



## **AMENDMENT REPORT VOLUME 2**

### **CUSC Amendment Proposal CAP186 Code Governance Review: Send Back Process**

**This document contains consultation responses**

Amendment Ref	CAP186
Issue	V0.1
Date of Issue	17 September 2010
Prepared by	National Grid

## **ANNEX 1 - REPRESENTATIONS RECEIVED DURING CONSULTATION**

This Annex includes copies of any representations received following circulation of the Consultation Document (circulated on 14/07/2010, requesting comments by close of business on 05/08/2010).

Representations were received from the following parties:

<b>No.</b>	<b>Company</b>	<b>File Number</b>
1	Scottish and Southern Energy	CAP186-CR-01
2	EDF Energy	CAP186-CR-02
3	ScottishPowers's Energy Wholesale Business which includes ScottishPower Generation Ltd, Scottish Power Energy Management Ltd and ScottishPower Renewable Energy Ltd	CAP186-CR-03
4	Drax Power Limited	CAP186-CR-04

**From:** garth.graham@sse.com  
**Sent:** 03 August 2010 14:00  
**To:** Virk, Bali  
**Cc:** .Box.Cusc.Team  
**Subject:** Re: CAP186 and CAP187 Consultation Documents  
Dear Sirs,

This response is sent on behalf of Scottish and Southern Energy, Southern Electric, Airtricity Developments (Scotland) Limited, Airtricity Developments (UK) Limited, Clyde Wind Farm (Scotland) Limited, Dalswinton Wind Farm (Scotland) Limited, Greenock Wind Farm (Scotland) Limited, Griffin Wind Farm Limited, Keadby Developments Limited, Keadby Generation Limited, Medway Power Limited, Minsca Wind Farm (Scotland) Limited, Slough Energy Supplies Limited, SSE (Ireland) Limited, SSE Energy Limited and SSE Generation Limited.

In relation to the Consultation Document associated with CUSC Amendment Proposal CAP186 "Code Governance Review: Send Back Process" (contained within your email of 14th July 2010) we wish to make the following comments.

We note that the CAP186 Amendment Proposal is part of a series of proposals raised by National Grid to implement the Final Proposals of the wider Code Governance Review which was initiated by Ofgem in November 2007 and taken forward for implementation via the Transmission Licence changes in July 2010

We are also mindful that the 'Description of the Proposed Amendment' (and paragraph 3.3 of the consultation document) states that CAP186:-

"...would enable the Authority to send back an Amendment Report to the Amendments Panel in circumstances where the Authority considers that it is unable to form a decision based on the content of the report. It is judged that the 'send back' provisions will provide an effective safeguard against the Authority being placed in a position where it is unable to approve a proposal owing to deficiencies in the report such as an insufficient assessment, incorrect legal texts or other technical issues. The Authority can then specify the action that it believes is required in order to make the report complete."

We agree with this principle.

It appears to us to correctly reflect the P198 Judicial Review Judgement (Teesside and Others v The Authority, 25th June 2008), in particular the statement in paragraph 66\*, namely that in exercising the power to 'Send Back' the Authority will need to:-

i) act reasonably; and  
ii) be limited to addressing deficiencies ("such as an insufficient assessment, incorrect legal texts or other technical issues") in the Amendment Report.

Thus the CAP186 'Send Back' power would not, for example, "...enable the Authority to set, for policy reasons, a different implementation date, or to sit upon a Modification Report for years and then seek to restart the exercise by a purported variation of the timetable set in the Report". It would also not "...enable the Authority to vary the Panel's timetable set in the Modification Report for any reason that seemed appropriate to the Authority".

In terms of the direction issued by the Authority to the Panel, we note the comments (in the description of CAP186) that "The Panel considers the Authority's direction at its next meeting and makes a decision on the course of action required and the timetable to which it must work to, as agreed by Ofgem" and that "The course of action will depend on Ofgem's direction. If the direction is detailed and gives specific steps and timescales, the Panel will follow this and take actions as appropriate."

However, in considering the direction the Panel will need to be mindful, amongst other things, of (i) whether the direction is reasonable (for example, has sufficient time been allowed to undertake the tasks required by the Authority) and (ii) paragraph 83\* of the P198 Judicial Review Judgement including, in particular, the comment about remitting "...the matter to the Panel for complete reconsideration". If, for example, insufficient time is allowed (to complete the required tasks) and / or complete reconsideration (if required) is not permitted then, in this unlikely situation, perhaps the Panel might wish to seek external legal advice on how to proceed.

In addition to the comments above, the previous comments we provided regarding CAP179 should also be taken into consideration as there is a lot of commonality between CAP179 and CAP186 as regards the exercising of powers by the Authority.

In light of the above, and being mindful of the points detailed in paragraph 6.1, we agree with the Proposer's assessment that CAP186 would better facilitate CUSC Applicable Objective (a).

Finally, there appears to be a typographical error in 8.20.9 (a) and (b) of the Appendix 1 where the 'normal' text is in bold and the two defined terms ("Proposed Amendment" in (a) and "Amendment Report" in (b)) are not.

Yours faithfully

Garth Graham  
Electricity Market Development Manager, SSE

\* P198 Judicial Review Teesside and Others v The Authority June 2008 - Paragraph 66.

"I would also observe that the adjunctive power needed for the purpose would not be a wide ranging one, so as to enable the Authority to vary the Panel's timetable set in the Modification Report for any reason that seemed appropriate to the Authority. It would be a limited power to vary, solely so that the Authority could take a decision within a reasonable time in the light of the circumstances that had arisen following receipt of the Modification Report. It would not be a power that would enable the Authority to set, for policy reasons, a different implementation date, or to sit upon a Modification Report for years and then seek to restart the exercise by a purported variation of the timetable set in the Report. "

\* P198 Judicial Review Teesside and Others v The Authority June 2008 - Paragraph 83.

"The justification for a Proposed Modification put forward by the Panel might be dependent upon a very time sensitive analysis of costs and benefits, and the Panel timetable for implementation might accordingly be tailored to that time sensitive analysis. If for any reason there were then a long delay before the Authority could take a final decision, a question might arise whether the Authority was in substance and reality considering the same modification as had been submitted by the Panel, or was considering an altogether different modification, putatively predicated on a cost benefit analysis that the Panel did not, and could not have, evaluated. In such circumstances a power to remit the matter to the Panel for complete reconsideration, rather than a power in the Authority to change the timetable for implementation of what had in substance become by lapse of time a different modification, might better preserve the institutional balance between the Panel and the Authority and better serve the objectives of the BSC."

From: "Virk, Bali" <bali.virk@uk.ngrid.com>  
To:  
Date: 14/07/2010 11:12  
Subject: CAP186 and CAP187 Consultation Documents

---

Dear CUSC Parties

At the special CUSC Amendments Panel meeting on the 9<sup>th</sup> July 2010 the CUSC Amendments Panel agreed for the following Code Governance Review Amendment Proposals to proceed to the consultation phase:

- CAP186 – Code Governance Review: Send Back Process
- CAP187 – Code Governance Review: Environmental Assessment and the Relevant Objectives

The closing date for responses for the above consultations is 5<sup>th</sup> August at 5.00pm, please send your responses to [cusc.team@uk.ngrid.com](mailto:cusc.team@uk.ngrid.com)

CAP186 and CAP187 consultation documents will be available at <http://www.nationalgrid.com/uk/Electricity/Codes/systemcode/amendments/currentamendmentproposals/> later today.

Regards

file://C:\Documents and Settings\emma.clark\Local Settings\Temporary Internet Files\OLK... 11/08/2010

## CUSC Team

5 August 2010

### **CUSC Amendment Proposal CAP186: Code Governance Review – Send Back Process**

We agree that CAP186 would better facilitate CUSC Applicable Objective (a) and our further comments are as follows:

We note that CAP186 has been proposed due to the new licence condition C10 text in National Grid's Transmission Licence, recently formulated by Ofgem as part of its Code Governance Review, and implemented with effect from 5 July 2010.

We note that C10 requires a "Send Back Process" to enable the Authority to send back an Amendment Report to the CUSC Panel in circumstances where the Authority considers that it is unable to form a decision based on the content of the report. The Authority, in doing so, can specify the action that it believes is required in order to make the report complete (for example, the undertaking of fresh analysis, requiring improvements to the legal text, requiring re-drafting in relation to the mod or FMR, or to account for a radical change in the external environment since the FMR was issued).

CAP186 proposes changes to the CUSC in order to incorporate the following parts of the process:

Firstly, following submission of a final Amendment Report to the Authority, the Authority may send back the Report if it is unable to form an opinion, and may issue a direction to the panel specifying the steps, revision, analysis or information it requires in order to form an opinion. To avoid "timing out" issues, it will be very important for the Authority to use send-back in sufficient time for the Panel, the code administrator and industry to complete the required process before the last decision-by date as per the "original" final modification report.

EDF Energy believes that there would be significant issues with CAP186 if send-back occurred at a very late stage. In practice decision-by dates rarely arise in the existing CUSC modification process. This may change in regard to charging modifications which will be part of the CUSC from January 2011. We note that Ofgem can request additional, later implementation dates from the relevant Panel as part of the send-back process, although again, this should not be left too late.

Secondly, the Panel will consider the Authority's direction at its next meeting and will make a decision on the course of action. If Ofgem's send-back "Direction" is detailed and

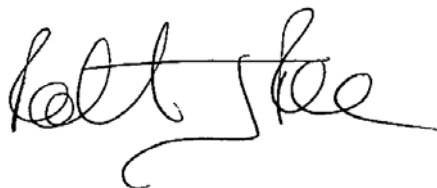
gives specific steps and timescales, the Panel will, insofar as it is able, follow this and take actions as appropriate. If the Direction is not detailed, EDF Energy believes the Panel will be required to make their own recommendations in terms of the next steps and timescales.

Finally, once the necessary changes have been made to the Report, the Panel will retake the Panel Recommendation Vote and the Report will be re-submitted to the Authority. It is intended by Ofgem that this new process will provide an effective safeguard against the Authority being placed in a position where it is unable to approve a proposal due to deficiencies in the report, such as an insufficient assessment or inaccurate legal text.

EDF Energy is supportive of the proposed approach in CAP186 to giving effect to the new licence condition, and we have no alternative amendment to suggest.

We agree that CAP186 would better facilitate CUSC Applicable Objective (a) - the efficient discharge by the Licensee of the obligations imposed upon it by the act and the Transmission Licence – specifically, with regard to the relevant obligation under standard condition C10 of the licence.

Yours sincerely

A handwritten signature in black ink, appearing to read "Rob Rome".

**Rob Rome**  
**Head of Trading and Transmission Arrangements**

Amendments Panel Secretary  
Electricity Codes  
National Grid  
National Grid House  
Warwick Technology Park  
Gallows Hill  
Warwick  
CV34 6DA

**Ref** CAP186  
**Date** 20<sup>th</sup> July 2010

**Tel No.** 01355 35 2699  
**Email:** [sp\\_electricity.spoc@accenture.com](mailto:sp_electricity.spoc@accenture.com)

## **CUSC Amendment Proposal CAP186**

Thank you for the opportunity to comment on the Consultation for Amendment Proposal CAP180. This response is submitted on behalf of ScottishPower's Energy Wholesale Business which includes ScottishPower Generation Ltd, ScottishPower Energy Management Ltd and ScottishPower Renewable Energy Ltd.

ScottishPower are generally supportive of any measures which increase the efficiency of Industry Governance, however we have some concerns with the provisions of this change. The proposal would allow the Authority to send a change back to the CUSC Panel where it felt that it required further information before it could form a decision on the change proposal. CUSC changes can have a material impact on the economics of generation investment decisions. Anything which potentially increases the level of uncertainty over when (and indeed if) a change may be decided upon may lead to an unwillingness on the part of investors to commit to future projects at a time when significant investment is required in both low carbon generation and replacement of existing thermal plant. In theory such a change could go round and round in circles for months or even years without reaching a decision. That level of regulatory uncertainty can only be damaging to the market. The process needs a limitation on the decision making timescales (preferably a limit on the number of times a change can be sent back).

We would hope that this process would be the exception rather than the rule. It is much more preferable that the Authority ensure suitably qualified representatives are actively engaged in the change process from the start, resulting in an appropriate level of analysis detailed in the report to the Authority from the outset.

I hope you find these comments useful. Should you have any queries on the points raised, please feel free to contact us.

Yours sincerely

*Gary Henderson*



FAO Alex Thomason  
Commercial  
National Grid  
National Grid House  
Warwick Technology Park  
Gallows Hill  
Warwick  
CV34 6DA

5<sup>th</sup> August 2010

Dear Alex,

**CAP186 Code Governance Review: Send Back Process**

Drax Power Limited ("Drax") is the operating subsidiary of Drax Group plc and the owner and operator of Drax Power Station in North Yorkshire. In March 2009, Drax acquired an electricity supply business, Haven Power Limited ("Haven"); Haven supplies some 27,000 small and medium sized business customers and provides an alternative route to market for some of Drax's power output.

Drax welcomes this opportunity to comment on the implementation of Licence changes that have resulted from the conclusions of Ofgem's Code Governance Review. Generally, Drax supports the approach taken by National Grid in implementing the send back process, including the implementation timetable.

Drax continues to believe that the industry, via industry code processes, should retain responsibility for the analysis contained within Amendment reports. The new send back process developed as part of the Code Governance Review will ensure that the industry remains responsible for updating such analysis after the final report has been sent to the Authority for determination; this is a welcome move. However, it will be important for Code Administrators to continue to promote efficiency in industry code processes by encouraging Ofgem to engage with the industry (via Panel and Working Group meetings) to ensure relevant considerations are captured as early as possible, rather than relying on the send back process at a later stage.

Drax has concerns over the lack of detail on the interaction between the send back process and the current Amendment process. The CAP186 Amendment does not appear to contain *any* detail on the process that proposals shall follow when they have been sent back to the Panel. Whilst this may create flexibility in the approach the Panel could take, it is not clear at which stage a given proposal would re-enter the Amendment process and what actions the Panel will be *expected* to take; for example:

- How would, and under what circumstances could, Working Groups be reconvened?
- If Working Groups were to be reconvened, would they comprise of the same members or an equally "qualified" group of industry experts?
- If the analysis is updated, will the wider industry be consulted on the new analysis?
- Will the Panel provide a new recommendation to the Authority, based upon any new analysis and / or responses from wider industry consultation?

Drax believes that any changes or additions to the analysis contained within the original report sent to the Authority for determination should be subject to industry consultation. Further to this, Drax believes that



any changes / additions to the analysis would require a new Panel recommendation to form part of the updated report.

Finally, whilst Drax understands that the industry codes cannot place obligations on the Authority, the process should clearly state that the Panel would expect a reasonable justification from the Authority for sending back an Amendment, given the inherent cost of processing the request. Drax has previously advocated a limit on the number of times a report can be sent back by the Authority, in order to ensure the send back process is used sparingly, that the Amendment process remains cost effective (particularly due to the potential for send back requests to require further information / analysis from external consultants) and to promote timely decision making by the Authority.

If you would like to discuss any of the views expressed in this response, please feel free to contact me.

Yours sincerely,

By email

Stuart Cotten

Regulation  
Drax Power Limited