



Direct Dial: 020-7901-7355

14 June 2002

The National Grid Company, CUSC Signatories and
Other Interested Parties

Your Ref: CAP006
Our Ref: IND/COD/CUSC/CAP006

Dear Colleague,

Amendment to the Connection and Use of System Code (“CUSC”) - Decision and Notice in relation to Proposed Amendment CAP006: “Non-Discrimination”.

The Gas and Electricity Markets Authority (the “Authority”¹) has carefully considered the issues raised in the Amendment Report² in respect of Proposed Amendment CAP006 “Non-Discrimination”.

The National Grid Company plc (“NGC”) recommended to the Authority that:

- (i) Proposed Amendment CAP006 be rejected;
- (ii) Alternative Amendment (A), as developed by the Governance Amendments Working Group, be rejected; and
- (iii) Alternative Amendment (B), as proposed in response to NGC’s wider consultation, be approved and implemented with effect from 10 days after the Authority’s decision.

The Authority has decided not to direct a modification to the CUSC.

This letter explains the background to Proposed Amendment CAP006, as set out in the Amendment Report, and sets out the Authority’s reasons for its decision.

¹ Ofgem is the office of the Authority. The terms “Ofgem” and “the Authority” are used interchangeably in this letter.

² CAP006 Amendment Report dated 9 May 2002.

Background

Under Section 8 of the CUSC (CUSC Amendment) there is no requirement as part of the Amendment Process to include an assessment or evaluation of whether a Proposed Amendment unfairly discriminates against particular CUSC Parties.

The Proposer stated that Proposed Amendment CAP006 would enable proper evaluation of Proposed Amendments and would therefore better facilitate achievement of the Applicable CUSC Objectives³ in that it would facilitate effective competition in generation and supply of electricity and would facilitate the efficient discharge by NGC of its obligations. The Proposer also considered that the Proposed Amendment would bring the CUSC into line with the best regulatory practice of carrying out an assessment of the direct and indirect implications of proposed changes on the equal treatment of CUSC Parties. In addition to this the Proposer asserted that the Proposed Amendment would improve existing practice and increase confidence in the CUSC and would help safeguard against undue discrimination or undue preference.

Proposed Amendment CAP006 was raised by British Energy Generation Ltd on 31 October 2001 and was submitted for consideration at the CUSC Amendments Panel Meeting on 9 November 2001. At the meeting the Panel determined that a Working Group should be established to consider the Proposed Amendment. The Governance Amendments Working Group was established to evaluate Proposed Amendment CAP006. The Group was unable to reach an agreement as to whether the Proposed Amendment better facilitated achievement of the Applicable CUSC Objectives. The Group formulated Alternative Amendment (A) which it considered better facilitated achievement of the Applicable CUSC Objectives as compared with the Proposed Amendment. The Working Group report was submitted for consideration at the Panel Meeting on 22 February 2002. The Panel endorsed the Working Group report and determined that the Proposed Amendment and Alternative Amendment (A) should proceed to wider consultation by NGC. A consultation paper was issued on 28 February 2002 with responses invited by 28 March 2002. On 27 March 2002 an extension to the timetable in respect of Proposed Amendment CAP006 was requested. The request was made to enable Amendments Panel Members to view the responses made during consultation before providing their views to be included in the Amendment Report. The Authority did not object to the request to extend the timetable and the final Amendment Report was submitted to the Authority on 9 May 2002.

³ The Applicable CUSC Objectives are contained in Standard Condition C7F of the licence to transmit electricity treated as granted to NGC under Section 6 of the Electricity Act 1989 as amended (the "Transmission Licence") and are:

- (a) the efficient discharge by the licensee of the obligations imposed upon it under the Act and by this licence; and
- (b) facilitating effective competition in the generation and supply of electricity, and (so far as consistent therewith) facilitating such competition in the sale, distribution and purchase of electricity.

The Proposed Amendment

Proposed Amendment CAP006 seeks the inclusion in an Amendment Proposal of a statement by the Proposer to the effect that the Amendment Proposal does not unduly discriminate against any one or any group of persons or class or classes of persons. In addition the Proposed Amendment seeks to include a requirement in the terms of reference of a Working Group to the effect that the Group evaluate a Proposed Amendment to ensure that it does not unduly discriminate against any one or any group of persons or class or classes of persons. The Proposed Amendment also seeks the inclusion in an Amendment Report of an assessment of whether a Proposed Amendment (or an Alternative Amendment) unduly discriminates against any one or any group of persons or class or classes of persons. Finally the Proposed Amendment seeks the inclusion of a requirement to the effect that the Authority would be unable to approve a Proposed Amendment that it determined unduly discriminated against any one or any group of persons or class or classes of persons.

Alternative Amendments (A) and (B)

The majority of the members of the Governance Amendments Working Group supported the principle of including non-discrimination as an explicit requirement in the CUSC. The Group members also agreed that changes to the CUSC should not unduly discriminate against any particular CUSC Party or classes of CUSC Party. Some Group members felt that the Proposed Amendment would reinforce the intent of the Applicable CUSC Objectives by explicitly addressing the issue of non-discrimination in the Amendment Process.

However other members of the Group did not believe that an explicit requirement for non-discrimination in the CUSC would better facilitate achievement of the Applicable CUSC Objectives. It was noted that issues of discrimination were for the Authority to determine upon and that the Competition Act could be used to determine discrimination and therefore it may not better facilitate achievement of the Applicable CUSC Objectives to include the requirement in the CUSC.

The Group members noted that Proposed Amendment CAP006 sought to include a new obligation on the Authority in its consideration of Proposed Amendments, and it was further noted that it might not be possible or appropriate to implement such an obligation in the CUSC as the Authority has its own statutory obligations which it is required to meet.

The Governance Amendments Working Group formulated Alternative Amendment (A) which the Group believed better facilitated achievement of the Applicable CUSC Objectives as compared with the Proposed Amendment. The Group considered that Alternative Amendment (A) followed the intent of Proposed Amendment CAP006 but rather than requiring an absolute value judgement be made as to the presence of undue discrimination, Alternative Amendment (A) allows for the provision of information for the identification of the impact of a Proposed Amendment on all Parties (“winners” and “losers”).

Alternative Amendment (B) was proposed during NGC's wider consultation and is identical to Alternative Amendment (A) in its intent, but incorporates a textual change in order to increase the clarity of the proposed legal text.

Alternative Amendments (A) and (B) seek the inclusion of a provision in an Amendment Proposal for a statement by the Proposer on the likely impacts on, and the implications for, CUSC Parties or classes of CUSC Parties in general, of the Amendment Proposal. In addition Alternative Amendments (A) and (B) seek the inclusion of a provision in the terms of reference of a Working Group to the effect that the Group evaluate a Proposed Amendment to identify the likely impacts on, and the implications for, CUSC Parties or classes of CUSC Parties in general, of the Proposed Amendment. Finally Alternative Amendments (A) and (B) seek the inclusion in an Amendment Report of a provision for an assessment of the likely impacts on, and the implications for, CUSC Parties or classes of CUSC Parties in general, of the Proposed Amendment.

NGC issued a consultation paper on 28 February 2002 for views from CUSC Parties and interested parties.

Respondents' views

NGC received seven responses to the consultation in respect of Proposed Amendment CAP006, of which five were in favour of Alternative Amendment (A), one in favour of both the Proposed Amendment and Alternative Amendment (A), and one opposed to both the Proposed Amendment and Alternative Amendment (A).

The majority of respondents supported the principle of Proposed Amendment CAP006 that consideration should be given to the impact of Proposed Amendments on Parties. However, many respondents agreed that the Proposed Amendment as drafted placed a rigid requirement on a process that is not defined and therefore it would not benefit the effectiveness or efficiency of the Amendment Process.

Two respondents stated that the CUSC should contain a similar clause to the BSC that details that the Code should not discriminate between classes of Parties⁴.

In support of Alternative Amendment (A), one respondent identified that a Proposer might feel limited if it was required to consider issues of discrimination before submitting an Amendment Proposal.

⁴ Section B.1.2 of the Balancing and Settlement Code describes the BSC Panel's objectives. Paragraph B.1.2.1(c) states one of these objectives as "that the code is given effect without undue discrimination between Parties or classes of Party".

Two respondents considered that Alternative Amendment (A), whilst an improvement on the Proposed Amendment, did not explicitly provide for the principle of non-discrimination to be addressed within the CUSC and questioned whether Alternative Amendment (A) added anything to the requirements when the regulatory regime is considered in its entirety.

One respondent considered that issues of non-discrimination were already included in the statutory obligations of the Authority. However this view was countered by another respondent who felt that the principle should be included at the CUSC level to ensure that Parties raising Amendment Proposals gave due consideration to the impact of the proposal on other CUSC Parties.

One respondent raised a concern regarding the legal text proposed for Alternative Amendment (A). NGC recognised that there was some similarity in the wording of paragraphs 8.20.2(l) and 8.20.2(h) of the proposed legal text and that it would be possible to further rationalise the text to reflect this.

NGC received two responses following the publication of the draft Amendment Report. One respondent reiterated its concern regarding the legal text proposed for Alternative Amendment (A). NGC changed the proposed legal text of Alternative Amendment (A) to reflect this concern and Alternative Amendment (B) was included in a second draft of the Amendment Report.

NGC received one response following the publication of the second draft of the Amendment Report in which the respondent expressed support for Alternative Amendment (B).

The respondents' views are summarised and contained in the Amendment Report in respect of Proposed Amendment CAP006.

Amendments Panel Members' views

It was the opinion of those Amendments Panel Members expressing a view that Alternative Amendment (B), as set out in the Amendment Report, should be approved and implemented with effect from 10 days after the Authority's decision.

NGC's recommendation

NGC recommended that the Authority should not approve Proposed Amendment CAP006. NGC considered that including a provision for non-discrimination in the CUSC would be ambiguous in its requirements and therefore would not better facilitate achievement of the Applicable CUSC Objectives. In addition NGC considered that issues of non-discrimination should be for the Authority to determine.

NGC recommended that the Authority approve Alternative Amendment (B) and that if approved Alternative Amendment (B) be implemented with effect from 10 days after the

Authority's decision. NGC considered that Alternative Amendment (B) followed the intent of Proposed Amendment CAP006, but rather than requiring an absolute value judgement be made as to the presence of undue discrimination, Alternative Amendment (B) allows for the provision of information for the identification of the impact of a Proposed Amendment on all Parties ("winners" and "losers") and therefore better facilitated achievement of the Applicable CUSC Objectives as compared with Alternative Amendment (A) and Proposed Amendment CAP006.

Ofgem's view

Ofgem considers, having had regard to its statutory duties, that Proposed Amendment CAP006 and Alternative Amendments (A) and (B), as set out in the Amendment Report, do not better facilitate achievement of the Applicable CUSC Objectives.

Ofgem considers that the provision of information in respect of the likely impacts on, and the implications for, CUSC Parties or classes of CUSC Parties in general, of a Proposed Amendment or Alternative Amendment is already addressed in the requirements relating to an Amendment Report contained in paragraph 8.20.2 of the CUSC.

In order to satisfy the provisions of sub-paragraphs 8.20.2(d) and (e) of the CUSC, by demonstrating how a Proposed Amendment or Alternative Amendment will better facilitate achievement of the Applicable CUSC Objectives, the Proposer, the Working Group and NGC have to identify the impacts on CUSC Parties in general. It is unlikely that a CUSC Party opposed to a Proposed Amendment or Alternative Amendment would fail to draw attention to those elements of the proposal that the CUSC Party felt unduly discriminated against it, or those elements that the CUSC Party felt unduly preferred another CUSC Party. Ofgem accepts that, where a particular CUSC Party considers that a Proposed Amendment or Alternative Amendment will be to its benefit, it is unlikely to volunteer such information or to consider that such a benefit is "undue". However, there is no power at present within CUSC to require the provision of such information and it would, in any event, seem inappropriate for it to be provided to NGC or to its competitors.

It is open to any CUSC Party at the Working Group stage or in response to NGC's wider consultation to put forward the likely impacts on, and the implications for, CUSC Parties or classes of CUSC Parties in general, of a Proposed Amendment or Alternative Amendment. It is also open to any CUSC Party at the Working Group stage or in response to NGC's wider consultation to provide an assessment or evaluation of whether a Proposed Amendment or Alternative Amendment would unduly discriminate against or unduly prefer any one or any group of persons or class of persons. Such responses will be attached to the Amendment Report, be publicly available, and will inform Ofgem's decision on the matter.

It is important for the effective operation of the Amendment Process that those CUSC Parties that may be affected by a Proposed Amendment, particularly if adversely, make their views clear both for the benefit of other Parties and to enable the Authority to make an informed

decision. Where a CUSC Party considers that such views may be relevant, but would be commercially confidential, Ofgem would be prepared to receive a response direct in support of the public response to NGC's wider consultation. However, where the response includes assumptions that are untested by the challenge of others, Ofgem will need to determine the weight that can be allotted to it.

Ofgem therefore considers that, where non-discrimination issues may be relevant, there is already scope, within the existing provisions of the CUSC, for concerned Parties both to challenge a Proposed Amendment on such grounds and to provide information to support their case.

The Authority's Decision

The Authority has therefore decided not to direct that Proposed Amendment CAP006 or Alternative Amendments (A) or (B), as set out in the Amendment Report, should be made and implemented.

If you have any queries in relation to the issues raised in this letter, please feel free to contact me on the above number.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'A. N. Simpson', written over a horizontal line.

Nick Simpson
Director of Industry Code Development

Signed on behalf of the Authority and authorised for that purpose by the Authority