

Minutes and Actions Arising from Meeting No.96 Held on 03 April 2009

Present:

Mark Ripley	MR	Panel Chair
David Smith	DS	Secretary
Hedd Roberts	HR	Panel Member (National Grid)
Paul Jones	PJ	Panel Member (Users Member)
Paul Mott	PM	Panel Member (Users Member) via teleconference
Garth Graham	GG	Panel Member (Users Member)
Bob Brown	BB	Panel Member (Users Member)
Barbara Vest	BV	Panel Member (Users Member)
Tony Diccico	TD	Panel Member (Users Member)
Simon Lord	SL	Panel Member (Users Member)
Dave Wilkerson	DW	Alternate Panel Member (Users Member)
Hugh Conway	HC	National Consumer Council
Mark Feather	MF	Ofgem Representative
Dipen Gadhia	DG	Ofgem Observer

In Attendance

Kathryn Coffin	KC	Elexon
Mark Duffield (part meeting)	MD	National Grid
Sarah Hall (part meeting)	SH	National Grid

Observers

Peter Bolitho	PB	E.On
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1 Introductions/Apologies for Absence

1898. Apologies were received from Alison Kay, Bali Virk and Emma Carr.

2 Minutes of previous meetings

1899. It was agreed to send a final draft of the minutes, incorporating latest comments, of the Panel meetings held on 27th February 2009, 23rd March 2009 and 30th March 2009 and then seek comments from Panel members via email for approval at the 24th April 2009 Panel meeting.

3 Review of Actions

1900. GG noted two additional actions appeared not to have been included in the review. **Minute 1816** – request to circulate National Grid’s response to Ofgem’s letter of 17th February, which is now **complete**. **Minute 1754** – HR requested to consider provision of further pro-rata tables to allow parties to understand the potential impact of CAP166 WGAA3, this action is still **outstanding**.

4 New Amendment Proposals

1879. CAP172 Capacity Pricing Mechanism was proposed by National Grid, with a view to requesting urgent status from the Authority.
1880. PJ highlighted Ofgem’s letter of 2nd April 2009 to the CUSC Panel and specifically the request to provide full written reasons for the decision taken at the 30th March 2009 Panel meeting to reject CAP171 (rejected by the Panel under paragraph 8.15.4 (a) of the CUSC on 30 March 2009). PJ felt such reasons are available, in writing, via the minutes of the Panel meeting.
1881. MD, representing the proposer, gave the Panel a presentation describing CUSC Amendment CAP172 Capacity Pricing Mechanism. The presentation can be found at: http://www.nationalgrid.com/uk/Electricity/Codes/systemcode/Panel/2009_current/Meeting+95/. MD highlighted that CAP172 was substantially the same as CAP171 (rejected by the Panel under paragraph 8.15.4(a) of the CUSC on 30 March 2009). The presentation sought to highlight why, in the proposer’s opinion, the proposal is substantially different from CAP166 WGAA3.
1882. GG requested clarification on the difference in pricing between CAP166 WGAA3 and CAP172, since he felt both resulted in Users receiving a fixed price. HR stated that CAP166 WGAA3 would result in Users in constrained parts of the network being provided with a combination of long-term (fixed price) access rights and short-term (variable price) access rights in the, potentially significant, period between connection and the completion of wider transmission reinforcements. HR stated that this represented a clear difference between CAP166 WGAA3 and CAP172.
1883. HR stated that the difference in principle between CAP166 WGAA3 and CAP172 is the treatment of risk. In CAP166 WGAA3, Users need to decide on the level of long-term access rights they hold based on their knowledge of their own operations. They receive long-term access rights at a fixed price and need to purchase short-term access rights, at a variable price, for any access required above the long-term level. The Users therefore face a risk based on the operation of other generators. In CAP172, Users simply state their requirements (based on their knowledge of their own operations) and the SO aggregates these requirements together with the contributions from all other generators and calculates the associated access cost and price. Users receive a fixed price for their entire output, with the risk of this price being too high or low being shared.
1884. PJ highlighted that some of the differences relate to charging modifications and not the CUSC Amendment. HR noted the link between the definition of the access right in the CUSC and the associated charge for the access right in the charging

methodology.

1885. SL clarified that the level of long-term (fixed price) access rights released under CAP166 WGAA3 would take account of issues such as generation availability because they would be set in accordance with the planning criteria contained in the GB Security and Quality of Supply Standard (GBSQSS). SL noted that the GBSQSS assessment includes scaling factors to model generation availabilities and a ranking order to identify non-contributory plant. For this reason, SL believed that CAP166 WGAA3 would result in the same outcome as CAP172. HR noted that the GBSQSS planning criterion that SL was referring to was based on the peak demand condition only, whereas the assessment envisaged as part of CAP172 would be based on all-year-round conditions and therefore would clearly result in a different outcome.
1886. SL stated that by making changes to the GBSQSS and Charging Methodology, CAP166 WGAA3 could give the same outcome as CAP172. HR stated that National Grid had looked at this option in detail prior to raising a new CUSC Amendment Proposal. HR stated that National Grid had reached the conclusion that the link between the definition of the access right in the CUSC and the associated charge for the access right in the Charging Methodology would prevent this outcome. Under CAP166 WGAA3, all Users receive the same tradable access right, as defined by the CUSC, and therefore should receive the same charge as set out in the Charging Methodology. In order to give Users with different transmission access requirements charges which better reflect those requirements, National Grid concluded that the definition of the access right would need to change (as is envisaged under CAP172) such that a consequential Charging Methodology change can be raised to better reflect User access requirements. Under CAP172 therefore, Users would receive an access right tailored to their requirements and a charge based on that requirement.
1887. PJ asked if under CAP172 the GBSQSS would still be used to design the transmission system and if so questioned the benefit that the additional information of the load duration curve and buy back price would provide to the System Operator/Transmission Owners in planning the network. HR stated that the planning criteria in the GBSQSS are used by Transmission Owners to identify the transmission works required to accommodate generation. The expectation is that generation will wait until these reinforcements are complete prior to connection. Under CAP172, the information submitted by Users would be used by the System Operator to perform an assessment against the operational, rather than planning, criteria contained in the GBSQSS in order to identify the appropriate fixed transmission access price. Users will not be required to wait for the completion of wider reinforcements prior to connection. HR noted that there are differences between the GBSQSS planning and operational criteria.
1888. GG questioned whether securities are different under CAP172 as compared with CAP166 WGAA3 where it was identified that securities may be required for wider works. HR noted that the security provisions proposed under CAP172 were generic in nature whereas those proposed under CAP166 WGAA3 are specific cost reflective final sums liabilities.
1889. PJ questioned whether there would definitely be a change to the calculation of overrun prices. His understanding from the (30th March 2009) presentation on CAP171, which was identical to CAP172, was that this may be a consequential change depending on how the use of profiled rights was monitored by National Grid. For instance, one option mentioned was to rerun the model after the actual usage

was known to calculate the uplift charge for overrun, but this was by no means a certainty. Another option might be for Users to nominate which part of the profile they are using in each period of running, which would allow overrun to be calculated in exactly the same manner as under CAP162. HR noted that the calculation of the overrun volume would have to be different because the access right is defined differently. For CAP166 WGAA3, access rights are defined with respect to a capacity (MW) level and therefore overrun volume is defined as output above that capacity level. Under CAP172, access rights are defined with respect to a load duration curve, which introduces a temporal element to the calculation of overrun. HR conceded that differences associated with overrun under CAP172 were a consequence of the change to the definition of the access right rather than a driving change.

1890. PJ questioned the likely accuracy of the load factor information. Many generators would not be able to predict their running profile accurately over a period of longer than perhaps a year and this lack of certainty is likely to lead to these generators requesting 100% in order to ensure access is secured. HR noted that CAP172 would lead generators to face a charge which reflected access right requirements, and that this should provide the appropriate incentives. In the example of a generator requesting an access right for 100% of the year, the generator would face a charge based on the provision of access for 100% of the year. HR stated that whilst there may be a subset of examples in which generators request 100% access rights, there are other examples in which it is difficult to foresee this. HR gave the example of a windfarm located next to a conventional generator and suggested that since the windfarm is unable to generate for 100% of the year, they are unlikely to book 100%. PJ stated that parties would know that a wind generator was only going to run with a low load factor under CAP166 WGAA3 and therefore was still unconvinced that CAP172 would make any difference in the quality of information available. HR noted that CAP166 WGAA3 provides users with fully tradable and sharable access rights.
1891. TD stated he felt the areas that had been discussed so far required further exploration and stated his concern if this opportunity was not given.
1892. PJ offered the legal opinion he had received on paragraph 8.15.4(a) of the CUSC, stating 'substantially the same' was somewhere between similar and identical. It was also clear that it was to be the opinion of the CUSC Panel on whether an Amendment was substantially the same as a pending Amendment Proposal that determined whether or not it was rejected under 8.15.4(a). Therefore, it was up to Panel Members to use their judgement based on the evidence in front of them when reaching such an opinion. PJ believed it should be considered what conclusions the Panel could reach at this stage in the process (i.e. when the Amendment is first raised). It would not be reasonable for the Panel to be able to assess the exact likely effects on User behaviour, competition and efficiency as this is the role of the Working Group if and when an Amendment Proposal proceeded to assessment. The Code requires the Panel to consider this prior to deciding whether or not an Amendment Proposal proceeds to Working Group. The Panel therefore plainly cannot base its judgement on information that would be derived by the Working Group, but instead must consider the intention of that Amendment as known at the time. He believed that CAP166 WGAA3 and CAP171 both aimed to:
- Use a capacity duration auction to discover the true value of transmission access rights in order to develop an optimal system.
 - Release long-term transmission access rights based on willingness to pay.

- Fix the price of the rights at the time of auction, with the subsequent requirement for a volatile residual to facilitate recovery of SO allowed revenue
 - Introduce user commitment to provide efficient investment signals.
 - Establish equivalent transmission access rights for new and existing users.
 - Remove rolling transmission access rights.
 - Introduce arrangements for local capacity rights (a feature which is shared with other amendments as well as CAP166 WGAA3).
1893. PJ noted that there were some differences too such as the use of load duration curves and buy back prices. However, on balance he believed that CAP172 would have substantially the same effect as CAP166 WGAA3.
1894. PJ noted that the Ofgem open letter of 2nd April 2009 quoted extracts from the minutes of the Transmission Access Working Group 2 meeting held on the 27th January 2009 relating to comments made by members of that Working Group who were also members of the Panel and contrasted them with opinions expressed at the Panel. PJ believed that it was not appropriate to use the minutes in such a manner, seemingly to discredit Panel members' opinions, particularly when the comments were made in two different contexts. PJ also noted that it had been agreed that the Working Groups' minutes would not be a verbatim record of the discussions held but would represent a high level summary. Therefore, they often did not accurately record the precise context in which such comments were made. PJ gave the context of the comments that had been attributed to him and quoted in Ofgem's 2nd April 2009 open letter. PJ stated it was late in the proceedings when buyback and overruns were raised while the Working Group was considering Alternative Amendment Proposal CAP166 WGAA3. The group raised concerns about raising two solutions to the same Alternative Amendment and that the differences of the late raised option and the fact that it required further time for development and consideration meant that the group believed that original option should be put forward. PJ went on to state that whilst the Working Group stated a further Amendment Proposal could be raised, his understanding of this was is that it would be in the context of a further Amendment to CAP166 WGAA3, if implemented, rather than a further Amendment Proposal now.
1895. GG referred to the methodology statement that formed part of the CAP172 Amendment Proposal and stated the high level principles and processes set out in that statement are similar to those in the methodology statement for CAP166 WGAA3 and therefore the outcome is likely to have substantially the same effect. HR accepted that many of the process steps proposed under CAP172 were the same as those proposed for CAP166 WGAA3 but did not agree that this meant that a similar outcome was likely or even possible. HR used the example of the provision of information stating that the provision of load duration data and a bid price collar were just two additional sub-bullets in the methodology statement, but that they would completely change the definition of the transmission access right.
1896. TD asked Panel members that were also members of the Transmission Access Working Group 2 for clarification of whether it was the genuine view that CAP166 WGAA4 was different? PJ stated he can only give his opinion of the view. HR stated his understanding that the Working Group agreed it was different and an alternative Amendment should be raised during the TAR process, and noted that this was clearly highlighted in the Working Group conclusions. GG summarised the whole TAR process offered 6 key proposals and that it was his understanding this additional proposition would be brought forward later. GG went on to use the

example of gas transmission auctions where the final proposal that was first implemented has been further refined on numerous occasions subsequently.

1897. HR expressed his frustration that when National Grid attempted to develop this proposal as part of Transmission Access Working Group 2, they were told that it was too different and needed to be raised as a separate Amendment, and now that significant development work has been undertaken such that it has now been raised as a separate Amendment, they are being told it is the same.
1898. BV explained she originally raised the issue of CAP171 being substantially the same as CAP166 WGAA3 as she was aware of concerns with the BSC of modifications being raised that were the same and she had checked the CUSC to see if this issue had been envisaged. BV went on to explain her initial concern was reinforced by the number of times in the presentation of CAP171 at the Panel on 30th March 2009 that CAP171 was described, by the proposers' representative, as being the same as CAP166 WGAA3. BV explained her reason for raising this issue was to appropriately discharge her duties as a Panel member. BV raised concerns over Ofgem's open letter of 2nd April 2009 and (in response to the request to provide full written reasons) stated if the minutes of the Panel meeting are insufficient (for Ofgem) then Ofgem should ask for further detail. MF noted that there were clearly other industry stakeholders interested in the CUSC debate and questioned who they should ask if they could not follow the debate from the minutes.
1899. MF stated the need for transparency around such an important decision and that these reasons should be published on the Grid website so that all interested parties (and not just Ofgem who are present at CUSC Panel meetings) can see and understand the rationale for decisions. MF noted that the draft minutes of the Panel meeting of 30th March 2009 did not in Ofgem's view provide reasons to outline why the Panel had reached the decision it had on CAP171. MF referred to Ofgem's open letter of 2nd April 2009 to the Panel and said that whilst he recognised that Panel members take their responsibility seriously, it is important that they discharge this role reasonably and in a transparent manner. MF said that this was even more important in the case of the TAR mods (including both CAP172 and CAP168) where there are significant potential impacts on competition, the environment and security of supply. MF went on to state that the Panel should not take lightly a decision to reject a proposal at the outset and stated a concern that if a viable reform Amendment is stopped at the outset then it will not be given a proper hearing. MF noted Panel comments that more work needed to be done on this Amendment and questioned how, if this were the case the Panel could conclude that it had substantially the same effect as an existing Amendment Proposal and reject it at the outset. MF highlighted that it appeared the purpose of clause 8.15.4(a) was for administrative efficiency and that he could not understand the administrative efficiency benefits associated with rejecting CAP171 or CAP172 if the Panel chose to go down that route. MF noted the comments by PJ earlier in the meeting on how PJ considered that CAP172 and CAP166 WGAA3 had substantially the same effect. MF noted that he felt that PJ had only focussed on the similarities between the high level principles governing these modifications. However, MF noted that it appeared to Ofgem that the CAP172 and CAP166 WGAA3 proposals were in practice and effect quite different. MF stated there are high level differences between CAP172 and CAP166 WGAA3 including, that National Grid is taking on more risk under CAP172 (through capacity buy backs) relative to CAP166 WGAA3 where more risk is placed on users, that there are linked curtailment rights under CAP172 but not under CAP166 WGAA3, and that under CAP166 WGAA3 capacity rights are rationed

in a primary allocation, whereas under CAP172 Users obtain capacity at a known fixed price. MF indicated that these appeared to be fundamental differences. MF went on to state a concern that if this Amendment is stopped at the outset then it will not be given a proper hearing. MF noted Panel comments that more work needed to be done on this Amendment and questioned how this could be done if the Amendment is stopped now. MF stated there are high level differences between CAP172 and CAP166 WGAA3 including user commitment, linked curtailment rights and a different allocation mechanism.

1900. In response to MF's comments on transparency, PJ highlighted that detailed minutes are published for Panel meetings and these should provide sufficient transparency. Panel members believed that the process followed at the Panel meeting on 30th March 2009 was both robust and transparent. With respect to transparency, Panel members were mindful that the minutes of CUSC Panel meetings are very comprehensive in nature; detailing, for example, individual Panel members' views during the course of the meeting, their votes cast and their reasoning for voting in a particular way; unlike some organisations associated with the industry whose minutes lack details, such as on individual's views, votes taken or reasons for voting. TD went on to state the Panel do give reasons for their voting decisions.
1901. GG highlighted administrative efficiency was dealt with under paragraph 8.15.2 of CUSC whilst 8.15.4 provides for a specific test. DG noted references to paragraph 8.15.2 but considered 8.15.4(a) was there to ensure the Panel and industry did not have to unnecessarily repeat or duplicate assessment and analysis that may have only recently been conducted with respect to another Amendment. It was not there to allow the Panel to prematurely make a decision on the merits of an Amendment. In this particular instance, Panel Members have identified a significant amount of new or additional assessment that would be required if CAP172 were to progress and so paragraph 8.15.4(a) could not apply. KC highlighted the wording in BSC was similar to CUSC but did provide for Ofgem to veto the Panel decision in such a similar circumstance (clauses F2.1.4 and F1.4.3 of the BSC).
1902. BB highlighted he saw a difference between the process and the outcome of CAP172 and CAP166 WGAA3. BB stated faced with the proposal and (30th March 2009) presentation for CAP171 he didn't feel the hurdle was reached to clearly state why the proposal was substantially different to CAP 166 WGAA3. However, faced with the information for CAP172 he notes the key differences around who takes the risk.
1903. HC asked if CAP166 could be rejected by Ofgem to allow this proposal to come forward. It was noted by the members of the Panel that even if CAP166 were rejected under paragraph 8.15.4 (b) it would still be necessary to wait 2 months before raising the proposal again.
1904. SL stated he had looked carefully at CAP172 and the use of load duration and capacity buyback could be achieved via SQSS and therefore could have the same effect as CAP166 WGAA3. SL expressed concerns over the content of the Ofgem open letter that the CUSC Panel received late yesterday. He noted the open letter indicated that Ofgem was unhappy with the process that had been followed that led to the rejection of CAP171. He stated the operation of the Panel is governed by the CUSC and this process was followed. Whilst the open letter indicated that the CUSC Panel must follow the rules there is concern that given the timing and content of the open letter some degree of pressure was being exerted on individual Panel

members to arrive at a different decision when CAP172 is considered later today compared with CAP171 on Monday.

1905. MF clarified that the open letter only sets out an expectation that Panel members should be reasonable and transparent in their decisions. PJ replied by stating he feels the open letter goes further than this.
1906. BB drew attention to paragraph 8.2.3.2, which he believed to be an over-arching obligation on the Panel. He stated his belief that consideration of 8.2.3.2 should outweigh the consideration of 8.15.4(a). GG noted that in drafting the CUSC there must have had good reason for including 8.15.4(a).
1907. MF noted the comments made by BB regarding the need for an efficient process. MF indicated that if CAP172 is a viable Amendment Proposal, then it did not appear to be efficient to have to wait an additional two months before the Amendment Proposal could be re-raised, particularly given the urgent need for transmission access reform and the concerns expressed by Government. PJ responded by saying there is a balance between having as many proposals on the table as possible and ensuring that those that have already been considered are progressed in a timely manner. PJ believed the intent of 8.15.4(a) was not simply about administrative efficiency, but to ensure that Amendments that had been considered under due process and were ready for consideration by the Authority could not be delayed or frustrated by the last minute submission of alternative proposals which essentially had the same effect. It was therefore consistent with the general provisions of 8.2.3.2 of the CUSC. He believed that the Panel should not treat an Amendment Proposal differently under 8.15.4(a) simply because Ofgem liked it. MF replied indicating that Ofgem has no pre-set view on the Amendment Proposal. He indicated that the issue being discussed is not about whether a proposal is liked or not liked, simply the fact that all viable proposals should be on the table.
1908. DG stated in a set of circumstances that were considering what should and should not be available to the Authority for decision, the views of the Authority should be taken into account. GG responded by stating that the CUSC does not appear to have such a requirement.
1909. The Chairman called for any further queries on the proposal before asking Panel members in turn to vote whether CAP172, in their opinion, has substantially the same effect as CAP166 WGAA3.

Details of the voting and reasons for such vote are below:

1910. Hedd Roberts – CAP172 is substantially different to CAP166 WGAA3. HR noted that National Grid had received considerable feedback from the industry on the lack of usefulness of the short-term access products proposed to date, due to the price uncertainty. HR noted the conclusions previously expressed by many Panel members that, whilst a useful addition to the arrangements, the lack of bankability associated with short-term access meant that it would only be used at the margins. HR noted that the scale of the challenge ahead to meet the renewables target whilst maintaining security of supply and minimising the cost for consumers may require a more complete solution. HR expressed his opinion that CAP172 had the potential to provide this solution by addressing the concerns associated with variable price short term access by providing a fixed price. CAP172 has been developed to allow users to provide useful information to the System Operator, something new and different,

such that the System Operator could calculate a fixed price. HR commented that whilst it is agreed CAP172 and CAP166 WGAA3 look similar in terms of process, the outcome will be fundamentally different. HR stated he does not believe under CAP172 a windfarm would ever ask for a 100% fully sharable access right and that this provides one key example of why the proposal is different and would lead to a different outcome.

1911. Garth Graham – CAP172 has substantially the same effect as CAP166 WGAA3. GG noted that he agreed with the examples of similarity PJ had referred to earlier in the meeting. GG went on to state that in the limited time available since Monday's Panel meeting he had sought to identify some legal interpretations of "substantially the same" that could help guide him in coming to an opinion on CAP172 - CAP166 WGAA3. GG briefly referred to Lord Justice Mummery's comments in the *Ravenscroft Properties v Hall* case (at paragraph 12 (ii) 'The Reasonable Recipient') quoting Lord Clyde, with respect to that of the reasonable person exercising his common sense in the context and the circumstances of the particular case, which GG indicated was what he was seeking to do. In addition GG had also found some illumination from the World Trade Organisation, which GG noted was, like the CUSC, a multi-lateral agreement entered into by numerous independent organisations. In particular GG read the following extracts from a WTO document "Guide to WTO Law & Practice" at the Panel meeting (a copy is attached to these minutes as Annex 1) "[t]he ordinary meaning of the term "substantially"appears to provide for both qualitative and quantitative components. The expression "substantially the same duties" would appear to encompass both quantitative and qualitative elements, the quantitative aspect more emphasized in relation to duties." GG went on to quote "[t]he Appellate Body on *Turkey — Textiles* further agreed with the Panel that the phrase "substantially the same"offered a "certain degree of flexibility".We also believe that the Panel was correct in its statement that in particular, the phrase 'substantially the same' offer a certain degree of 'flexibility' to the constituent members of a customs union..... here too we would caution that this 'flexibility' is limited. It must not be forgotten that the word 'substantially' qualifies the words 'the same'. Therefore, in our view, something closely approximating 'sameness' is required". GG stated he had been guided by the principles set down in this WTO case study when seeking to address the matter at hand (CAP172 – CAP166WGAA3) and coming to a decision. GG stated as a generator he felt the net effect from either the CAP172 or CAP166 WGAA3 proposal is substantially the same. GG highlighted the product the generator gets is essentially the same and the outcome of the price could not be certain from either product. GG highlighted that a decision on CAP172, with respect to paragraph 8.15.4(a), does not preclude the proposal being raised at a later date once a decision on CAP166 has been made (as there would no longer be a 'Pending Amendment' to which 8.15.4(a) relates). GG also wished it to be noted that he also raised a similar concern, with respect to paragraph 8.15.4(a), when CAP168 was raised in February. HR asked for clarification as what was meant by 'as a generator'. GG confirmed he meant as a generic generator.
1912. Simon Lord - Abstained. SL stated that in his opinion CAP172 has substantially the same effect as CAP166 WGAA3. This is based on knowledge of some of the detail of the SQSS that is used as a basis for determining the available TEC for allocation. The SQSS utilises a merit order(s) based on fuel price to determine flows on the system along with factors to increase the effective TEC available that can be plant specific. Although this was his view he decided to abstain on this occasion taking into account 8.2.3.2(a) of the CUSC.

1913. Tony Diccico - CAP172 is substantially different to CAP166 WGAA3. TD noted that load duration and buyback make the proposal different. TD also noted that whilst he felt some aspects were flawed in the proposal it should get full assessment by the industry.
1914. Bob Brown - CAP172 is substantially different to CAP166 WGAA3. Regarding CAP171, he noted that the Panel had rejected the proposal as it did not pass the test of paragraph 8.15.4(a) of the CUSC. He stated that he made his voting decision (on CAP171) based on the information contained in the report before the Panel, together with the information contained in the presentation to the Panel and subsequent discussion at the Panel. He noted that the report and initial presentation on CAP171 had not addressed the requirements of the test in paragraph 8.15.4(a), by identifying how CAP171 differed from CAP166 WGAA3, and that the Chair had to invite the proposer to highlight differences between CAP171 and CAP166 WGAA3. Based on this information presented to the Panel, and subsequent discussion, he did not feel confident to take a decision, so abstained on CAP171. He did not agree with comments that suggested that Panel members should take account of the minutes of Working Group meetings, as he believed that decisions should be taken on the information presented to, and discussions at, the Panel meeting where voting took place. It would be easier for Panel members from larger companies to be more aware of the activities within Working Groups, as those companies were more likely to have membership of both the Panel and Working Groups. Regarding CAP172, he was satisfied, by the information in the report and presentation to the Panel, that there were sufficient differences between CAP172 and CAP166 WGAA3 to allow it to proceed. In particular, he was satisfied that the risk on parties was different, so there was a different effect. He noted the comments in the Panel regarding the requirements of 8.15.4(a), but drew attention to paragraph 8.2.3.2, which he believed to be an over-arching obligation on the Panel. This paragraph required the Panel to take account of the complexity, importance and urgency of a particular Amendment Proposal. He believed that the proposal was important as it was related to TAR and urgent because of the decision-taking timetable. He believed that consideration of 8.2.3.2 should outweigh the consideration of 8.15.4(a).
1915. Barbara Vest – CAP172 has substantially the same effect as CAP166 WGAA3. BV stated nothing presented as part of CAP172 had changed her opinion from the CAP171 vote (on 30th March 2009). BV highlighted concern of using minutes from Working Groups as any Panel members on such Working Groups have different responsibilities. BV queried why the Ofgem open letter of 2nd April 2009 did not make reference to the need for Panel members to adhere to the paragraph 8.15.4(a) from a legal basis. BV also highlighted a concern that Ofgem had published details of CAP171 in their consultation on “Addressing Market Power Concerns in the Electricity Wholesale Sector - Initial Policy Proposals”, dated 30th March 2009 before the outcome of the Panel meeting (25th March CAP171 raised, 30th March CAP171 rejected by Panel).
1916. Paul Jones – CAP172 has substantially the same effect as CAP166 WGAA3 for the reasons stated earlier in the meeting. PJ also highlighted the earlier example used by HR to query whether under CAP166 WGAA3 the System Operator would take account of likely load factor of a wind farm in determining price of short-term access, and therefore believed that it would have substantially the same effect as CAP172 in this respect also. PJ highlighted his concern about the CUSC process operating efficiently with Amendments being raised at the last minute. He went on to state it is right for the work done to date on TAR to come to a conclusion.

1917. Paul Mott - CAP172 has substantially the same effect as CAP166 WGAA3. PM raised concerns over process points on CAP172 and the Ofgem open letter which were raised within 24 hours of the Panel meeting without any calls to inform Panel members that they had been sent. PM stated he had took advice from a Transmission Access Working Group 2 member, with their advice being that CAP172 has substantially the same effect as CAP166 WGAA3. PM expressed concern that Panel members are being berated when making professional decisions.
1918. In summary four Panel members voted that in their opinion they did believe CAP172 to have substantially the same effect as a Pending Amendment Proposal (CAP166 WGAA3), three Panel members voted that they did not believe this to be the case and one Panel member abstained.
1919. The Chairman confirmed that the Panel agreed by majority vote that CAP172 should be rejected under paragraph 8.15.4(a) of the CUSC.
1920. The Chairman offered to co-ordinate a response to Ofgem's open letter of 2nd April 2009 to the Panel and asked Panel members how they would like to share their reasons for their choice of vote under CAP171 and CAP172. BV expressed concerns at having to publish detailed reasons for the Panel's decision, particularly when Ofgem is present at CUSC Panel meetings and noted that the Authority does not provide reasons for its decisions. MF noted that the Authority publishes minutes of its meetings and documents containing detailed reasons for its decisions. MF also noted that when the Authority or Ofgem reaches a decision on an industry code modification proposal (such as a CUSC Amendment Proposal) it provides full and detailed reasons. These reasons take the form of the Authority's decision letter on the code modification. MF also noted that whilst it attends CUSC Panel meetings there are clearly other interested parties in the CUSC debate who will want to understand the reasons for Panel decisions and that these reasons should therefore be published. MF commented that it is not sufficient for industry to abdicate responsibility for publishing reasons, merely because Ofgem is in attendance at Panel meetings. Panel members expressed concern over each providing written responses and instead requested the minutes of this meeting be attached to the letter. The Chairman agreed to draft a copy of the letter on this basis and circulate to Panel members for comment prior to the next Panel meeting.
Action: Panel Secretary
1921. In response to PM's comments earlier in the meeting, MF clarified that Ofgem had contacted a number of Panel members in advance of the Panel meeting today regarding Ofgem's open letter of 2nd April 2009. MF commented that he had not been able to call all Panel members as he did not have contact details for all Panel members.
Action: Panel Secretary
1922. BV expressed concern over the process for the notification of the recent urgent Amendments and asked if Panel members could be forewarned of future urgent Amendments and when raised a phone call made to each Panel member to ensure they have received the information.
Action: Panel Secretary

5 Working Groups / Standing Group reports

1923. SH gave the Panel a presentation on the CAP168 Working Group summary. This presentation can be found at:-
http://www.nationalgrid.com/uk/Electricity/Codes/systemcode/Panel/2009_current/13/.
1924. HR raised the issue that the proposer of CAP168 had requested a Working Group Alternative Amendment be raised however, at the Working Group there was a lack of support for such an alternative. HR stated the alternative was proposed around the under-run deadband and noted that as Working Group chairman he can take such a WGAA forward regardless of Working Group support. HR asked for Panel member views.
1925. GG questioned whether a WGAA could be raised for CAP168 as it was an Urgent Amendment Proposal and highlighted the advice he had been given by National Grid for CAP170 (regarding the raising of WGAA's to an Urgent Amendment Proposal as set out in paragraph 8.21.1.9 of the CUSC) that an alternative could not be raised. HR responded by stating CAP168 was different to CAP170 as a Working Group has been set up, whilst for CAP170 the proposal went straight to company consultation.
1926. HR highlighted the timetable given for CAP168 and noted it didn't expressly allow time for WGAA's to be raised. HR went on to state there are some clear learning points being found with the urgent process set out in the CUSC. SL commented that with hindsight perhaps CAP168 should not have been given urgent status.
1927. HR made the Panel aware that the proposer of CAP168 had stated they intend to withdraw the proposal if a WGAA is not agreed to since the original Amendment had been developed by the Working Group into something which did not meet the original intent of the Amendment Proposal. HR noted this would not be a good outcome due to the importance of having all proposals on the table for consideration. PJ commented that the Panel should have a consistent view on this. GG restated his view that taking on board the comments given by National Grid (as regards WGAA's to an Urgent Amendment Proposal as set out in paragraph 8.21.1.9 of the CUSC) on CAP170, to which he stated he did not necessarily agree with, it would not allow for a WGAA for CAP168. HR agreed to look at the advice previously given by National Grid on CAP170 and respond accordingly.
- Action: Hedd Roberts**
1928. BV questioned why HR, as chair of the Working Group, did not use his power to allow a WGAA. HR responded by stating he questioned whether the WGAA would better meet CUSC Objectives but in hindsight perhaps the WGAA can be argued as better than the original CAP168 Amendment. HR went on to state that should a WGAA be taken forward a large proportion of the work has already been carried out.
1929. PJ commented that he felt the proposer of CAP168 should have the option to retain ownership of the original intent of the proposal. As such, if a WGAA was not progressed in this instance then the original intent of CAP168 may be lost. This was a different set of circumstances than when the Chairman's discretion had been exercised, for example, in respect of CAP165 to progress options on which the Working Group's vote was finely balanced, but where the original intent of the Amendment was not compromised. Therefore, it would appear appropriate to take forward the WGAA for CAP168 despite it receiving very little support from the Working Group.
1930. HR stated that on the balance of the comments he had heard from the Panel he would take forward the CAP168 Working Group Alternative Amendment. HR noted this would not require a further Working Group meeting and he felt the proposal could be developed via email. HR requested a one week extension to the remaining

timetable of CAP168 Transmission Access – Under-use and reallocation of TEC. The purpose of the extension would be to finalise the legal text and complete a Working Group Alternative Amendment. The CUSC Panel agreed to a one week extension for CAP168. MF, on behalf of Ofgem, expressed no concerns for such an extension. The Chairman asked MF to inform the Panel if this position changes following the meeting. The revised timetable is as follows:

- Amendment submitted to Company Consultation 17/04/09
- Company Consultation closes 1/05/09
- Draft Amendment Report circulated to Industry 08/05/09
- Panel undertake Recommendation Vote 13/05/09
- Final Amendment Report submitted to the Authority 18/05/09

1931. The CUSC Panel agreed that (subject to the updates to include a WGAA) CAP168 should progress to wider industry Company Consultation.

1932. GG requested whether the responses to the CAP168 pre-consultation (helpfully undertaken by National Grid to assist the CAP168 Working Group in their deliberations) could be included as a Volume 2 to the Company Consultation, noting they are not official consultation responses. HR agreed to this request and stated it would be made clear on the documentation that they are not official consultation responses.

Action: Hedd Roberts

1933. BB asked how National Grid intends to progress the concerns raised by Ofgem on process with respect to the time lapse between CAP168 being raised and the CUSC Panel agreeing urgent status. The Chairman responded that National Grid do not intend to formally respond on this point but this issue, along with other issues raised with the urgent process, should be debated in Governance Standing Group.

6 A.O.B.

1934. DS gave a high level overview on progress with regards to the Gas Insulated Switchgear joint Grid Code / CUSC working group. DS stated the working group intend to report to the GCRP in May and asked the Panel whether they agreed it was appropriate to raise any CUSC Amendments after that GCRP meeting. The Panel agreed that, subject to confirmation that the GIS working group are in agreement to this, then any CUSC Amendment Proposals should be raised following May's GCRP.

Action: David Smith

1935. BB raised concerns with the governance and process followed during recent Urgent Amendment Proposals. He stated that he was proposing to bring forward a paper at the next Panel meeting.

1936. MF highlighted that in response to industry comments Ofgem would be publishing more information on timelines for Ofgem assessments and decisions in respect to Amendment Proposals.

7 Record of Decisions – Headline Reporting

1937. The Panel Secretary will circulate an outline Headline Report after the meeting and place it on the National Grid website in due course.

Action: Panel Secretary

8 Date of Next Meeting

1938. The next meeting is scheduled for Friday 24 April 2009, at National Grid House, Warwick Technology Park, Gallows Hill, Warwick, CV34 6DA.

Annex 1

http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_09_e.htm

(i) Interpretation

712. In *Turkey — Textiles*, the Appellate Body addressed the requirement contained in [Article XXIV:8\(a\)\(ii\)](#) that constituent members of a customs union apply “substantially the same” duties and other regulations of commerce to their external trade with third countries. The Appellate Body agreed with the Panel that the term “substantially the same” has both “qualitative and quantitative components”:

“[Sub-paragraph 8\(a\)\(ii\)](#) establishes the standard for the trade of constituent members *with third countries* in order to satisfy the definition of a ‘customs union’. It requires the constituent members of a customs union to apply ‘substantially the same’ duties and other regulations of commerce to external trade with third countries. The constituent members of a customs union are thus required to apply a common external trade regime, relating to both duties and other regulations of commerce. However, [sub-paragraph 8\(a\)\(ii\)](#) does *not* require each constituent member of a customs union to apply *the same* duties and other regulations of commerce as other constituent members with respect to trade with third countries; instead, it requires that *substantially the same* duties and other regulations of commerce shall be applied. We agree with the Panel that:

[t]he ordinary meaning of the term “substantially” in the context of [sub-paragraph 8\(a\)](#) appears to provide for both qualitative and quantitative components. The expression “substantially the same duties and other regulations of commerce are applied by each of the Members of the [customs] union” would appear to encompass both quantitative and qualitative elements, the quantitative aspect more emphasized in relation to duties.’(1007)”(1008)

713. The Appellate Body on *Turkey — Textiles* further agreed with the Panel that the phrase “substantially the same” in [Article XXIV:8\(a\)\(ii\)](#) offered a “certain degree of flexibility”. However, the Appellate Body objected to the standard of “comparable trade regulations having similar effects” developed by the Panel and held that this standard did not rise to the required standard of “sameness”:

“We also believe that the Panel was correct in its statement that the terms of [sub-paragraph 8\(a\)\(ii\)](#), and, in particular, the phrase ‘substantially the same’ offer a certain degree of ‘flexibility’ to the constituent members of a customs union in ‘the creation of a common commercial policy.’(1009) here too we would caution that this ‘flexibility’ is limited. It must not be forgotten that the word ‘substantially’ qualifies the words ‘the same’. Therefore, in our view, something closely approximating ‘sameness’ is required by [Article XXIV:8\(a\)\(ii\)](#).(1010) We do not agree with the Panel that:

... as a general rule, a situation where constituent members have ‘comparable’ trade regulations having similar effects with respect to the trade with third countries, would generally meet the qualitative dimension of the requirements of [sub-paragraph 8\(a\)\(ii\)](#).(1011)

[Sub-paragraph 8\(a\)\(ii\)](#) requires the constituent members of a customs union to adopt ‘substantially the same’ trade regulations. In our view, ‘comparable trade regulations having similar effects’ do not meet this standard. A higher degree of ‘sameness’ is required by the terms of [sub-paragraph 8\(a\)\(ii\)](#).”(1012)