECR I-8453, at [34] and [35]; and Case C-165/98 Mazzoleni v. Inter Surveillance Assistance SARL [2001] ECR I-2189, at [24].

[112] See Case C-286/94 Garage Molenheide BVBA v Belgium [1997] ECR I-7281, ECJ; and Case C-409/04 Teleos and Others [2007] ECR I-7797, ECJ at [45].

Regulation) is one of the guidelines adopted under that power. The Guidelines Regulation is applicable to transmission charging in GB.

22. Article 2 states that "*charges applied by network operators for access to the transmission system shall be in accordance with guidelines set out in Part B of the Annex*." Part B, paragraph 1 sets "*annual average transmission charges paid by producers in each Member State*" by reference to a stipulated range. That range for GB generators is €0 to €2.50/MWh.

23. The fact is clear that the Guidelines Regulation is applicable to National Grid and this has been accepted by National Grid in its CMP224 proposal where it states that "*The European Commission Regulation 838/2010 is legally binding for all Transmission licensees across Europe*". That concession is rightly made, since a Guidelines Regulation is binding directly in the law of England and Wales without any need for implementation.

24. It is also noteworthy that Addleshaw Goddard have stated in their opinion dated 22nd April 2016 that:

> *"There is a strong argument that a material breach of the €2.5 MWh G Charges limit in respect of the 2015/16 charging year equates to non-compliance with the Guidelines Regulation As a result, reconciliation of G Charges for the 2015/16 charging year would be prudent".*

25. Addleshaw Goddard have suggested[113] that there is a materiality requirement before any breach of the relevant provision could be found. There is, however, no express requirement for any breach of the Guidelines Regulation to be a material breach before it constitutes a breach.

26. In this case the breach amounts to some £119M – it is not a 'trifling' amount in the context of *de minimis non curat lex*[114].

27. Furthermore, it can be said more generally that National Grid should have been and, even now, should be taking steps to review and then reconcile its transmission charges in order to ensure that it does not fall foul of the Guidelines Regulation.

28. While it is true that Ofgem has approved the G:D Split on an annual basis, that does not forestall National Grid from taking its own separate steps to ensure compliance with the Guidelines Regulation. Since SSE, and others, have warned both National Grid and Ofgem on a number of occasions of the risk of a breach, it is clear that National Grid has infringed the terms of Conditions C5 and C10 of its Licence by not responding to these warnings. The obligation on National Grid was to "*make such modifications of the use of system charging methodology as may be requisite*" to ensure that the Guidelines Regulation is complied with. National Grid has failed to do so.

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[113] In their April 2016 advice for the CMP261 Workgroup, at Annex 5 of the CMP261 Code Administrator Consultation document.

[114] 'The law does not deal in trifles'.

29. In summary, there has been a clear breach of the Guidelines Regulation. The case law of the ECJ confirms that individuals affected by a breach of EU law have a right to effective protection[115].

National Grid's View

30. SSE notes the views provided by National Grid, as set out in paragraphs 7.1-7.3[116] of the CMP261 Code Administrator Consultation, and would, in particular take issue with three aspects; (i) the treatment of currency risk; (ii) 'windfall gains'; and (iii) the background to CMP224.

(i) Treatment of Currency Risk

31. In respect of (i) SSE notes the statement, from National Grid, in paragraph 7.1[117], that:

> *"The CMP224 methodology also deliberately excluded exchange rate risk to avoid inclusion of risk premia into contract pricing which would be to the detriment of GB consumers."*

32. SSE observes the following:

(1) that this (CMP224 Original) was the proposal raised by National Grid; and
(2) that in accordance with the 'proposer ownership' principle, National Grid (rather than, say, any other party or parties – including a Workgroup – having 'ownership) sets what is, or is not, within the original proposal.

33. Therefore the deliberate exclusion, from CMP224, of exchange rate risk was based on the conscious decision on the part of National Grid and no other organisation. Any consequences with respect to compliance with the Guidelines Regulation that arise from this deficiency; of that deliberate exclusion; rest squarely with National Grid.

34. Notwithstanding that, it is important to remember that the Guidelines Regulation sets out a range; from €0 to €2.50/MWh; within which National Grid had during Charging Year 2015/16, and in other years, to keep the annual average transmission charges for GB generators within.

[115] Case 199/82 Amministrazione delle Finanze dello Stato v. SpA San Giorgio [1983] ECR 359, ECJ at [12]; and Case C-94/10 Danfoss A/S [2011] ECR I-9963, ECJ at [20]-[21]. See also Case C-295/04 Manfredi [2006] E.C.R. I-6619, ECJ at [39] and [60], which suggests that the overpaid sums should be repaid in full with appropriate, compensatory interest.

[116] See page 43, CMP261 Code Administrator Consultation document.

[117] See page 43, the CMP261 Code Administrator Consultation.

35. This range is the highest set in the Guidelines Regulation and is only applicable to two Member States, the UK and Ireland.

36. This range was deliberately set so wide, for the UK and Ireland, by ERGEG (and subsequently adopted by the Commission in the Guidelines Regulation, as SSE sets out in its answer to Question 1 above) to allow specifically for currency risk (as they noted in their evaluation[118] of two responses; one from a GB organisation[119] the other from a pan European organisation[120]; when they stated that *"the figure corresponds to the expected situation in the UK and Ireland (average charge for generators), and allows for currency risk*".

37. This wide range therefore afforded National Grid a high degree of latitude compared, say, to an equivalent organisation in many other Member States (whose applicable ranges, in the Guidelines Regulation, are set much narrower at €0 to €0.50/MWh).

38. This high degree of latitude, coupled with the national mechanisms[121] available to National Grid to initiate a 'mid-year' transmission tariff change; as they had done, for example, in a previous Charging Year[122]; allowed National Grid ample scope and opportunity for ensuring that any currency risk was addressed by them before or during Charging Year 2015/16. As was noted in the Code Administrator Consultation[123], had National Grid exercised 'good industry practice'[124], in terms of initiating a 'mid-year' transmission tariff change, as it had in the past, then this breach of the Guidelines Regulation could (and should) have been avoided.

39. Whilst SSE refers in the preceding paragraph to the national mechanisms available to National Grid, to initiate a 'mid-year' transmission tariff change, it is important to stress that irrespective of whether any such national mechanism(s) existed (which they did) or not, that National Grid was (and still is) bound by its overriding EU law obligations, as set out in the Guidelines Regulation, to ensure that the annual average transmission charges paid by generators in GB; that National Grid sets, invoices and collects; in Charging Year 2015/16 remained within the range of €0-2.50/MWh.

40. For the avoidance of doubt, whilst another party may, or may not, have any role to play in this matter (it is not thought that any stakeholders, except Ofgem, do) any action, or

[118] http://www.ceer.eu/portal/page/portal/EER_HOME/EER_CONSULT/CLOSED%20PUBLIC%20CONSULTATIONS/ELECTRICITY/Transmission%20Tarification%20Guidelines/CD/E05-PC-02-19b_Guidelines%20on%20transmission%20tarification_evaluation%20of%20comments.pdf

[119] "[AEP] We believe that an average G charge of €2.5/MWh for the UK, which is far higher than for any other Member State except Ireland, is inequitable."

[120] "[Eurelectric] The value of the 'annual national average G' within the GB system will be at maximum 2.5 €/MWh."

[121] Such as allowed for in their Transmission Licence and the CUSC.

[122] See paragraph 2.35, page 11, CMP261 Code Administrator Consultation document "*It was noted that a mid-year tariff change had been carried out before by National Grid*."

[123] See paragraph 2.35, page 11, CMP261 Code Administrator Consultation document.

[124] See paragraph 2.35, page 11, CMP261 Code Administrator Consultation document "*the 'Good Industry Practice' standard that is widely used within the industry; namely that degree of skill, diligence, prudence and foresight expected from the same type of undertaking under the same or similar circumstances."*

in-action, on the part of that party does not, in the view of SSE, absolve National Grid from its legal duties with regard to their compliance with the Guidelines Regulation.

(ii) 'Windfall Gains'

41. In respect of (ii) SSE has the following comments to make.

42. SSE rejects the notion[125], with respect to either the CMP261 Original or WACM1, that there has been any 'windfall gains' to generators during Charging Year 2015/16 – rather the reverse. GB generators have paid in excess of some £119M of annual transmission charges during the period in question.

43. As the Commission noted in their Impact Assessment; when concluding that they should proceed with the Guidelines Regulation, which addressed the harmonisation of transmission tariffs[126]; this is important because:

> *"….generators will have to incorporate in their power pricing the costs arising from the network charges they have to pay, generators with low network charges will have a competitive advantage compared to those with high charges. Where a charge is placed on actual power generated and injected on the system, production will take place where charges are lower potentially leading to an inefficient use of the interconnected transmission system"* [127]. [emphasis added]

44. It therefore follows that the effect on GB generators of them having paid in excess of some £119M of annual transmission charges, during the 2015/16 Charging Year, is that they have collectively, and individually, been placed at a competitive disadvantage compared with, for example, imports of electricity into GB from other Member States[128] which significantly increased; as the Commission foretold[129] (in its statement above); during 2015/16, due to "*increased power price differentials between the Netherlands and the UK*" and "*higher price arbitrage between the UK and mainland Europe*"[130]. SSE has set out further details on this in its response to the CMP261 Workgroup Consultation[131].

45. Furthermore, as the Commission has also noted, the concern that the harmonisation of transmission tariffs aspects of the Guidelines Regulation is seeking to address, is that:

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[125] Stated in paragraph 7.3. page 43, CMP261 Code Administrator Consultation document.

[126] Plus the Inter-TSO Compensation mechanism.

[127] See page 12, Commission Impact Assessment.

[128] And within the (UK) Member State, from Northern Ireland.

[129] "*…production will take place where charges are lower potentially leading to an inefficient use of the interconnected transmission system.*"

[130] According to National Grid, in their 2015/16 results statement:
http://investors.nationalgrid.com/~/media/Files/N/National-Grid-R/results-centre/full-year-results-statement-2015-16.pdf

[131] See pages 124-126, CMP261 Code Administrator Consultation document.

> *"…if the level of charges that generators faced were significantly different between Member States, this could distort cross-border trade[132] and/or decisions about new plant location or existing plant retirement"[133].* [emphasis added]

46. In this respect, it is important to remember that during Charging Year 2015/16 in the region of 5GW of existing generation plant in GB was either retired or announced its retirement (and left early into the following, 2016/17, Charging Year) the explanation for some of which was attributed to the higher levels of generation transmission charges[134] (in GB).

47. One of the 'side effects' of GB generators paying in excess of some £119M of annual transmission charges, during the 2015/16 Charging Year, is that the transmission charges for GB consumers has been reduced.

48. However, as the Commission identified, this has a distortionary effect on generation investment incentives, as:

> *"…excessive transmission charges on generators in a (short-term) effort to minimise the costs of consumers also distorts investment incentives in the long run"[135].*

49. Notwithstanding the above; which relates to CMP261 Original and WACM1; it is clear that the only 'windfall gains' (nay unjustified enrichment) to generators arise with WACMs 2 and 3. SSE has set out its views on this and other aspects about WACM2 and WACM 3 in its answer to Question 1.

(iii) Background to CMP224

50. In respect of (iii) SSE notes the statement, from National Grid, in paragraph 7.1[136] that:

> *"National Grid has followed an industry-agreed process to set the G:D split, established by the CMP224 industry working group, and subsequently ratified by the Regulator, to comply with EU Regulation 838/2010".*

51. SSE observes the following:

(1) that Ofgem approved CMP224 Original[137];

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[132] See the points SSE make with respect to the cross border trade affect in its preceding paragraph.

[133] See page 22, Commission Consultation Document.

[134] See, for example, the Scottish Power announcement, dated 18th August 2015, of the closure of Longannet: "The combination of high carbon taxes and high transmission charging means that running a thermal plant in Scotland is uneconomic. Longannet Power Station will now close on March 31st 2016," [emphasis added].
http://www.scottishpoSSEr.com/news/pages/longannet_poSSEr_station_to_close_in_march_2016.aspx

[135] See page 12, Commission Impact Assessment.

[136] See page 43, the CMP261 Code Administrator Consultation.

[137] "*The Authority directs that the original proposal be made*", page 1, Authority Decision letter, CMP224, 22nd October 2014.

(2) that this (CMP224 Original) was the proposal raised by National Grid;
(3) that in accordance with the 'proposer ownership' principle, National Grid (rather than, say, any other party or parties – including a Workgroup – having 'ownership) sets what is, or is not within the Original proposal;
(4) that the process followed is as set out in the CUSC and is not (in that sense) an industry agreed process; and
(5) that the industry Workgroup can only consider the defect within the (CMP224) proposal – which was identified not by them but by National Grid, acting alone – and that defect included consideration of the G:D split[138].

Trade

52. As SSE noted in the answer to Question 1, the actual annual average transmission charges paid by generators in GB during Charging Year 2015/16 was €3.15/MWh. This clear exceedance of the €2.50/MWh upper level set in the Guidelines Regulation amounted to €0.65 MWh during Charging Year 2015/16.

53. As noted above, the Commission identified, in their Impact Assessment, that this is important because:

> *"….generators will have to incorporate in their power pricing the costs arising from the network charges they have to pay, generators with low network charges will have a competitive advantage compared to those with high charges. Where a charge is placed on actual power generated and injected on the system, production will take place where charges are lower potentially leading to an inefficient use of the interconnected transmission system"* [139]. [emphasis added]

54. The effect on trade; in contravention of European law, including Article 81(1) of the Treaty as well as Article 8 (7)[140] of Regulation 714/2009; of this is clear - whenever there were cross border trades of electricity between GB and either (1) France, Ireland or the Netherlands and / or (2) Northern Ireland that was within a range of €0.01 and €0.65 then this would have distorted that trade between them and GB.

55. In a simple, illustrative, example of this, if (during Charging Year 2015/16) the underlying GB price was, in terms of €, at €10.00/MWh for a given trade, then as a result of the breach it would have been priced at €10.65/MWh; for the reasons the Commission

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[138] "*It is National Grid's view that the latter goal can only be accomplished by a comprehensive review of the Generation/Demand revenue split (G/D split in short)*." CMP224, 'Description of Issue or Defect'.

[139] See page 12, Commission Impact Assessment.

[140] "*The network codes shall be developed for cross-border network issues and market integration issues and shall be without prejudice to the Member States' right to establish national network codes which do not affect cross-border trade*." [emphasis added].

stated in their Impact Assessment – see quote above[141]. If the market price[142] offered, say, in Northern Ireland, France, Ireland or the Netherlands was in the region of €10.01-10.64/MWh then, everything else being equal, this would have seen power being imported into GB (from other Member States and within the (UK) Member State) and GB generators not operating to provide the equivalent volume of power.

56. Furthermore, continuing with this simple example, in respect of exports (from the GB market) to Northern Ireland, France, Ireland or the Netherlands if the prices[143] in those respective markets was in the region of €10.01-10.64/MWh then, everything else being equal, GB generators were denied the opportunity to trade their output into those other Member States and within the (UK) Member State.

57. In the view of SSE it was clearly possible for National Grid to foresee with a sufficient degree of probability the influence, direct or indirect, actual or potential, on the pattern of trade between Member States (and within the UK Member State) that would arise from GB generators paying annual average transmission charges that were out with the range of €0 to 2.5/MWh during Charging Year 2015/16.

Treatment of Overcharged Customers

58. SSE also points out that in light of the breach of the Guidelines Regulation having occurred during Charging Year 2015-16 (which is the clear contention of SSE) then it is self-evident that National Grid has overcharged its generator customers accordingly.

59. Furthermore, SSE believes that the flawed suggestion that the principle party; having, in this case, overcharged GB generators in the region of £119M in Charging Year 2015/16; should, nevertheless, not now be required to recompenses the affected parties for all the impacts and losses they have incurred; as to do so would, by some perverse logic, be to give the affected parties a 'windfall gain'; lacks credibility. SSE feels certain that if, hypothetically, National Grid had been overcharged £119M by a provider of a service to it, that they would see no logic in that provider not repaying them – why should SSE and other GB generators be treated differently by National Grid than they would wish to be treated themselves, if the roles were reversed.

60. In addition, SSE would also like to bring to the attention of National Grid the Ofgem letter[144] of 12th August 2016 which is directly relevant to matters associated with overcharging customers, and in particular, the statement Ofgem made in that letter, in respect of repayments, that:-

[141] "*…generators will have to incorporate in their power pricing the costs arising from the network charges they have to pay…".*

[142] Including any costs charged to the generator / trader for using the interconnector.

[143] Including any costs charged to the generator / trader for using the interconnector.

[144] https://www.ofgem.gov.uk/system/files/docs/2016/08/open_letter_to_gas_suppliers_on_metricimperial_indicator_charging_error.pdf

"*For overcharged customers:*

- *Repayments include a payment for the historic overcharging as well as an appropriate interest payment.*
- *Repayments include an ex-gratia payment reflective of the detriment caused."*

[emphasis added]

61. SSE finds it very difficult indeed to comprehend a situation whereby had there (hypothetically) been a breach of the Guidelines Regulation that resulted in end customers being overcharged transmission charges (especially where this had, as is the case with the breach of the Guidelines Regulation in Charging Year 2015-16, been clearly, and repeatedly, flagged up[145]) that the approach set out in the August 2016 letter would not also be applied in that (hypothetical) case too.

62. Furthermore, SSE sees no justification that supports any 'undue discrimination' of treatment for generator customers; when compared with end customer; in the situation where they have been overcharged for transmission charges; be that during 2015/16 or indeed any other time.

63. To be clear, of the three constituent items; namely (i) payment for the historic overcharging, (ii) an appropriate interest payment (calculated up to the date the reconciliation payments for item (i) are sent to the affected parties) and (iii) an ex-gratia payment reflective of the detriment caused to the overcharged customers; which Ofgem, just three months ago, identified as forming part of the repayment(s) due to customers who have been overcharged, that CMP261 Original and WACM1 only address the item (i) – payment for the historic overcharging.

64. SSE expects National Grid and Ofgem to give appropriate consideration to the prompt payment of these two other items; covering (ii) appropriate interest and (iii) ex-gratia payment reflective of the detriment caused; as well as the historic overcharged (i) amount itself, as part of the repayment to GB generators who paid, on average, excessive transmission charges in Charging Year 2015/16 in breach of the Guidelines Regulation.

Draft Legal Text

65. There is a typo with respect to the draft legal text for CMP261 Original and WACM1 at proposed paragraph 14.1.4.14 (ii)[146] (for the Original) and paragraph 14.14.24 (ii)[147] (for WACM1) which currently says:

"*Adjustment to the demand TNUoS tariffs: the demand TNUoS tariffs for Charging Year 2017/18 shall be adjusted to reflect the reconciliation of generator*

[145] Many examples of which are clearly shown under paragraph 2.34, Page 11, CMP261 Code Administrator Consultation document.

[146] See page 190, CMP261 Code Administrator Consultation document.

[147] See page 194, CMP261 Code Administrator Consultation document.

charges made or received in Charging Year 2016/17 in respect of Charging Year 2015/16"[148]. [emphasis added]

66. The words '*or received*' are erroneously used here for CMP261 (and may have arisen due to this draft legal text for CMP261 being modelled on that for CMP251[149] – where the use of these word, in that modification, is appropriate to that proposal).

67. It is also clearly erroneous when looking at the CMP261 Code Administrator Consultation document itself[150] and is, for example, further illustrated as erroneous when looking at the intent of the wording in the preceding paragraph(s) (at 14.14.14 (i) and 14.14.24 (i) respectively) as well as when looking at the wording later on in the draft legal text (at 14.15.133 and 14.15.135 respectively) which talk in terms of:

"*The value of $GDSadj_{2015/16}$ is the sum of the rebate made to generators*" [emphasis added]

68. For the avoidance of doubt, the amended legal text, for CMP261 and WACM1 should therefore read:

"*Adjustment to the demand TNUoS tariffs: the demand TNUoS tariffs for Charging Year 2017/18 shall be adjusted to reflect the reconciliation of generator charges made in Charging Year 2016/17 in respect of Charging Year 2015/16*."

[148] For the Original - similar use of the words '*or received*' appears in the equivalent text for WACM1.

[149] This outlined in Footnote 1, page 3 CMP261 Code Administrator Consultation document, in the following terms: "*The CMP261 original solution proposes the same mechanism as that of CMP251 original to remedy any exceedance of the €2.5/MWh value for average Generator transmission charges. However, it is a one-off change proposal applying to the charging year 2015/16, whereas CMP251 would, if approved, apply on an enduring basis commencing 2017/18. The other important distinction is that CMP261 considers the €2.5/MWh value as a cap whereas CMP251 is a target with reconciliation possible in both directions*." [emphasis added]

[150] See, for example, paragraphs 4.3 and 4.4, page 28.

Appendix 1

Commission Consultation Document – Use of the word 'physical' or 'physics'.[151]

Page 1

"The commercial flows which cause this congestion are probably the most important cause of the **physical** flows of electricity which the ITC mechanism addresses."

Page 6

"The benefits of transit flows have only been considered in the context of the impact **physical** flows have on the host network. Commercial benefits to TSOs linked to these **physical** flows have not been included in the analysis although such benefits can be considerably higher than the costs incurred hosting the flows."

Page 7

"Should accurately reflect the **physical** flows of electricity actually measured in given periods of time5 derived from cross-border flows"

"Should capture both costs imposed on host networks and benefits realised as a result of cross-border flows including the commercial flows related to **physical** flows"

Page 15

"These congestion rents are partially a result of commercial transactions which are the main cause of the **physical** transit flows. Congestion rents which result from such commercial transactions can be calculated in a manner analogous to the calculation of **physical** transit flows."

Page 17

"However, as noted above, these regulated costs differ substantially between countries and are an important variable, in addition to the magnitude of the **physical** flows, determining the amount of compensation that is due."

Page 29

"Annex 1 [Table, Row 1] Reflect **physical** flows" and "**Physical** flows considered, but not following **physics**. Can use snapshots."
[Table, Row 10] "Algorithm is consistent, though not based on **physics**. Modelling is complex"

Page 30

"These are defined on a control zone basis as a minimum of the **physical** imports and exports Min(Imp, Exp)."

[151] See Footnote 72, page 20 of this response for further background.

Page 32

"The results are consistent with the laws of **physics** and observed power flows."

"The cost of each network element is allocated to the different loads and generators according to their relative participation to the **physical** flow in this element."

Page 34 Annex 2

"Annual average G shall exclude any charges paid by generators for **physical** assets required for the generators connection to the system (or the upgrade of the connection) as well as any charges paid by generators related to ancillary services or any specific network loss charges paid by generators."

Commission Impact Assessment – Use of the word 'physical' or 'physics'.

Page 8

"This is because electricity transmission flows utilize all available paths on the interconnected system in accordance with the laws of **physics**."

"When planned generation and consumption patterns mean that the expected flows on a line would be greater than it is **physically** capable of transporting, congestion is said to exist."

Page 10

"This is due to the **physical** properties of transmission systems and their independent development under different political and economic frameworks."

Page 16

"Should accurately reflect the **physical** flows of electricity actually measured in given periods of time16 derived from cross-border flows"

"Should capture both costs imposed on host networks and benefits realised as a result of cross-border flows including the commercial flows related to **physical** flows "

Page 18

"They do so based on expected **physical** flows across the entire interconnected transmission system, including a security margin. Where the volume of desired commercial flows between two countries implies higher **physical** flows than the overall system can accommodate, the available capacity must be allocated in a market based manner."

"Generally the revenues are shared between the countries on either side of the congested border of the commercial transaction, though this will probably not reflect the actual **physical** path which the flows of electricity take."

Page 20

"Because of the nature of the operation of the interconnected transmission system, the principles that compensation reflect the costs of hosting cross border flows, and that it be based on **physical** flows of electricity remain the most appropriate basis on which to base compensation. It is not (necessarily) the case that all TSOs who host cross border flows of electricity receive congestion rents."

Page 29

"Should accurately reflect the **physical** flows of electricity actually measured in given periods of time derived from cross-border flows"

"Power flow based models should reflect the actual behaviour of the European transmission system. This allows such models to accurately reflect **physical** flows of electricity, and *(except for the WWT model)* determine those responsible for cross border flow including perimeter countries"

Page 30

"This is particularly true of the IMICA model but also the Marginal Participation model, often considered to best represent the **physics** of the transmission system in its modeling."

"There is attempt to link them to the laws of **Physics**."

Page 31

"Should capture both costs imposed on host networks and benefits realised as a result of cross-border flows including the commercial flows related to **physical** flows"

Page 40

"These are defined on a control zone basis as a minimum of the **physical** imports and exports Min(Imp, Exp). "

Page 42

"The results are consistent with the laws of **physics** and observed power flows."

"The cost of each network element is allocated to the different loads and generators according to their relative participation to the **physical** flow in this element."

Page 47

"Annex D Commercial transactions and **physical** flows

Due to the **physical** laws governing electricity, export transactions often cause **physical** flows in countries which are not on the – theoretical – direct path of the electricity."

"**Physical** flows are represented by the blue arrows."

"Potential impact of 100 MW commercial transaction on **physical** flows:"

Appendix 2

Extracts of various statements made in 'The Authority's December 2004 decision on National Grid's proposed GB electricity transmission charging methodologies'[152].

> *"The **connection charging methodology** calculates charges for the provision of assets that enable users to connect to the transmission system."*[153] [emphasis added]
>
> *"NGC[154] proposes to adopt "shallow" connection charging proposals whereby connection assets will be defined as being those assets which are for the sole use of each connected party. The definition excludes all assets which are shared or could be shared by more than one user. The connection charge would be calculated as the cost of providing and operating those assets and would include a reasonable rate of return on capital employed."*[155] [emphasis added]
>
> *"To ensure that the underlying intent of a "shallow" connection charging policy is applied consistently across GB, and recognising the more radial nature of the Scottish network, NGC proposes to introduce an additional rule to limit the maximum length of generator connection circuits to two kilometres. This proposed approach, which would apply GB wide but which the Authority understands would be more likely to affect generators in Scotland as a consequence of the more radial nature of the Scottish transmission network, is similar to NGC's treatment of demand connections under the existing approved methodology in England and Wales where, in the absence of such a rule, the definition of connection assets could include relatively long circuits."*[156]
>
> *"NGC also proposes to allocate a proportion of general running costs, such as rates and overheads, to connection assets in calculating connection charges."*
>
> *"NGC did not consider that connections should be considered on a case by case basis[157]. NGC argued that this approach would be inconsistent with the aim of developing transparent charging arrangements based on unambiguous charging rules. NGC also noted that an established rule was necessary in this case to differentiate between local and remote substations for the purposes of determining a shallow connection policy across GB."*[158]
>
> *"The Authority notes the comments relating to the application of the '2km rule', and the potential for an alternative rule to be more cost-reflective. The Authority, however,*

[152] See paragraphs 83-85, pages 26-27 of this response for further background.

[153] In the Summary.

[154] At the time 'National Grid' was commonly referred to as 'NGC'.

[155] Paragraph 3.3.

[156] Paragraph 3.4.

[157] The relevance of this is that the proposed approach with the further analysis that Ofgem has been seeking in support of their updated legal advice (for CMP261) is seeking to look at generator connections on a case by case basis.

[158] Paragraph 3.16.

considers that NGC's proposed treatment is a reasonable and pragmatic approach consistent with the underlying intent of a shallow connection charging policy, given the more radial nature of some generation connections in Scotland."[159]

"The Authority considers that NGC's proposed GB connection charging methodology will contribute to furthering the interests of consumers by promoting effective competition. It is the Authority's view that alternative connection charging methodologies, for example adopting a 'deeper' definition of connection assets, would be less effective in promoting competition. 'Deeper' connection charging methodologies can result in transmission users being unduly or arbitrarily advantaged or disadvantaged on the basis of when and where they connect to the network"[160] [emphasis added]

"For example, a deep connection charging methodology is more likely than a shallow charging policy to result in charges which could discriminate between similar customers depending on the time of their connection. The connection of a new customer in a given location may trigger the need for reinforcement of assets which would be shared by all local users. Under a deep connection policy, these charges would be charged to the new customer despite the fact that they will be shared by other users. Furthermore, given the lumpy nature of connection investments, subsequent new users may be able to connect at a relatively low cost. Such arrangements will act to distort competition by changing the cost base of otherwise similar users."[161]

"In addition, the level of connection charges under a deep connection policy is unlikely to be either transparent or stable over time. Charges will depend significantly on the engineering design judgement of the network operator and on network conditions at the time of connection. They will therefore be difficult for users to assess in advance."[162] [emphasis added]

[159] Paragraph 3.22.

[160] Paragraph 3.27.

[161] Paragraph 3.28.

[162] Paragraph 3.29.

CUSC Code Administrator Consultation Response Proforma

CMP261 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'

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

Please send your responses by **5:00pm** on **16 November 2016** to cusc.team@nationalgrid.com. Please note that any responses received after the deadline or sent to a different email address may not be included within the Final Report to the Authority.

Any queries on the content of the consultation should be addressed to Ryan Place at ryan.place@nationalgrid.com

These responses will be included within the Draft CUSC Modification Report to the CUSC Panel and within the Final CUSC Modification Report to the Authority.

Respondent:	Paul Bedford, Tel: 01604 673256 Paul.bedford@opusenergy.com
Company Name:	Opus Energy Ltd
Please express your views regarding the Code Administrator Consultation, including rationale. **(Please include any issues, suggestions or queries)**	**Use of System Charging Methodology** (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity; (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection); (c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses.

	(d) compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency. (e) to promote efficiency in the implementation and administration of the Grid Code arrangements. These are defined within the National Grid Electricity Transmission plc Licence under Standard Condition C10, paragraph 1. ***Objective (d) refers specifically to European Regulation 2009/714/EC. Reference to the Agency is to the Agency for the Cooperation of Energy Regulators (ACER).***

Code Administrator Consultation questions

Q	Question	Response
1	**Do you believe that CMP261 better facilitates the Applicable CUSC objectives? Please include your reasoning.**	We do not believe CMP261 better facilitates CUSC objective (a) The original and alternative solutions introduce one-off adjustments to tariffs which would not have been expected by the market, based on National Grid following the current approved methodology. This causes an adverse effect to competition in supply, as the ability of suppliers to recover these costs is based on whether they are able to adjust customer prices. Whilst CMP261 may highlight deficiencies within the current methodology, there is no acceptance of a breach of regulations and therefore a retrospective adjustment does not appear to be appropriate. If these deficiencies are sought to be addressed, modifications to future methodology would be a more appropriate response, such as CMP251. However, as the recent consultation for CMP251 shows the majority of the panel in favour of the baseline, it would seem unusual to allow a one-off reconciliation to take place, whereas a revision to current methodology to prevent similar occurrences in future years looks unlikely.
2	**Do you support the proposed implementation approach? If not, please**	As above, we do not support the implementation of CMP261.

	provide reasoning why.	However, should CMP261 be approved, we believe that the earliest the adjustment to demand tariffs should be applied is 2018/19.
3	**Do you have any other comments?**	

CUSC Code Administrator Consultation Response Proforma

CMP261 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'

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

Please send your responses by **5:00pm** on **16 November 2016** to cusc.team@nationalgrid.com. Please note that any responses received after the deadline or sent to a different email address may not be included within the Final Report to the Authority.

Any queries on the content of the consultation should be addressed to Ryan Place at ryan.place@nationalgrid.com

These responses will be included within the Draft CUSC Modification Report to the CUSC Panel and within the Final CUSC Modification Report to the Authority.

Respondent:	Mary Teuton (mteuton@vpi-i.com; 0207 312 4469)
Company Name:	VPI Immingham
Please express your views regarding the Code Administrator Consultation, including rationale. **(Please include any issues, suggestions or queries)**	**Use of System Charging Methodology** (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity; (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection); (c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses. (d) compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the

	Agency. (e) to promote efficiency in the implementation and administration of the Grid Code arrangements. These are defined within the National Grid Electricity Transmission plc Licence under Standard Condition C10, paragraph 1. ***Objective (d) refers specifically to European Regulation 2009/714/EC. Reference to the Agency is to the Agency for the Cooperation of Energy Regulators (ACER).***

Code Administrator Consultation questions

Q	Question	Response
1	**Do you believe that CMP261 better facilitates the Applicable CUSC objectives? Please include your reasoning.**	Yes, we believe that CMP261 better facilitates the applicable CUSC objectives. Most obviously, it better delivers objective (d) - Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency. There has clearly been a breach of Regulation 838/2010 in year 2015/16 with zero effort from National Grid to rectify the issue once it became apparent that the Regulation was going to be breached. This modification would rectify the breach and hence better facilitate objective (d). In addition, we also believe that the modification better delivers applicable objective (a) – better facilitation of competition. With some companies using their TNUoS as set by NGET before the charging year and other companies potentially limiting their TNUoS to €2.5/MWh, there would be a natural distortion of competition due to the different approaches.
2	**Do you support the proposed implementation approach? If not, please provide reasoning why.**	We support the implementation approach that reimburses generators immediately, yet delays recovery from suppliers to a later date to enable them to factor costs in (i.e. WACM1)

3	**Do you have any other comments?**	It is disappointing that this modification has taken such a long time to reach this point when it materially affects generators within the UK. Despite the ex-ante approach being in place, it is clear that Regulation 838/2010 has been breached, and a material breach at that. As a result, National Grid is non-compliant with the law and we believe that immediate recompense should be made to affected parties.

CUSC Code Administrator Consultation Response Proforma

CMP261 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'

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

Please send your responses by **5:00pm** on **16 November 2016** to cusc.team@nationalgrid.com. Please note that any responses received after the deadline or sent to a different email address may not be included within the Final Report to the Authority.

Any queries on the content of the consultation should be addressed to Ryan Place at ryan.place@nationalgrid.com

These responses will be included within the Draft CUSC Modification Report to the CUSC Panel and within the Final CUSC Modification Report to the Authority.

Respondent:	James Anderson james.anderson@scottishpower.com
Company Name:	ScottishPower Energy Management Limited
Please express your views regarding the Code Administrator Consultation, including rationale. **(Please include any issues, suggestions or queries)**	**Use of System Charging Methodology** (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity; (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection); (c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses.

	(d) compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency. (e) to promote efficiency in the implementation and administration of the Grid Code arrangements. These are defined within the National Grid Electricity Transmission plc Licence under Standard Condition C10, paragraph 1. ***Objective (d) refers specifically to European Regulation 2009/714/EC. Reference to the Agency is to the Agency for the Cooperation of Energy Regulators (ACER).***

Code Administrator Consultation questions

Q	Question	Response
1	**Do you believe that CMP261 better facilitates the Applicable CUSC objectives? Please include your reasoning.**	We believe that the Original Proposal and WACM1 overall better meet the Applicable CUSC Charging Objectives than the baseline principally by ensuring compliance with Electricity Regulation 838/2010 and ensuring that the average charge paid by GB generators does not exceed €2.50/MWh (Objective (d)). In this regard, we note Key Conclusion 4 from Addleshaw Goddard that: "in circumstances where the outturn figures for a charging year demonstrate average €/MWh G Charges which are *materially* above the G Charge Guidelines limit (**as is the case for the 2015/16 charging year**), on balance we would suggest that the G Charges paid for the relevant year should be adjusted on a backward looking basis in order to bring them materially in line with the €2.5/MWh limit and in order to demonstrate compliance with the Guidelines Regulation". We further note at paragraph 20 pf Addleshaw Goddard's opinion that: "..it is reasonable that such (Generation only) spurs should be included in the average G charge calculation. It is not clear on what basis the exclusion of "charges paid by producers for physical assets required for connection to the system" justifies the exclusion of TNUoS Charges in respect of generation only spurs, and therefore the justification for such a carve-out appears lacking".

		WACMs2&3 do not better meet the Applicable CUSC Charging Objectives as they describe a reconciliation process which makes reconciliation payments to generators who were not impacted by the original “overcharge” (i.e. they have increased TEC between charging years) and fails to make payments to others affected by the “overcharge” (i.e. they have reduced TEC between charging years). Such arrangements would represent an unjustified enrichment to the first category of generators.
2	**Do you support the proposed implementation approach? If not, please provide reasoning why.**	We support the implementation approaches outlined in Section 5 for the Original Proposal and WACM1. As outlined above we do not support implementation of WACM2.
3	**Do you have any other comments?**	No

CUSC Code Administrator Consultation Response Proforma

CMP261 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'

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

Please send your responses by **5:00pm** on **16 November 2016** to cusc.team@nationalgrid.com. Please note that any responses received after the deadline or sent to a different email address may not be included within the Final Report to the Authority.

Any queries on the content of the consultation should be addressed to Ryan Place at ryan.place@nationalgrid.com

These responses will be included within the Draft CUSC Modification Report to the CUSC Panel and within the Final CUSC Modification Report to the Authority.

Respondent:	*William Chilvers (William.chilvers@esb.ie)*
Company Name:	*ESB*
Please express your views regarding the Code Administrator Consultation, including rationale. **(Please include any issues, suggestions or queries)**	**Use of System Charging Methodology** (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity; (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection); (c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses. (d) compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the

	Agency. (e) to promote efficiency in the implementation and administration of the Grid Code arrangements. These are defined within the National Grid Electricity Transmission plc Licence under Standard Condition C10, paragraph 1. ***Objective (d) refers specifically to European Regulation 2009/714/EC. Reference to the Agency is to the Agency for the Cooperation of Energy Regulators (ACER).***

Code Administrator Consultation questions

Q	Question	Response
1	**Do you believe that CMP261 better facilitates the Applicable CUSC objectives? Please include your reasoning.**	**Objective (a)** We believe that both the proposal and WACM 1 better facilitate the applicable CUSC objective as it corrects a defect that clearly breached regulations. Making an adjustment as proposed provides confidence in the proper functioning of the regulatory frameworks that govern the generation and supply of electricity, which are vital for the effective functioning of a competitive market. **Objective (b)** Neutral **Objective (c)** Neutral **Objective (d)** Based on the legal advice provided to the workgroup we believe that the proposed modification better reflects regulatory requirements and thus better satisfies Objective (d) **Objective (e)** Neutral
2	**Do you support the proposed implementation approach? If not, please provide reasoning why.**	Providing a generator re-bate is the only approach that could feasibly be implemented to correct the defect. Under any other proposal monies would not necessarily be repaid to parties that were affected by the defect, thus failing to fulfil the competition and cost reflectivity objectives of the

		CUSC.
3	**Do you have any other comments?**	We note procedural concerns that a number of parties have raised in relation to this modification and would urge both the CUSC Panel and Ofgem to address these concerns during their deliberations on the proposal

HIE
Highlands and Islands Enterprise
Iomairt na Gàidhealtachd 's nan Eilean

CUSC.team@nationalgrid.com

ryan.place@nationalgrid.com

14 November 2016

Dear Ryan,

CMP261 CONSULTATION RESPONSE

Thank you for providing the opportunity to respond to this consultation on the proposals 'CMP261: Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)' published on 26 October 2016. Within this letter and attached appendix, we set out our position as Highlands and Islands Enterprise (HIE).

HIE along with its local partners - the democratically elected local authorities covering the north of Scotland and the islands; Shetland Islands Council, Orkney Islands Council, Comhairle nan Eilan Siar, Highlands Council and Argyll & Bute Council, make representations to key participants on behalf of industry to influence the way in which regulation of the electricity industry is managed in order to ensure the needs and interests of the Highlands and Islands are understood and taken into consideration. HIE also works closely with Scottish Government in relation to regulatory matters.

We strongly support the continued implementation of a stable, transmission charging regime which is transparent, cost reflective and fit for purpose. We also expect that National Grid will comply with UK and EU legal requirements in collecting revenue through TNUoS charges – specifically Commission Regulation (EU) No 838/2010 Part B.

We agree that, based on the charging arrangements developed through CMP224, it seems likely that the final transmission charges for 2015/16 will result in revenue collection from generators which is too high, therefore potentially exceeding the limit of average transmission charges set out in the regulations.

However, we are concerned that this expedited CUSC change process has resulted in a proposed methodology which does not properly address the actual CUSC defect with an enduring solution. The proposed methodology change only corrects the tariff calculation for a single year (2015/16). We consider that an enduring solution should be progressed to ensure that ex-ante charging can continue to be used, without ad-hoc corrections after the final tariffs have been set.

We are also concerned about the potential for a windfall for generators, at the expense of consumers. We consider that tariff correction for future years (as already accommodated within the CUSC) is more appropriate mechanism to address the possible over-collection of revenue rather than a simple rebate – which is unlikely to be reflected in a reduction to consumers' bills. A correction in future tariffs reinforces the ex-ante tariff setting principles, but a rebate undermines this principle by in effect resulting in a reconciliation of charges.

In summary, we do not support the implementation of the proposed methodology as based on a rebate to generators, and consider a correction to future years' tariffs to be a more appropriate mechanism for complying with EU regulation.

Yours sincerely

Audrey MacIver.

Audrey MacIver
Head of Energy

In partnership with:-
Shetland Islands Council
Orkney Islands Council
Comhairle nan Eilean Siar
Highland Council
Argyll & Bute Council

APPENDIX: CONSULTATION RESPONSE

Respondent:	*Audrey MacIver* *Head of Energy* *Highlands and Islands Enterprise* *An Lòchran,* *10 Inverness Campus* *IV2 5NA* *T +44 (0) 300 013 4807* *M +44 (0) 7917 598700* *E audrey.maciver@hient.co.uk*
Company Name:	*Highlands and Islands Enterprise*
Please express your views regarding the Code Administrator Consultation, including rationale. (Please include any issues, suggestions or queries)	**Use of System Charging Methodology** (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity; (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection); (c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses. (d) compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency. (e) to promote efficiency in the implementation and administration of the Grid Code arrangements. These are defined within the National Grid Electricity Transmission plc Licence under Standard Condition C10, paragraph 1. ***Objective (d) refers specifically to European Regulation 2009/714/EC. Reference to the Agency is to the Agency for the Cooperation of Energy Regulators (ACER).***

Q	Question	Response
1	**Do you believe that CMP261 better facilitates the**	*Not clear.* *With regard to CUSC objective (a) – we are concerned*

	Applicable CUSC objectives? Please include your reasoning.	*about the potential for a windfall for generators, at the expense of consumers undermining effective competition within year 2015/16. We consider that tariff correction for future years is a more appropriate mechanism to address the possible over-collection of revenue rather than a simple rebate – which is unlikely to be reflected in a reduction to consumers' bills. A correction to future tariffs reinforces the ex-ante tariff setting principles, but a rebate undermines this principle by resulting in a reconciliation of charges.* *With regarding to CUSC objective (d) – we consider that the proposal does better facilitate this objective. Albeit, there is significant legal uncertainty regarding the definition of what assets should and shouldn't be included within the calculation of the cap detailed in the EU regulations.*
2	**Do you support the proposed implementation approach? If not, please provide reasoning why.**	*No.* *We are also concerned about the potential for a windfall for generators, at the expense of consumers. We consider that tariff correction for future years (as already accommodated within the CUSC) is more appropriate mechanism to address the possible over-collection of revenue rather than a simple rebate – which is unlikely to be reflected in a reduction to consumers' bills. A correction in future tariffs reinforces the ex-ante tariff setting principles, but a rebate undermines this principle by in effect resulting in a reconciliation of charges mid-year. Therefore, we do not support the implementation of the proposed methodology as based on a rebate to generators.*
3	**Do you have any other comments?**	*We are concerned that this expedited CUSC change process has resulted in a proposed methodology change which does not properly address the actual CUSC defect with an enduring solution. The proposed methodology change only corrects the tariff calculation for a single year. We consider that an enduring solution should be progressed to ensure that ex-ante charging can continue to be used, without the need for ad-hoc corrections after the final tariffs have been set.*

CUSC Code Administrator Consultation Response Proforma

CMP261 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'

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

Please send your responses by **5:00pm** on **16 November 2016** to cusc.team@nationalgrid.com. Please note that any responses received after the deadline or sent to a different email address may not be included within the Final Report to the Authority.

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These responses will be included within the Draft CUSC Modification Report to the CUSC Panel and within the Final CUSC Modification Report to the Authority.

Respondent:	*Joshua Phelps/01453 840637/joshua.phelps@ecotricity.co.uk*
Company Name:	*The Renewable Energy Company (Ecotricity)*
Please express your views regarding the Code Administrator Consultation, including rationale. **(Please include any issues, suggestions or queries)**	**Use of System Charging Methodology** (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity; (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection); (c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses. (d) compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the

	Agency. (e) to promote efficiency in the implementation and administration of the Grid Code arrangements. These are defined within the National Grid Electricity Transmission plc Licence under Standard Condition C10, paragraph 1. ***Objective (d) refers specifically to European Regulation 2009/714/EC. Reference to the Agency is to the Agency for the Cooperation of Energy Regulators (ACER).***

Code Administrator Consultation questions

Q	Question	Response
1	**Do you believe that CMP261 better facilitates the Applicable CUSC objectives? Please include your reasoning.**	We believe that CMP261 better facilitates the Applicable CUSC objectives as the intentions of this modification better facilitates objective D. This is based on the rationale that this shall ensure compliance with EU regulation.
2	**Do you support the proposed implementation approach? If not, please provide reasoning why.**	We support the proposed implementation approach of Option A. The reasons for our support of this approach is that we have already set prices for Consumers that does not factor in the associated charges incurred as a result of the Original solution, as these prices have already been agreed to. By incorporating the implementation approach of Option A, the delay of a charging year means that we can then price consumers in the future with the extra expected charges in mind.
3	**Do you have any other comments?**	We would suggest that the implementation of Option A would be the best possible solution for the industry.

CUSC Code Administrator Consultation Response Proforma

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Please send your responses by **5:00pm** on **16 November 2016** to cusc.team@nationalgrid.com. Please note that any responses received after the deadline or sent to a different email address may not be included within the Final Report to the Authority.

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These responses will be included within the Draft CUSC Modification Report to the CUSC Panel and within the Final CUSC Modification Report to the Authority.

Respondent:	*George Moran*
Company Name:	*British Gas*
Please express your views regarding the Code Administrator Consultation, including rationale. **(Please include any issues, suggestions or queries)**	**Use of System Charging Methodology** (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity; (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection); (c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses. (d) compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the

	Agency. (e) to promote efficiency in the implementation and administration of the Grid Code arrangements. These are defined within the National Grid Electricity Transmission plc Licence under Standard Condition C10, paragraph 1. ***Objective (d) refers specifically to European Regulation 2009/714/EC. Reference to the Agency is to the Agency for the Cooperation of Energy Regulators (ACER).***

Code Administrator Consultation questions

Q	Question	Response
1	**Do you believe that CMP261 better facilitates the Applicable CUSC objectives? Please include your reasoning.**	The CMP261 Original Proposal and all of the WACMs do not better facilitate the CUSC objectives. **Applicable Objective (a)** Under CMP224, compliance with the relevant EU Regulation is managed via an ex-ante approach with no reconciliation. This was the accepted expectation of the market. The examples presented in paragraph 2.34 of the consultation document show that National Grid and market participants were aware that the €2.50/MWh limit might have been exceeded during 2015/16. This demonstrates that the accepted expectation of the market was that there would be no mid-year tariff change or reconciliation in respect of the cap. This expectation was also affirmed at both the May 2015 and August 2015 CUSC Panel meetings – by National Grid in May 2015, who were clear that there was no intention of reviewing the CMP224 solution and by the proposer of CMP 251 in August 2015, who was clear that any solution should not be applied retrospectively to 2015/16. National Grid did not, at any point, propose any mid-year tariff change to address the potential exceedance – which would have been fully visible to it. Therefore the Original and all of the WACMs perform worse against applicable objective (a) as the unexpected nature of this modification would damage competition because the impact on parties, and parties' ability to manage those impacts, will vary. The retrospective nature of the changes could also lead to increased risk premiums applied to future

		tariffs. Below we consider each of the WACMs compared to the Original with respect to Applicable Objective (a): WACM 1: Worse than the baseline but better than Original as the D reconciliation includes reasonable notice for suppliers and also customers on pass-through contracts. WACM 2: Worse than baseline but better than Original as there is a slight delay in G adjustment which provides some (limited) opportunity for the adjustment to pass through to wholesale prices (and to consumers), reducing any windfall to Generators (and detriment to consumers/suppliers). In this instance we do not believe the notice for Demand charge adjustment is sufficient due to the unexpected nature of the modification. Also there is insufficient notice for customers on pass-through contracts. WACM 3: Worse than baseline but better than Original, and the least detrimental of the WACMs, as the delay in the Generation adjustment provides more opportunity for the adjustment to pass through to wholesale prices (and to consumers), limiting any windfall to Generators (and detriment to consumers/suppliers). Also, the Demand reconciliation includes reasonable notice for suppliers and customers on pass-through contracts. **Applicable Objective (b)** The principles underpinning the charging methodology, including the default proportion of revenue to be recovered from generators in 2015/16, were approved as meeting objective (b). Therefore, any unnecessary restrictions or changes to how these principles are translated into charges are detrimental to meeting objective (b). To the extent that the proposed change retrospectively moves Generation tariffs from the default position in the methodology for 2015/16, CMP261 performs worse against applicable objective (b). **Applicable Objective (d)** CMP261 has no impact on Objective (d) as the current methodology is compliant with the relevant EU Regulation.

		This is clear as: •There has been no enforcement action taken or (as far as we are aware) being considered. •The Addleshaw Goddard opinion received by the Workgroup does not conclude that National Grid is not compliant. It was clear that Ofgem's CMP224 decision was based on the view that the words "*charges in respect of assets required to connect to the system*" were ambiguous. Ofgem, therefore, approved an option that would comply with either the '*strict*' or the '*broad*' interpretation, whichever was correct, on the grounds of legal risk. This ambiguity would be required to be resolved (and would require the conclusion that the 'strict' interpretation was correct) before a breach of the €2.50 limit can be established. Until such time as non-compliance is found, and given the uncertainty surrounding whether such a finding would be achievable, no impact can be assessed against objective (d).
2	**Do you support the proposed implementation approach? If not, please provide reasoning why.**	We do not support the modification. However, any implementation should seek to limit or avoid windfalls and should seek to protect consumers. Windfalls will be received by Generators if any rebate/tariff adjustment is made with insufficient notice to feed through and impact wholesale prices. This will especially be the case for the Original and WACM1 which simply provide Generators with a one-off lump sum payment, and to the extent that a significant portion of output will already have been contracted for 2017/18, it will also be true of WACM2. Consumers will be adversely affected in three ways: • Consumers on pass-through contracts will be adversely affected by insufficient notice for the Demand charge adjustment. • Consumers, as a body, will be adversely affected since they have already paid the appropriate amount of TNUoS charges for 2015/16 and CMP 261 will lead to consumers paying again through future demand charge. • Consumers may also be adversely affected by increased risk premia being applied due to the retrospective nature of the proposal. We believe that any implementation should seek to avoid the above negative impacts. This will require solutions that adjust future tariffs (WACM2 and WACM3) rather than

		ones which provide lump sum payments. We would also note that the negative impact on consumers can also be largely mitigated by implementation of CMP251. CMP251 would remove the error margin altogether and this would largely offset the value of the rebate/tariff adjustment proposed by CMP261 if implemented in the same year.
3	**Do you have any other comments?**	No

Legal Analysis of CUSC Modification Proposal 261 in the context of

Regulation (EU) 838/2010 Compliance

In this note:

- the term "**Current Approach**" refers to the way in which Transmission Network Use of System (**TNUoS**) charges are currently calculated for any financial year (1 April to 31 March) pursuant to Part 2 of Section 14 of the CUSC;
- the term "**SSE Proposal"** refers to SSE plc's (**SSE**'s) proposal to amend the Current Approach (as set out in CMP261)
- the term **"BG Proposal"** refers to British Gas Trading Limited's (**British Gas**'s) proposal to amend the Current Approach (as set out in CMP251); and
- the term **"G Charges"** refers to TNUoS Charges recovered from generation (as opposed to demand).

The Current Approach, the BG Proposal and the calculation of G Charges pursuant to the CUSC are outlined in more detail in the Appendix to our note of 23 November 2015, which is reproduced and expanded in this note to include developments since.

Other defined terms used in this note adopt the same definitions as used in our note of 23 November 2015 or are defined (**in bold in brackets**) within the body of this note.

Introduction

This note supplements our note of the 23 November 2015[162] (**Previous AG Note**) and has been prepared in order to set out our preliminary legal analysis in respect of your initial legal queries following SSE's Connection and Use of System Code (**CUSC**) modification 261 (**CMP261**). The Previous AG Note set out the Guidelines Regulation, the context for it, and assessed the extent to which the Current Approach or BG Proposal better facilitated compliance with the Guidelines Regulation and, from a legal perspective, the pros and cons of each approach.

The context for CMP261 is that it has become apparent that the generation output and €/£ exchange rate forecasts which underpin the Current Approach are inaccurate in respect of the 2015/16 TNUoS charging year and that, consequently, if they are unmodified the resulting G Charges actually paid are likely to significantly exceed the cap set out in the Guidelines Regulation. The SSE Proposal therefore seeks a mid year tariff modification[163] to enable a reconciliation

[162] Can be found in Annex 7 of the CMP251 Final Modification Report
[163] As provided for pursuant to paragraph 14.14.10 of the CUSC

payment to be made in Spring 2016 to take account of G Charge overpayments made in the 2015/16 TNUoS charging year. In that context, you have asked us to address the following questions:

(i) If under the current methodology (which uses an ex-ante approach with error margin and no reconciliation) GB's average Generator charge exceeds €2.5/MWh due to forecast error for the 2015/16 Charging Year, is it compliant with the Guidelines Regulation (ie no action is required) and, if not, what action is required:

(a) reconciliation for the 2015/16 charging year;

(b) changes to the methodology to apply for future charging years?

(ii) If changes are required for future charging years, should they ensure we do not exceed €2.5/MWh, eg by introducing ex-post reconciliation, or would changes to reduce the risk of exceeding €2.5/MWh, eg a larger error margin, be sufficient?

(iii) If a G Charge reconciliation is required for 2015/16, how quickly should this happen?

(iv) Should the charges for Generation only Spurs be included in the calculation of the average G Charge (see CMP224 Report and Responses)?

(v) Would the use of the exchange rate at the time the Regulation was set be reasonable?

Key Conclusions

1. Our view remains that both ex-ante and ex-post reconciliation approaches can facilitate G Charges that are consistently compliant with the G Charge Guidelines.

- **The position for the 2015/16 charging year**

2. Where a forecast proves (despite the Error Margin) to have been inaccurate for a given year, and therefore takes the average G Charge above the €2.5/MWh limit, this exceeding of the Guidelines Regulation limit represents a breach of the technical requirements of the Guidelines Regulation.

3. In circumstances where the €2.5/MWh limit is *only exceeded to a minor extent* for a given charging year, we can see robust arguments that the approach still falls within the purpose of the Guidelines Regulation and therefore the legal position does not necessitate a backward looking adjustment to G Charges[164].

4. However, in circumstances where the outturn figures for a charging year demonstrate average €/MWh G Charges which are *materially above* the G Charge Guidelines limit (as is the case for the 2015/16 charging year), on balance we would suggest that the G Charges paid for the relevant year should be adjusted on a backward looking basis in order to bring them materially in line with the €2.5/MWh limit and in order to demonstrate compliance with the Guidelines Regulation.

[164] As set out in the Previous AG Note (and as discussed at length during the CMP 224 process), the use of ex-post adjustment to G Charges introduces uncertainty, which in the round may be detrimental to cross border electricity trading (which is the stated aim of the Network Access Regulation). Therefore we can see that this point in particular would weigh against such an adjustment in the context of a minor incursion of the €2.5/MWh. No doubt there would be other policy and implementation considerations which would be relevant to the Working Group's decision on whether or not to reconcile in such a scenario.

5. The G Charges Guidelines do not mandate how such a reconciliation should be performed, and therefore the way in which (and the speed at which) such a reconciliation is performed under the CUSC[165] is a matter for wider policy and financial consideration, as opposed to the G Charge Guidelines mandating an approach. We would of course be happy to consider any specific suggestions from a legal perspective, if this would be helpful.

- **The position regarding the use of the ex-ante approach for future charging years**

6. If it is reasonable to conclude that:

    a. the issues in 2015/16 have arisen from a unique set of circumstances (rather than a fundamental deficiency in the approach to forecasting generation output and €/£ exchange rates, in combination with the use of the Error Margin); and

    b. the Current Approach, in the round, continues to represent a reasonable and good faith method of forecasting the relevant outturn figures and thereby complying with the €2.5/MWh limit, we can see robust legal arguments for maintaining the current ex-ante approach going forward.

7. Given that the forecasting in respect of 2015/16 has been sufficiently far out (despite the use of the Error Margin) to result in the €2.5/MWh limit being materially exceeded, this may be indicative of the current approach to forecasting (or its application), in combination with the current Error Margin approach, requiring improvement (or in extremis fundamentally not being a reasonable approach to rely upon for providing robust outturn figures). This, however, is a technical question rather than a legal one.

8. In circumstances, as is the case in GB, where a tariff cannot be set up on an ex-ante basis with reasonable certainty upfront that the outturn will be compliant, industry participants, including Generators, suppliers and National Grid will need to allocate the risks of that between them. However, our view is that there are no clear legal drivers that determine how to do this. Rather it is a question for the Working Group as to how best to meet the CUSC Objectives overall.

Question (i):

If under the current methodology (which uses an ex-ante approach with error margin and no reconciliation) GB's average Generator charge exceeds €2.5/MWh due to forecast error for the 2015/16 Charging Year, is it compliant with the Guidelines Regulation (ie no action is required) and, if not, what action is required:

(a) reconciliation for the 2015/16 charging year;

(b) changes to the methodology to apply for future charging years?

9. In short:

    a. there is a strong argument that a material breach of the €2.5/MWh G Charges limit in respect of the 2015/16 charging year equates to non compliance with the Guidelines Regulation;

    b. as a result, we are of the view that reconciliation of G Charges for the 2015/16 charging year would be prudent;

[165] For example whether through the CUSC provisions at paragraph 14.14.10, an amendment to the ex-ante formula at paragraph 14.4.5 such that it factors in overpaid G Charges for the previous charging year, or through some other mechanism or amendment.

c. we are not of the view that the breach in respect of the 2015/16 charging year automatically means the methodology for future charging years requires amending.

All of these points are discussed in more detail below.

- **Should there be reconciliation for the 2015/16 charging year? (Question (i)(a)):**

10. In circumstances where the outturn G Charge level for a charging year has materially exceeded the G Charges limitation in the Guidelines Regulation, we are of the view that the G Charge level for the relevant year should be reconciled on a backward looking basis. Given the wider financial and policy considerations, whether this reconciliation is by way of an amendment to the ex-ante calculations in paragraph 14.14.5[166] of the CUSC, the broad tariff update provision included at paragraph 14.14.10 of the CUSC, or through mechanisms available elsewhere in the CUSC is a question more suited to consideration by the Working Group rather than in the first instance being driven by legal tramlines.

- **Should there be changes to the methodology to apply for future charging years? (Question (i)(b)):**

11. Our understanding of the Current Approach's ex-ante formula (as set out at paragraph 14.14.5(v) of the CUSC) is that it can be characterised as aiming to mitigate the inherent risks of an ex-ante approach through (i) using robust forecasts, and (ii) using an error margin which adjusts the €2.5/MWh cap, in order to reduce the risk of a breach of the G Charge Guidelines' cap due to erroneous forecasting.

12. In our view, provided that for future charging years the ex-ante formula and the way in which the calculations are implemented continues to represent (at the time the calculation is performed) a reasonable and good faith mechanism for securing (ex-ante) compliance with the Guidelines Regulation there is a robust argument for continuing to use the Current Approach for future charging years.

13. In respect of the 2015/16 charging year, we understand the degree of error is a result of an unusual combination of factors[167]. If, however, the Current Approach proved to regularly result in G Charges that exceeded the permitted range, for example because it was clear that in ordinary circumstances the forecasting process combined with the Error Margin was not robust, then it may be right to say that a reconciliation approach whether based on the BG Proposal or SSE Proposal is better fitted to ensuring compliance with the Guidelines Regulation. However, on the basis of a single year's outturn, it is not possible to say this.

14. In circumstances, as is the case in the GB, where a tariff cannot be set up front with reasonable confidence that the outturn will ultimately be compliant with the G Charge Guidelines, industry participants, including Generators, suppliers and National Grid will need to allocate the risks of that between them. However, our view is that there are no clear legal drivers that determine how to do this. Rather it is a question for the Working Group as to how best to meet the CUSC Objectives overall.

[166] We would note that the Error Margin (set out in definition "y" in paragraph 14.1.4.5 of the CUSC) is stated as being "based on previous years [forecasting] error […]". We understand the way in which the Error Margin is calculated cannot reasonably be characterised as having the effect of introducing a form of reconciliation in respect of a previous charging year through its adjustment of the coming year's G Charges; and instead should be characterised purely as a mechanism to assist with the Error Margin being appropriate for the coming charging year. It may be, however, that this calculation could be developed such that it does introduce a form of reconciliation into the ex-ante calculations. However, this is of course ultimately a financial point rather than a legal one.

[167] We understand unexpected weather conditions, increases in embedded generation and mis-forecasting of the exchange rate, because of volatility in the euro, have had a particular impact.

15. Our conclusion (as discussed in the Previous AG Note) that the ex ante approach is inherently capable of complying with the Guidelines Regulation is driven by a number of factors:

    a. The Guidelines Regulation itself does not set any timetable or mechanism for how and when charges should comply. As GB G Charges are set on a £/KWh basis and the Guidelines Regulation sets the permitted range of G Charges on an energy basis and in euro (€/MWhs) at the time of tariff setting, it will never be possible to be know that the outturn will fall within the permitted range and the CUSC will always need to conduct the conversion and check that average outturn over the year proves accurate. The issue is therefore not so much whether charges are compliant at a particular point in time, but when and how they are adjusted to secure compliance.

    b. As noted in our previous advice, the European Court of Justice takes a *purposive* approach to the interpretation of EU law (an approach which has in turn been adopted by the Courts of England and Wales when they consider compliance with EU law). The result of this is that the courts will look to the broader purpose and objectives of EU legislation in interpreting the meaning of the specific provisions. In particular, the recitals setting out the objectives of the Guidelines Regulation have weight and are relevant to interpreting the requirements of the G Charge Guidelines as a whole.

    c. The upfront certainty on G Charges and demand side TNUoS charges afforded by an ex-ante approach arguably better encourages cross-border electricity trading than an ex-post approach. While an ex-post approach guarantees the reconciliation of annual average G Charges where they exceed the G Charge Guidelines, given the overall aim of the Network Access Regulation is explicitly stated to be to encourage the cross border trading of electricity this provides argument for the Current Approach.

    d. The use of the risk margin for forecasting error (at paragraph 14.14.5(v) of the CUSC) (**Error Margin**), and the careful weighing up of the implementation options at the time the original CUSC modification was made, demonstrate a clear desire on the part of Ofgem and NGET to implement the intent of the G Charge Guidelines and provides sound reason for avoiding an ex-post approach on grounds of the uncertainty it would create. Again, this gives robust legal argument for defending the Current Approach, even where, on a particular occasion, the Error Margin is insufficient to prevent the average charge, at the end of a given year, from exceeding the permitted range.

Question (ii): If changes are required for future charging years, should they ensure we do not exceed €2.5/MWh, eg by introducing ex-post reconciliation, or would changes to reduce the risk of exceeding €2.5/MWh, eg a larger error margin, be sufficient?

16. As set out above, our view is that the current position does not automatically mean that the current ex ante methodology as set out in the CUSC requires amendment for future years. As discussed in the Previous AG Note, we do not view the Guidelines Regulation as mandating either an ex-ante or ex-post approach.

17. Looking to future years, the wider pros and cons in relation to an ex-post reconciliation versus an ex-ante approach continue to be key in any consideration of a move to ex-post (as was the case at the time of CMP224). Similarly, changes to the Current Approach while maintaining a wholly ex-ante methodology (eg through an increase in the Error Margin) should be considered in the light of whether the Current Approach represents a reasonable and robust approach to securing Guidelines Regulation compliant G Charges, or whether the relevant changes are appropriate to meet this threshold.

Question (iii): If Generator charge reconciliation is required for 2015/16, how quickly should this happen?

18. The G Charge Guidelines do not mandate any timescale for such a reconciliation There will of course be wider advantages and disadvantages of each approach, including the balance of risk between industry participants and how best to achieve the CUSC Objectives, which the Working Group will no doubt consider.

Question (iv): should the charges for Generation only Spurs be included in the calculation of the average G Charge (see CMP224 Report and Responses))?

19. As was concluded during the CMP224, we would agree with the view that it is a reasonable interpretation of the Guidelines Regulation for TNUoS in respect of generation only spurs to be included within the TNUoS charges subject to the Guidelines Regulation G Charge limits (as implemented under the CUSC).

20. We say this on the basis of the wording at Part B of the Annex to the Guidelines Regulation, which refers to the Guidelines Regulation's G Charge limits applying to "total transmission tariff charges" and taking into account the exclusions (including in respect of "charges paid by produces for physical assets required for connection to the system or the upgrade of the connection") set out at paragraph 2 of the same Part B. While these terms are not given specific definitions within the Guidelines Regulation, given that generation only spurs are treated as part of the transmission system in GB and TNUoS charges include charges for the use of such spurs, we agree with the conclusions reached in respect of the CMP224 that it is reasonable that such spurs should be included within the average G charge calculation. In contrast, it is not clear on what basis the exclusion of "charges paid by produces for physical assets required for connection to the system" justifies the exclusion of TNUoS charges (as opposed to connection charges) in respect of generation only spurs, and therefore the justification for such a specific carve-out appears lacking.

Question (v): Would the use of the exchange rate at the time the Guidelines Regulation was set in 2010 be reasonable?

21. In the context of ex-ante G Charge calculations for future years, we would note that paragraph 14.14.6(v) of the CUSC refers to the forecast exchange rate calculation being calculated on the basis of "OBR Spring Forecast €/£ Exchange Rate in charging year n-1". Under the current drafting of the CUSC this would therefore be the appropriate currency forecasting basis to use for ex-ante G Charge calculations.

22. In the context of a a reconciliation of G Charges (in the context where a reconciliation is deemed appropriate) the Guidelines Regulation does not mandate a specific approach on exchange rates. However, we would suggest that a robust and reasonable approach would be to use average actual exchange rates during the period of the 2015/16 charging year.

23. By way of example, the EU Merger Regulation 139/2004/EC sets mandatory thresholds for notification in euro and the Commission's Consolidated Jurisdictional Notice made under that Regulation states that the annual turnover should be converted at the average rate for the 12 months concerned.[168] We believe that the same approach to currency conversion would be expected in this context, as it would be more consistent with the purpose of the Guidelines

[168] Jurisdictional Notice, paragraph 204.

Regulation to use an exchange rate for the relevant year, which better represents the economic reality in that year.

Appendix

Background

The Network Access Regulation notes in its preamble that "at present, there are obstacles to the sale of electricity on equal terms, without discrimination or disadvantage in the Community. In particular, non-discriminatory network access and an equally effective level of regulatory supervision do not yet exist in each Member State, and isolated markets persist". While much of the Network Access Regulation specifically concerns itself with appropriately compensating national transmission system operators for hosting cross-border flows of electricity, the Network Access Regulation also empowers the European Commission (**Commission**) to adopt Guidelines which "determine appropriate rules leading to progressive harmonisation of the underlying principles for the setting of charges applied to producers and consumers (load) under national tariff systems […]".

Pursuant to this, the Guidelines Regulation was enacted by the European Commission on 23 September 2010. This states in its preamble that "Variations in charges faced by producers of electricity for access to the transmission system should not undermine the internal market. For this reason average charges for access to the network in Member States should be kept within a range which helps to ensure that the benefits of harmonisation are realised." Under Article 2, and Part B of the Annex, the Guidelines Regulation sets out guidelines on the level of transmission charges which each Member State may permit to be levied on electricity Generators.

In the case of Great Britain, these guidelines state that annual total transmission charges paid by Generators divided by the total measured energy injected annually by Generators onto Great Britain's transmission system ("annual average transmission charges") shall be within a range of 0 to 2.5 Euros/MWh (**G Charge Guidelines**). (The Guidelines Regulation provides for the Agency for the Cooperation of Energy Regulators (**ACER**) to, by 1 January 2014, provide an opinion to the Commission on the appropriate range/ranges of these charges for the period after 1 January 2015. This opinion was provided by ACER on 15 April 2014 – the Commission has not yet responded.)

While the range of transmission charges are referred to as "guidelines", the Network Access Regulation requires that Member States lay down rules on effective, proportionate and dissuasive penalties for infringements of the provisions of the Network Access Regulation (Article 22).

Under Article 19 of the Network Access Regulation, Ofgem (in the context of Great Britain) is required to ensure compliance with the G Charge Guidelines. As a result, the Electricity and Gas (Internal Markets) Regulation 2011 amended the Electricity Act 1989 (**EA89**) such that Ofgem is empowered to enforce compliance (including by way of penalties) by National Grid Electricity Transmission PLC (**NGET**) with the G Charge Guidelines (Sections 25 – 27F of the EA89).

As a result of the need to implement the G Charge Guidelines, NGET raised CUSC Modification Proposal 224 in September 2013. Following a consultation, this proposal was accepted in its original form by Ofgem on 8 October 2014 and implemented as a modification to the CUSC on 22 October 2014.

Prior to the consultation the relevant provisions of the CUSC operated on the following basis (much of this remains unchanged by the modification):

- Part 2 Section 14 of the CUSC sets out the basis upon which Transmission Network Use of System charges (**TNUoS**) are calculated for any financial year (1 April to 31 March). This takes as its starting point NGET's Maximum Allowed Revenue (as determined under Ofgem's price control processes in conjunction with NGET's Transmission Licence) for the relevant financial year. (By way of example, for the financial year 1 April 2014 to 31 March 2015 this Maximum Allowed Revenue was set at £2,477 million.) This Maximum Allowed Revenue takes into account under or over recovery in a previous year.

- This Maximum Allowed Revenue was then split between Generators and demand in a fixed proportion of generation at 27% and demand at 73%. (Applied to the example, this gives an aggregate total of £669m to be recovered from generation (**G Charge**) and £1808m to be recovered from demand.)

- The TNUoS charges paid by each Generator are then calculated on a £/kW basis. This is achieved through firstly calculating location specific TNUoS charges, based upon marginal costs of investment in the transmission system as the result of increased generation in a relevant area. This, for example, might produce a charge of £25/kW for a Generator located in North Scotland, with additional locational charges also applying for specific local circuits (for example, Hartlepool at £0.53/kW), specific types of local substation, and specific areas of offshore generation. Under the CUSC, the forecast aggregate level of these locational charges is then subtracted from the total G Charge to leave a "residual" component of the G Charge. For example, from the £669m G Charge referred to above, £326m might be taken by the aggregate locational G Charges.

- This scenario would leave a total of £343m residual G Charges to be levied on Generators in the worked example. This residual amount is simply spread across the total generation capacity (based upon generating stations' Transmission Entry Capacity) to give a consistent £/kW payment for all generation capacity. So, to complete the example, the £343m residual amount would be divided by aggregate total capacity (for example, 71.5GWs) which would produce a payment of £4.81/kW for each Generator in relation to the residual charge element of the G Charge.

- In this way, the aggregate annual TNUoS Charges were split between generation and demand on a 27%/73% basis.

Following the CUSC modification, the above approach has remained the same except that the 27%/73% split between generation and demand has been amended (see paragraph 14.14.5(v) of the CUSC) (**Current Approach**) such that the G Charge is set at the *lower of:*

- 27%; or

- the percentage achieved from:

    - taking the Guidelines Regulation €2.5/MWh maximum, amending this based on a risk margin for forecasting error (**Error Margin**), and multiplying this by forecast GB generation output for the relevant year (calculated two months ahead of the time) to give a total €x figure;

    - and taking this €x figure as a proportion of forecast transmission operator maximum allowed revenues (converted from pound Sterling into Euros based on forecast exchange rates, in order to ensure consistency of units),

    (**Forecasting Equation**)

By way of example, for financial year 15/16 this has led to the Generator/demand split being set at 23.2%/76.8% rather than at the 27%/73% level.

The Error Margin is set each year by NGET based upon the level of historical error in forecast generation output and forecast transmission operator maximum allowed revenues. In its original consultation and decision on the CUSC modification, Ofgem confirm that this Error Margin is included to mitigate the risk of forecast errors causing the actual outturn average G Charges level to exceed the Guidelines Regulation €2.5/MWh maximum.

Fundamentally, this calculation is needed in the context of GB G Charges because GB G Charges are charged on a £/kW basis (power based charges) rather than on a £/kWh basis (energy based charges). Given the Guidelines Regulation sets the permitted range of G Charges on an energy basis (€/MWhs), the CUSC will always need (whether the check against the Guidelines Regulation permitted range of G Charges is conducted on an ex-ante or ex-post basis) to conduct this conversion from power to energy.

British Gas Trading Limited (**British Gas**), in its capacity as a CUSC party, made a CUSC modification proposal on 19 August 2015 (**BG Proposal**). This modification proposal suggests that the Forecasting Equation is carried out without the use of the Error Margin and (instead of relying on the Error Margin to allow for forecasting error on an ex-ante basis) an ex-post reconciliation is conducted to establish whether the Guidelines Regulation cap on G Charges has been exceeded or alternatively whether the G Charges proportion can be increased (up to a maximum of 27%) without exceeding the Guidelines Regulation cap. British Gas suggest any reconciliation would be paid by way of an adjustment to the subsequent year's G Charge/demand side charge levels. That proposal remains under consideration. As part of its work, the CMP251 Working Group Consultation (dated 29 February 2016) looked at 3 reconciliation options, including Option 1, an ex-post reconciliation in Spring 2016 whereby each Generator would receive a credit for overpayment over the charging year, with recovery from suppliers over the following charging year..

SSE, also in its capacity as a CUSC party made a further CUSC modification proposal on 8 March 2016 (**SSE Proposal**). This proposal observes that for a number of reasons, the forecasts which underpin the Current Approach to generation transmission charges are proving inaccurate and if not corrected, the actual outturn average G Charges level are currently likely to substantially exceed the permitted maximum charge of €2.5/MWh for the charging year 2015/16. SSE are therefore proposing a mid-year tariff change, to achieve an ex-post reconciliation for the current charging year, seeking to apply "Option 1" of the methodologies considered in the CMP251 Working Group Consultation i.e. reconciliation payments to Generators in Spring 2016 and recovery of such payments from suppliers during the charging year 2017/16.

Annex 7 – SSE Legal Opinion

Summary of legal advice provided to SSE by Leading Counsel in relation to the legality of GEMA's approach in the 'send back' letter of 22 February 2017 in so far as it relates to raising new WACMs at this stage in the process.

Without waiving any privilege we have in the legal advice we have received, we are prepared to offer the following summary of the legal arguments that can or will be deployed in support of the position contained herein.

CAP 186 and the 'send back' procedure

1. The CAP 186 decision was adopted by GEMA in October 2010. Among the reasons articulated for approving NGET's proposal for a "send back" procedure were that:

   "There would also be a broader beneficial impact on the efficiency of the CUSC governance process by removing a risk that amendment proposals are rejected because of identified deficiencies which are not related to the merits of proposals. By addressing these deficiencies through 'send back', in a timely manner and without wastage of previous valid work on proposals, the governance process would operate more effectively and produce better and more robust decisions."

2. GEMA also stated that:

   "We note the concerns that a minority of panel members have about potential inefficiency introduced into the CUSC by the 'send back' power should Ofgem limit its engagement with the amendments process. We highlighted in our CGR final proposals the importance of timely resolution of deficiencies when these arise in final amendment reports. Ofgem will seek, as resources allow, to engage with the amendments process and to highlight any concerns in the development of amendment proposals. Resolving deficiencies through use of 'send back' would be preferable and more efficient than an Authority rejection of a proposal. We would anticipate that instances where deficiencies arise after the final report has been sent to the Authority ought to be rare."

3. The CAP 186 Decision also made clear that the purpose of the 'send back' power would be to ensure the delivery of a robust final report to GEMA. This would facilitate optimal decision-making. The Authority stated expressly that: "the purpose of the 'send back' power and its use is clear and **would not cover rewriting the intent of an amendment proposal**." [Emphasis added]

The legality of GEMA's decision to send back the FMR in CMP 261

4. The GEMA request for revision of the legal text and clarification of the remedial steps/implementation which is sought by the FMR is not inappropriate. Such a request is compatible with the 'send back' procedure which is now found in sections 8.23.12 and 8.23.13 of the CUSC (and also summarised in NGET's licence condition C10(7)(aa)). It is open to GEMA to specify "the additional steps (including drafting or amending existing drafting of the amendment to the CUSC), revision (including revision to the timetable), analysis or information that it requires in order to form such an opinion."

5. However, what GEMA cannot do is require a Proposer or the CUSC Panel to submit an entirely different modification request. It is apparent from the terms of the CUSC set out above that the procedure is intended to ensure that a definitive text is settled on by the workgroup. Once the workgroup has done so, the text is subject to code administrator consultation. It is on the basis of the settled text and the response of consultees that the independent CUSC Panel then decides whether or not it will recommend the change to GEMA in the form of a FMR.

6. GEMA can pass comment on the terms of the FMR, identifying drafting or evidential deficiencies which might cause the Proposal or a WACM to be rejected in circumstances where revisions to the legal text or the FMR itself would otherwise mean that a different decision might be reached. But it would not be appropriate for GEMA to suggest that the core content of the proposed modification should be changed; or that a differently formulated modification request is to be preferred. In so far as the text of the 'send back' letter is construed as going this far, it fails to comply with the CUSC. Moreover, such construction is supported by the terms of the CAP186 procedure which introduced the possibility of 'send back' in the first place.

7. It is a principle of public law that a regulatory body should follow its published policy unless there are good reasons to depart from it. The case law concerning (a) a requirement to follow a policy; and (b) the domestic law principle of legitimate expectations were set out in SSE's consultation response to the code administrator consultation. The principles are accordingly set out on the face of the FMR itself.

8. The "send back" letter fails to comply with those principles. There is no provision in the CUSC which permits GEMA to direct that the CUSC Panel file a revised FMR with *different* WACMs under consideration, as opposed to a better explanation of, or further evidence in support of, the existing Proposal and/or WACMs set out in the FMR. To the extent that the section of the 'send back' letter headed "other issues" can be taken as inviting the CUSC Panel to submit alternative WACMs, it is vulnerable to challenge as unlawfully failing to comply with the existing procedural requirements set out in the CUSC itself and confirmed in Condition C10 of NGET's licence conditions.

9. In addition, the CUSC procedure is intended to consider an identified proposal and make recommendations accordingly. The Proposer is entitled to have its proposed modification considered by GEMA. If GEMA rejects that proposal, the Proposer has a right of appeal before the CMA which it can exercise. If GEMA were able to exert pressure on the CUSC Panel to put forward an alternative WACM that would potentially subvert the Proposer's right of appeal. An example would be as follows. A Proposal and three WACMs are advanced in a FMR. GEMA responds by adopting a 'send back' decision which strongly hints that an alternative WACM should be considered. That might lead the CUSC Panel to infer that WACM 4 would be agreed by GEMA. The CUSC Panel members might take the view that the adoption of WACM 4 was preferable to what was anticipated to be the rejection of the existing Proposal and existing WACMs 1 to 3. That might lead the CUSC Panel to revise its FMR with an additional WACM 4, agreed by a majority decision. If GEMA accepted WACM 4 on that basis, it would become an "excluded decision" for the purposes of appeals under section 173 EA 2004. The appeal rights of the Proposer in relation to the rejection of the original Proposal would thereby be nullified.

10. Such a process would risk failing to ensure effective protection of EU law rights. If EU rights are engaged, such as a right to repayment, but the majority decision on the remitted FMR decision fails to respect that, then the dissatisfied CUSC user ought in principle be able to have its claim for repayment by the national regulatory authority subject to an appellate judicial review. Even if it could be argued that the availability of CPR Part 54 judicial review as a fall-back measure (because the statutory appeal right was excluded) provided a system of "appeal" sufficient to comply with the requirements of Article 37 of the Electricity Directive, it can be seen that the overall approach would be vulnerable to challenge on grounds of procedural unfairness. In addition, it might lead to an allegation that Ofgem was "picking winners", in breach of EU law principles of non-discrimination and/or legal certainty, or contrary to more general precepts of good regulation.

11. For the reasons set out above, while it is considered by Counsel that the CUSC Panel would be well advised to consider the request for greater legal clarity and an explanation of the mechanics of implementation of the existing WACM[s], if any aspects of the send back letter going beyond this were acceded to by the CUSC Panel, any decision which it subsequently took on re-submission of the FMR to Ofgem would be vulnerable to challenge. Similarly, the final product of GEMA's decision would also be subject to challenge because of the flawed procedural steps which were taken in the position leading up to it.

12. Counsel also considers that it is strongly arguable that the workgroup which the CUSC Panel may choose to reconvene is not permitted to consider and advance alternative or new WACMs at this stage. This is consistent with the analysis of Counsel outlined above that GEMA cannot require the submission of new WACMs once the FMR is settled.

    This summary has been prepared in consultation with Counsel.

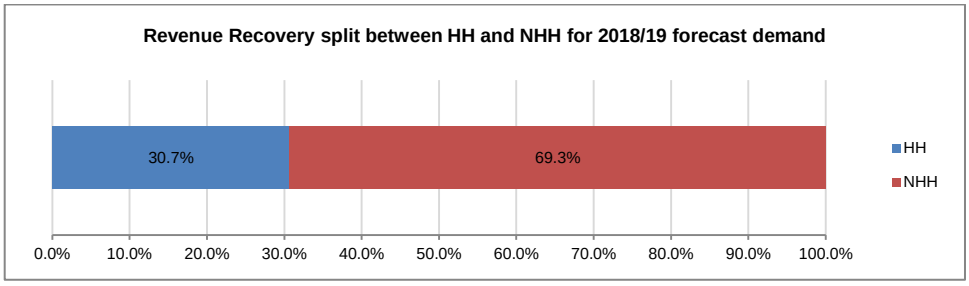
Annex 8 – Indicative Information Regarding the Recovery of CMP261 Rebate Amounts from Demand Recovery Rates

Forecast split of revenue recovery between supplier parties in 2018/19

The recovery of revenue from demand in 2018/19, will be achieved by the calculation of a flat-rate £/kW tariff for Half-Hourly (HH) metered demand, and a flat-rate p/kWh tariff for Non-Half Hourly (NHH) metered demand.

For 2018/19, the total quantities of NHH and HH demand used in the most recent National Grid forecast[169] are HH Demand of 14.3GW, NHH Demand of 23.7TWh, and a total system peak demand of 46.4GW. This means that 30.7% of the revenue would be recovered from HH tariffs, and the 69.3% from NHH tariffs; this split does not change based on the amount of actual revenue but the split of HH, NHH and system demand.

These are indicative only based on historic data for the reader to understand the potential impact of the recovery amount



Using this data, for an indicative revenue recovery of ~£120M[170], this equates to tariffs of:

- HH Tariff - £2.58 /kWh;
- NHH Tariff - 0.351 p/kWh.

Based on the forecast demand figures for 2018/19, and indicative tariffs this recovers £36.8M of the revenue from HH tariffs, and £83.17 from NHH tariffs.

169 http://www2.nationalgrid.com/WorkArea/DownloadAsset.aspx?id=8589939104

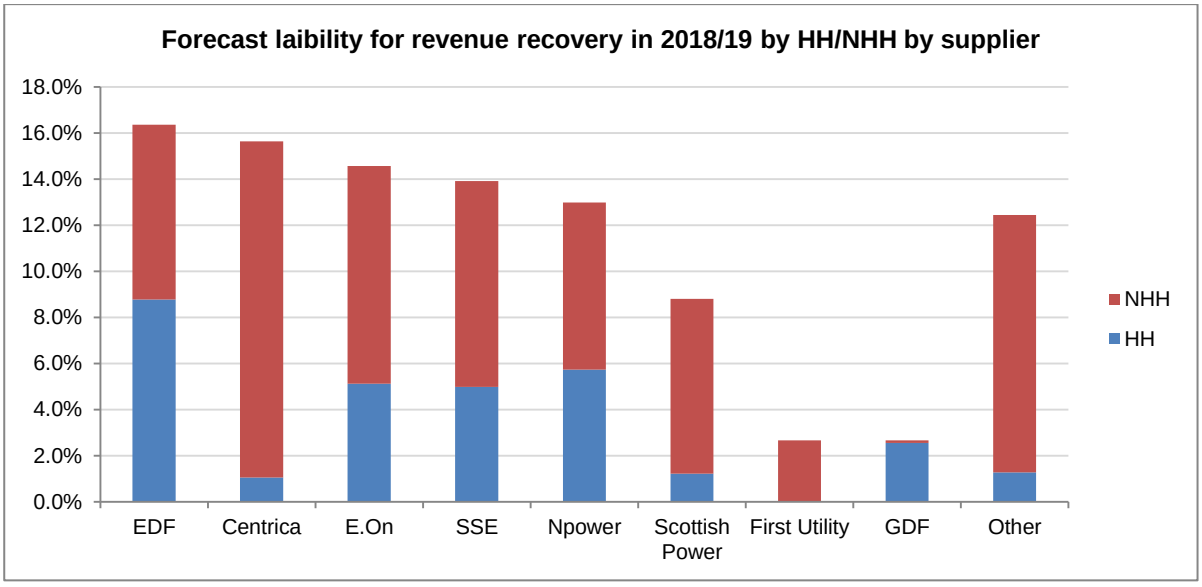
170 This number is used for illustrative purposes only. The actual amount varies between WACMs

Indicative Supplier Liability

Demand reconciliation data for HH and NHH demand by supplier from 2010/11 until 2015/16 has been used to forecast[171] the predicted volumes for 2018/19 to provide indicative HH and NHH volumes per supplier.

These indicative volumes have then been used to determine the percentage liability for revenue recovery. These liabilities are summarised in the following table, as a percentage of the total liability, for parties with an HH or NHH liability of 2% or more of the total.

	HH	NHH	**Total**
TOTAL	**30.7%**	**69.3%**	**100%**
By party			
EDF	8.8%	7.6%	**16.4%**
Centrica	1.1%	14.6%	**15.6%**
E.On	5.1%	9.4%	**14.6%**
SSE	5.0%	8.9%	**13.9%**
Npower	5.7%	7.3%	**13.0%**
Scottish Power	1.2%	7.6%	**8.8%**
First Utility	0.0%	2.7%	**2.7%**
GDF	2.6%	0.1%	**2.7%**
Others	1%	11%	**12%**



[171] Using an ordinary least squares regression.

Summary of EU Regulation 838/2010 Interpretations

Exceedance

		Exchange Rate Interpretation					
		Risk Excluded Forecast data used		Risk Included Actual data used			
Generation Output Interpretaion	Using Actual Data	Outturn €/MWh	2.81	Outturn €/MWh	3.15	Include (Strict)	Local Circuits Interpretation
		G Charge over-recovery £m	64.12	G Charge over-recovery £m	119.50		
		£/KW over-recovery	0.92	£/KW over-recovery	1.71		
	Using Forecast Data	Outturn €/MWh	2.21	Outturn €/MWh	2.47	Include (Strict)	
		G Charge over-recovery £m	N/A	G Charge over-recovery £m	N/A		
		£/KW over-recovery	N/A	£/KW over-recovery	N/A		
	Using Actual Data	Max Outturn €/MWh	2.02	Max Outturn €/MWh	2.26	Exclude (Broad)	
		G Charge over-recovery £m	N/A	G Charge over-recovery £m	N/A		
		£/KW over-recovery	N/A	£/KW over-recovery	N/A		

***Figure 8**: Summary of EU Regulation 838/2010 Interpretations.*

CMP224 Approach

Exchange Rate Risk: Excluded based on Spring 2014 OBR Forecast

Interpretation: Strict

Inputs

	Final Tariffs 2015/16	CMP224 Methodology	Using Forecast Output
Energy (TWh)	319.6	250.7	319.6
Limit (€/MWh)	2.34	2.34	2.34
Allowed Revenue (£m)	2637	2637	2637
Exchange Rate (€/£)	1.22	1.22	1.22
G %	23.2%	18.2%	23.2%
D %	76.8%	81.8%	76.8%
Revenue from Generators (£m)	612	480	612
Actual Recovery from Generators (£m) including Cancellation Charges	578	578	578
Capped €2.5/MWh Revenue from Generators (£m)		514.2	654.0
Balance (£m)		64.1	-75.6
Outturn €/MWh		2.81	2.21

TEC	
69,784	MW
0.92	£/kW

***Figure 9**: Calculation of the Euro Per MWh outturn based on the CMP224 Methodology.*

SSE Approach

Exchange Rate Risk: *Included (actual for 2015/16)*

Interpretation: *Strict*

Inputs

	Final Tariffs 2015/16	SSE Methodology	Using Forecast Output
Energy (TWh)	319.6	250.7	319.6
Limit (€/MWh)	2.34	2.34	2.34
Allowed Revenue (£m)	2637	2637	2637
Exchange Rate (€/£)	1.22	1.37	1.37
G %	23.2%	16.3%	20.8%
D %	76.8%	83.7%	79.2%
Revenue from Generators (£m)	612	430	548
Actual Recovery from Generators including Cancellation Charges (£m)	578	578	578
Capped €2.5/MWh Revenue from Generators (£m)		458.8	585.4
Balance (£m)		119.5	-7.1
Outturn €/MWh		3.15	2.47

TEC	
69,784	MW
1.71	£/kW

Figure 10: *Calculation of the Euro Per MWh outturn based on the SSE approach.*

Other Approach 1

Exchange Rate Risk: *Excluded based on Spring 2014 OBR Forecast*

Interpretation: *Broad*

Inputs

Variables	Final Tariffs	Outturn
Volume (TWh)	319.60	250.7
Exchange Rate £/€	1.22	1.22

			Based on Outturn Data					
			Wider & Residual Only		Remove Offshore Local		Remove Local CCTs onshore and offshore, but retain Substations	
Elements of Tariff from Final Tariff	£m		£m	€/MWh	£m	€/MWh	£m	€/MWh
Zonal Tariff		47.6	47.6	0.23	47.6	0.23	47.6	0.23
Offshore Local Circuit & Substation		186.6		-		-	55.98	0.27
Onshore Substation		20.1		-	20.1	0.10	20.1	0.10
Onshore Local Circuit		13.8		-	13.8	0.07		-
Residual		343.68	343.68	1.67	343.68	1.67	343.68	1.67
Total		611.78	391.28	1.90	425.18	2.07	467.36	2.27
Small Gen Discount	-£	18		- 0.09		- 0.09		- 0.09
TEC Under-recovery	-£	34		- 0.17		- 0.17		- 0.17
Cancellation Charges	£	18		0.09		0.09		0.09
Recovered from Gen		578		1.65		1.82		2.02

Figure 11*: Calculation of the Euro Per MWh outturn based on a broad interpretation of the EU Regulation using the forecast exchange rate.*

Other Approach 2

Exchange Rate Risk: *Included (actual for 2015/16)*

Interpretation: *Broad*

Inputs

Variables	Final Tariffs	Outturn
Volume (TWh)	319.60	250.7
Exchange Rate £/€	1.22	1.37

			Based on Outturn Data					
			Wider & Residual Only		Remove Offshore Local		Remove Local CCTs onshore and offshore, but retain Substations	
Elements of Tariff from Final Tariff	£m		£m	€/MWh	£m	€/MWh	£m	€/MWh
Zonal Tariff		47.6	47.6	0.26	47.6	0.26	47.6	0.26
Offshore Local Circuit & Substation		186.6		-		-	55.98	0.31
Onshore Substation		20.1		-	20.1	0.11	20.1	0.11
Onshore Local Circuit		13.8		-	13.8	0.08		-
Residual		343.684	343.684	1.87	343.684	1.87	343.684	1.87
Total		611.784	391.28	2.13	425.18	2.32	467.36	2.55
Small Gen Discount	-£	18		- 0.10		- 0.10		- 0.10
Under-recovery	-£	34		- 0.19		- 0.19		- 0.19
Cancellation Charges	£	18		0.10		0.10		0.10
Recovered from Gen		578		1.85		2.03		2.26

***Table 12**: Calculation of the Euro Per MWh outturn based on a broad interpretation of the EU Regulation using the actual exchange rate*

Annex 10 – Outturn Analysis and Small Generator Discount

Power Station	2015/16 TEC Forecast Used at Charge Setting	TEC Actual/ MW	Cancellation charge percentage	Adjusted TEC Actual/ MW	Chargeable?	2015/16 Generation Output (MWh)	Total TNUoS Charge (£)	2015/16 Pre Connection Cancellation Charges related to the Forecast Used at Charge Setting (£m)	2015/16 Post Connection Cancellation Charges (£m)	(Adjusted TEC/Total TEC) * Total Rebate	Rebate Payment
Abernedd	500	0		250				£ 10,833,186.00		£ 413,990.15	£ 413,990.15
Aberthaw	1620	1620	n/a	1620	Yes	7,248,030.751	£6,217,780.32			£ 2,682,656.15	£ 2,682,656.15
Achruach	43	43	n/a	43	Yes	9,012.686	£722,360.61			£ 71,206.31	£ 71,206.31
Afton	68	0		59				£ 108,736.02		£ 97,701.67	£ 97,701.67
Aigas	20	20	n/a	20	Yes	0.000	£324,013.08			£ 33,119.21	£ 33,119.21
An Suidhe	20.7	20.7	n/a	20.7	Yes	44,283.751	£324,850.83			£ 34,278.38	£ 34,278.38
Arecleoch	114	114	n/a	114	Yes	245,792.746	£1,857,838.96			£ 188,779.51	£ 188,779.51
Baglan Bay	552	552	n/a	552	Yes	1,370,272.070	£2,328,330.48			£ 914,090.24	£ 914,090.24
Barrow	90	90	n/a	90	Yes	307,724.649	£3,932,901.54			£ 149,036.45	£ 149,036.45
Barry	235	235	n/a	235	Yes	40,589.057	£777,579.51			£ 389,150.74	£ 389,150.74
Beauly Cascade			n/a	0		285,631.275	£0.00			£ -	£ -
Black Law	118	118	n/a	118	Yes	62,552.740	£1,704,811.49			£ 195,403.35	£ 195,403.35
Blacklaw Extension	69	69	n/a	69	Yes	114,837.728	£373,112.67			£ 114,261.28	£ 114,261.28
Brigg	155	0		99					£ 131,243.28	£ 163,940.10	£ 131,243.28
Brimsdown	408	408	n/a	408	Yes	557,951.682	-£204,340.68			£	£

										675,631.92	675,631.92
Carraig Gheal	46	46	n/a	46	Yes	123,914.449	£777,267.84			£ 76,174.19	£ 76,174.19
Carrington	910	910	n/a	910	Yes	299.400	£4,615,044.98			£ 1,506,924.13	£ 1,506,924.13
Clunie	61.2	61.2	n/a	61.2	Yes	314,948.381	£751,783.31			£ 101,344.79	£ 101,344.79
Clyde (North)	220.8	220.8	n/a	220.8	Yes	617,577.504	£2,997,069.87			£ 365,636.10	£ 365,636.10
Clyde (South)	128.8	128.8	n/a	128.8	Yes	330,610.210	£1,750,269.12			£ 213,287.72	£ 213,287.72
Cockenzie	0	0	n/a	0	No	0.000	£0.00			£ -	£ -
Conon Cascade			n/a	0		429,245.117				£ -	£ -
Connahs Quay	1380	1380	n/a	1380	Yes	3,292,264.080	£7,281,380.94			£ 2,285,225.61	£ 2,285,225.61
Corby	401	401	n/a	401	Yes	156,127.174	£837,776.42			£ 664,040.20	£ 664,040.20
Corriegarth	69	0		0						£ -	£ -
Cour	23	0		20.5				£ 35,565.00		£ 33,947.19	£ 33,947.19
Coryton	800	800	n/a	800	Yes	1,673,970.350	-£413,922.40			£ 1,324,768.47	£ 1,324,768.47
Cottam	2000	2000	n/a	2000	Yes	5,696,719.150	£10,552,726.00			£ 3,311,921.17	£ 3,311,921.17
Cottam DC	395	395	n/a	395	Yes	949,937.310	£2,084,163.39			£ 654,104.43	£ 654,104.43
Cowes	99.9	99.9	n/a	99.9	No	3,854.667	£0.00			£ 165,430.46	£ 165,430.46
Cruachan	440	440	n/a	440	Yes	314,247.534	£8,679,370.92			£ 728,622.66	£ 728,622.66
Crystal Rig	138	138	n/a	138	Yes	356,201.354	£1,920,511.91			£ 228,522.56	£ 228,522.56
Culligran	19.1	19.1	n/a	19.1	Yes	0.000	£327,884.93			£ 31,628.85	£ 31,628.85
Damhead Creek	805	805	n/a	805	Yes	4,512,455.055	-£456,953.42			£ 1,333,048.27	£ 1,333,048.27
Deanie	38	38	n/a	38	Yes	0.000	£690,239.90			£ 62,926.50	£ 62,926.50
Deeside	515	260	75%	451	Yes	382,357.900	£1,371,854.38		£	£	£

										406,425.38	747,252.21	747,252.21
Derwent	0	0	n/a	0	No	0.000	£0.00				£ -	£ -
Didcot	0	0	n/a	0	No	0.103	£0.00				£ -	£ -
Didcot B	1550	1550	n/a	1550	Yes	5,343,618.650	-£3,009,948.10				£ 2,566,738.91	£ 2,566,738.91
Didcot GTs	99.9	99.9	n/a	99.9	No	3,836.932	£0.00				£ 165,430.46	£ 165,430.46
Dinorwig	1644	1644	n/a	1644	Yes	2,090,202.750	£16,554,971.50				£ 2,722,399.21	£ 2,722,399.21
Drax	3906	3906	n/a	3906	Yes	24,982,374.840	£25,954,991.12				£ 6,468,182.05	£ 6,468,182.05
Dumnaglass Wind Farm	94	0		0							£ -	£ -
Dungeness B	1081	1081	n/a	1081	Yes	6,417,326.047	-£613,623.16				£ 1,790,093.39	£ 1,790,093.39
Dunlaw Extension	29.75	29.75	n/a	29.75	Yes	53,988.092	£141,374.50				£ 49,264.83	£ 49,264.83
Edinbane Wind	41.4	41.4	n/a	41.4	Yes	103,464.263	£1,037,796.94				£ 68,556.77	£ 68,556.77
Eggborough	1940	1940	n/a	1940	Yes	4,341,099.803	£12,891,111.82				£ 3,212,563.54	£ 3,212,563.54
Errochty	75	75	n/a	75	Yes	143,218.730	£921,303.08				£ 124,197.04	£ 124,197.04
Fallago	144	144	n/a	144	Yes	359,382.336	£2,091,033.07				£ 238,458.32	£ 238,458.32
Farr Windfarm	92	92	n/a	92	Yes	218,981.410	£1,633,816.59				£ 152,348.37	£ 152,348.37
Fasnakyle G1 & G3	46	46	n/a	46	Yes	201,521.917	£622,130.54				£ 76,174.19	£ 76,174.19
Fawley	0	0	n/a	0	No	0.000	£0.00				£ -	£ -
Fawley CHP	158	158	n/a	158	Yes	386,203.971	-£623,222.31				£ 261,641.77	£ 261,641.77
Ferrybridge B	980	980	n/a	980	Yes	1,948,644.898	£6,373,473.12				£ 1,622,841.38	£ 1,622,841.38
Ffestiniog	360	360	n/a	360	Yes	107,419.666	£1,879,098.84				£ 596,145.81	£ 596,145.81
Fiddlers Ferry	1953	1953	n/a	1953	Yes	4,348,006.682	£13,256,678.86				£ 3,234,091.03	£ 3,234,091.03
Fife	0	0	n/a	0	No	0.000	£0.00				£	£

										-	-
Finlarig	16.5	16.5	n/a	16.5	Yes	91,043.537	£198,000.89			£ 27,323.35	£ 27,323.35
Foyers	300	300	n/a	300	Yes	259,030.553	£7,899,875.40			£ 496,788.18	£ 496,788.18
Garry Cascade			n/a	0		196,199.435	£0.00			£ -	£ -
Glandford Brigg	99	99	n/a	99	No	15,787.643	£0.00			£ 163,940.10	£ 163,940.10
Glendoe	99.9	99.9	n/a	99.9	No	213,159.013	£1,515,610.97			£ 165,430.46	£ 165,430.46
Glenmoriston	37	37	n/a	37	Yes	250.521	£544,158.26			£ 61,270.54	£ 61,270.54
Gordonbush	70	70	n/a	70	Yes	188,975.599	£1,876,749.84			£ 115,917.24	£ 115,917.24
Grain	1517	1517	n/a	1517	Yes	5,057,484.440	-£545,325.09			£ 2,512,092.21	£ 2,512,092.21
Grangemouth	120	120	n/a	120	Yes	542,046.250	£2,058,398.76			£ 198,715.27	£ 198,715.27
Great Yarmouth	405	405	n/a	405	Yes	2,081,676.684	£846,133.29			£ 670,664.04	£ 670,664.04
Greater Gabbard	500	500	n/a	500	Yes	2,064,370.305	£23,436,765.00			£ 827,980.29	£ 827,980.29
Griffin Wind Farm	188.6	188.6	n/a	188.6	Yes	334,021.947	£4,580,223.05			£ 312,314.17	£ 312,314.17
Gunfleet Sands I	99.9	99.9	n/a	99.9	Yes	373,212.003	£2,471,003.52			£ 165,430.46	£ 165,430.46
Gunfleet Sands II	64	64	n/a	64	Yes	239,762.906	£1,583,025.28			£ 105,981.48	£ 105,981.48
Gwynt y Mor	565	574	increased TEC	574	Yes	1,642,771.510	£21,651,083.12			£ 950,521.38	£ 950,521.38
Hadyard Hill	117	99.9	75%	113	Yes	225,901.520	£588,830.38		£ 143,116.10	£ 186,668.16	£ 186,668.16
Harestanes	146	146	n/a	146	Yes	222,791.630	£2,421,077.70			£ 241,770.25	£ 241,770.25
Hartlepool	1207	1207	n/a	1207	Yes	5,432,122.545	£11,315,925.54			£ 1,998,744.43	£ 1,998,744.43
Heysham	2433	2433	n/a	2433	Yes	14,929,122.762	£19,748,536.92			£ 4,028,952.11	£ 4,028,952.11
Hinkley Point B	1261	1261	n/a	1261	Yes	7,153,439.985	-£4,749,275.30			£ 2,088,166.30	£ 2,088,166.30
Humber Gateway	220	220	n/a	220	Yes	785,673.253	£1,415,476.70			£	£

											364,311.33	364,311.33
Hunterston	1074	1074	n/a	1074	Yes	7,430,630.268	£17,075,694.62				£ 1,778,501.67	£ 1,778,501.67
Immingham	1218	1218	n/a	1218	Yes	6,884,108.700	£7,839,943.23				£ 2,016,960.00	£ 2,016,960.00
Indian Queens	140	140	n/a	140	Yes	872.380	-£802,292.96				£ 231,834.48	£ 231,834.48
Invergarry	20	20	n/a	20	Yes	0.000	£295,884.46				£ 33,119.21	£ 33,119.21
Ironbridge	680	385	75%	606	Yes	1,241,065.032	£872,943.61			£ 577,535.51	£ 1,003,926.11	£ 1,003,926.11
Keadby	0	0	n/a	0	No	718,254.100	£0.00				£ -	£ -
Kilbraur	67	67	n/a	67	Yes	177,221.360	£1,787,789.21				£ 110,949.36	£ 110,949.36
Killin Cascade			n/a	0		284,563.334	£0.00				£ -	£ -
Killingholme (Centrica)	685	0	75%	499	No	7,726.320	£0.00			£ 1,558,513.95	£ 826,324.33	£ 826,324.33
Killingholme (Eon)	900	0	75%	675	No	0.000	£0.00			£ 2,109,267.00	£ 1,117,773.40	£ 1,117,773.40
Kilmorack	20	20	n/a	20	Yes	0.000	£315,839.02				£ 33,119.21	£ 33,119.21
Kingsnorth	0	0	n/a	0	No	0.000	£0.00				£ -	£ -
Langage	905	905	n/a	905	Yes	1,191,307.500	-£4,558,652.42				£ 1,498,644.33	£ 1,498,644.33
Lincs Wind Farm	250	256	increased TEC	256	Yes	1,026,191.671	£18,119,162.11				£ 423,925.91	£ 423,925.91
Little Barford	740	740	n/a	740	Yes	2,537,847.500	£1,677,865.64				£ 1,225,410.83	£ 1,225,410.83
Littlebrook D	800	800	n/a	800	Yes	0.000	-£454,115.20				£ 1,324,768.47	£ 1,324,768.47
Lochay	47	47	n/a	47	Yes	0.000	£565,927.24				£ 77,830.15	£ 77,830.15
Lochluichart	69	69	n/a	69	Yes	121,177.139	£1,262,195.47				£ 114,261.28	£ 114,261.28
London Array	630	630	n/a	630	Yes	2,578,592.491	£25,106,396.49				£ 1,043,255.17	£ 1,043,255.17
Longannet	2260	2260	n/a	2260	Yes	7,320,079.885	£39,962,698.60				£ 3,742,470.93	£ 3,742,470.93
Luichart	34	34	n/a	34	Yes	0.000	£565,506.90				£	£

											56,302.66	56,302.66
Marchwood	900	920	increased TEC	920	Yes	3,910,922.100	-£3,150,420.40				£ 1,523,483.74	£ 1,523,483.74
Mark Hill	53	53	n/a	53	Yes	109,107.106	£802,635.18				£ 87,765.91	£ 87,765.91
Medway	700	700	n/a	700	Yes	1,960,728.195	-£251,633.20				£ 1,159,172.41	£ 1,159,172.41
Millennium Wind	65	65	n/a	65	Yes	174,242.870	£973,698.90				£ 107,637.44	£ 107,637.44
Moriston Cascade			n/a	0		313,096.999	£0.00				£ -	£ -
Mossford	18.66	18.66	n/a	18.66	Yes	0.000	£357,612.85				£ 30,900.22	£ 30,900.22
Nant	15	15	n/a	15	Yes	43,334.130	£177,884.13				£ 24,839.41	£ 24,839.41
Ormonde	150	150	n/a	150	Yes	559,688.000	£10,825,059.45				£ 248,394.09	£ 248,394.09
Orrin	18	18	n/a	18	Yes	0.000	£281,072.68				£ 29,807.29	£ 29,807.29
Pembroke	2199	2199	n/a	2199	Yes	11,874,370.921	£13,898,047.23				£ 3,641,457.33	£ 3,641,457.33
Peterborough	245	245	n/a	245	Yes	19,125.462	£728,719.92				£ 405,710.34	£ 405,710.34
Peterhead	400	400	n/a	400	Yes	661,352.666	£8,531,878.80				£ 662,384.23	£ 662,384.23
Pogbie Wind Farm	12	0		0							£ -	£ -
Ratcliffe-on-Soar	2021	2021	n/a	2021	Yes	3,294,535.333	£5,003,094.63				£ 3,346,696.35	£ 3,346,696.35
Robin Rigg East	92	92	n/a	92	Yes	232,816.830	£3,407,557.55				£ 152,348.37	£ 152,348.37
Robin Rigg West	92	92	n/a	92	Yes	277,786.853	£3,407,557.55				£ 152,348.37	£ 152,348.37
Rocksavage	810	810	n/a	810	Yes	1,153,232.630	£4,033,740.87				£ 1,341,328.08	£ 1,341,328.08
Roosecote	99	99	n/a	99	No	0.000	£0.00				£ 163,940.10	£ 163,940.10
Rugeley B	1018	980	75%	1008.5	Yes	3,451,044.244	£2,222,038.28			£ 74,394.41	£ 1,670,036.25	£ 1,670,036.25
Rye House	715	715	n/a	715	Yes	481,018.729	-£405,865.46				£ 1,184,011.82	£ 1,184,011.82
Saltend	1100	1100	n/a	1100	Yes	5,160,702.150	£7,482,257.20				£	£

										1,821,556.65	1,821,556.65
Seabank	1234	1234	n/a	1234	Yes	2,856,752.444	£475,779.81			£ 2,043,455.36	£ 2,043,455.36
Sellafield	155	155	n/a	155	Yes	379,215.740	£1,198,245.01			£ 256,673.89	£ 256,673.89
Severn Power	850	850	n/a	850	Yes	1,308,692.150	£3,020,752.10			£ 1,407,566.50	£ 1,407,566.50
Sheringham Shoal	315	315	n/a	315	Yes	1,172,463.876	£15,638,472.99			£ 521,627.58	£ 521,627.58
Shoreham	420	420	n/a	420	Yes	1,731,220.837	-£1,072,515.36			£ 695,503.45	£ 695,503.45
Sizewell B	1212	1216	n/a	1216	Yes	10,545,282.266	£2,757,141.38			£ 2,013,648.07	£ 2,013,648.07
Sloy G2 & G3	80	80	n/a	80	Yes	63,549.930	£648,031.20			£ 132,476.85	£ 132,476.85
South Humber Bank	1285	540	75%	1098.75	Yes	2,052,546.880	£3,883,383.54		£ 1,746,004.35	£ 1,819,486.70	£ 1,819,486.70
Spalding	880	880	n/a	880	Yes	3,327,517.550	£3,013,680.56			£ 1,457,245.32	£ 1,457,245.32
Staythorpe	1728	1728	n/a	1728	Yes	9,971,680.050	£9,117,555.26			£ 2,861,499.89	£ 2,861,499.89
Strathy North & South Stage 1	76	67.65	75%	73.9125	Yes	91,654.000	£1,347,205.24		£ 235,727.58	£ 122,396.19	£ 122,396.19
Strathy North & South Stage 2	0	0	50%	8.7				£ 327,477.83		£ 14,406.86	£ 14,406.86
Sutton Bridge	819	819	n/a	819	Yes	945,659.400	£2,581,926.17			£ 1,356,231.72	£ 1,356,231.72
Taylors Lane	144	144	n/a	144	Yes	1,685.729	-£750,552.62			£ 238,458.32	£ 238,458.32
Thanet	300	300	n/a	300	Yes	979,869.379	£13,811,352.90			£ 496,788.18	£ 496,788.18
Tilbury B	0	0	n/a	0	No	0.000	£0.00			£ -	£ -
Toddleburn	27.6	27.6	n/a	27.6	Yes	62,853.239	£131,157.52			£ 45,704.51	£ 45,704.51
Torness	1215	1215	n/a	1215	Yes	8,686,834.358	£16,464,288.83			£ 2,011,992.11	£ 2,011,992.11
Uskmouth	0	115	increased TEC	115	Yes	318,994.500	£426,052.00			£ 190,435.47	£ 190,435.47
Walney I	182	182	n/a	182	Yes	679,278.024	£11,928,356.08			£ 301,384.83	£ 301,384.83
Walney II	182	182	n/a	182	Yes	501,731.686	£11,964,485.4			£	£

							4			301,384.83	301,384.83
West Burton	1987	1987	n/a	1987	Yes	5,296,885.442	£10,484,133.28			£ 3,290,393.69	£ 3,290,393.69
West Burton B	1332	1332	n/a	1332	Yes	6,485,491.250	£7,028,115.52			£ 2,205,739.50	£ 2,205,739.50
West Of Duddon Sands	382	382	n/a	382	Yes	539,950.384	£15,153,568.70			£ 632,576.94	£ 632,576.94
Westermost Rough	205	205	n/a	205	Yes	766,974.194	£1,318,966.93			£ 339,471.92	£ 339,471.92
Whitelee	305	305	n/a	305	Yes	507,764.920	£4,886,985.72			£ 505,067.98	£ 505,067.98
Whitelee Extension	206	206	n/a	206	Yes	312,897.990	£3,335,556.53			£ 341,127.88	£ 341,127.88
Wilton	99	99	n/a	99	Yes	140,337.908	£875,656.29			£ 163,940.10	£ 163,940.10
Wylfa	450	450	n/a	450	Yes	2,573,308.511	£3,538,256.85			£ 745,182.26	£ 745,182.26
	73,495	**69,784**		**72,164**		**250,037,379.44**	**£551,256,727.59**	**£11,304,964.85**	**£6,982,227.56**	**£119,915,222.61**	**£119,501,232.46**

£0.00

Temporary TEC Charges	672,186.00	£ 5,748,799.00	SSE Rebate amount £ 119,501,232.46
Adjustments		£ 3,046,513.46	SSE Rebate as £/kW £ 1.66
Total TNUoS Tariff Charges	**250,709,565.44**	**£560,052,040.05**	
Total Charges including Cancellation Charges			**£578,339,232.46**

Figure13: Forecast and actual Generator TEC, output, total TNUoS charges and cancellation charges.

Small Gen Discount 2015/16

Station	Discount	TEC
Achruach	-£434,756.36	43
An Suidhe	-£209,289.69	20.7
Barrow	-£909,955.17	90
Robin Rigg East	-£930,176.40	92
Robin Rigg West	-£930,176.40	92
Farr Windfarm	-£930,176.40	92
Carraig Gheal	-£465,088.20	46
Gunfleet Sands II	-£647,079.23	64
Gunfleet Sands I	-£1,010,050.24	99.9
Lochluichart	-£697,632.30	69
Millennium Wind	-£657,189.85	65
Blacklaw Extension	-£697,632.30	69
Dunlaw Extension	-£300,790.74	29.75
Aigas	-£202,212.26	20
Clunie	-£618,769.52	61.2
Culligran	-£193,112.71	19.1
Deanie	-£384,203.29	38
Errochty	-£758,295.98	75
Fasnakyle G1 & G3	-£465,088.20	46
Finlarig	-£166,825.11	16.5
Glendoe	-£1,010,050.24	99.9
Glenmoriston	-£374,092.68	37
Hadyard Hill	-£1,010,050.24	99.9
Invergarry	-£202,212.26	20
Kilmorack	-£202,212.26	20
Lochay	-£475,198.81	47
Luichart	-£343,760.84	34
Mossford	-£188,664.04	18.66
Nant	-£151,659.20	15
Orrin	-£181,991.03	18
Sloy G2 & G3	-£808,849.04	80
Strathy North & South	-£683,982.97	67.65
Toddleburn	-£279,052.92	27.6
Edinbane Wind	-£418,579.38	41.4
Total	**-£17,938,856.22**	

Figure 14: Calculation of the small Generator discount.

Annex 11 – Analysis on Network Connections

The Workgroup in conjunction with National Grid and Ofgem have produced some supporting analysis on local circuit connection which is displayed in the attached Excel document.

Connection Asset Examples_v8.xlsx

Annex 12 – Proposer's Questions

Costs Attributed to the exceedance of the €2.50 CAP
A) the overpayment made by Generators in CY 2015/16.
A1) the Generators cost of finance of (A) during CY 2015/16.
A2) the Generator cost of finance of (A) plus (A1) from 1st April 2016 to the date of payment to Generators of (A) plus (A1).
A3) any additional consequential costs or losses (such as a proportion of power station closure costs?) suffered by Generators arising from (A) and / or (A1) and / or (A2).
B) the recovery of item (A) from suppliers (see item (C) below).
B1) the suppliers cost of finance of (B) if recovery of (B) is ahead of charging year CY 2017/18.
B2) any additional consequential costs or losses suffered by suppliers in respect of paying (B) and / or (B1) ahead of CY 2017/18.
C) the recovery of item (A) from National Grid (rather than, as per (B), from Suppliers).
C1) the recovery of item (A1) from National Grid.
C2) the recovery of item (A2) from National Grid.
C3) the recovery of item (A3) from National Grid.
C4) the recovery of item (B1) from National Grid.
C5) the recovery of item (B2) from National Grid.
In respect of the items under (C) - (C5) it is possible that one or more (or all) of the six items is applicable (depending on the legal advice - or Court determination?).
D) the cost of finance for National Grid of (A) and / or (A1) and / or (A2) till 1st April 2017 (assuming (B) is applicable).

Figure 15: List of possible items of cost arising from the breaching of the €2.50/MWh limit in 2015/16.

Annex 13 - Proposers Questions following Send back

13.5 Following Ofgem's 22nd February 2017 send back letter, the Proposer laid out (on 28th February 2017) the following questions to Ofgem in relation to the progression of the CMP261 modification whilst it had been waiting with Ofgem for a decision. Ofgem's responses to the questions; provided to the Workgroup at its meetings on 7th-8th March 2017; are as follows:

1) Can Ofgem please confirm that in the past three months, since it received the CMP261 FMR in November, that it has (or has not) made any contact with:-

i) the member state (BEIS); and / or
ii) the Agency; and / or
iii) the Commission;

to seek advice, guidance, information or support from them to help the Authority discharge its duties in the matter of ensuring that the changes paid by generators in GB, in 2015/16, are within the range set in 838/2010.

2) Can Ofgem confirm that prior to it receiving the CMP261 FMR in November, that it had (or had not) made any contact with:-

i) the member state (BEIS); and / or
ii) the Agency; and / or
iii) the Commission;

to seek advice, guidance, information or support to help the Authority discharge its duties in the matter of ensuring that the changes paid by generators in GB, in 2015/16, remain within the range set in 838/2010.

3) Can Ofgem confirm that in the past three months, since it received the CMP261 FMR in November, that it has (or has not) made any contact with:-

i) the member state (BEIS); and / or
ii) the Agency; and / or
iii) the Commission;

to advise them of a potential or actual breach of the €2.50/MWh limit for GB, set in 838/2010, during 2015/16.

4) Can Ofgem confirm that prior to it receiving the CMP261 FMR in November, that it had (or had not) made any contact with:-

i) the member state (BEIS); and / or
ii) the Agency; and / or
iii) the Commission;

to advise them of a potential or actual breach of the €2.50/MWh limit for GB, set in 838/2010, during 2015/16.

Ofgem confirmed that it has had no contact with the ~~c~~Commission or any other bodies as Regulation 838/2010 is applicable to domestic court and not European court.

In addition to these four questions, there are a number of additional questions that it would be helpful for the Workgroup to have clarification on from Ofgem, including:-

5) Noting the legal advice[172] received by the CMP251 (CUSC) Workgroup[173] in November 2015 highlights that, legally, the recitals setting out the objectives of 838/2010 have weight and are relevant to interpreting the requirements of 838/2010 as a whole; and given the statement in Recital 10[174] of 838/2010; can Ofgem kindly inform the workgroup what steps, if any, it has taken or plans to take; (a) since 30th November 2016 (up to 28th February 2017), (b) prior to 30th November 2016, and (c) from today (28th February 2017) onwards; to ensure that the internal market has not been undermined as a result of GB producers paying, on average, charges for access to the transmission system in GB in 2015/16 that were not kept within the range €0-2.50/ MWh?

Ofgem have yet to determine whether a breach has occurred.

6) Given the helpful summary provided by Ofgem to the Workgroup last summer, can Ofgem please provide the Workgroup with a similar helpful summary of the legal advice it has received up to today (28th February 2017) since it last provided such a summary to the Workgroup last summer.

No update to give as no final legal view.

7) Can Ofgem please inform the Workgroup, in light of the guidance[175] it issued on 12th August 2016, what steps it expects would be taken by any licensee found to be in breach in respect of (i) 'payment for the historic overcharging'; (ii) 'an appropriate interest payment'; and (iii) 'an ex-gratia payment reflective of the detriment caused'?

Ofgem confirmed they have yet to determine whether a breach has occurred and if a breach has occurred what the most appropriate remedy would be, thus Ofgem are not in a position to answer the question.

8) In light of CUSC Panel minute 5917 (and action 5865)[176] can Ofgem (and National Grid) please confirm to the Workgroup that, as of 28th February 2017, no enforcement action is currently being undertaken by Ofgem against NGET with respect to them not complying with either Condition C5 and / or C10 of their transmission licence in regard to charging year 2015/16.

Ofgem confirmed no enforcement action has been taken.

9) Can Ofgem please confirm that it has (or has not) a common law duty, under EU law, to ensure GB charging arrangements are fully, and remain fully, in compliance with EU law including 838/2010.

Ofgem confirmed it has.

---

[172] CMP251 Legal Advice, paragraph 2, page 41 of the Workgroup Consultation "This conclusion is partly driven by the fact that the European Court of Justice takes a purposive approach to the interpretation of EU law (an approach which has in turn been adopted by the Courts of England and Wales when they consider compliance with EU law). The result of this is that the courts will look to the broader purpose and objectives of EU legislation in interpreting the meaning of the specific provisions. In particular, the recitals setting out the objectives of the Guidelines Regulation have weight and are relevant to interpreting the requirements of the G Charge Guidelines as a whole." [emphasis added]

[173] http://www2.nationalgrid.com/UK/Industry-information/Electricity-codes/CUSC/Modifications/CMP251/

[174] "Variations in charges faced by producers of electricity for access to the transmission system should not undermine the internal market. For this reason average charges for access to the network in Member States should be kept within a range which helps to ensure that the benefits of harmonisation are realised."

[175] See footnote 144, CMP261 FMR.

[176] "Action: GG asked NH and NJ to confirm British Gas's assumption in their CMP261 Code Administrator Consultation response to Question 1 about whether enforcement action has been taken. National Grid has confirmed back to GG that no enforcement action has been taken. NH was also able to confirm that no enforcement action was taken by Ofgem and no action was anticipated in the future. This action is complete."

Annex 14 – Emails provided by the Proposer

-----Original Message-----
From: Graham, Garth
Sent: 19 January 2015 09:27
To: Hynes, Patrick
Cc: '.Box.Cusc.Team'; [CUSC Panel members]
Subject: CMP224 - £/€ cap

Patrick,

Just wanted to enquire about the ongoing effects that the recent changes in the £/€ rate might have in terms of the €2.5 cap on GB Generator TNUoS.

Clearly CMP224 has now been implemented and should, via the agreed 7% 'bandwidth', address any variances in currency (as well as the other two variables needed for the €2.5 cap calculation, namely (i) the total level of generation output and (ii) the TO Allowed Revenues).

As per the CMP224 Modification we will be using the OBR forecast for the £/€ exchange rate from the Budget last March for the purposes of the forthcoming (2015/16) charging year TNUoS charges.

As I'm sure you appreciate, this OBR forecast (as set out, for example, in Table 4.1 of their Budget report* on page 92) is £/€ 1.22 for 2015/16.

However, as we are seeing the situation has changed (hence why we built in the7% 'bandwidth') and the £/€ rate stands at circa 1.31 as at Friday's close.

On the face of it this is a circa 7% variance between the OBR forecast and the current exchange rate. Clearly in isolation this may not be an issue given (a) that there are two other variables (items (i) and (ii) noted above) which may have gone in the 'opposite direction' such that they counter-act the £/€ variance and (b) we are only in the first month of the 12 month period[177].

However, absent of knowing what is happening with respect to those other two variables, it might be said that the £/€ variance 'wipes out' the 7% 'bandwidth' that we have built in via CMP224.

I was just wondering if there might be merit in National Grid perhaps providing an update to the CUSC Panel in due course on this matter if there is a possibility, over the course of the year, of the 7% 'bandwidth' not being sufficient to avoid the €2.5 cap being exceeded, especially given that the €2.5 cap applies for the calendar, rather than charging, year and we are applying two sets of Generator TNUoS charges over that period (namely those for 2014/15 from 1st January up to the 31st March (on a 27:73 basis) and those for 2015/16 from 1st April up to – for the purposes of the cap – 31st December 2015 (on a ~23:77 basis)).

Regards

Garth

*http://cdn.budgetresponsibility.org.uk/37839-OBR-Cm-8820-accessible-web-v2.pdf

[177] Note – prior to the Addleshaw Goddard advice of November 2015, for the CMP251 Workgroup, there was some uncertainty as to whether the measurement year (for the purposes of the Regulation) was a 'calendar year' (1st January 2016-31st December 2015) or 'charging year' (1st April 2015-31st March 2016). The correspondence etc., in January 2015 was on the basis that it was calendar year; i.e. the warnings on 19th and 30th January assumed that the measurement year had already started, and that (at that time) there was an exceedance (due to £/€ variances) in excess of the 'error margin' introduced into the CUSC by CMP224.

-----Original Message-----
From: Graham, Garth
Sent: 29 May 2015 13:48
To: 'Hynes, Patrick'
Cc: '.Box.Cusc.Team'; [CUSC Panel members]
Subject: RE: CMP224 - £/€ cap

Folks,

As per the discussion a few moments ago at the Panel - the email that I circulated back in January, when the £/€ rate was circa 1.31 - compared to circa 1.41 today.

Regards

Garth

Annex 15 – Email from the Authority

[Email sent from Donald Smith, Ofgem, the Authority representative on the CMP261 Workgroup to the Workgroup on Monday 8th August 2016 @ 16:58.]

All

We have sought advice on CMP261 from a leading junior barrister from Blackstone chambers. He advised us in a conference last Wednesday [3rd August 2016] as follows:

- We are not bound by the approach to constructing a compliant charge under CMP224
- The Regulation says you *must* exclude charges associated with physical assets required to connect in calculating the average charge.
- The Regulation requires us to look beyond the names we give charges and look instead at the nature of the underlying asset.
- Before we can work out whether there has been a breach of the regulation we need to make clear that we are applying the calculation correctly and excluding charges in respect of physical assets required to connect to the transmission system.
- CMP 224 was a legitimate and reasonable approach to constructing a compliant charge, but it did not set out the rules for how we calculate whether we are in fact compliant – that is in the Regulation.

This means that we need to look in more detail at local TNUoS charges to work out whether we should exclude some or all of these from the calculation of GB's average charge for 2015/16 before we make a decision on the Mod (which is all about compliance with the Regulation). We ask the work group to include this analysis in their report and deliberations.

Kind regards

Donald

[end]

Annex 16 – Email from the Authority

[Email sent from Donald Smith, Ofgem, the Authority representative on the CMP261 Workgroup to the Workgroup on Monday 17th August 2016 @ 16:48.]

Hi all

I've set out a list of what we think the examples that Damian's working on need to illustrate. I'm not sure that this will be do-able for next week's meeting and I expect the examples will warrant some face to face discussion with the workgroup. Could I suggest meeting on the 30th to discuss draft scenarios? (If that gives Damian sufficient time)

- What should the diagrams for different scenarios show?
    a. What exists pre connection request
    b. what's built
    c. who owns what assets
    d. who uses the assets
    e. how the assets are sized
    f. what assets are 'enabling' and what assets are 'wider' [different from wider v local charge]
    g. How the costs of different assets are recovered
        i. Generation now
        ii. Generation pre local charges
        iii. Demand

- What should the different scenarios should illustrate?
    h. Onshore and offshore connections
    i. New assets built/owned by the generator (including any different choices that generators can make in this respect)
    j. New assets paid for through connection charges
    k. New assets paid for through local that are for one specific generator
    l. New assets paid for through local that may be shared in future
    m. New assets paid for through local charges that will be shared
    n. Reinforcement of exiting local assets
    o. Reinforcement of existing MITS assets
    p. Differences between Scotland and E&W

Kind regards

Donald

[end]

Annex 17 – Authority Letter in relation to refunding customers (mentioned in Section 10)

ofgem
Making a positive difference
for energy consumers

To: All gas suppliers, and
other interested parties

Email: charlotte.friel@ofgem.gov.uk
Date: 12 August 2016

Dear colleagues,

Gas meter metric/imperial indicator charging error

A large supplier recently notified Ofgem of an issue they have uncovered that has resulted in a very small number of gas customers being incorrectly charged for their energy use. This supplier has done the right thing in coming forward promptly and taking decisive action to identify affected customers.

The issue is a result of a mismatch between the unit (metric or imperial) the meter is measuring gas consumption in, and the unit (metric or imperial) recorded in suppliers' back office systems. The mismatch leads to either a significant undercharge or significant overcharge to the customer for their gas consumption as a result of the conversion factor between imperial and metric measurements.

The cause of the issue has yet to be fully determined but we understand that human error and poor data flows between industry participants upon meter installation, exchange, and change of supplier are factors.

Identifying affected meters

The affected supplier has taken action to identify affected customers, and through Energy UK, notified other suppliers that they may be affected by the same issue. Energy UK members have committed to Ofgem to identify affected customers by 19 August 2016.

This letter serves to notify all suppliers of the issue and encourages all suppliers to coordinate with Energy UK (audrey.gallacher@energy-uk.org.uk) by 19 August 2016 to determine whether they are affected. Energy UK are willing to provide guidance to suppliers on checks that can be conducted to identify potentially affected meters for further analysis. Should you have concerns sharing data with

Energy UK, please contact Ofgem (charlotte.friel@ofgem.gov.uk) and we can assist in anonymising data.

Suppliers are individually responsible for identifying customers affected by this issue and providing redress, but collective, industry-led action is needed to determine the root cause of the problem and address it properly.

Redress for affected customers

Working with Energy UK, we are making sure suppliers take immediate and decisive action to identify affected customers. Our primary motivation is to ensure that consumers do not lose out and are quickly and fairly compensated for over-payments. We are also keen to ensure that customers who have been undercharged are protected and treated fairly when the issue is rectified.

Upon determining the full extent and impact of the issue, Ofgem will work with affected suppliers to agree a timetable for putting things right, including resolving all traceable cases of mischarged customers and preventing this issue from further impacting other customers. The affected supplier has adopted the following principles for conducting redress activities and we encourage all suppliers to follow suit:

For overcharged customers:

- Repayments include a payment for the historic overcharging as well as an appropriate interest payment.
- Repayments include an ex-gratia payment reflective of the detriment caused.

For undercharged customers:

- Repayment will not be sought from undercharged customers.
- An appropriate cushion will be provided for financially vulnerable customers to ease the transition to accurate bills.

Furthermore, we remind suppliers of their obligations under the Standards of Conduct[1] and expect all suppliers to adhere to the principle of treating customers fairly. This includes taking reasonable steps to ease the transition to accurate bills for undercharged customers. Suppliers must try hard to return all refunds owed to customers and should not profit from this metering data issue. After a reasonable period of time, suppliers will calculate the amount of credit they have been unable to return to affected customers and contribute an equivalent amount to a charity. There is no time limit to when a customer can be issued a refund resulting from this metering data issue.

You should respond to this letter - whether or not you are an Energy UK member - confirming to what extent you are affected by this issue and your proposed

[1] Standard condition 7B of the gas supply licence - Customer Objective and Standards of Conduct for non-domestic supply activities. Standard Condition 25C of the gas supply licence – Customer Objective and Standards of Conduct for supply activities.

The Office of Gas and Electricity Markets
9 Millbank London SW1P 3GE **Tel** 020 7901 7000 **Fax** 020 7901 7066 **www.ofgem.gov.uk**

approach to redress.[2] Your response should include how you are adhering to the principles set out in this letter. Please send your responses to charlotte.friel@ofgem.gov.uk by 26 August 2016.

We will follow-up by setting out any further detailed information we will need from suppliers to closely monitor progress and provide assurance that suppliers are meeting their commitments. We will consider further action if suppliers do not take appropriate steps to rectify the issue as a priority, or if we see evidence of serious failings to rectify this issue.

Yours faithfully,

Rob Salter-Church
Partner, Consumers and Competition

[2] This request to provide information is made pursuant to section 34 of the Gas Act 1986

The Office of Gas and Electricity Markets
9 Millbank London SW1P 3GE **Tel** 020 7901 7000 **Fax** 020 7901 7066 **www.ofgem.gov.uk**

The Original Proposal

Part 2 - The Statement of the Use of System Charging Methodology

Section 1 – The Statement of the Transmission Use of System Charging Methodology

14.14 Principles

14.14.1 Transmission Network Use of System charges reflect the cost of installing, operating and maintaining the transmission system for the Transmission Owner (TO) Activity function of the Transmission Businesses of each Transmission Licensee. These activities are undertaken to the standards prescribed by the Transmission Licences, to provide the capability to allow the flow of bulk transfers of power between connection sites and to provide transmission system security.

14.14.2 A Maximum Allowed Revenue (MAR) defined for these activities and those associated with pre-vesting connections is set by the Authority at the time of the Transmission Owners' price control review for the succeeding price control period. Transmission Network Use of System Charges are set to recover the Maximum Allowed Revenue as set by the Price Control (where necessary, allowing for any K_t adjustment for under or over recovery in a previous year net of the income recovered through pre-vesting connection charges).

14.14.3 The basis of charging to recover the allowed revenue is the Investment Cost Related Pricing (ICRP) methodology, which was initially introduced by The Company in 1993/94 for England and Wales. The principles and methods underlying the ICRP methodology were set out in the The Company document "**Transmission Use of System Charges Review: Proposed Investment Cost Related Pricing for Use of System (30 June 1992)"**.

14.14.4 In December 2003, The Company published the Initial Thoughts consultation for a GB methodology using the England and Wales methodology as the basis for consultation. The Initial Methodologies consultation published by The Company in May 2004 proposed two options for a GB charging methodology with a Final Methodologies consultation published in August 2004 detailing The Company's response to the Industry with a recommendation for the GB charging methodology. In December 2004, The Company published a Revised Proposals consultation in response to the Authority's invitation for further review on certain areas in The Company's recommended GB charging methodology.

14.14.5 In April 2004 The Company introduced a DC Loadflow (DCLF) ICRP based transport model for the England and Wales charging methodology. The DCLF model has been extended to incorporate Scottish network data with existing England and Wales network data to form the GB network in the model. In April 2005, the GB charging methodology implemented the following proposals:

i.) The application of multi-voltage circuit expansion factors with a forward-looking Expansion Constant that does not include substation costs in its derivation.

ii.) The application of locational security costs, by applying a multiplier to the Expansion Constant reflecting the difference in cost incurred on a secure network as opposed to an unsecured network.

iii.) The application of a de-minimus level demand charge of £0/kW for Half Hourly and £0/kWh for Non Half Hourly metered demand to avoid the introduction of negative demand tariffs.

iv.) The application of 132kV expansion factor on a Transmission Owner basis reflecting the regional variations in network upgrade plans.

v.) The application of a Transmission Network Use of System Revenue split between generation and demand where the proportion of the total revenue paid by generation, for the purposes of tariff setting for a charging year n, is x times the total revenue, where x is:

1. Whilst European Commission Regulation 838/2010 Part B paragraph 3 (or any subsequent regulation specifying such a limit on annual average transmission charge payable by generation) is in effect (a "Limiting Regulation") then:

$$x_n = \frac{(Cap_{EC} * (1 - y)) * GO}{MAR * ER}$$

Where;

Cap_{EC} = Upper limit of the range specified a Limiting Regulation

y = Error margin built in to adjust Cap_{EC} to account for difference in one year ahead forecast and outturn values for MAR and GO, based on previous years error at the time of calculating the error for charging year n

GO = Forecast GB Generation Output for generation liable for Transmission charges (i.e. energy injected into the transmission network in MWh) for charging year n

MAR = Forecast TO Maximum Allowed Revenue (£) for charging year n

ER = OBR Spring Forecast €/£ Exchange Rate in charging year n-1

2. Where there is no Limiting Regulation, then x for charging year n is set as the value of x used in the last charging year for which there was a Limiting Regulation.

vi.) The number of generation zones using the criteria outlined in paragraph 14.15.42 has been determined as 21.

vii.) The number of demand zones has been determined as 14, corresponding to the 14 GSP groups.

14.14.6 The underlying rationale behind Transmission Network Use of System charges is that efficient economic signals are provided to Users when services are priced to reflect the incremental costs of supplying them. Therefore, charges should reflect the impact that Users of the transmission system at different locations would have on the Transmission Owner's costs, if they were to increase or decrease their use of the respective systems. These costs are primarily defined as the investment costs in the transmission system, maintenance of the transmission system and maintaining a system capable of providing a secure bulk supply of energy.

The Transmission Licence requires The Company to operate the National Electricity Transmission System to specified standards. In addition The Company with other transmission licensees are required to plan and develop the National Electricity Transmission System to meet these standards. These requirements mean that the system must conform to a particular Security Standard and capital investment requirements are largely driven by the need to conform to both the deterministic and supporting cost benefit analysis aspects of this standard. It is this obligation, which provides the underlying rationale for the ICRP approach, i.e. for any changes in

generation and demand on the system, The Company must ensure that it satisfies the requirements of the Security Standard.

14.14.7 The Security Standard identifies requirements on the capacity of component sections of the system given the expected generation and demand at each node, such that demand can be met and generators' output over the course of a year (capped at their Transmission Entry Capacity, TEC) can be accommodated in the most economic and efficient manner. The derivation of the incremental investment costs at different points on the system is therefore determined against the requirements of the system both at the time of peak demand and across the remainder of the year. The Security Standard uses a Demand Security Criterion and an Economy Criterion to assess capacity requirements. The charging methodology therefore recognises both these elements in its rationale.

14.14.8 The Demand Security Criterion requires sufficient transmission system capacity such that peak demand can be met through generation sources as defined in the Security Standard, whilst the Economy Criterion requires sufficient transmission system capacity to accommodate all types of generation in order to meet varying levels of demand efficiently. The latter is achieved through a set of deterministic parameters that have been derived from a generic Cost Benefit Analysis (CBA) seeking to identify an appropriate balance between constraint costs and the costs of transmission reinforcements.

14.14.9 The TNUoS charging methodology seeks to reflect these arrangements through the use of dual backgrounds in the Transport Model, namely a Peak Security background representative of the Demand Security Criterion and a Year Round background representative of the Economy Criterion.

14.14.10 To recognise that various types of generation will have a different impact on incremental investment costs the charging methodology uses a generator's TEC, Peak Security flag, and Annual Load Factor (ALF) when determining Transmission Network Use of System charges relating to the Peak Security and Year Round backgrounds respectively. For the Year Round background the diversity of the plant mix (i.e the proportion of low carbon and carbon generation) in each charging zone is also taken into account.

14.14.11 In setting and reviewing these charges The Company has a number of further objectives. These are to:

- offer clarity of principles and transparency of the methodology;
- inform existing Users and potential new entrants with accurate and stable cost messages;
- charge on the basis of services provided and on the basis of incremental rather than average costs, and so promote the optimal use of and investment in the transmission system; and
- be implementable within practical cost parameters and time-scales.

14.14.12 Condition C13 of The Company's Transmission Licence governs the adjustment to Use of System charges for small generators. Under the condition, The Company is required to reduce TNUoS charges paid by eligible small generators by a designated sum, which will be determined by the Authority. The licence condition describes an adjustment to generator charges for eligible plant, and a consequential change to demand charges to recover any shortfall in revenue. The mechanism for recovery will ensure revenue neutrality over the lifetime of its operation although it does allow for effective under or over recovery within any year. For the avoidance of doubt, Condition C13 does not form part of the Use of System Charging Methodology.

14.14.13 The Company will typically calculate TNUoS tariffs annually, publishing final tariffs in respect of a Financial Year by the end of the preceding January. However The Company may update the tariffs part way through a Financial Year.

14.14.14 **Forecast and reconciliation of x in the Transmission Network Use of System Revenue Split between Generation and Demand ("the G:D Split") for the Charging year 2015/16**

In setting the G:D split, at paragraph 14.14.5(v), for charging year 2015/16, x has been calculated on a forecast of "GO" and "MAR" and "ER" was the OBR Spring 2014 Forecast €/£ Exchange Rate. Following Implementation of CMP261 it has been determined that there was a breach of Cap_{EC} in Charging Year 2015/16.

Following Implementation of CMP261 only, the Company shall recalculate the G:D Split for Charging Year 2015/16 in accordance with paragraph 14.14.5(v) using outturn data for terms GO and MAR and setting the values
Y: the Error margin shall be set to zero
ER: Exchange rate set to the mean average of the daily Exchange rates published within the Charging Year 2015/16 by the Bank of England

and:

i. Adjustment of Generator Charges: The Company shall, within 14 calendar days of the Implementation of CMP261, prepare and send to each User a statement showing the annual Generation Charges paid by that User in Charging Year 2015/16 against the Generation Charges payable with the adjusted G:D split.

The adjustment of the generator TNUoS tariff to remedy the breach of Cap_{EC} shall include a rebate in respect of the cancellation charges paid during Charging Year 2015/16 meaning that an amount of £119.5m shall be paid out to generator Users. In relation to any sum shown in this statement as being due to the User The Company shall therefore make a one off payment to the User of £1.66/KW.

ii. Where the Implementation of CMP261 is made in Charging Year T, the total amount refunded in Year T to Generators (in respect of Charging Year 2015/16) of £119.5m will be recovered from Demand Users only via twelve monthly debit invoices issued to all payers of Demand TNUoS charges in Year T+1 and T+2 using Demand Recovery Rates defined in 14.14.15. The KW or KWh demand recovery rate, for the invoices in T+1, will be calculated using the forecast of HH and NHH volumes respectively charged in the relevant Charging Year (T+1) based on standard Demand charging processes and published in line with charge setting timetable. This will be reconciled at the end of the relevant Charging Year (T+1) with any under or over recovery, for any reason, fed through to the new Demand recovery rates calculated using the forecast of HH and NHH volumes for the following Charging Year (T+2). Any further under or over recovery, for any reason, in respect of Charging Year T+2 HH and NHH volumes will be subject to the final Demand reconciliation process 'truing up' (for Charging Year T+2) in accordance with the standard process; i.e. this will, if appropriate, be a separate line item in the circa July T+3 Demand reconciliation statement issued to Demand TNUoS paying parties for the T+2 Charging Year.

14.14.15 **Demand Recovery Rates**

The total amount due to adjustment of generator charges will be recovered from Demand. The recovery amount:

$Dadj_{2015/16}$ = £119.5m

The rate applied to HH Demand, in order to adjust for the GD Split in Charging Year 2015/16, is calculated by:

$$DRadj_{2015/16} = \left(\frac{Dadj_{2015/16}}{\sum_{Di=1}^{n} D_{Di}}\right)$$

Where
$DRadj_{2015/16}$ = Rate applied to demand capacity for the Demand Recovery
D_{Di} = Total forecast metered triad demand for demand zone Di

The rate applied to NHH energy consumption, in order to adjust for the GD Split in Charging Year 2015/16 is calculated by:

$$ERadj_{2015/16} = \left(\frac{Dadj_{2015/16} - AHHD \times DRadj_{2015/16}}{ANHHC}\right) \times 100$$

Where
$ERadj_{2015/16}$ = Rate applied to energy consumption for the Demand Recovery in p/kWh
AHHD = The forecast half-hourly metered Triad Demand (kW)
ANHHC = The forecast non-half-hourly metered total energy consumption (KWh) for the period 16:00 hrs to 19:00 hrs inclusive (i.e. settlement periods 33 to 38) over the period the charge is applicable

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Part 2 - The Statement of the Use of System Charging Methodology

Section 1 – The Statement of the Transmission Use of System Charging Methodology

14.14 Principles

14.14.1 Transmission Network Use of System charges reflect the cost of installing, operating and maintaining the transmission system for the Transmission Owner (TO) Activity function of the Transmission Businesses of each Transmission Licensee. These activities are undertaken to the standards prescribed by the Transmission Licences, to provide the capability to allow the flow of bulk transfers of power between connection sites and to provide transmission system security.

14.14.2 A Maximum Allowed Revenue (MAR) defined for these activities and those associated with pre-vesting connections is set by the Authority at the time of the Transmission Owners' price control review for the succeeding price control period. Transmission Network Use of System Charges are set to recover the Maximum Allowed Revenue as set by the Price Control (where necessary, allowing for any K_t adjustment for under or over recovery in a previous year net of the income recovered through pre-vesting connection charges).

14.14.3 The basis of charging to recover the allowed revenue is the Investment Cost Related Pricing (ICRP) methodology, which was initially introduced by The Company in 1993/94 for England and Wales. The principles and methods underlying the ICRP methodology were set out in the The Company document "**Transmission Use of System Charges Review: Proposed Investment Cost Related Pricing for Use of System (30 June 1992)"**.

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iv.) The application of 132kV expansion factor on a Transmission Owner basis reflecting the regional variations in network upgrade plans.

v.) The application of a Transmission Network Use of System Revenue split between generation and demand where the proportion of the total revenue paid by generation, for the purposes of tariff setting for a charging year n, is x times the total revenue, where x is:

1. Whilst European Commission Regulation 838/2010 Part B paragraph 3 (or any subsequent regulation specifying such a limit on annual average

transmission charge payable by generation) is in effect (a "Limiting Regulation") then:

$$x_n = \frac{(Cap_{EC} * (1 - y)) * GO}{MAR * ER}$$

Where;

Cap_{EC} = Upper limit of the range specified a Limiting Regulation
y = Error margin built in to adjust Cap_{EC} to account for difference in one year ahead forecast and outturn values for MAR and GO, based on previous years error at the time of calculating the error for charging year n
GO = Forecast GB Generation Output for generation liable for Transmission charges (i.e. energy injected into the transmission network in MWh) for charging year n
MAR = Forecast TO Maximum Allowed Revenue (£) for charging year n
ER = OBR Spring Forecast €/£ Exchange Rate in charging year n-1

2. Where there is no Limiting Regulation, then x for charging year n is set as the value of x used in the last charging year for which there was a Limiting Regulation.

vi.) The number of generation zones using the criteria outlined in paragraph 14.15.42 has been determined as 21.

vii.) The number of demand zones has been determined as 14, corresponding to the 14 GSP groups.

14.14.6 The underlying rationale behind Transmission Network Use of System charges is that efficient economic signals are provided to Users when services are priced to reflect the incremental costs of supplying them. Therefore, charges should reflect the impact that Users of the transmission system at different locations would have on the Transmission Owner's costs, if they were to increase or decrease their use of the respective systems. These costs are primarily defined as the investment costs in the transmission system, maintenance of the transmission system and maintaining a system capable of providing a secure bulk supply of energy.

The Transmission Licence requires The Company to operate the National Electricity Transmission System to specified standards. In addition The Company with other transmission licensees are required to plan and develop the National Electricity Transmission System to meet these standards. These requirements mean that the system must conform to a particular Security Standard and capital investment requirements are largely driven by the need to conform to both the deterministic and supporting cost benefit analysis aspects of this standard. It is this obligation, which provides the underlying rationale for the ICRP approach, i.e. for any changes in generation and demand on the system, The Company must ensure that it satisfies the requirements of the Security Standard.

14.14.7 The Security Standard identifies requirements on the capacity of component sections of the system given the expected generation and demand at each node, such that demand can be met and generators' output over the course of a year (capped at their Transmission Entry Capacity, TEC) can be accommodated in the most economic and efficient manner. The derivation of the incremental investment costs at different points on the system is therefore determined against the requirements of the system both at the time of peak demand and across the remainder of the year. The Security Standard uses a Demand Security Criterion and an Economy Criterion to assess capacity requirements. The charging methodology therefore recognises both these elements in its rationale.

14.14.8 The Demand Security Criterion requires sufficient transmission system capacity such that peak demand can be met through generation sources as defined in the Security Standard, whilst the Economy Criterion requires sufficient transmission system capacity to accommodate all types of generation in order to meet varying levels of demand efficiently.

The latter is achieved through a set of deterministic parameters that have been derived from a generic Cost Benefit Analysis (CBA) seeking to identify an appropriate balance between constraint costs and the costs of transmission reinforcements.

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14.14.11 In setting and reviewing these charges The Company has a number of further objectives. These are to:

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14.14.12 Condition C13 of The Company's Transmission Licence governs the adjustment to Use of System charges for small generators. Under the condition, The Company is required to reduce TNUoS charges paid by eligible small generators by a designated sum, which will be determined by the Authority. The licence condition describes an adjustment to generator charges for eligible plant, and a consequential change to demand charges to recover any shortfall in revenue. The mechanism for recovery will ensure revenue neutrality over the lifetime of its operation although it does allow for effective under or over recovery within any year. For the avoidance of doubt, Condition C13 does not form part of the Use of System Charging Methodology.

14.14.13 The Company will typically calculate TNUoS tariffs annually, publishing final tariffs in respect of a Financial Year by the end of the preceding January. However The Company may update the tariffs part way through a Financial Year.

CMP261 Implementation

14.14.14 **Forecast and reconciliation of x in the Transmission Network Use of System Revenue Split between Generation and Demand ("the G:D Split") for the Charging Year 2015/16**

In setting the G:D split, at paragraph 14.14.5(v), for charging year 2015/16, x has been calculated on a forecast of "GO" and "MAR" and "ER" was the OBR Spring 2014 Forecast €/£ Exchange Rate. Following Implementation of CMP261 it has been determined that there was a breach of Cap_{EC} in Charging Year 2015/16.

Following Implementation of CMP261 only, the Company shall recalculate the G:D Split for Charging Year 2015/16 in accordance with paragraph 14.14.5(v) using outturn data for terms GO and MAR and setting the values
Y: the Error margin shall be set to zero
ER: Exchange rate set to the mean average of the daily Exchange rates published within the Charging Year 2015/16 by the Bank of England

and:

i. Adjustment of Generator Charges: The Company shall, within 14 calendar days of the Implementation of CMP261, prepare and send to each User a statement showing the annual Generation Charges paid by that User in charging year 2015/16 against the Generation Charges payable with the adjusted G:D split.

The adjustment of the generator TNUoS tariff to remedy the breach of Cap_{EC} shall include a rebate in respect of the cancellation charges paid during Charging Year 2015/16 meaning that an amount of £119.5m shall be paid to generator Users. In relation to any sum shown in this statement as being due to the User The Company shall therefore make a one off payment to the User of £1.66/KW.

ii. Where the Implementation of CMP261 is made in Charging Year T, the total amount refunded in Year T to Generators (in respect of Charging Year 2015/16) of £119.5m will be recovered from Demand Users only via twelve monthly debit invoices issued to all payers of Demand TNUoS charges in Year T+2 and T+3 using Demand Recovery Rates defined in 14.14.15. The KW or KWh demand recovery rate, for the invoices in T+2, will be calculated using the forecast of HH and NHH volumes respectively charged in the relevant Charging Year (T+2) based on standard Demand charging processes and published in line with charge setting timetable. This will be reconciled at the end of the relevant Charging Year (T+2) with any under or over recovery, for any reason, fed through to the new Demand recovery rates calculated using the forecast of HH and NHH volumes for the following Charging Year (T+3). Any further under or over recovery, for any reason, in respect of Charging Year T+3 HH and NHH volumes will be subject to the final Demand reconciliation process 'truing up' (for Charging Year T+3) in accordance with the standard process; i.e. this will, if appropriate, be a separate line item in the circa July T+4 Demand reconciliation statement issued to Demand TNUoS paying parties for the T+3 Charging Year.

14.14.16 **Demand Recovery Rates**

The total amount due to adjustment of generator charges will be recovered from Demand. The recovery amount is:

$Dadj_{2015/16}$ = £119.5m

The rate applied to HH Demand, in order to adjust for the GD Split in Charging Year 2015/16, is calculated by:

$$DRadj_{2015/16} = \left(\frac{Dadj_{2015/16}}{\sum_{Di=1}^{n} D_{Di}}\right)$$

Where
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D_{DI}= Total forecast metered triad demand for demand zone Di

The rate applied to NHH energy consumption, in order to adjust for the GD Split in Charging Year 2015/16 is calculated by:

$$ERadj_{2015/16} = \left(\frac{Dadj_{2015/16} - AHHD \times DRadj_{2015/16}}{ANHHC}\right) \times 100$$

Where
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AHHD = The forecast half-hourly metered Triad Demand (kW)
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Part 2 - The Statement of the Use of System Charging Methodology

Section 1 – The Statement of the Transmission Use of System Charging Methodology

14.14 Principles

14.14.1 Transmission Network Use of System charges reflect the cost of installing, operating and maintaining the transmission system for the Transmission Owner (TO) Activity function of the Transmission Businesses of each Transmission Licensee. These activities are undertaken to the standards prescribed by the Transmission Licences, to provide the capability to allow the flow of bulk transfers of power between connection sites and to provide transmission system security.

14.14.2 A Maximum Allowed Revenue (MAR) defined for these activities and those associated with pre-vesting connections is set by the Authority at the time of the Transmission Owners' price control review for the succeeding price control period. Transmission Network Use of System Charges are set to recover the Maximum Allowed Revenue as set by the Price Control (where necessary, allowing for any K_t adjustment for under or over recovery in a previous year net of the income recovered through pre-vesting connection charges).

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CMP261 Implementation

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Following Implementation of CMP261 only, the Company shall recalculate the G:D Split for Charging year 2015/16 in accordance with paragraph 14.14.5(v) using outturn data for terms GO and MAR and setting the values
Y: the Error margin shall be set to zero
ER: Exchange rate set to the mean average of the daily Exchange rates published within the Charging Year 2015/16 by the Bank of England

and:

i. Adjustment of Generator Charges: The Company shall, within 14 calendar days of the Implementation of CMP261, prepare and send to each User a statement showing the annual Generation Charges paid by that User in Charging Year 2015/16 against the Generation Charges payable with the adjusted G:D split.

The adjustment of the generator TNUoS tariff to remedy the breach of Cap_{EC} shall exclude a rebate in respect of the cancellation charges paid during Charging Year 2015/16 meaning that an amount of £101.2m shall be paid to generator Users. In relation to any sum shown in this statement as being due to the User The Company shall therefore make a one off payment to the User of £1.45/KW being the amount payable to those holding TEC in Charging Year 2015/16 and excluding any capacity relating to Termination Charges.

The Adjustment of Generator Charges shall include the payment to Generator Users of interest, calculated at base rate +2% or such other level, if appropriate, set by Ofgem and paid by the party or parties determined by Ofgem, if appropriate, in due course. Interest shall be calculated from 1st April 2016 to the date 14 calendar days after the Implementation Date of CUSC Modification Proposal 261. The total amount of interest payments made to Generators shall be recovered through the Demand Recovery Rates.

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ii. Where the Implementation of CMP261 is made in Charging Year T, the total amount refunded in Year T to Generators (in respect of Charging Year 2015/16) of £101.2m plus interest rebated will be recovered from Demand Users only via twelve monthly debit invoices issued to all payers of Demand TNUoS charges in Year T+1 and T+2 using Demand Recovery Rates defined in 14.14.15. The KW or KWh demand recovery rate, for the invoices in T+1, will be calculated using the forecast of HH and NHH volumes respectively charged in the relevant Charging Year (T+1) based on standard Demand charging processes and published in line with charge setting timetable. This will be reconciled at the end of the relevant Charging Year (T+1) with any under or over recovery, for any reason, fed through to the new Demand recovery rates calculated using the forecast of HH and NHH volumes for the following Charging Year (T+2). Any further under or over recovery, for any reason, in respect of Charging Year T+2 HH and NHH volumes will be subject to the final Demand reconciliation process 'truing up' (for Charging Year T+2) in accordance with the standard process; i.e. this will, if appropriate, be a separate line item in the circa July T+3 Demand reconciliation statement issued to Demand TNUoS paying parties for the T+2 Charging Year.

14.14.15 **Demand Recovery Rates**

The total amount due to adjustment of generator charges will be recovered from Demand. The recovery amount:

$Dadj_{2015/16} = Gadj_{2015/16}$

Where

$Gadj_{2015/16}$ = The total amount due to users described in 14.14.14 i.e. £101.2m plus interest paid

The rate applied to HH Demand, in order to adjust for the GD Split in Charging Year 2015/16, is calculated by:

$$DRadj_{2015/16} = \left(\frac{Dadj_{2015/16}}{\sum_{Di=1}^{n} D_{Di}}\right)$$

Where

$DRadj_{2015/16}$ = Rate applied to demand capacity for the Demand Recovery

D_{Di}= Total forecast metered triad demand for demand zone Di

The rate applied to NHH energy consumption, in order to adjust for the GD Split in Charging Year 2015/16 is calculated by:

$$ERadj_{2015/16} = \left(\frac{Dadj_{2015/16} - AHHD \times DRadj_{2015/16}}{ANHHC}\right) \times 100$$

Where

$ERadj_{2015/16}$ = Rate applied to energy consumption for the Demand Recovery in p/kWh
AHHD = The forecast half-hourly metered Triad Demand (kW)
ANHHC = The forecast non-half-hourly metered total energy consumption (KWh) for the period 16:00 hrs to 19:00 hrs inclusive (i.e. settlement periods 33 to 38) over the period the charge is applicable

WACM3

Part 2 - The Statement of the Use of System Charging Methodology

Section 1 – The Statement of the Transmission Use of System Charging Methodology

14.14 Principles

14.14.1 Transmission Network Use of System charges reflect the cost of installing, operating and maintaining the transmission system for the Transmission Owner (TO) Activity function of the Transmission Businesses of each Transmission Licensee. These activities are undertaken to the standards prescribed by the Transmission Licences, to provide the capability to allow the flow of bulk transfers of power between connection sites and to provide transmission system security.

14.14.2 A Maximum Allowed Revenue (MAR) defined for these activities and those associated with pre-vesting connections is set by the Authority at the time of the Transmission Owners' price control review for the succeeding price control period. Transmission Network Use of System Charges are set to recover the Maximum Allowed Revenue as set by the Price Control (where necessary, allowing for any K_t adjustment for under or over recovery in a previous year net of the income recovered through pre-vesting connection charges).

14.14.3 The basis of charging to recover the allowed revenue is the Investment Cost Related Pricing (ICRP) methodology, which was initially introduced by The Company in 1993/94 for England and Wales. The principles and methods underlying the ICRP methodology were set out in the The Company document "**Transmission Use of System Charges Review: Proposed Investment Cost Related Pricing for Use of System (30 June 1992)"**.

14.14.4 In December 2003, The Company published the Initial Thoughts consultation for a GB methodology using the England and Wales methodology as the basis for consultation. The Initial Methodologies consultation published by The Company in May 2004 proposed two options for a GB charging methodology with a Final Methodologies consultation published in August 2004 detailing The Company's response to the Industry with a recommendation for the GB charging methodology. In December 2004, The Company published a Revised Proposals consultation in response to the Authority's invitation for further review on certain areas in The Company's recommended GB charging methodology.

14.14.5 In April 2004 The Company introduced a DC Loadflow (DCLF) ICRP based transport model for the England and Wales charging methodology. The DCLF model has been extended to incorporate Scottish network data with existing England and Wales network data to form the GB network in the model. In April 2005, the GB charging methodology implemented the following proposals:

i.) The application of multi-voltage circuit expansion factors with a forward-looking Expansion Constant that does not include substation costs in its derivation.

ii.) The application of locational security costs, by applying a multiplier to the Expansion Constant reflecting the difference in cost incurred on a secure network as opposed to an unsecured network.

iii.) The application of a de-minimus level demand charge of £0/kW for Half Hourly and £0/kWh for Non Half Hourly metered demand to avoid the introduction of negative demand tariffs.

iv.) The application of 132kV expansion factor on a Transmission Owner basis reflecting the regional variations in network upgrade plans.

v.) The application of a Transmission Network Use of System Revenue split between generation and demand where the proportion of the total revenue paid by generation, for the purposes of tariff setting for a charging year n, is x times the total revenue, where x is:

1. Whilst European Commission Regulation 838/2010 Part B paragraph 3 (or any subsequent regulation specifying such a limit on annual average transmission charge payable by generation) is in effect (a "Limiting Regulation") then:

$$x_n = \frac{(Cap_{EC} * (1 - y)) * GO}{MAR * ER}$$

Where;

Cap_{EC} = Upper limit of the range specified a Limiting Regulation
y = Error margin built in to adjust Cap_{EC} to account for difference in one year ahead forecast and outturn values for MAR and GO, based on previous years error at the time of calculating the error for charging year n
GO = Forecast GB Generation Output for generation liable for Transmission charges (i.e. energy injected into the transmission network in MWh) for charging year n
MAR = Forecast TO Maximum Allowed Revenue (£) for charging year n
ER = OBR Spring Forecast €/£ Exchange Rate in charging year n-1

2. Where there is no Limiting Regulation, then x for charging year n is set as the value of x used in the last charging year for which there was a Limiting Regulation.

v.) The number of generation zones using the criteria outlined in paragraph 14.15.42 has been determined as 21.

vi.) The number of demand zones has been determined as 14, corresponding to the 14 GSP groups.

14.14.6 The underlying rationale behind Transmission Network Use of System charges is that efficient economic signals are provided to Users when services are priced to reflect the incremental costs of supplying them. Therefore, charges should reflect the impact that Users of the transmission system at different locations would have on the Transmission Owner's costs, if they were to increase or decrease their use of the respective systems. These costs are primarily defined as the investment costs in the transmission system, maintenance of the transmission system and maintaining a system capable of providing a secure bulk supply of energy.

The Transmission Licence requires The Company to operate the National Electricity Transmission System to specified standards. In addition The Company with other transmission licensees are required to plan and develop the National Electricity Transmission System to meet these standards. These requirements mean that the system must conform to a particular Security Standard and capital investment requirements are largely driven by the need to conform to both the deterministic and supporting cost benefit analysis aspects of this standard. It is this obligation, which provides the underlying rationale for the ICRP approach, i.e. for any changes in generation and demand on the system, The Company must ensure that it satisfies the requirements of the Security Standard.

14.14.7 The Security Standard identifies requirements on the capacity of component sections of the system given the expected generation and demand at each node, such that demand can be met and generators' output over the course of a year

(capped at their Transmission Entry Capacity, TEC) can be accommodated in the most economic and efficient manner. The derivation of the incremental investment costs at different points on the system is therefore determined against the requirements of the system both at the time of peak demand and across the remainder of the year. The Security Standard uses a Demand Security Criterion and an Economy Criterion to assess capacity requirements. The charging methodology therefore recognises both these elements in its rationale.

14.14.8 The Demand Security Criterion requires sufficient transmission system capacity such that peak demand can be met through generation sources as defined in the Security Standard, whilst the Economy Criterion requires sufficient transmission system capacity to accommodate all types of generation in order to meet varying levels of demand efficiently. The latter is achieved through a set of deterministic parameters that have been derived from a generic Cost Benefit Analysis (CBA) seeking to identify an appropriate balance between constraint costs and the costs of transmission reinforcements.

14.14.9 The TNUoS charging methodology seeks to reflect these arrangements through the use of dual backgrounds in the Transport Model, namely a Peak Security background representative of the Demand Security Criterion and a Year Round background representative of the Economy Criterion.

14.14.10 To recognise that various types of generation will have a different impact on incremental investment costs the charging methodology uses a generator's TEC, Peak Security flag, and Annual Load Factor (ALF) when determining Transmission Network Use of System charges relating to the Peak Security and Year Round backgrounds respectively. For the Year Round background the diversity of the plant mix (i.e the proportion of low carbon and carbon generation) in each charging zone is also taken into account.

14.14.11 In setting and reviewing these charges The Company has a number of further objectives. These are to:

- offer clarity of principles and transparency of the methodology;
- inform existing Users and potential new entrants with accurate and stable cost messages;
- charge on the basis of services provided and on the basis of incremental rather than average costs, and so promote the optimal use of and investment in the transmission system; and
- be implementable within practical cost parameters and time-scales.

14.14.12 Condition C13 of The Company's Transmission Licence governs the adjustment to Use of System charges for small generators. Under the condition, The Company is required to reduce TNUoS charges paid by eligible small generators by a designated sum, which will be determined by the Authority. The licence condition describes an adjustment to generator charges for eligible plant, and a consequential change to demand charges to recover any shortfall in revenue. The mechanism for recovery will ensure revenue neutrality over the lifetime of its operation although it does allow for effective under or over recovery within any year. For the avoidance of doubt, Condition C13 does not form part of the Use of System Charging Methodology.

14.14.13 The Company will typically calculate TNUoS tariffs annually, publishing final tariffs in respect of a Financial Year by the end of the preceding January. However The Company may update the tariffs part way through a Financial Year.

CMP261 Implementation

14.14.14 **Forecast and reconciliation of x in the Transmission Network Use of System Revenue Split between Generation and Demand ("the G:D Split") for the Charging year 2015/16**

In setting the G:D split, at paragraph 14.14.5(v), for charging year 2015/16, x was calculated on a forecast of "GO" and "MAR" and "ER" was the OBR Spring Forecast €/£ Exchange Rate. Following Implementation of CMP261 it has been determined that there was a breach of Cap_{EC} in Charging Year 2015/16.

Following Implementation of CMP261 only, the Company shall recalculate the G:D Split for the Charging Year 2015/16 in accordance with paragraph 14.14.5(v) using outturn data for terms GO and MAR and setting the values
Y: the Error margin shall be set to zero
ER: Exchange rate set to the mean average of the daily Exchange rates published within the Charging Year 2015/16 by the Bank of England

and The Company shall notify market participants of adjustments to generator and demand TNUoS tariffs with the TNUoS forecast and charge setting for Year T+2 (where the implementation of CMP261 is in Charging Year T).

The adjustment of the generator TNUoS tariff to remedy the breach of Cap_{EC} shall include a rebate in respect of the Termination Charges paid during Charging Year 2015/16 meaning that a recovery amount of £119.5m shall be incorporated into Charging Year T+2 generator and demand TNUoS tariffs.

1. **The Residual Tariff**

14.15.132 As a result of the factors above, in order to ensure adequate revenue recovery, a constant non-locational **Residual Tariff** for generation and demand is calculated, which includes infrastructure substation asset costs. It is added to the initial transport tariffs for both Peak Security and Year Round backgrounds so that the correct generation / demand revenue split is maintained and the total revenue recovery is achieved.

$$RT_D = \frac{(p \times TRR) - ITRR_{DPS} - ITRR_{DYR}}{\sum_{Di=1}^{14} D_{Di}}$$

$$RT_G = \frac{[(1-p) \times TRR] - ITRR_{GPS} - ITRR_{GYRNS} - ITRR_{GYRS} - LCRR_G}{\sum_{Gi=1}^{n} G_{Gi}}$$

Where

RT	=	Residual Tariff (£/MW)
p	=	Proportion of revenue to be recovered from demand

14.15.133 For charging year T+2 only, the Demand and Generation Residual Tariff will be set as follows:

$$RT_D = \frac{(p \times TRR) + GDSadj_{2015/16} - ITRR_{DPS} - ITRR_{DYR}}{\sum_{Di=1}^{14} D_{Di}}$$

$$RT_G = \frac{[(1-p) \times TRR] - GDSadj_{2015/16} - ITRR_{GPS} - ITRR_{GYRNS} - ITRR_{GYRS} - LCRR_G}{\sum_{Gi=1}^{G} G_{Gi}}$$

Where

RT	=	Residual Tariff (£/MW)

p	=	Proportion of revenue to be recovered from demand
$GDSadj_{2015/16}$	=	The under recovery which relates to the G:D Split adjustment to ensure compliance with European Regulation 838/2010 in charging year 2015/16, the recovery amount of £119.5m as specified in 14.14.14.