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Dear Alison

CUSC Panel Meeting of 30th March 2009

As you are aware, at its meeting on 30th March 2009 the CUSC Panel considered and voted by majority to reject modification proposal CAP 171. I understand that in reaching this decision the Panel used its powers under the CUSC amendment rules which enable it to reject a proposal on the basis that, in the Panel's view, it has substantially the same effect as a proposal which is with the Authority for decision. In this case the majority of the Panel considered that the CAP 171 proposal was not sufficiently different from one of the CAP 166 alternative proposals which is currently with the Authority for decision.

In this letter we set out some concerns with the process that was adopted on 30th March. In essence these are that the CUSC panel's decision appears difficult to reconcile with previous positions of both the Panel and the Working Group for CAP 166 on the treatment of the proposals that ultimately formed CAP 171. Secondly, this is compounded by the fact that clear reasons for this decision have not been provided. These concerns are detailed further below.

As you know we have frequently outlined our view throughout the TAR process and the industry's assessment and consideration of the TAR modifications, that it is important that a broad range of viable options are developed and consulted on with industry and presented to the Authority to consider. Indeed, in view of the significant impacts that the TAR modifications could have on different classes of industry participants as well as consumers, it is even more important that all viable options are developed and consulted upon and presented to the Authority for consideration.

Given the importance of the TAR process, we would be concerned if a modification had been prematurely excluded from consultation with industry participants and consideration by the Authority.

Whilst we recognise that it is the role of the Panel to reach its own decisions and apply the CUSC amendment rules, it is vital that the process that the CUSC panel follows is robust and transparent at all times and that the Panel acts in a reasonable manner. This is

particularly important in view of the materiality of the TAR process and its impacts upon industry and consumers as well as the broader environmental context of the TAR reforms.

In this respect, we have a number of significant concerns regarding the process adopted by the CUSC panel at its meeting on 30th of March.

1. A decision to formally “reject” a proposal at the outset such that it cannot proceed through the industry consultation process, is not in our view, a decision that should be taken lightly given the importance of the TAR process to consumers, industry participants and, indeed the broader environmental agenda. We would therefore ask the Panel to provide full written reasons for the decision taken on 30th March outlining why in the Panel’s view CAP 171 is substantively the same as the CAP 166 proposal or one of its alternatives.
2. As you are aware, during the consideration of CAP166, National Grid sought to progress a new Working Group Alternative Amendment, known as WGAP1 (or WGAA4). This amendment is similar in form to CAP 171 as it incorporates specific provisions relating to users bidding buy back prices and annual load durations. We would note that the Working Group for CAP 166 considered that WGAP1 could not be taken forward by the Working Group within the scope of its terms of reference. Indeed, the CUSC Amendments Panel meeting of 30th January 2009 also discussed this issue where it was noted that the Working Group voted by majority not to extend the Working Group processes to take the WGAA4 amendment forward. The 30th January CUSC Panel minutes note that the “buy back and load duration options” discussed at the Working Group were not taken forward on the basis that they “relate to WGAP1 only”. The Final Amendment report for CAP 166 also notes that the “Working Group felt that there were still significant areas where it needed to be developed further (specifically how a load duration and buyback price would be used in practice) and as such was not in a sufficiently fit state to be formally progressed.

In addition, the minutes of the 27th January meeting of the Transmission Access Working Group 2 (Meeting 30) also included a discussion of the WGAA4 proposal (which was ultimately not progressed). In these minutes there are references to statements of members of the Working Group (some members of which are also CUSC Panel members) which are also difficult to reconcile with the CUSC Panel’s position on CAP 171. For example, there is a suggestion that WGAA4 could be raised as an alternative amendment (see paragraphs 23 and 25) and a comment that WGAA4 is “significantly different” to one of the other CAP 166 alternatives, namely WGAA3 (see paragraph 16).

Given the Working Group’s view that the buy-back and load duration options relate to WGAP1 only and the comments in the minutes of Transmission Access Working Group 2, it is difficult for Ofgem to reconcile this with the view of the CUSC Panel on Monday 30th March that the CAP 171 proposal has substantially the same effect as CAP 166 or its alternatives. Indeed, the Panel’s conclusion that the modification has substantially the same effect as CAP 166 is also unusual given that the Working Group reached the view that WGAP1 required further work and yet did not wish to undertake that work within its Terms of Reference.

In our view, National Grid has provided sufficient evidence to demonstrate that the provisions of CAP 171 contained elements that had not been given full consideration by the Working Group, citing differences in the approach to procuring access, and the access pricing mechanism. We consider this view is also supported by the conclusions of the Working Group which were noted by the CUSC Panel at its meeting on 30th January. Based on the observations above, we are concerned that the CUSC Panel has not provided a considered rationale and balanced explanation of the reasons why it now believes the

amendment proposal was too similar to CAP 166 or one of its alternatives to stand in its own right.

In the light of these observations, and in the absence of further reasoning from the CUSC Panel, we are concerned that a valid option for development and consultation and subsequent consideration by the Authority may have been prematurely rejected by the Panel. Indeed, we are concerned that this might represent a further example of the failure of the industry codes process to manage the progress of wide ranging fundamental reform in a key policy area. As you are aware, the effectiveness of the industry codes arrangements to deliver reforms such as those being considered under TAR, is being considered within our Industry Code Governance Review.

I understand that on Friday 3 April, the CUSC Panel will be giving consideration to a new amendment proposal to be raised by National Grid, in the same form as CAP 171. I would urge the CUSC Panel to ensure that it discharges its responsibilities under the CUSC amendment rules in a reasonable manner and to give full consideration to this proposal and indeed any subsequent amendment proposals that contain viable alternative options for access reform.

If you wish to discuss any issues in this letter, please contact me on the above number or alternatively Mark Feather on extension 7437.

Yours sincerely,

Sarah Harrison
Managing Director, Corporate Affairs

Cc CUSC Panel members - (Paul Jones (E.ON), Paul Mott (EDF Energy), Barbara Vest (AEP), Bob Brown (Cornwall Energy Consulting), Garth Graham (Scottish and Southern), Dave Wilkerson (Centrica), Tony Diccio (Npower), Simon Lord (First Hydro), Hugh Conway.