

Modification proposal:	Connection and Use of System Code (CUSC) CMP195: Code Governance Review post implementation clarifications		
Decision:	The Authority ¹ directs that Workgroup Alternative Code Modification 2 (WACM 2) be made ²		
Target audience:	National Grid Electricity Transmission PLC (NGET), Parties to the CUSC and other interested parties		
Date of publication:	18 November 2011	Implementation Date:	2 December 2011

Background to the modification proposal

On 31 March 2010, Ofgem published its final proposals for the Code Governance Review (CGR)³. The CGR final proposals set out a number of changes to existing code governance arrangements to improve the transparency of those arrangements and encourage greater participation from, amongst others, smaller market participants.

On 5 July 2010, Ofgem published the final licence changes to give effect to the CGR final proposals. The licence changes also gave rise to a number of code changes to be made by the relevant licensee. In the case of the CUSC, NGET raised a suite of code changes (CUSC Amendment Proposals (CAPs) 183 to 188) which were approved by the Authority in November and December 2010⁴ and implemented by 31 December 2010.

During the development of CAPs 183 to 188, Ofgem wrote to NGET with an extensive list of comments on the legal text giving effect to the code changes suggesting improvements that would more appropriately align the proposed CUSC legal text with the intent of the final proposals⁵. Because these comments were raised after the Company Consultation (now Code Administrator Consultation) stage of the CUSC governance process, it was not possible to address our comments as the process did not allow for late changes to legal text. Instead, NGET agreed in an open letter to Ofgem on 9 November 2010⁶ that the CUSC Governance Standing Group (GSG) would review our comments and a further code change would be raised by NGET to 'sweep up' any outstanding legal text changes in a further modification.

The GSG met in January 2011 and identified a number of further text changes. In addition, Ofgem provided further comments on 2 March 2011. The majority of the comments suggested further changes to Section 8 with a smaller number to Section 11 of the CUSC. After NGET raised CMP195, the GSG adopted the role of the CMP195 Workgroup and took all these additional comments into account when assessing the modification proposal.

¹ The terms 'the Authority', 'Ofgem' and 'we' are used interchangeably in this document. Ofgem is the Office of the Gas and Electricity Markets Authority.

² This document is notice of the reasons for this decision as required by section 49A of the Electricity Act 1989.

³ The final proposals appear on the Ofgem website here:

http://www.ofgem.gov.uk/LICENSING/INDCODES/CGR/Documents1/CGR_Finalproposals_310310.pdf.

⁴ CUSC modification proposals, modification reports and representations can be viewed on NGET's website at <http://www.nationalgrid.com/uk/Electricity/Codes/systemcode/amendments/>.

⁵ Ofgem's initial comments of 12 October 2010, with further comments provided on 2 March 2011, appear on pages 39 to 58 of the CMP195 Final Modification Report (FMR).

⁶ NGET's letter is available at: <http://www.nationalgrid.com/NR/rdonlyres/2DDE30C6-468E-47CF-A3D4-60E0E0A5126E/44033/OfgemCodeGovernanceReviewlegalcommentsletterfinal.pdf>.

The modification proposal

NGET raised CMP195 in March 2011. The proposal seeks to incorporate further text changes suggested by Ofgem and by the GSG prior to the raising of the proposal into the CUSC to better reflect the intent of the CGR final proposals and the intent of the approved CUSC modifications CAPs 183 to 188. During the assessment of the proposal, a number of further changes were suggested by Ofgem and by the CMP195 Workgroup which were included in the proposed legal text.

In the course of assessment, a specific issue was also identified regarding the intent of the approved modification CAP188 Alternative. CAP188 Alternative provided for the inclusion of transmission charging methodologies within the CUSC. The current text in the CUSC (Section 8.28.3) regarding implementation of CUSC modifications to the charging methodologies states that such changes “may only take effect from 1 April of any given year”. Ofgem noted that the Final Modification Report (FMR) for CAP188⁷ recorded the intent of the CAP188 Alternative (Annex 6 of the FMR) to allow the Authority to direct an implementation date other than 1 April (an alternative implementation date) in exceptional circumstances. The full text is set out below:

“Working Group Alternative Amendment

Under the WGAA, there would be no fixed cut-off date for approving charging methodology Amendment Proposals for implementation from the following charging year.

In order to provide certainty, a standard fixed implementation date of 1st April would apply to all Amendment Proposals to the Charging Methodologies. However, an alternative Implementation Date could be directed by the Authority, if exceptional circumstances applied.” (our emphasis)

The intent of the approved CAP188 Alternative as expressed above allows for the direction by the Authority of an alternative implementation date ‘in exceptional circumstances’. As such, the proposed legal text for CMP195 would need to reflect the intent of CAP188 Alternative which has already been approved. As a result, three Workgroup alternatives were raised which sought to address this specific issue.

Workgroup Alternative Code Modification 1 (WACM 1) is the same as the original proposal except for a change to 8.28.3. This change allows the Authority to direct an alternative implementation date for CUSC modifications to the charging methodologies in exceptional circumstances following consultation with the CUSC Panel and industry by reference to Section 8.23.9. 8.23.9 was included in the CUSC after Authority approval of CAP179. It provides for the Authority to direct re-consultation with the Panel and industry where it cannot make a decision on a CUSC modification with a fixed implementation date by the ‘decide by date’ and there is a risk of the Authority being ‘timed out’ from making a decision. The Authority would not be bound by any Panel recommendation following a consultation. A majority of Workgroup members supported this alternative.

WACM 2 is the same as the original except that it introduces a new paragraph (8.28.3A) to clearly set out that the Authority may direct an alternative implementation date for

⁷ The CAP188 Final Modification Report is here: <http://www.nationalgrid.com/NR/rdonlyres/5E0F6F21-5B49-48E8-8510-F3A8254E4739/43980/CAP188FinalAmendmentReport10.pdf>.

charging methodology CUSC modifications in exceptional circumstances taking into account the complexity, importance and urgency of such modifications following consultation with the Panel. WACM 2 does not provide for any consultation with industry. The Authority would set out in writing its reasons for directing an alternative implementation date. One Workgroup member supported this alternative.

WACM 3 is similar to WACM 2 but includes a process for industry consultation (set out in 8.28.3A). This process mirrors the process for a 'timing out' re-consultation in 8.23.9 (see above). However, it is set out separately from that process to distinguish it because of the different circumstances in which a consultation on an alternative implementation date would arise.

The majority of the Workgroup concluded that WACM 1 was the best option and better facilitates the Applicable CUSC Objectives compared to the CUSC baseline as it would include a specific process for consultation with industry on an alternative implementation date. It would also provide more certainty to CUSC parties about when a change to charging methodologies would take place.

CUSC Panel⁸ recommendation

At the CUSC Modifications Panel meeting on 30 September 2011, a majority of CUSC Panel members recommended that WACM 1 be approved as it best facilitated the Applicable CUSC Objectives compared to the other options and the current CUSC baseline. The full views of Panel members can be found in the FMR.

The Authority's decision

The Authority has considered the issues raised by the modification proposal and the Workgroup alternatives as set out in the FMR dated 14 October 2011. The Authority has considered and taken into account the responses to the Code Administrator consultation on the modification proposal and the Workgroup alternatives which are attached to the FMR⁹. The Authority has concluded that:

- 1. implementation of Workgroup Alternative Code Modification 2 (WACM 2) will best facilitate the achievement of the applicable objectives of the CUSC¹⁰; and**
- 2. directing that WACM 2 be made is consistent with the Authority's principal objective and statutory duties¹¹.**

Reasons for the Authority's decision

We note the extensive debate that took place about the issue of how to reflect the intent of approved modification CAP188 Alternative in the text for CMP195. We also note the different views expressed during the assessment of the modification proposal about the circumstances in which the Authority may direct an alternative implementation date for a CUSC charging methodology modification and what checks and balances would be needed around any Authority direction.

⁸ The CUSC Panel is established and constituted from time to time pursuant to and in accordance with section 8 of the CUSC.

⁹ The FMR is available on NGET's website - see footnote 4 above.

¹⁰ As set out in Standard Condition C10(1) of NGET's Transmission Licence, see: http://epr.ofgem.gov.uk/document_fetch.php?documentid=5327

¹¹ The Authority's statutory duties are wider than matters which the Panel must take into consideration and are detailed mainly in the Electricity Act 1989 as amended.

In our view, the intent of approved CAP188 Alternative is clear from the text in the CAP188 Alternative FMR as reported above. The Authority may direct an alternative implementation date in exceptional circumstances and this should be reflected in the CUSC. The outstanding question is whether and what further safeguards are needed for industry stakeholders should the Authority make a direction of an alternative implementation date.

The proposed legal text for WACM 2 provides that the Authority would take into account 'the complexity, importance and urgency of the modification' before making a direction, would provide its reasons in writing for directing an alternative implementation date and would consult with the Panel beforehand. In our view, consultation with the Panel, which is a largely industry appointed body, provides sufficient safeguards for industry stakeholders that the Authority's reasons for a possible direction would be scrutinised.

The Authority would seek to raise the issue of a potential alternative implementation date as early as possible with the Panel and provide sufficient notice of a potential direction so that the Panel can gauge industry opinion.

We recognise that the other alternative modifications seek to introduce more safeguards for industry through a process of consultation. However, we do not consider that these alternatives are appropriate.

In the case of WACM 1, it seeks to amend an existing unrelated consultation process (where the 'timing out' of Authority decisions on CUSC modifications may occur) to provide for consultation on a possible direction of an alternative implementation date. This approach fails to recognise the quite distinct circumstances of a 'timing out' direction, namely:

- the Authority considers that it is unable to make a decision and there is a risk of 'timing out' if it does not re-consult on a revised implementation date
- the Authority's direction applies to any kind of CUSC modification with a fixed implementation date (not just a charging methodology modification)

In the circumstances set out in the CAP188 Alternative, the Authority may be able to make a decision by the relevant 'decide by date'. However, the current CUSC text provides no flexibility to the Authority to direct a date other than 1 April. The flexibility allowed to the Authority to direct an alternative implementation date for a charging methodology modification arises where a 1 April implementation date is 'in exceptional circumstances' no longer achievable and it may be detrimental to defer implementation to the following 1 April.

In the case of WACM 3, we note that it seeks to create a distinct (though similar) process to the 'timing out' process for the circumstances where the Authority may wish to direct an alternative implementation date. However, as we have noted above, we consider that consultation by the Authority with the Panel is a sufficient safeguard for industry stakeholders without the need for a full consultation with industry. Where 'exceptional circumstances' may suggest that an early alternative implementation date is desirable, the process of a full industry consultation may be inefficient. Whilst each case for making any such direction would be considered on its merits, we doubt that circumstances would (or would often) arise where the possible need for such a direction would arise unexpectedly and without warning.

Applicable CUSC Objective (a) 'the efficient discharge by the licensee of the obligations imposed upon it under the Act and by this licence'

In our view, the proposed legal text for WACM 2, with the inclusion of 8.28.3A, provides the most proportionate check on the Authority's ability to direct an alternative implementation date for a CUSC charging methodology modification in exceptional circumstances. The Authority would consult with the Panel beforehand and would provide reasons for making its direction. The Authority would seek to raise a potential direction with the Panel as early as possible to allow the Panel to gauge industry views and improve the overall efficiency of the process of consultation and direction.

We also agree that the other proposed changes to the CUSC legal text set out in WACM 2 better reflect the comments made by Ofgem and the Workgroup about the need to clarify the legal text further after the CGR code changes CAPs 183 to 188.

For these reasons, we consider that WACM 2 best facilitates this applicable objective compared with the current baseline.

Applicable CUSC Objective (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'

As noted above, the intent of CAP188 Alternative states that the Authority has the ability to direct an alternative implementation date for CUSC charging methodology modifications in exceptional circumstances. Where no exceptional circumstances can be shown, the proposed implementation date would remain 1 April, providing CUSC parties with the certainty which they seek regarding when transmission charges will change. We consider that the addition of limited flexibility to the Authority to direct an alternative implementation date, with proportionate safeguards for industry stakeholders around any direction as set out in WACM 2, does not adversely affect CUSC parties' ability to effectively compete in generation and supply markets.

For these reasons, we consider that by providing the flexibility prescribed by CAP188 Alternative, WACM 2 best facilitates this applicable objective compared with the current baseline.

Legal text issue

We note that a minor legal text issue regarding duplication of wording in paragraph 8.25.14 was identified as the draft CMP195 FMR was being prepared. We have agreed with NGET to address this issue through a 'consent to modify' request after the approval of this modification.

Decision notice

In accordance with Standard Condition C10 of NGET's Transmission Licence, the Authority, hereby directs that Workgroup Alternative Code Modification 2 (WACM 2) to CMP195 'Code Governance Review post implementation clarifications' be made.

Declan Tomany

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Signed on behalf of the Authority and authorised for that purpose