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Dear Jon

Code Governance Review Consultation on Role of Code Administrators and Small Participants/Consumer Initiatives

I am writing to you as the CUSC Amendments Panel Chair on behalf of the CUSC Amendments Panel. Thank you for the opportunity to respond to the above consultation. We would also like to thank your colleague Mark Feather for taking the time to attend the August 2009 CUSC Panel meeting to outline the proposals, that he and his team developed, to us.

To begin with the Panel has some general observations regarding the proposed approach. Answers to the specific questions asked in the consultation document are provided in Annex 1.

The Panel broadly welcomes the proposal outlined in the consultation document. However, there are a number of matters that the majority of the Panel feel should be addressed and these are covered, in more detail, in the answers to the specific consultation questions.

The Panel has been mindful, as we are approaching the tenth anniversary of the first drafts of the CUSC being developed, that the CUSC has broadly stood the test of time since its inception, by the Authority and its predecessor.

Over time it has become increasingly clear that the need for a formally imposed, one size fits all, solution across all the GB energy industry codes might not be entirely appropriate. Rather the industry codes need to be flexible enough to adapt to the changing needs of:

- (a) the matter they address (be that highly technical (such as the Grid Code)) or highly commercial (such as the BSC); and
- (b) the stakeholders involved.

As long as this flexibility remains then, in the view of the Panel, the proposals outlined in the consultation document should be broadly supported.

If you wish to discuss further please do not hesitate to contact me or Alex Thomason on 01926 656379 or alex.thomason@uk.ngrid.com.

Yours sincerely



Alison Kay

ANNEX 1: Responses to the specific questions raised in the consultation document.

Question 1: Which activities should be considered within scope of the 'critical friend' approach?

Question 2: What is the appropriate mechanism to introduce the 'critical friend' approach?

Question 3: Should a specific obligation be placed upon code administrators to assist smaller participants and consumer representatives?

The Panel has chosen to answer questions 1, 2 and 3 together.

The majority of the Panel believes the 'critical friend' activities are already fulfilled by National Grid as the Code Administrator for CUSC. A minority of Panel Members believes that reforms may be appropriate, recognising that members of CUSC Working Groups are not required to act in an independent manner. Any additional areas for improvement could be introduced via 'good practice' being exercised by the Code Administrators, rather than the more rigid licence changes, which then lead to CUSC Amendment Proposal(s) being raised to embed these within the CUSC.

This, in turn, means that as 'good practice' evolves over time, the improvements can be adopted by Code Administrators without the need to change the licence and / or the CUSC itself.

In terms of providing support to 'small participants' the Panel is mindful that support should be provided to all CUSC Parties that require it and that we should strive to avoid discriminating between CUSC Parties.

It would seem anomalous that some 'large' global players will be defined as 'small' (and thus qualify to receive additional support) whilst companies which are, in terms of overall resources, smaller, will not qualify to receive additional support. It has been brought to the Panel's attention that even some 'large' market participants have, over the years, availed themselves of the support available from Code Administrators.

To deny or curtail in any way that support to any CUSC Party could, in the view of the majority of the Panel, unnecessarily constrain the ability of Code Administrators to facilitate the efficient operation of the governance processes.

Finally, it will be important where a Code Administrator does provide support to a participant, that they are not seen (by the proposer, or others) as in any way 'endorsing' or 'supporting' the change in question.

Question 4: For the purposes of identifying those who will be offered greater assistance by the code administrator, what is the appropriate threshold between small and large participants for each category of party?

The majority of the Panel believes that all CUSC Parties should be treated equally by the Code Administrators. In practice it is likely that most larger participants are least likely to avail themselves of this support when compared with smaller participants. In practice the level of support required will vary on a case by case basis and, therefore, the assistance provided should be available to all CUSC Parties who require it.

Question 5: Is it appropriate to modify the Gas Transporters licence in order to provide voting member status to consumer representatives on the UNC?

The Panel has no comments to make on the UNC.

Question 6: Are there any other bodies in addition to Consumer Focus which the Authority should consider as potential consumer representatives on the UNC?

The Panel has no comments to make on the UNC.

Question 7: Do you agree that the Authority should appoint the chairs of the UNC and CUSC panel in addition to the BSC?

The Panel welcomes and supports the idea of the appointment of an independent Chair for the CUSC Amendments Panel. It is important to recognise that in coming to this view the Panel make no criticism whatsoever of either the current incumbent or her predecessors. The arrangements to date by which a senior officer from National Grid assumes the role of Chair of the CUSC Panel is one that, at the time of its inception, was appropriate. That having been said, things have moved on and the Panel recognises and supports this development

However, in light of the proposed changes¹ to the role of the Authority, with respect to being able to raise CUSC Amendment Proposals² (as well as those under the BSC and UNC) the majority of the Panel believes that it would be inappropriate for the Authority to also appoint an 'independent' Chair to the Panel. This is because, upon taking the ability to raise, in its own name, an Amendment Proposal, the Authority will become an 'interested party' in the relevant Panel meeting, in exactly the same way as any other CUSC Party.

In this situation if the Authority had also appointed the Chair then, in the view of the majority of the Panel the independence of the Chair could be open to question. However, this issue could be addressed by allowing DECC to appoint the independent Chair on behalf of the Secretary of State. At present DECC appoints many hundred (if not thousands) of people to a wide range of public bodies (including to the Authority itself) each year. Therefore, to extend its role in this manner should entail limited additional cost or disruption.

Question 8: Should such an appointment be made only at the end of the current chairs ordinary tenure?

The provisions of Section 8 of the CUSC (para 8.3.1(c)) state that the term of office of the Panel Chairman shall be a period expiring on 30 March every third year following the CUSC Implementation Date. The CUSC Implementation Date was 18th September 2001; therefore the end of the current chair's ordinary tenure will be 30th March 2010. As it is unlikely that Ofgem's consultation process will have concluded in time for implementation by that date, the next expiry date for the Chair's tenure would be 30th March 2013. However, the Panel believes that the appointment of an independent Chair could be undertaken prior to the expiry of term of office in March 2013 by amending the provisions within the CUSC to allow an earlier appointment. A period of handover, perhaps including a short period 'shadowing' the incumbent, may be useful for the new chair.

Question 9: How should the salaries of the independent chairs be funded?

The majority of the Panel believes that the salary and associated costs of the independent Chair of the CUSC Panel should be recovered in exactly the same way as the current costs of the administration of the CUSC are; namely via a price control recoverable cost from users of the transmission system.

¹ Set out in the 'sister' consultation document issued, by Ofgem, on 24th July 2009 on "Major Policy Reviews & Self-Governance"

² 'Major Policy Reviews' consultation document 2.33 pg 11 "We also propose that Ofgem has the power to draft appropriate modifications in the event that the relevant licensee(s) fails to develop proposals that are consistent with the direction provided by Ofgem." / 4.27 pg 26 "We also propose that Ofgem should have a backstop" power to draft code modifications in the event that the original modification is not being progressed within the appropriate timescales or does not reflect Ofgem's policy conclusions."

Question 10: What is the appropriate mechanism by which these proposals can be introduced?

As noted above, in terms of the code administration support aspects, the majority of the Panel believes this should be via 'good practice'. In practical terms this should be developed collaboratively with the Authority, Code Administrators, industry code Panels, parties to those codes and Consumer Focus being engaged in the process of:

- a) outlining what is 'good practice'
 - (i) for all industry codes; and (if appropriate)
 - (ii) each specific industry code; and
- b) keeping it under regular review.

In terms of the appointment of an independent Panel Chair this could, in practical terms, be achieved via a CUSC Amendment Proposal to reflect that the appointment will not longer be via a National Grid nominee but via the Secretary of State.

As outlined in other industry codes (such as Section G of the BSC) there are already examples where the Secretary of State is directly involved in determining certain matters under the industry codes. Thus extending this to include his determining the appointment of an independent Panel Chair is not an alien concept under either the Acts, the licences or the industry codes themselves.

Question 11: Do you consider it necessary to include the powers to 'call in' and 'send back' modification proposals within the relevant licences?

The majority of the Panel does not believe that it is necessary to include either a 'call in' or 'send back' power. Rather the majority of the Panel believes it is more efficient and effective when Ofgem staff attending Working Group meetings actively engage in the process and identify issues (such as those that might, under these proposals, have warranted an Amendment Proposal being 'called in' or 'sent back') early so that they can be addressed whilst the matters are 'fresh' in Working Group members' minds.

It is the view of the majority of the Panel that whilst it might be intended that these powers should be used as a last resort, the ability to call in or send back proposals at any time would undermine the incentive for such active engagement from Ofgem at an earlier stage.

In addition, the majority of the Panel is mindful that if the Authority were to exercise its power, in particular, to 'call in' an Amendment Proposal and, as your colleague Mark Feather outlined in his presentation to the August Panel, "issue directions on the scope of the analysis that needs to be undertaken" this could seriously undermine the ability of a CUSC Party to successfully mount a Competition Commission appeal.

This is because analysis, such as an impact assessment of the effects of the Amendment Proposal on CUSC Parties, could only, practically, be undertaken (or commissioned from an independent organisation) by the Code Administrator. This is because commercially confidential information could be provided, anonymously, and then reported back to all CUSC Parties and the Panel in an unbiased way. This could not be undertaken by an individual CUSC Party.

Even where (non-commercially confidential) analysis could be undertaken by a CUSC Party the cost and resources required could preclude many small participants (and bodies with consumer interests) from doing so. As such this seems to be entirely at odds with some of the central aims of this consultation document.

Furthermore, such analysis, for the reasons alluded to elsewhere in this response, could be perceived; by

- (i) CUSC Parties;
- (ii) the Panel;
- (iii) the Authority; and

(iv) the Competition Commission (potentially on appeal)

to be biased or 'tainted' as they came from the paying CUSC Party.

Question 12: Do you consider that a licence modification requiring more explicit provision of reasons for recommendations is appropriate?

The majority of the Panel believes that the changes, as detailed in its answers to the questions above, could, in the main, be achieved via a voluntary process.

Where this is not possible, such as in the appointment of independent Panel chairs by DECC, then it should be achievable via a CUSC Amendment Proposal.

Question 13: Do you consider that a regular scorecard evaluation of the code administrators' conducted by Ofgem would be of value, particularly in influencing the behaviour of the code administrators?

The majority of the Panel believes that this is not required.

Rather, the Panel should be tasked with establishing, keeping under review and monitoring performance against Key Performance Indicators that the Panel has set (in consultation with CUSC Parties, Consumer Focus and other interested stakeholders).

This is because it is the Panel; along with CUSC Parties, Consumer Focus and other interested stakeholders; rather than the Authority, which is most closely involved in the work of the Code Administrator.

Question 14: Do you consider that code administrators' should be required to obtain and maintain ISO9001 accreditation for their processes?

The majority of the Panel does not believe that it is necessary for the code administrators to be required to obtain and maintain ISO9001 accreditation.

However, if Ofgem has first hand experience of how it obtained and maintains its ISO9001 accreditation, which it could share with the Panel, then the Panel might be persuaded otherwise.