

Stage 03: Workgroup Report

Connection and Use of System Code (CUSC)

CAP190 Two-Thirds majority voting requirement for CUSC Panel recommendations on Amendments arising from licence obligations, Authority requests or obligations

This proposal seeks to amend the CUSC in order that, where a Modification Proposal and any Workgroup Alternative CUSC Modification (WACM) has been raised to comply with a Licence change, or following an Authority direction, request, obligation, or instruction, a two-thirds majority vote would be required to recommend approval

This document contains the discussion of the Workgroup which formed in September 2010 and concluded in July 2011.



The Code Administrator recommends:

CAP190 proceeds to Code Administrator Consultation



High Impact:

CUSC Modifications Panel

What stage is this document at?

01	Initial Written Assessment
02	Workgroup Consultation
03	Workgroup Report
04	Code Administrator Consultation
05	Draft CUSC Modification Report
06	Final CUSC Modification Report

Contents

1	Summary	3
2	Description of Proposed Modification	5
3	Summary of Workgroup Discussions.....	6
4	Impact and Assessment.....	10
5	Proposed Implementation.....	12
6	Recommendations.....	13
	Annex 1 – Joint P264 and CAP190 Legal Brief to QC	14
	Annex 2 - Workgroup Letter to DECC	23
	Annex 3 – DECC Response Letter.....	27
	Annex 4 – Workgroup Terms of Reference and Membership	28
	Annex 5 – CUSC Modification Proposal	33
	Annex 6 - Workgroup Attendance Register.....	40



Any Questions?

Contact:

Emma Clark



[emma.clark@
uk.ngrid.com](mailto:emma.clark@uk.ngrid.com)



01926 655223

Proposer:

Emma Clark

National Grid Electricity
Transmission plc

About this document

This is the Workgroup Report, which includes a description of CAP190 and the deliberations of the Workgroup. No Workgroup Consultation has been carried out and the Workgroup is not making any recommendations in this report as a result of developments that have occurred during the modification process and ensuing time constraints.

Document Control

Version	Date	Author	Change Reference
0.1	10/08/11	National Grid	Draft for Workgroup Comment
1.0	18/08/11	National Grid	Final version for submission to Panel

1 Summary

- 1.1 CAP190 was proposed by Wyre Power on 3 September 2010. The Modifications Panel determined that the proposal should be considered by a Workgroup and that the Workgroup should report back to the CUSC Modifications Panel meeting within four months following a period of Workgroup Consultation.
- 1.2 CAP190 seeks to amend the CUSC in order that, where a Modification Proposal and any Workgroup Alternative CUSC Modification (WACM) has been raised to comply with a Licence change, or following an Authority direction, request, obligation, or instruction, a two-thirds majority vote would be required to recommend approval. A like for like Proposal, P264 – ‘Two-thirds majority requirement for Panel recommendations on licence originated Modifications’, was raised under the BSC and Workgroup discussions were held in conjunction with CAP190. A similar Proposal was also raised under the UNC - 0312 ‘Introduction of two-thirds majority voting to the UNC Modification Panel. These Proposals have recently been rejected by the Authority. More detail is provided in Section 2 of this report.
- 1.3 A Workgroup for CAP190 was established and the first meeting held on 23rd September 2010. Following discussions at that meeting it was agreed that advice would be sought from a QC with respect to a view of the interpretation of the Statutory Instrument (SI) with regard to the Competition Commission appeal. It was agreed that a legal brief would be drafted jointly by National Grid and ELEXON for the purpose of both CAP190 and P264 and reviewed by members of the Workgroup prior to submission to the QC. Two joint Workgroup teleconferences were held on 27th October 2010 and 10th December 2010 to discuss the legal advice and further actions following receipt of the draft advice from the QC. A meeting was arranged with the QC between National Grid, ELEXON, the Proposers of P264 and CAP190 and two other Workgroup members and this took place on 21st January 2010. Attendance for the Workgroup meetings can be found in Annex 5.
- 1.4 Following the QC meeting, a joint Workgroup teleconference was held on 26th January 2011 to discuss the outcome of the meeting and next steps. The QC advice had the result that P264 could be progressed but that CAP190 as it remained would have no effect if implemented due to interpretation of the SI and ambiguities with the term ‘recommendation’. The Proposer of CAP190 did not wish to withdraw CAP190 and instead the Workgroup recommended to the Panel to put CAP190 on hold for three months pending investigations into changing the SI. The CUSC Panel was informed of the update and delays to the timetable at its meeting on 28th January 2011. The Panel expressed concerns about the length of time taken to progress CAP190 further and approved a one month delay whilst advice was sought in changing the SI.
- 1.5 A letter was prepared and sent to the Department of Energy and Climate Change (DECC) on 21 February 2011 illustrating the issues that had arisen from CAP190. This letter is contained in Annex 2. A further one month extension was sought at the February CUSC Panel in order to allow time for a response from DECC to be received. At the CUSC Panel meeting a number of members expressed a concern highlighted in the QC’s advice that multiple ‘recommendations’ in the final CUSC Modifications Report could potentially lead to an appeal to the Competition Commission being disallowed and suggested that this issue should be dealt with as a priority. The Panel therefore requested that National Grid, as Code Administrator reviewed the CUSC provisions in this area and advise on a potential solution.
- 1.6 A response from DECC was received on 16 March 2011 which advised that

due to workload and time constraints and the fact that this issue was not deemed to be of an urgent nature, it would be appropriate to consider other alternatives in order to find a solution instead of via legislation. This letter can be found in Annex 3. The Workgroup held a further meeting on 24 March 2011 to discuss the DECC response and the findings from National Grid as Code Administrator as to what alternative solution could be found to the issue. It was agreed to pursue a resolution to alter the wording in the CUSC through the raising of another CUSC Modification Proposal: CMP196. This is discussed in more detail in Section 3. In light of this the CUSC Panel agreed to put CAP190 on hold until July 2011 whilst CMP196 was progressed.

- 1.7 On 20 July 2011 the Authority published letters in relation to UNC Modification Proposal 0312 and BSC Modification Proposal P264 which informed the industry that these proposals have been rejected. At the July CUSC Panel meeting, the Panel agreed by majority that the Workgroup timetable for CAP190 should not be extended further. However, the Proposer felt that CAP190 should not be withdrawn in order to provide the industry with the opportunity to respond to the issues raised by CAP190 via the Code Administrator Consultation.
- 1.8 This Workgroup Report has been prepared in accordance with the Terms of the CUSC. An electronic copy can be found on the National Grid Website, www.nationalgrid.com/uk/Electricity/Codes/, along with the CUSC Modification Proposal Form.

2 Description of Proposed Modification



How does a Competition Commission Appeal work?

The Competition Commission has a number of criteria that must be met before an appeal can be considered, namely that an Authority decision on a CUSC Modification Proposal must be contrary to the majority recommendation of the CUSC Panel. If the Authority decision is in agreement with the Panel recommendation, no appeal can be raised.

Further information on the Competition Commission appeals process can be found at the following link: <http://www.competition-commission.org.uk/appeals/energy/>

- 2.1 CAP190 has arisen from the implementation of Ofgem's Code Governance Review which led to certain changes to the Transmission Licence. One aspect of these changes was the ability for the Authority to place an obligation on the Licensee to raise a CUSC Modification Proposals following a Significant Code Review (SCR). The Proposer believes that Modification Proposals that arise from Licence obligations may have significant impacts and commercial implications which have possibly been discussed previously without reaching an agreement, and are therefore likely to be contentious.
- 2.2 CAP190 proposes that when the Modifications Panel vote on its final recommendation for a Modification Proposal resulting from an Authority request, direction or instruction, a two-thirds majority vote would be required to recommend approval. This means that the number of votes cast in favour of approval would have to be at least twice the number as against approval. The table below demonstrates how voting would work should a two-thirds majority be required.

Total Votes cast	Votes required "for"	Votes required "against"
9	6	3
8	6	2
7	5	2
6	4	2

- 2.3 This is in contrast to the current vote which requires a simple majority (ie over 50%). Therefore the current Panel voting process could result in a single vote making a recommendation to the Authority and removing the right of appeal to the Competition Commission. For CUSC Modification Proposals that have not been raised as a result of a direction from the Authority, the voting would remain as a simple majority vote.

3 Summary of Workgroup Discussions

Presentation of proposal

- 3.1 The first CAP190 Meeting was held on 23rd September 2010. The Workgroup Chair invited the Proposer of CAP190 to give a presentation of the CUSC Modification Proposal. Background was provided on how the Proposal came to fruition and its intention as described in section 3 above. Discussion arose as to where CAP190 may apply and the Proposer clarified that the issue centred around how Ofgem can make requests or directions and that regulated monopolies such as National Grid were most likely to be affected. The Proposer stressed the importance of CAP190 in allowing for an open route of appeal

Discussion of Terms of Reference

- 3.2 When discussing the Terms of Reference for CAP190, the group debated the wording used in applying the two-thirds majority vote to Panel Recommendations. The group agreed that the following criteria should be reflected in any draft legal text and the Workgroup Report.

Where a Proposer raises a CUSC Modification Proposal as a result of:

- a) an Authority or Ofgem request, direction or instruction (verbally or in writing, including email);
 - b) where the Authority or Ofgem compels or coerces a party to raise a Proposal;
 - c) where the Authority or Ofgem is the effective progenitor of a CUSC Modification Proposal
- 3.3 The Workgroup felt that it was necessary to distinguish between the Authority and Ofgem and that CAP190 applied to both when making reference in this context. The group also clarified that CAP190 would cover CUSC Modifications that are fulfilling a SCR conclusion, in part or in full and also proposals that are subsumed into or suspended during a SCR process.
- 3.4 At the first Workgroup meeting, the possibility of seeking external legal advice was discussed. This had been raised at the first Workgroup for P264 in order to clarify whether the proposed solution could be progressed via changes to the BSC and CUSC, specifically concerning interpretation of the SI with regard to appeals and the use of the term 'majority'. The group felt that it was pragmatic to seek advice from a QC in this respect and it was agreed that a joint legal brief by ELEXON and National Grid would be compiled, with input from the Workgroup, and sent to a QC.
- 3.5 An additional issue raised in the CUSC Modification Proposal form was regarding the view that 'The Company member [who] may feel obliged to vote for the Proposal they have been required to raise'. At the first meeting on 23rd September 2010, the National Grid representative in the Workgroup advised the group that the National Grid Panel Member is required to act impartially and in accordance with the CUSC and would have to justify their views against the Applicable CUSC Objectives.

QC Legal Advice

- 3.6 A second meeting was held jointly with P264 via teleconference on 27th October 2010 in order to finalise the legal brief and agree the set of questions that would be asked as part of the brief. Further to the meeting,

the legal brief was finalised and sent to the QC on 8th November 2010. The joint legal brief can be found within Annex 1 of this report.

- 3.7 Upon receipt of the draft legal advice on 25th November 2010, it was agreed that a meeting with the QC would be appropriate in order to discuss the advice further and gain clarity of some of the issues raised. The advice had unexpectedly raised an issue with CAP190 which had the possible effect of CAP190 being unable to continue as it stood. This was because of the term 'majority recommendation' referred to in the SI and ambiguity as to which recommendation it actually referred to. The QC concluded that the recommendation could be that which is contained in the Amendment Report, as, at the time of writing the SI, there was no such thing as a CUSC Panel Recommendation. In addition, the wording in the SI also refers to 'Panel Members' as opposed to the 'Amendments Panel' which suggests that the emphasis is on the view of each Panel Member and not the Panel itself.
- 3.8 A second issue highlighted by the advice, which has a cross-code effect and not specific to CAP190, is that the wording of the SI indicates that there is a right of appeal to the Competition Commission if the Authority rejects a Proposal, regardless of whether there has been a recommendation to approve by the Panel. This is contrary to industry understanding, where an appeal is allowed only if the Authority determination is contrary to that of the Panel recommendation. This understanding arises out of interpretation of the DTI's response to the consultation on the draft order for the Energy Act 2004 which is contained within a footnote in the legal brief in Annex 1.
- 3.9 In preparation for a meeting with the QC, a third joint meeting was held via teleconference on 10th December 2010 to discuss the draft advice provided by the QC and to agree a set of questions to ask at the meeting in order to better understand the advice and specifically to address the issues raised in relation to CAP190. Following cancellation of the QC meeting arranged for 17th December 2010 due to unforeseen circumstances, a meeting was scheduled for 21st January 2011 in which the Proposers of P264 and CAP190 attended, along with two other Workgroup members and Company and Legal Representatives from National Grid and ELEXON.
- 3.10 The outcome of the QC meeting and the action that was required was discussed and agreed on at a fourth joint Workgroup meeting on 26th January 2011. During the meeting a number of solutions to the issues highlighted by the QC were discussed. It was agreed by the group that CAP190 could not continue as it currently stands and in order to progress it, a change would be required either to the SI or to the CUSC/Transmission Licence to remove the ambiguity regarding the term 'recommendation' referred to in the SI. The group agreed that the most logical step and preferred option was to seek a change to the SI.
- 3.11 The Proposer of CAP190 advised that they did not wish to withdraw CAP190 at this stage, and it was agreed to propose to the CUSC Modifications Panel to put the CAP190 Workgroup on hold for three months to allow time to contact DECC and establish more information on the possibility of changing the SI. It was agreed that the BSC equivalent, P264 would continue as a separate Workgroup as the QC did not raise a specific issue with it that would render it unable to proceed.

Post QC Legal Advice discussions

- 3.12 At the CUSC Modifications Panel on 28th January 2011, approval was sought to put CAP190 on hold for three months. The Panel expressed concern regarding a lack of clarity regarding the process and time required for changing an SI and agreed that a one month delay would be appropriate.
- 3.13 Final Legal Advice from the QC was received on 7th February 2011 which reiterated the draft advice and discussions that had been held in the meeting.¹
- 3.14 Further to CAP190 being put on hold, the Workgroup compiled a letter to send to DECC illustrating the issues that had been raised as part of CAP190. The letter was sent on 21st February 2011 and is contained in Annex 2 of this report. A further one month extension was agreed at the February CUSC Panel to allow time for a response to be received from DECC. A response was received on 16th March 2011 which advised that other routes need to be considered to find a solution to the issue as opposed to a change to the SI as DECC were not in a position to be able to change the SI at this time. This letter is contained within Annex 3.
- 3.15 The Workgroup held a teleconference on 24 March 2011 and agreed to pursue the other option in order to attempt to rectify the ambiguity caused by the SI. As a result CMP196 was raised by National Grid Electricity Transmission (NGET) and presented to the CUSC Panel on 25 March 2011. CMP196 proposed to replace all references to the term “recommendation” in the CUSC Modification Report other than that which refers to the recommendation of the CUSC Modifications Panel to ensure that existing rights of appeal are maintained.² The Workgroup agreed that CMP196 would not necessarily prevent CAP190 from progressing at a later stage.
- 3.16 As a result of the raising of CMP196, the CUSC Panel agreed to put CAP190 on hold until July 2011 to allow time for CMP196 to be progressed. On 20th July 2011 the Authority published rejection letters for both the like-for-like UNC and BSC proposals. In light of the decision letters, the CUSC Modifications Panel agreed by majority at its meeting on 29 July 2011 that the timetable for the CAP190 Workgroup should not be extended and that the Workgroup should move straight to the report phase.
- 3.17 The Code Administrator advised the Proposer of the Panel’s decision and the Proposer decided not to withdraw CAP190 and instead keep open the route to proceed to Code Administrator Consultation in order for the industry to comment on the Proposal and for the Authority to make a determination in due course.

¹ The Final QC Advice can be found at this link :

<http://www.nationalgrid.com/uk/Electricity/Codes/systemcode/workingstandinggroups/wg/CAP190/>

² The CUSC Modification Proposal Form for CMP196 can be found at

<http://www.nationalgrid.com/uk/Electricity/Codes/systemcode/amendments/currentamendmentproposals/>

Potential Workgroup Alternative CUSC Modification

3.18 At the first Workgroup meeting on 23rd September 2010, the Workgroup discussed three potential Workgroup Alternative CUSC Modifications:

- (i) All CUSC Modification Proposals would be subject to a two-thirds majority Panel Recommendation Vote;
- (ii) All CUSC Modification Proposals would be subject to a two-thirds majority Panel Recommendation Vote, with the exception of Self-governance Modification Proposals;
- (iii) Identical to CAP190 except that it excludes Modification Proposals that have been suspended or subsumed during an SCR phase.

3.19 Due to the raising of CMP196 and the Panel decision not to extend the Workgroup timetable beyond July 2011, no Workgroup Consultation for CAP190 has taken place and therefore no Workgroup Alternative CUSC Modifications were pursued further or raised by another party.

4 Impact and Assessment

Impact on the CUSC

- 4.1 CAP190 requires amendments to the following parts of the CUSC:
- Section 8

Impact on Greenhouse Gas Emissions

- 4.2 Neither the Proposer nor the Workgroup identified any material impact on Greenhouse Gas emissions.

Impact on Core Industry Documents

- 4.3 Neither the Proposer nor the Workgroup identified any impacts on Core Industry Documents.

Impact on other Industry Documents

- 4.4 Neither the Proposer nor the Workgroup identified any impacts on Other Industry Documents.

Assessment against the Applicable CUSC Objectives

- 4.5 Given the circumstances of CAP190 and the decision to end the Workgroup phase, the CAP190 Workgroup has not carried out an assessment against the Applicable CUSC Objectives.

- 4.6 The Proposer believes that CAP190 would better facilitate both Applicable CUSC objectives, as summarised under each objective below.

- (a) the efficient discharge by the licensee of the obligations imposed upon it under the Act and by this licence;

The change suggested by this Proposal is a minor alteration to the working practice of the CUSC Panel which would address the concerns raised at the Competition Commission, in the Code Governance Review and recognised by Ofgem in their Final Proposals. It is efficient for the licensee to meet the spirit of the regime as well as the letter of the licence conditions imposed under the Governance review. In the longer term the efficiency of the market will be helped if a more robust regulatory regime is developed. This solution is also in line with that put forward under the BSC and UNC, which will help to ensure consistency across the industry codes.

- (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.

This Amendment Proposal will ensure that Panel recommendations on potentially contentious Amendment Proposals resulting from Licence changes, SCR directions or other Authority requests and obligations are subject to an appropriate level of support from the expert Panel Members, and that Parties'

*rights to appeal Authority decisions regarding such Proposals are protected.
The support of the CUSC signatories is vital if the contract is to develop in
such a way as to encourage new entrants to the market.*

5 Proposed Implementation

- 5.1 Given the circumstances of CAP190, the Workgroup has not discussed a proposed implementation date for CAP190. It is therefore likely that implementation would default to the CUSC standard of 10 working days after an Authority decision.

Workgroup View

- 6.1 In light of the developments of CAP190 and the subsequent CMP196 proposal, the Workgroup has not made a recommendation on the implementation of CAP190.

National Grid initial view

- 6.2 National Grid agrees with the principle that existing rights of appeal should be maintained. However, the implementation of CAP190 would not necessarily be more efficient in terms of fulfilling licence obligations as a party may still raise an appeal under circumstances where there has been a two-thirds majority vote for implementation. National Grid believes that the decision of the Panel should be focused on the merit of the proposal itself and not potentially on keeping open the rights of appeal.
- 6.3 In addition, whilst a unanimous Panel vote indicates a clear view to the Authority and the industry, it is possible under CAP190 that only one additional vote could result in a two-thirds Panel majority and this therefore represents only a marginal difference from the current position.
- 6.4 National Grid notes that CAP190 has not been fully developed and for clarity this view is an initial view based on analysis undertaken by the Workgroup to date.



TO **MONICA CARSS-FRISK QC, BLACKSTONE CHAMBERS**
TRISTAN JONES, BLACKSTONE CHAMBERS

FROM: **DIANE MAILER, ELEXON LIMITED**
diane.mailer@elexon.co.uk
0207 380 4254

DATE: **8 NOVEMBER, 2010**

**INSTRUCTIONS TO COUNSEL
FOR ADVICE**

Counsel is instructed by ELEXON Limited (“ELEXON”) and National Grid Electricity Transmission plc (“National Grid”) to provide written advice on the validity of a proposal to modify the Balancing and Settlement Code of Great Britain (“BSC”), Modification Proposal P264, and a proposal to amend the Connection and Use of System Code (“CUSC”), Amendment Proposal CAP190, in light of the appeals process provided for under the Energy Act 2004 to appeal decisions of the Gas and Electricity Market Authority (the “Authority”) concerning modifications to industry codes.

BSC Modification Proposal P264 (“P264”) and CUSC Amendment Proposal CAP190 (“CAP190”) seek to change the voting requirements for the BSC Panel and CUSC Amendments Panel respectively from a simple majority to a two thirds majority for the Panels to recommend to the Authority a Modification or Amendment to the BSC and CUSC. The two thirds majority voting requirement will only apply in circumstances where the Authority has directed, instructed or requested a licensee to raise the Proposal to modify or amend the BSC and/or CUSC. Such proposals may result from Significant Code Reviews (“SCR”), a new mechanism to facilitate complex and significant changes which is currently being implemented in the BSC and CUSC following Transmission Licence changes that resulted from the recent “Code Governance Review” conducted by the Authority.

P264 and CAP190, if approved, would affect the ability of a party to appeal the Authority's final determination on a SCR Modification or Amendment because appeals to the Competition Commission are restricted to circumstances where the recommendation of the relevant industry Panel is contrary to the determination of the Authority.

However, concern has arisen that the proposed changes would make requirements under the BSC and CUSC inconsistent with the conditions of appeal specified in the Electricity and Gas Appeals (Designation and Exclusion) Order 2005 ("SI 2005/1646"), which provides that if the Authority consents to a Modification or Amendment Proposal to a designated document which has been given 'a majority recommendation made by the Panel' no appeal shall lie to the Competition Commission under section 173 of the Energy Act 2004.

In particular, we seek advice on the following questions:

1. What is the meaning of 'a majority' under Articles 5 and 6 of SI 2005/1646?
2. Given the meaning of 'a majority' recommendation under Articles 5 and 6 of SI 2005/1646, can the definition of a majority be changed in the BSC and CUSC, as is proposed under P264 and CAP190, for certain Modification and Amendment Proposals?
3. If P264 and CAP190 were implemented in the Codes, would an appeal be possible to the Competition Commission if the Panel did not reach a two-thirds majority (and therefore did not recommend a Modification or Amendment) but a simple majority of Panel Members voted in favour of a Modification or Amendment Proposal?
4. If P264 and CAP190 were implemented in the Codes, certain proposals would require a two thirds majority vote for Panel support, whereas all other Proposals would only require a simple majority vote (i.e. 50% or more), would this inconsistency cause any issues?
5. Given the differences in the change proposal processes set out in the BSC and CUSC, in particular Section F of the BSC and Section 8 of CUSC, does your advice differ in any way with respect to P264 and CAP190?

Following is an overview for Counsel of the operation of the Modification and Amendment procedures under the BSC and CUSC respectively, background to Modification Proposal P264 and Amendment Proposal CAP190, the appeals process under the Energy Act 2004 and SI 2005/1646 and references to further reading that may be of relevance to the issues raised.

• BACKGROUND

1 The Balancing and Settlement Code, ELEXON and the BSC Panel

- 1.1 The BSC is a multi-party contract containing the rules and governance for the wholesale balancing and settlement arrangements that exists under the British Electricity Trading and Transmission Arrangements (BETTA). Companies who have Generation and/or Supply Licence must accede to the BSC and become BSC Parties. Other parties who are not Generators and/or Suppliers may accede to the BSC, with wholesale power traders

usually acceding to facilitate their trading activities.

- 1.2 ELEXON is the Balancing and Settlement Code Company (BSCCo). It is created by and administers the BSC.
- 1.3 The BSC has mechanisms for the consideration, approval and incorporation of changes to the BSC, known as Modification Proposals (principally contained in Section F of the BSC). Modification Proposals can be submitted by any BSC Party, the National Consumer Council and, in limited circumstances, the BSC Panel. Administering the BSC Modification Procedures is one of the prime functions of the BSC Panel.
- 1.4 P264 is a current Modification proposal before the BSC Panel. P264 is at the assessment stage and the issues outlined in this brief have been identified by the Modification Group made up of industry participants.

BSC Panel Recommendation's on Modification Proposals

- 1.5 For each Modification Proposal, the BSC Panel is required to consult with the industry and make a recommendation to the Authority as to whether or not, in the Panel's opinion, the Proposal should be made. The Authority then determines whether or not to approve or reject the Modification.
- 1.6 The BSC Panel make their recommendation by considering whether the Proposal better facilitates the Applicable BSC Objectives when compared to the current arrangements. The Panel then forms its recommendation by means of a vote. This vote is made based on a simple majority (i.e. over 50%) as set out in Section B 4.4.3 of the BSC:
4.4.3 Except as otherwise expressly provided in the Code, any matter to be decided at any meeting of the Panel shall be decided by simple majority of the votes cast at the meeting (and an abstention shall not be counted as a cast vote).
- 1.7 The BSC Panel's recommendation is then issued to the Authority as part of the Modification Report.
- 1.8 For business relating to Modification Proposals the BSC Panel currently has 11 voting Panel Members, all of whom are required to act impartially when acting as a Panel Member:
a Chairman (appointed by the Authority) (who can only vote where a casting vote is required on a split decision/recommendation);
two independent members (appointed by the Chairman);
two consumer members (appointed by the National Consumer Council);
five industry members (elected by BSC Parties); and
a further industry member appointed by the Chairman to represent the interests of any class or category of Party that is not reflected in the Panel composition.
- 1.9 The Panel also has representatives from National Grid, Distribution System Operators and Ofgem who are non-voting members.

2 The CUSC and the CUSC Amendments Panel

- 2.1 The Connection and Use of System Code ("CUSC") is the contractual framework for connection to, and use of, National Grid's high voltage transmission system. It is a licence based code administered by National

Grid setting out within it the principal rights and obligations in relation to the Connection and/or use of the GB Transmission System and also relating to the provision of certain balancing services. National Grid is required under the Transmission Licence to be a party to the CUSC. It is also a requirement for holders of a generation, distribution or supply licence to be a party to the CUSC Framework Agreement and comply with the CUSC. Non-licensed market participants cannot sign the CUSC.

- 2.2 Like the BSC, the CUSC has mechanisms for the consideration, approval and incorporation of changes, known as Amendment Proposals. An Amendment Proposal can be made by a CUSC Party, a BSC Party or National Consumer Council, and, in limited circumstances, the CUSC Amendments Panel or Relevant Transmission Licensee, as defined in the CUSC.
- 2.3 CAP190 is a current Amendment Proposal before the CUSC Panel.

CUSC Panel Recommendation's on Amendment Proposals

- 2.4 In a similar fashion to the BSC arrangements, the CUSC Amendments Panel is required to consult with the industry and make a recommendation to the Authority as to whether or not it believes that the Amendment Proposal should be approved or rejected; based on an assessment of the merits of the proposal against the Applicable CUSC Objectives.
- 2.5 The CUSC Panel forms its recommendation by means of a vote. This vote is made based on a simple majority (i.e. over 50%) as set out in Section 8.10.3 of the CUSC:
- 8.10.3 Except as otherwise expressly provided in the CUSC, and in particular Paragraph 8.5.2, any matter to be decided at any meeting of the Amendments Panel shall be decided by simple majority of the votes cast at the meeting (an abstention shall not be counted as a cast vote).*
- 2.6 The CUSC Panel's recommendation is then issued to the Authority as part of the Amendment Report.
- 2.7 The CUSC Panel consists of the following members:
- 7 Industry elected members (1 vote each)
 - 1 National Consumer Council member (1 vote)
 - 2 National Grid members (1 vote between them)
 - 1 Panel Chairman (no vote for Panel recommendations)
 - 1 Authority representative (no vote)
- 2.8 There is also a provision in the CUSC to allow the Authority to appoint an additional Panel member with the ability to vote, where the Authority considers that there is a class or category of person whose interests are not currently reflected in the make up of the Panel. Currently there is no Authority-appointed Panel member.

3 Ofgem Code Governance Review

- 3.1 In November 2007 the Office of Gas and Electricity Markets (Ofgem) launched a Code Governance Review. The aim of the review was to

reduce the complexity and fragmentation, and increase the transparency and accessibility, of the electricity and gas industry codes. In July 2010, following industry consultation on the proposals, Ofgem directed that licence modifications be made to the BSC and CUSC to implement the Code Governance Review Final Proposals. The necessary amendments to the industry codes need to be in place by 31 December 2010.

- 3.2 One of the Code Governance Review changes is the introduction of Significant Code Reviews (SCRs). This change is contained in Modification Proposal P262, the Final Report for which is due to go before the BSC Panel on 11 November 2010.

Significant Code Reviews

- 3.3 Ofgem has introduced the SCR process to provide a role for Ofgem to holistically review a code based issue (for the main commercial industry codes) and speed up industry reform. Ofgem will have the ability to start a SCR where a Modification/Amendment Proposal is likely to have significant impacts on consumers, competition or other issues relevant to their statutory duties such as sustainable development. Ofgem will have the sole right to raise SCRs, but will consult on the scope of the review before commencing a SCR.
- 3.4 Once commenced, the SCR may utilise a number of industry workshops to develop a SCR conclusion. The SCR conclusion may result in a direction from the Authority that:
- Requires National Grid as the Licensee to raise a Modification(s)/Amendments(s) to the BSC/CUSC (SCR Modification/Amendment Proposal); or
 - States that no changes to the BSC/CUSC are needed.
- 3.5 A SCR Modification/Amendment Proposal would be progressed through the Modification/Amendment Procedures in the same manner as a normal Modification/Amendment Proposal. As such, the Panel will (after industry consultation) make a recommendation to the Authority as to whether or not, in the Panel's opinion, the Proposal should be made. As with any other Modification/Amendment Proposal the Panel forms its recommendation by means of a majority vote. The Authority will then determine whether or not to approve or reject the Proposal.

4 Industry Concern – Raising of P264/CAP190

- 4.1 Concern has been expressed in the industry that the introduction of SCRs will place the Authority in a position where it will be making a determination on a Proposal which it has directed be raised. This concern is compounded by the fact that SCR Proposals are likely to be in areas that have significant impacts on the industry.
- 4.2 As Parties may only appeal to the Competition Commission on decisions of the Authority that are counter to the simple majority recommendation of the Panel; BSC Modification Proposal P264 and a CUSC Amendment Proposal CAP190 have been raised to modify the Code recommendation voting thresholds.

- 4.3 Both P264 and CAP190 propose that when the BSC/CUSC Panel votes on its final recommendation for a Modification/Amendment Proposal that National Grid as the Licensee has been directed to raise by the Authority, a two-thirds majority vote would be required to recommend approval³. If the two-thirds majority is not reached by the Panel, the Panel recommendation would be to reject the Proposal.
- 4.4 The aim of these Proposals is to introduce an additional check to the code modification process where the Authority directs the raising of the Modification/Amendment Proposal in addition to determining the final outcome. The change attempts to enhance the ability of Parties to appeal decisions of the Authority to the Competition Commission where they are likely to have significant impacts on consumers, competition or other issues relevant to Ofgem's statutory duties. The proposers feel that as the right to appeal a decision of the Authority hinges on the Panel recommendation, it would be unfortunate if a Party was denied the option of appealing the implementation of a potentially contentious Proposal where only a simple majority of Panel votes had been achieved.
- 4.5 Ofgem acknowledged such concerns in its Final Proposals:

“To the extent that parties believe that further checks and balances are needed in relation to SCR modification proposals, it may be possible to pursue them through changes to the modification rules. For instance, while panel recommendations are currently made on the basis of a simple majority, the rules could be changed to require a different threshold for SCR modification proposals. We have ourselves considered the case for introducing a different threshold for SCR modification proposals but do not believe that there is a compelling case for doing so at this time. However, we note that parties can bring forward proposals and we would of course consider them on their merits.” (para 1.65)

5 The Competition Commission Appeals Route for both BSC and CUSC

- 5.1 The Energy Act 2004 provides that Parties may appeal certain Authority determinations on Modification/Amendment Proposals to the Competition Commission.
- 5.2 In particular, section 173 of the Energy Act 2004 provides that an appeal shall lie to the Competition Commission from a decision of the Authority to which section 173 applies. Section 173 applies to Authority determinations on Modification Proposals to the BSC and Amendment Proposals to the CUSC on the basis that the BSC and CUSC are documents which are made under conditions of an electricity licence and those documents are designated by Order SI 2005/1646.
- 5.3 Article 4 of Order SI 2005/1646 excludes certain decisions from appeal by placing conditions on the appeal criteria. The relevant conditions for the BSC and CUSC are contained in articles 5 and 6 of the Order and require

³ As set out in Section B 4.4.3 of the BSC, the initial wording in that paragraph does envisage that different majority requirements can be introduced to Panel voting in different circumstances

the giving of a consent to a majority recommendation made by the Panel in the Modification/Amendment Report. This is why the meaning of a majority recommendation is important to Parties.

5.4 I set out the wording of Articles 5 and 6 of SI 2005/1646 in full:

Article 5

(1) The condition referred to in article 4(2)(a) is that the decision consists in the giving of a consent to a majority recommendation made by the Panel in the Modification Report.

(2) In this article, the words "Panel" and "Modification Report" have the same meanings as in the Balancing and Settlement Code.

Article 6

(1) The condition referred to in article 4(2)(b) is that the decision consists in the giving of a consent to a majority recommendation of Panel Members in the Amendment Report.

(2) In this article –

(a) "majority recommendation" means a recommendation that is supported by the majority of those views of Panel Members which, in the reasonable opinion of GEMA, are clearly expressed in the Amendment Report; and

(b) the words "Panel Members" and "Amendment Report" have the same meanings as in the Connection and Use of System Code.

The Appeals Process Context

5.5 In April 2003 the former Department of trade and Industry ("DTI") issued a consultation document "Strengthening the Transparency and Accountability of the Gas and Electricity Industry Code Modification Process". As a result of consultation sections 173-177 of the Energy Act 2004 were introduced providing for the creation of a statutory right of appeal to the Competition Commission, with the proviso:

'(5) The Competition Commission may refuse permission only on one of the following grounds-

(a) that the appeal is brought for reasons that are trivial or vexatious;

(b) that the appeal has no reasonable prospect of success'.

5.6 In 2004, DTI consulted on the draft Order to give effect to the appeal provisions, further proposing that, in line with the Government's initial view set out in the explanatory notes to Section 173 of the Act, appeals would not be allowed where the delay occasioned by an appeal could have a negative impact on security of supply, "*or where GEMA's decision agrees with the recommendation of the panel in the case of the BSC, or with a certain proportion of code participants in the case of the CUSC*".

5.7 In 2004 it was not standard practice for all Code Panels to make recommendations; a CUSC Panel recommendation did not exist. Thus the original

drafting for the Statutory Instrument referred only to the views of the CUSC Panel or respondents and did not include a reference to a BSC Panel majority⁴.

5.8 The draft Order was subsequently amended (acknowledged in DTI's Response to the Consultation on the draft Order⁵) and their Regulatory Impact Assessment⁶, to include the reference to a BSC Panel majority in the final draft: *"The final Order provides for decisions where Ofgem agrees with a panel recommendation based on a majority panel view to be excluded from appeal. This is an intentional clarification of procedures in the unlikely event of a hung panel decision reaching Ofgem, under current or future code governance arrangements: were Ofgem to make a decision based on a recommendation from a hung panel, the decision would be appealable"*.

5.9 However, it was emphasised that *"It was not DTI's intention in introducing the appeals mechanism fundamentally to alter the workings of the panel, or to provide a mechanism by which the workings and decisions of the panel itself can be appealed even where Ofgem has not departed from the panel view."*

6. Further Information

6.1 This section contains further information on context and links to relevant documentation.

Relevant Code Sections

Links to the relevant BSC Sections are here:

[Section B - The Panel](#)

[Section F - Modification Procedures](#)

Links to the Relevant CUSC sections are here:

[CUSC sections](#)

Law and extrinsic materials

Energy Act: <http://www.legislation.gov.uk/ukpga/2004/20/contents/enacted>

Explanatory Notes on the Act:

Part 3, Chapter 4 Sections 173-176:

<http://www.legislation.gov.uk/ukpga/2004/20/notes/division/6/2/4/2>

Part 3, Chapter 4 Sections 172-186:

<http://www.legislation.gov.uk/ukpga/2004/20/notes/division/7/4>

Schedule 22:

<http://www.legislation.gov.uk/ukpga/2004/20/notes/division/8/22>

Competition Commission Appeals guidance: <http://www.competition-commission.org.uk/appeals/energy/>

The Electricity and Gas Appeals (Designation and Exclusion) Order 2005:

<http://www.legislation.gov.uk/uksi/2005/1646/contents/made>

⁴ 2004 DTI consultation on the draft Order:

http://webarchive.nationalarchives.gov.uk/tna+/http://www.dti.gov.uk/energy/consultations/appeals_secondary_order.pdf/

⁵ 2005 DTI Response to consultation on draft Order:

<http://www.decc.gov.uk/assets/decc/what%20we%20do/uk%20energy%20supply/energy%20markets/regulation/appeals/file28686.pdf>

⁶ 2005 DTI Explanatory Memorandum to and Regulatory Impact Assessment for The Electricity and Gas Appeals (Designation and Exclusion) Order 2005:

http://www.legislation.gov.uk/uksi/2005/1646/pdfs/uksiem_20051646_en.pdf

Further information on Ofgem Code Governance Review

[Ofgem Final Proposals](#)

Proposals

[P264](#)

[CAP190](#)

Neil Feinson
Head, Energy Markets Frameworks
Department of Energy and Climate Change
3 Whitehall Place
London
SW1A 2AW

Alex Thomason
CAP190 Workgroup Chair

Alex.thomason@uk.ngrid.com
Direct tel 01926 656379

21 February 2011

www.nationalgrid.com

Dear Neil

The Electricity and Gas Appeals (Designation and Exclusion) Order 2005

I am writing to you as Chair of the CUSC Workgroup for CUSC Modification Proposal (CAP) 190: "Two-Thirds Majority Voting requirement for CUSC Panel recommendations on Amendments arising from Licence obligations, Authority requests or obligations".

CAP190 seeks to change the threshold required for the CUSC Modifications Panel to recommend implementation of a CAP to the Authority⁷. The threshold would be increased from the current simple majority of the Panel Member votes cast to two thirds of Panel votes cast for those CAPs which arise from a Licence obligation, Authority request or obligation. Should the two thirds majority not be reached, the Panel Recommendation would be deemed to be rejection of the CAP in question.

During the industry assessment process for this CAP, National Grid, in conjunction with ELEXON, sought legal advice from a QC as to whether CAP 190, if implemented within the CUSC, would be effective, given that the relevant Statutory Instrument⁸ (SI) does not specify what a "majority" is. The QC's advice highlighted two areas of ambiguity within the SI: one specific to the CUSC and the second generic across all the industry codes covered by the SI⁹.

Please note that the advice we have received from the QC concludes that CAP190 would be unlikely to achieve its stated objective as things currently stand and therefore without a change to the SI it is likely that CAP190 would need to be withdrawn. A potential alternative approach may be to change the CUSC to remove the multiple recommendations, as explained under Issue 1 below, however this would not resolve all of the SI ambiguities we identify in this letter.

¹ The Gas and Electricity Markets Authority (GEMA) or more often referred to as 'Ofgem'.

² The Electricity and Gas Appeals (Designation and Exclusion) Order 2005 (SI 2005/1646)

³ The BSC, the CUSC and the UNC are the codes affected by the SI.

I am therefore writing to you to raise awareness of these two areas of ambiguity within the SI and seek your advice as to how such ambiguity can be resolved. I have set out the two issues in more detail below.

Issue 1: Majority Recommendation within the CUSC

During the Workgroup discussions of CAP190, it was noted that the SI (2005/1646) which governs appeals to decisions of the Gas and Electricity Markets Authority (GEMA) does not specify what a "majority" is and that this called into question whether CAP190 would have any effect if it were implemented in the CUSC.

It is worth noting that a similar Modification Proposal, P264, was raised to the BSC with similar issues with the same SI.

National Grid and ELEXON, on behalf of the CAP190 and P264 Workgroups respectively, sought joint advice from a QC as to her interpretation of the SI. The advice, dated 4th February 2011, is attached to this letter for your information.

The QC considered that "majority" in the SI means "a number which is more than half the total number" (para 75), and that implementing a change to the code (be that the CUSC or the BSC) would not change the meaning within the SI, but would be effective in ensuring the right of appeal remained open should GEMA direct implementation of a code proposal which had not reached two thirds majority Panel recommendation.

However, the QC noted the differences in the wording of the SI between the CUSC and other codes and concluded that although P264 would be likely to be effective, CAP190 would not.

The issue for the CUSC centres on the SI's definition of "majority recommendation". The SI states that an appeal to GEMA is not possible where GEMA gives consent *"to a majority recommendation of Panel Members in the Amendment Report"* where a majority recommendation is *"a recommendation that is supported by the majority of those views of Panel members which, in the reasonable opinion of GEMA, are clearly expressed in the Amendment Report"*.

There are three elements here: the first is that the CUSC Panel Amendment Report to the Authority contains more than one recommendation¹⁰; the second is that the SI refers to the majority of views of CUSC Panel Members, as opposed to a majority recommendation made by the Panel, as is the case for the BSC. The third is a minor one, but worth noting – the term "Amendment Report" no longer exists in the CUSC as it was changed to "Modification Report" in December 2010, as a result of the changes to the CUSC required to implement Ofgem's Code Governance Review.

With regard to multiple recommendations within the Amendment Report, this refers to the report including both the results of the Panel Recommendation Vote and a separate "Company Recommendation". As the QC notes, this issue could be resolved by removing the requirement for a Company Recommendation from the CUSC.

⁴ One from National Grid, as the Transmission Licensee, and one from the CUSC Panel is the 'norm' although if a Workgroup is established then they also provide one as well.

However, the second element regarding consistency with the other codes in the SI would remain. It is not clear to us why the appeal rights for the BSC are based on a recommendation of the Panel collectively, whereas the rights for the CUSC focus on the views of individual Panel Members. It would seem appropriate to align the arrangements across the BSC and CUSC.

Issue 2: Rights of Appeal

The second issue raised by the QC in relation to the SI relates to a potential ambiguity in the scope of exclusions from the right of appeal of industry code decisions by GEMA to the Competition Commission. Please note that this issue is not specific to CAP190 or P264, but may impact all codes covered by the SI.

Paragraphs 28 to 38 of the attached advice contain the QC's explanation. In summary, the QC identified an ambiguity in the SI wording that makes it unclear whether there is a right of appeal where GEMA decides not to direct a Modification Proposal be implemented in accordance with a majority recommendation from the Panel. Essentially, if a code Panel¹¹ recommends, by majority, to reject a Modification Proposal and GEMA rejects that Modification Proposal, the QC considered that one interpretation of the SI wording would be that that decision would still be appealable. The QC noted that this interpretation is not in line with the DTI's stated intention in drafting the order (para 36(a)), however, given that a potential ambiguity exists, it may be worth clarifying this within the SI.

Summary

In summary, we are seeking your views on the following issues:

- Amending the SI to provide consistency for the BSC and CUSC with regard to a "majority recommendation";
- Amending the SI to align the terminology used in the SI and the CUSC (specifically changing "Amendment Report" to "CUSC Modification Report"); and
- Clarifying the rights of appeal across all codes, in respect of the perceived existing ambiguity around appealing (to the Competition Commission) a GEMA decision which agrees with a Panel recommendation to reject a Modification Proposal;

We would appreciate the opportunity to discuss these issues with you in person. If you wish to discuss further please do not hesitate to contact me in the first instance on 01926 656379 or alex.thomason@uk.ngrid.com.

Yours sincerely

Alex Thomason
Chair, CAP190 Workgroup
(Senior Commercial Analyst, National Grid)

Cc: Mark Cox, Associate Partner, Industry Codes and Licensing, Ofgem

⁵ Be that the CUSC, BSC or UNC Panel.

Tim Davis, CEO, Joint Office of Gas Transporters (UNC)
Andrew Pinder, Chairman, ELEXON (BSC)
Alison Kay, CUSC Modifications Panel Chair, National Grid (CUSC)
Electralink (DCUSA and SPAA)
Gemserv (iGT UNC and MRA)
Workgroup Members

Enc: QC Advice on P264 and CAP190 dated 4 February 2011¹²

⁶ The advice from the QC refers to a number of related documents, such as sections of the BSC and CUSC and the parts of the Transmission Licence – for the sake of brevity I have not included them with this letter; however, if you require copies of these documents please let me know.

Alex Thomason
CAP190 Workgroup Chair
National Grid
National Grid House
Warwick Technology Park
Gallows Hill
Warwick
CV34 6DA
16 March 2011

Department of Energy & Climate Change
3 Whitehall Place,
London SW1A 2AW
T: 0300 068 6059
E: phil.hicken@decc.gsi.gov.uk
www.decc.gov.uk

Dear Alex

RE: THE ELECTRICITY AND GAS APPEALS (DESIGNATION AND EXCLUSION) ORDER 2005

Thank you for your letter of 21st February to Neil Feinson concerning a proposal to change the threshold required for the CUSC Modifications Panel to recommend implementation of a CMP to the Authority.

I regret that there are currently significant obstacles to DECC making any commitment, at least at this stage, to a more formal consideration of your proposal. Not least of which, we are currently facing a very busy Parliamentary timetable and resources and timing issues may therefore be a factor. In particular, we would wish to run any final proposals past our own legal team who are fully engaged on this Parliamentary work.

I also understand that Ofgem considered appeal rights in the Final Proposals for the Code Governance Review project and did not consider any changes necessary. With this in mind, it would be helpful if you could set out how vital these suggested revisions are to maintaining a robust industry governance framework. I would ask you to also consider how you might meet your objectives through means other than legislation.

I am, of course, happy to discuss over the phone or to meet up if you feel that would be helpful.

Yours faithfully,

PHIL HICKEN

TERMS OF REFERENCE FOR CAP190 WORKGROUP

RESPONSIBILITIES

1. The Workgroup is responsible for assisting the CUSC Modifications Panel in the evaluation of CUSC Modification Proposal CAP190: Two-thirds majority voting requirements for CUSC panel recommendations on Modification Proposals arising from Licence obligations, Authority requests or obligations, tabled by Wyre Power at the Modifications Panel meeting on 3rd September 2010.
2. The proposal must be evaluated to consider whether it better facilitates achievement of the Applicable CUSC Objectives. These can be summarised as follows:
 - (a) the efficient discharge by the Licensee of the obligations imposed on it by the Act and the Transmission Licence; and
 - (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.
3. It should be noted that additional provisions apply where it is proposed to modify the CUSC amendment provisions, and generally reference should be made to the Transmission Licence for the full definition of the term.

SCOPE OF WORK

4. The Workgroup must consider the issues raised by the Modification Proposal and consider if the proposal identified better facilitates achievement of the Applicable CUSC Objectives.
5. In addition to the overriding requirement of paragraph 4, the Workgroup shall consider and report on the following specific issues:
 - a) Consider any alternative amendments;
 - b) Review any illustrative legal text;
 - c) Consider any legal opinion procured (in conjunction with ELEXON for BSC Modification Proposal P264);
 - d) National Grid's response to the Proposer's view, expressed in the Modification Proposal form, that "The Company member, [who] may feel obliged to vote for the Proposal they have been required to raise".
6. The Workgroup is responsible for the formulation and evaluation of any Workgroup Alternative CUSC Modification (WACMs) arising from Group discussions which would, as compared with the Modification Proposal or the current version of the CUSC, better facilitate achieving the Applicable CUSC Objectives in relation to the issue or defect identified.
7. The Workgroup should become conversant with the definition of Workgroup Alternative CUSC Modification which appears in Section 11

(Interpretation and Definitions) of the CUSC. The definition entitles the Group and/or an individual member of the Workgroup to put forward a WGAA if the member(s) genuinely believes the WACM would better facilitate the achievement of the Applicable CUSC Objectives, as compared with the Modification Proposal or the current version of the CUSC. The extent of the support for the Modification Proposal or any WACM arising from the Workgroup's discussions should be clearly described in the final Workgroup Report to the CUSC Modifications Panel.

8. Workgroup members should be mindful of efficiency and propose the fewest number of WACMs possible.
9. All proposed WACMs should include the Proposer(s)'s details within the final Workgroup report, for the avoidance of doubt this includes WACMs which are proposed by the entire Workgroup or subset of members.
10. There is an obligation on the Workgroup to undertake a period of Consultation in accordance with CUSC 8.20. The Workgroup Consultation period shall be for a period of 3 weeks as determined by the Modifications Panel.
11. Following the Consultation period the Workgroup is required to consider all responses including any WG Consultation Alternative Requests. In undertaking an assessment of any WG Consultation Alternative Request, the Workgroup should consider whether it better facilitates the Applicable CUSC Objectives than the current version of the CUSC.

As appropriate, the Workgroup will be required to undertake any further analysis and update the original Modification Proposal and/or WACMs. All responses including any WG Consultation Alternative Requests shall be included within the final report including a summary of the Workgroup's deliberations and conclusions. The report should make it clear where and why the Workgroup chairman has exercised his right under the CUSC to progress a WG Consultation Alternative Request or a WACM against the majority views of Workgroup members. It should also be explicitly stated where, under these circumstances, the Workgroup chairman is employed by the same organisation who submitted the WG Consultation Alternative Request.

12. The Workgroup is to submit its final report to the CUSC Panel Secretary on 28 April 2011 for circulation to Panel Members. The final report conclusions will be presented to the Modifications Panel meeting on 6 May 2011.

MEMBERSHIP

13. The following individuals have nominated themselves to become Workgroup members:

Role	Name	Representing
Chairman	Alex Thomason	National Grid
National Grid Representative*	Emma Clark	National Grid
Industry Representatives*	Garth Graham	SSE

	Lisa Waters	Waters Wye Associates – for Wyre Power
	Esther Sutton	E.ON UK plc
	Steven Eyre	EDF Energy
	Stuart Cotten	Drax
Authority Representative	N/A	
Technical Secretary	Bali Virk	National Grid
Observers	N/A	

NB: A Workgroup must comprise at least 5 members (who may be Panel Members). The roles identified with an asterisk in the table above contribute toward the required quorum, determined in accordance with paragraph 14 below.

14. The chairman of the Workgroup and the Modifications Panel Chairman must agree a number that will be quorum for each Workgroup meeting. The agreed figure for CAP190 is that at least 5 Workgroup members must participate in a meeting for quorum to be met.
15. A vote is to take place by all eligible Workgroup members on the Modification Proposal and each WACM. The vote shall be decided by simple majority of those present at the meeting at which the vote takes place (whether in person or by teleconference). The Workgroup chairman shall not have a vote, casting or otherwise. There may be up to three rounds of voting, as follows:
 - Vote 1: whether each proposal better facilitates the Applicable CUSC Objectives;
 - Vote 2: where one or more WACMs exist, whether each WACM better facilitates the Applicable CUSC Objectives than the original Modification Proposal;
 - Vote 3: which option is considered to BEST facilitate achievement of the Applicable CUSC Objectives. For the avoidance of doubt, this vote should include the existing CUSC baseline as an option.

The results from the vote and the reasons for such voting shall be recorded in the Workgroup report in as much detail as practicable.

16. It is expected that Workgroup members would only abstain from voting under limited circumstances, for example where a member feels that a proposal has been insufficiently developed. Where a member has such concerns, they should raise these with the Workgroup chairman at the earliest possible opportunity and certainly before the Workgroup vote takes place. Where abstention occurs, the reason should be recorded in the Workgroup report.
17. Workgroup members or their appointed alternate are required to attend a minimum of 50% of the Workgroup meetings to be eligible to participate in the Workgroup vote.
18. The Technical Secretary shall keep an Attendance Record for the Workgroup meetings and circulate the Attendance Record with the Action Notes after each meeting. This will be attached to the final Workgroup report.

19. The Workgroup membership can be amended from time to time by the CUSC Modifications Panel.

RELATIONSHIP WITH MODIFICATIONS PANEL

20. The Workgroup shall seek the views of the Modifications Panel before taking on any significant amount of work. In this event the Workgroup chairman should contact the CUSC Panel Secretary.
21. The Workgroup shall seek the Modifications Panel's advice if a significant issue is raised during the Consultation process which would require a second period of Consultation in accordance with 8.20.17 of the CUSC.
22. Where the Workgroup requires instruction, clarification or guidance from the Modifications Panel, particularly in relation to their Scope of Work, the Workgroup chairman should contact the Modifications Panel Secretary.

MEETINGS

23. The Workgroup shall, unless determined otherwise by the Modifications Panel, develop and adopt its own internal working procedures and provide a copy to the Panel Secretary for each of its Modification Proposals.

REPORTING

24. The Workgroup chairman shall prepare a final report to the April 2011 Modifications Panel responding to the matters set out in the Terms of Reference, including all Workgroup Consultation Responses and Alternative Requests.
25. A draft Workgroup Report must be circulated to Workgroup members with not less than five Business Days given for comments, unless all Workgroup members agree to three Business Days.
26. Any unresolved comments within the Workgroup must be reflected in the final Workgroup Report.
27. The chairman (or another member nominated by him) will present the Workgroup report to the Modifications Panel as required.

Appendix 1: Indicative Workgroup Timeline

The following timetable is suggested for progressing the CAP190 Workgroup. Please note that the timetable for the Modification Proposal process post-Workgroup is included for ease of reference (*in italics below*).

3 September 2010	Modifications Panel Meeting – agree Workgroup Terms of Reference
23 September 2010	First Workgroup meeting (using scheduled GSG meeting as host)
8 November 2010	Joint QC legal advice sought for CAP190 and P264
10 December 2010	Second Workgroup Meeting
21 January 2011	QC Meeting
W/C 31 January 2011	Third CAP190 Workgroup Meeting
10 February 2011	Circulate draft Workgroup Consultation for comment
23 February 2011	Publish Workgroup Consultation
16 March 2011	Deadline for responses to Workgroup Consultation
W/C 21 March 2011	Post-consultation Workgroup meeting (to review consultation responses, confirm any alternatives and undertake Workgroup vote)
7 April 2011	Draft Workgroup Report circulated for comment
14 April 2011	Deadline for comment on Workgroup report
26 April 2011	Publish final Workgroup report for Panel Papers
6 May 2011	Present Workgroup report to Modifications Panel
12 May 2011	<i>Issue industry consultation (3 weeks)</i>
3 June 2011	<i>Deadline for industry responses</i>
8 June 2011	<i>Draft Modification Report published</i>
15 June 2011	<i>Deadline for industry comment</i>
16 June 2011	<i>Publish draft Modification Report with panel papers</i>
24 June 2011	<i>Modifications Panel Meeting – Panel Recommendation Vote</i>
29 June 2011	<i>Circulate updated draft Modification Report with Panel Recommendation Vote for Panel comment</i>
6 July 2011	<i>Deadline for Panel Members' comments on draft Modification Report</i>
7 July 2011	<i>Send final Modification Report to Authority</i>
11 August 2011	<i>Indicative date for Authority decision (25 Working Day KPI)</i>
25 August 2011	<i>Indicative implementation date (10 Working Days after decision)</i>

NB. The timetable has been updated to take account of the postponement of the second Workgroup meeting to allow time for a joint legal brief to be circulated for CAP190 and BSC Modification Proposal P264 and for a meeting with the QC in London to take place following discussion of the legal advice. As a result, an extension was sought for the submission of the Workgroup Report to the Modifications Panel, from December 2010 to April 2011 (April meeting taking place in May due to Bank Holiday).

The draft legal advice received from the QC raised an issue with CAP190 and Article 6 of Statutory Instrument 2005/1646 and there is the possibility that CAP190 would have no effect if implemented. Therefore the timetable in red font is dependant on further clarification following a meeting with the QC and their final legal advice.

CUSC Amendment Proposal Form	CAP:190
<p>Title of Amendment Proposal:</p> <p>Two-Thirds Majority Voting requirement for CUSC Panel recommendations on Amendments arising from Licence obligations, Authority requests or obligations</p>	
<p>Description of the Proposed Amendment (mandatory by proposer):</p> <p>It is proposed that where an Amendment Proposal being presented to the CUSC Panel for a recommendation vote has been raised to comply in full or in part with a Licence change, or following an Authority direction, request or obligation (e.g. potentially from a Significant Code Review (SCR) should this be facilitated under the CUSC), a recommendation to implement that Amendment Proposal by the CUSC Amendments Panel must be based on at least two-thirds of votes cast by those Panel members present being in favour of implementation. Thus if the Panel comprises 7 members plus 1 Consumer Focus representative and 2 National Grid representatives (with one vote) and that all 9 votes are cast, it would take at least 6 votes in favour for the Panel to recommend implementation of such a Proposal. As at present an abstention would not count as a vote cast.</p> <p>Where the Panel does not have a two thirds majority, even if the votes cast do make any majority, the Panel recommendation will be maintain the status quo and not implement the Amendment. This would also be the case where the Panel reaches no decision, for example where the vote is split 4:4.</p> <p>For clarity, it is intended that this Proposal should only apply to Amendment Proposals arising either directly from a Licence condition or Authority request, direction or instruction to bring forward a proposal (i.e. a Proposal raised in response to a Licence condition or SCR conclusions) or indirectly (i.e. a Proposal arising from an industry review process which was initiated to meet a Licence condition or SCR conclusions). For all other Amendment Proposals the current rules shall continue; i.e. a simple majority of votes cast is required, with an abstention not counted as a vote cast.</p> <p>It is suggested that a Proposer should indicate on the CUSC Amendment Proposal Form whether they believe that implementation of their Proposal would meet the requirements of a Licence direction, Authority request, direction or instruction, in full or in part; in which case it should be subject to two-thirds majority voting for the final Panel recommendation. The Panel would review this and confirm by simple majority vote whether or not two-thirds or the default simple majority voting would apply for their final recommendation vote to be presented to the Authority.</p> <p>Alternatively the Panel could write to the Proposer asking that they confirm that the Amendment Proposal falls into one of the categories subject to a two thirds majority vote.</p> <p>It is suggested that the voting approach determined by the Panel for the original</p>	

Proposal would also apply to any Alternative(s) raised, any such solution(s) having also been raised to comply with the relevant direction or licence change.

The proposal is that all Proposed Amendments that meet the criteria are subject to the two thirds majority vote. This would include Licence conditions arising from a price control or other regulatory process that result in a CUSC Amendment being raised.

To cover Amendments that may also be fulfilling SCR conclusions, in part or in full, the voting would also be applied to Amendments subsumed into an SCR or suspended during an SCR process. The proposer recognises that an alternative may be to exclude such Amendments.

Description of Issue or Defect that Proposed Amendment seeks to Address

(mandatory by proposer):

Introducing two-thirds majority voting for recommendation of Licence-originated, Authority directed, requested or instructed Amendment Proposals would safeguard Parties' Appeal rights regarding those Proposals likely to be of greatest impact on industry.

The requirement to recommend rejection where a two thirds majority cannot be achieved likewise protects and strengthens these appeal rights.

The Panel vote on whether to recommend implementation of an Amendment Proposal determines the ability of a Party or Parties to appeal the Authority's final determination on that Proposal: in order to appeal such a determination, the Authority's decision must be counter to the Panel's recommendation to the Authority. The government having given rights of appeal that allow parties to question the Authorities' policy decisions (rather than the narrower Judicial Review appeal grounds) it signalled that its policy was to implement a check on regulatory powers to change industry contracts. This Amendment seeks to protect those appeal rights and should help achieve better regulation by making the Authority decisions more robust, well argued and supported by appropriate analysis.

The implementation of Ofgem's Code Governance Review recommendations (via the associated changes to Licence conditions) will enable Ofgem to conduct Significant Code Reviews. SCR instigation, assessment and conclusions will all be led by Ofgem, who propose that:

"Ofgem should have the ability to start a SCR where a modification proposal is likely to have significant impacts on consumers, competition or other issues relevant to our statutory duties such as sustainable development." (Code Governance Review Final Proposals 2.29)

The desirability of protecting Parties' appeal rights on any matters where the Authority is 'the effective progenitor of a proposal' was highlighted by the Competition Commission's 2007 appeal decision regarding UNC Modification Proposal 116. This is particularly critical when as the Code Governance Review confirmed, matters addressed by SCRs are likely to be major issues on which the industry may have been unable to reach consensus in the past. Thus Amendment Proposals raised to comply with any SCR Direction issued to a licensee to

progress Ofgem's SCR conclusions may well be contentious with potentially major impact on certain Parties. Ofgem acknowledged such concerns in their Final Proposals which also stated:

"To the extent that parties believe that further checks and balances are needed in relation to SCR modification proposals, it may be possible to pursue them through changes to the modification rules. For instance, while panel recommendations are currently made on the basis of a simple majority, the rules could be changed to require a different threshold for SCR modification proposals." (Appendix 2, 1.65)

This proposal thus seeks to introduce an appropriate check to ensure that where potentially contentious issues are addressed via Licence originated Amendment Proposals, an appropriate level of support is required for the Panel recommendation that will ultimately determine the ability of a Party to appeal an Authority determination. This is particularly pertinent to the CUSC Panel where The Company member, who may feel obliged to vote for the Proposal they have been required to raise, is indeed a voting Panel member, potentially one of a quorum of just 6.

The proposal also addresses a related issue raised during the Code Governance Review. The Final Proposals noted that the Panel Chairman should be independent and will be appointed by Ofgem. If the Chairman then gets a casting vote, or seeks to steer the debate, the Chair may effectively close the route to appeal. The Authority's documents appear to foresee this problem arising on Licence originated or Authority directed/requested Amendments:

"We have noted the concern that the independent chair's casting vote should not be able to determine whether or not an SCR proposal is subject to appeal. We note that a casting vote is only relevant where there would otherwise be deadlock and the panel is required to make a determination. We do not consider that a casting vote is necessary in the case of a recommendation, which can legitimately reflect a split vote without hindering the ongoing progress of a proposal; it will simply be recorded as such in the modification report to the Authority." (3.35)

Were Ofgem in future to recommend that the Panel Chairman has a vote, or it appoints another Panel member, as it can under CUSC 8.3.3, this proposal would still ensure that a significant majority is achieved in the very limited circumstances in which the proposal would apply. We believe that in creating the rights of parties to appeal the nature of an Ofgem decision (rather than the limited Judicial Review scope) the government clearly intended that the right to appeal should be open for contentious issues. This modification would preserve and strengthen those rights.

The proposer is aware that the Authority has at times also requested Amendments are raised without an SCR process (e.g. transmission access) or via other regulatory processes, such as in a price control. Any changes that result in Amendments where the Authority could be perceived as the originator as well as the approver of a change should require greater support from the Panel to ensure the changes can be appealed by those not party to the original origination discussions.

Wyre Power believes that this proposal is particularly important to smaller players who may not have the staff to participate in the resource intensive processes of an

SCR, or may not monitor all of the consultations on price controls, so will not necessarily have seen some of these changes coming. This means it may only be at the point of an Amendment being raised that they become aware that the proposal impacts their business. Knowing that such changes must carry a two thirds majority vote will offer some comfort to them that the governance process is weighted towards facilitating appeals where there is a proportion of the market who do not support the change.

We would note that we do not think that the main impact of this Amendment would be to increase the number of appeals, as they themselves are resource intensive and expensive. However, we do believe that it will improve the regulator process, reducing regulatory risk, by encouraging Ofgem to make robust, well analysed decisions. The potential for appeals more than appeals themselves should create the right incentives for good regulation.

Impact on the CUSC (this should be given where possible):

Amendments to Section 8. A new section on the CUSC Amendment Proposal Form.

Impact on Core Industry Documentation (this should be given where possible):

None anticipated.

Impact on Computer Systems and Processes used by CUSC Parties (this should be given where possible):

None anticipated.

Details of any Related Modifications to Other Industry Codes (where known):

UNC modification proposal 0312: 'Introduction of Two-Thirds Majority Voting to the UNC Modification Panel'.

BSC modification proposal P264: "Two-thirds majority requirement for Panel recommendations on licence originated modifications".

Justification for Proposed Amendment with Reference to Applicable CUSC Objectives** (mandatory by proposer):

The proposer believes that implementation of this Amendment Proposal would better facilitate the
Applicable CUSC Objective:

(a): "the efficient discharge by the licensee of the obligations imposed upon it under the Act and by this licence", specifically with regard to the obligation under standard condition C10 of the licence.

The change suggested by this Proposal is a minor alteration to the working practice of the CUSC Panel which would address the concerns raised at the Competition Commission, in the Code Governance Review and recognised by

Ofgem in their Final Proposals. It is efficient for the licensee to meet the spirit of the regime as well as the letter of the licence conditions imposed under the Governance review. This means taking account of the appeal rights created by government and trying to protect and enhance them. The appeal rights become more important in a situation where Ofgem will run a review, select the solution and then sign off the Amendment, which seriously alters the role of Ofgem.

It will be a more efficient process if the risks associated with these sorts of Amendment are subject to a higher threshold as it will indicate clearly to the Authority the level of support that a change has. This in turn should improve the incentive of the Authority to act in a manner consistent with good regulation, for example not putting badly drafted licence conditions on the licensee and ensuring all the decisions are robust to challenge, were one to arise.

Implementing two-thirds majority voting on Amendment Proposals arising from Licence obligations, Authority requests, obligations or directions reduces the uncertainty and risk of time and money being wasted on legal challenges that might otherwise be raised when Panel recommendations are finely balanced.

In the longer term the efficiency of the market will be helped if a more robust regulatory regime is developed. The Authority getting a clear steer from participants may reconsider some of their proposed solution. They may be encouraged to engage more widely with the participants earlier in the process, as they will need robust decision making processes to accept Amendments that do not have significant support and thus may want earlier dialogue to ensure all angles are covered. It would be in the interests of the market as a whole that the governance process is robust, transparent and open to challenge.

This solution is also in line with that put forward under the BSC and UNC, which will help to ensure consistency across the industry codes.

It would also better facilitate the 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.”

This Amendment Proposal will ensure that Panel recommendations on potentially contentious Amendment Proposals resulting from Licence changes, SCR directions or other Authority requests and obligations are subject to an appropriate level of support from the expert Panel Members, and that Parties’ rights to appeal Authority decisions regarding such Proposals are protected. The support of the CUSC signatories is vital if the contract is to develop in such a way as to encourage new entrants to the market. Market entry is vital to maintaining competitive pressure in the market.

Perceived regulatory risk is increasing with the Authority taking a more active role in the design and operation of the market. When civil servants are seen to be significantly impacting the way businesses operate this creates a barrier to entry. For example a regime that can change pricing rules with limited notice can be

seen as being too risky for a new entrant. To increase competition the CUSC governance process should try to reduce regulatory risk and create a stable investment background where new entrants and smaller players feel they will have rights of recourse against any bad regulation.

This Amendment may be of particular relevance to smaller players who do not have the resources to participate in the SCR or price control type of processes (with many meetings and pages of documents). The raising of an Amendment Proposal may be the first opportunity that they have had to consider the impact of a change on them, possibly raising issues the SCR has not considered. To close down the route of appeal for such parties will increase the regulatory risk that they face. Regulatory risk is far greater if (like smaller players) you do not have the resources to fully participate in the regulatory process due to the work load created by activities such as SCRs. We note that in 2004 the original cash-out review consultation only received responses from big players and in 2006, though the response was better, there are still only 18 responses to the impact assessment.

Details of Proposer:

Organisation's Name: Wyre Power

Capacity in which the Amendment is being proposed:

(i.e. CUSC Party, BSC Party or "National Consumer Council") CUSC Party

Details of Proposer's Representative:

Lisa Waters
Wyre Power
020 8286 8677
lisa@waterswye.co.uk

Details of Representative's Alternate:

Esther Sutton
E.On UK
024 7618 3440
esther.sutton@eon-uk.com

Attachments (Yes/No): No

If Yes, Title and No. of pages of each Attachment:

Notes:

1. Those wishing to propose an Amendment to the CUSC should do so by filling in this "Amendment Proposal Form" that is based on the provisions contained in Section 8.15 of the CUSC. The form seeks to ascertain details about the Amendment Proposal so that the Amendments Panel can determine more clearly whether the proposal should be considered by a Working Group or go straight to wider National Grid Consultation.

2. The Panel Secretary will check that the form has been completed, in accordance with the requirements of the CUSC, prior to submitting it to the Panel. If the Panel Secretary accepts the Amendment Proposal form as complete, then he will write back to the Proposer informing him of the reference number for the

Amendment Proposal and the date on which the Proposal will be considered by the Panel. If, in the opinion of the Panel Secretary, the form fails to provide the information required in the CUSC, then he may reject the Proposal. The Panel Secretary will inform the Proposer of the rejection and report the matter to the Panel at their next meeting. The Panel can reverse the Panel Secretary's decision and if this happens the Panel Secretary will inform the Proposer.

The completed form should be returned to:

Steven Lam
Commercial
National Grid
National Grid House
Warwick Technology Park
Gallows Hill
Warwick
CV34 6DA

Or via e-mail to: steven.lam@uk.ngrid.com

(Participants submitting this form by email will need to send a statement to the effect that the proposer acknowledges that on acceptance of the proposal for consideration by the Amendments Panel, a proposer which is not a CUSC Party shall grant a licence in accordance with Paragraph 8.15.7 of the CUSC. A Proposer that is a CUSC Party shall be deemed to have granted this Licence).

3. Applicable CUSC Objectives** - These are defined within the National Grid Electricity Transmission plc Licence under Standard Condition C10, paragraph 1. Reference should be made to this section when considering a proposed amendment.

Annex 6 - Workgroup Attendance Register

Name	Organisation	Role	23/09/10	18/10/10 (Joint with P264) Teleconference	10/12/10 (Joint with P264) Teleconference	26/01/11 (Joint with P264) Teleconference	24/03/11
Alex Thomason	National Grid	Chair	Yes	No	No	Yes	Yes
Emma Clark	National Grid	NG Rep	Yes	Yes	Yes (part meeting)	Yes	Yes
Bali Virk	National Grid	Technical Secretary	Yes	Yes	No	Yes	Yes
Angie Quinn	National Grid	Legal Rep	N	Yes	Yes	Yes	Yes
Adam Lattimore	ELEXON	ELEXON Rep	NA	Yes	Yes	Yes	No
Andrew Wright	ELEXON	ELEXON Chair	NA	Yes	Yes	Yes	No
Diane Mailer	ELEXON	ELEXON Legal Rep	NA	Yes	Yes	No	No
Stuart Cotten	Drax Power	Workgroup Member	No	Yes	Yes	Yes	Yes
Esther Sutton	E.ON UK	Workgroup Member	Yes	Yes	Yes	Yes (In person)	No*
Lisa Waters	Waters Wye	Workgroup Member	Yes (via teleconference)	Rekha Patel Alternate	Yes	Yes	Yes (via teleconference)
Steven Eyre	EDF Energy	Workgroup Member	Yes	Yes	Yes	No	Yes (via teleconference)
Garth Graham	SSE	Workgroup Member	Yes	Yes	Yes	Yes (In person)	Yes

* Peter Bolitho in place of Esther Sutton