

CUSC Special Panel

Monday 30 May 2022

Online Meeting via Teams

WELCOME

A wide-angle landscape photograph of a mountain valley. In the foreground, a grassy slope leads down into a valley. Several bright, glowing yellow-orange lines, resembling energy or data paths, curve through the valley floor. In the background, large, rugged mountains with patches of snow rise against a sky filled with dramatic, golden-hued clouds. The sun is low on the horizon, creating a warm, golden light across the scene.

nationalgridESO

New modifications submitted



**CMP392 – Transparency and legal certainty as to
the calculation of TNUoS in conformance with the
Limiting Regulation**

Garth Graham – SSE Generation Ltd

Critical Friend Feedback – CMP392

Code Administrator comments	Amendments made by the Proposer
<p>Proposed shortening the issue section and including the legal arguments as an Annex</p> <p>Questioned implementation date and asked for a date need decision by, how many Workgroups may be needed and produced urgent and standard timeline</p> <p>Asked whether or not CMP391 is a Pending CUSC Modification Proposal and needs to be implemented first</p>	<p>Discussed timeline with Proposer. Proposer explained rationale for keeping the legal arguments within the issue section and clarified why he believes CMP391 is not a Pending CUSC Modification Proposal</p>

CMP392 - Introduction

- **Transparency and legal certainty as to the calculation of TNUoS in conformance with the Limiting Regulation**
- As identified in the Authority's direction to the Panel regarding CMP391 it is relevant to identify whether (or not) particular charges fall within the Connection Exclusion taking into consideration the Judgment.
- *"We appreciate that CUSC Parties may want the CUSC to indicate principles (beyond the words of the Limiting Regulation itself) which may be relevant to identifying whether particular charges fall within the Connection Exclusion. We consider that any proposed change brought forward to do so would need to take into consideration what is said in the Judgment. Any such proposed changes should be progressed through a separate CUSC Modification Proposal."*

CMP392 - Defect (a) - Quotes from Authority, CMA and Judgement set out the issue

- *“....we consider that the Connection Exclusion is unlikely to be capable of be[ing a] prescriptive definition within the CUSC, without some provision that enables further case-by case assessment when required.”* [Authority]
- This proposal introduces the provision that *enables further case-by-case assessment ...[as] required* in order to undertake the ‘CUSC Calculation’.
- *“...will self-evidently depend on the facts of any specific case. Attempts at generic definition are necessary and useful, but only up to a point.”* [Judgement]
- *“We consider that charges paid by generators in relation to Local Assets which existed at the point at which such generator(s) wished to connect to the NETS do not fall within the Connection Exclusion ”* [Authority]
- *“Local Charges paid by Generator One will fall within the Exclusion (both before and after the connection of Generator Two), but the Local Charges paid by Generator Two will not ...”* [Authority]

CMP392 - Defect (b) - Quotes from Authority, CMA and Judgement set out the issue

- *“.... that the Authority cannot lawfully approve a proposal that does not fully and correctly reflect the Connection Exclusion ” [Authority]*
- *“... Regulation 838/2010 sets ...how the annual average transmission charge is to be calculated ...Generators should pay annual average transmission charges that are both calculated in the prescribed way (requiring proper application of ... the connection exclusion...Failing to give effect to the connection exclusion is...a breach of Regulation 838/2010 ” [CMA]*
- This proposal will mean that *generators ...pay annual average transmission charges that are ... calculated in the prescribed way (by the) proper application of ... the connection exclusion* and thus *give (practical) effect to the connection exclusion.*
- This proposal will also ensure that there is transparency and legal certainty for stakeholders (including the Authority) that the CUSC Calculation is undertaken in a way that *fully and correctly reflects the Connection Exclusion* when put into practice.

CMP392 - Defect (c) - Quotes from Authority, CMA and Judgement set out the issue

The conclusions we take from these views of the Authority, the CMA and the Court, as set out above, is:

- (i) that a case-by-case assessment is required when determining, for the purposes of undertaking the CUSC Calculation, what is (and what is not) a pre-existing asset when a generator connects to the system (based on the GEMA example¹¹);
- (ii) that it is not appropriate to apply a 'one size fits all' generic approach; and
- (iii) that the performance of the CUSC Calculation needs to be transparent and ensure legal certainty for stakeholders, by setting this out in the CUSC (as, for example, the ESO proposed with CMP317 and the Authority directed with CMP327).

These are, therefore, the issue within the CUSC that this proposal will address.

CMP392 – Why Change - Legal Certainty & Transparency

1. Accepting that the application of the test will depend on a case by case assessment of the charges and assets in issue, it is clear that someone – presumably either GEMA or NGESO – will need to carry out the relevant calculation.
2. Given that the calculation arises as a result of a legally binding obligation and is an important component in the overall charging structure for network access charging for generators, it is important that the calculation is conducted in a transparent manner, so that those affected by it can understand the process and, where appropriate, challenge it if they disagree.
3. Setting out the parameters which are in fact used for assessing the charges in a given area will also be important for regulatory consistency and to ensure a common approach is adopted nationwide.
4. If the calculation process remains opaque, a generator will not be able to ascertain whether or not the calculation has been conducted correctly. That has an adverse, negative impact on its ability effectively to enforce its legal rights.
5. As a matter of legal certainty, an entity which is or might well be adversely affected by a public law decision ought to be entitled to know the reasons for that decision, so that it can consider its options for seeking a legal review of the decision. Otherwise the legal rights are not capable of effective or meaningful enforcement. Publication of the method of calculation to be used (and the case by case results) in giving effect to the Connection Exclusion (as properly construed) is therefore an important aspect of ensuring that the rule of law is observed.

CMP392 - Solution

1. The methodology in terms of the broad principles the ESO will apply (when performing the CUSC Calculation) as a test to either include or exclude each (local) circuit and (local) asset, as well as how the entirety (end-to-end) of the compliance calculation will be carried out; and
2. The results of applying the broad principles on a case-by-case basis, including the rationale within the principles for either including or excluding every element of charge, as well as what and why there were exceptions to the rule. This should provide sufficient detail to stakeholders such that it is possible for them to clearly see, peer review, replicate (if they wish to) and, if necessary, challenge the ESO's result(s) in terms of the CUSC Calculation using the publicly available data (arising from this proposal's solution) regarding the classification of each circuit and asset charge all the way through the calculation to the final end result.

CMP392 - Guidance

- Mention at Friday's CUSC Panel CMP391 discussion by ESO Rep that considering preparing 'guidance'. Guidance does not address defect.
- Recent examples of the ESO's actions do not help their case now, such as:
 - the arbitrary cessation by the ESO of the publication of the System Incident Report means, in this case, we have no legal certainty or transparency as to what exactly the ESO is doing; and
 - the arbitrary publication by the ESO of the approach to Fault Ride Through which was then arbitrarily amended (without consultation or notification) means, in this case, we have no legal certainty or transparency as to what the ESO is (i) meant to do and (ii) actually doing.
 - See GC0105 and GC0151 (both approved by Authority) for further details.

CMP392 – Applicable Objectives / Implementation

- Positive in terms of better facilitating Applicable Objectives (a), (b), (d) and (e) whilst being neutral in terms of (c) for the reasoning provided in the proposal form.
- Implementation one Business Day after an Authority Decision.

CMP392 - Urgency

- This is **a current issue** which; as witnessed by, for example, the expediency directed, by the Authority, to the progression of CMP391; needs to be addressed with urgency.
- This is because without this legal certainty and transparency; as to the practical process to be performed by the ESO when undertaking the CUSC Calculation; then the assessment of whether (or not) the transmission charges paid by generators in GB fall within (or out-with) the range prescribed in the Limiting Regulation (and thus are, or are not, those transmission charges paid by generators in GB compliant with that regulation) will be uncertain and this gives rise to “**a significant commercial impact on parties, consumers or other stakeholder(s)**”.
- It also gives rise to concerns that the ESO will “**be in breach of any relevant legal requirements**” when seeking to perform the said CUSC Calculation; absent of the legal certainty and transparency from this proposal; as to how practically to treat, on a case by case basis, the requisite physical assets (and charges) required for connection of each generator to the system in light of the Judgement.

Ofgem's Urgency Criteria

Ofgem's current view is that an urgent modification should be linked to an imminent issue or a current issue that if not urgently addressed may cause:

- a) A significant commercial impact on parties, consumers or other stakeholder(s); or
- b) A significant impact on the safety and security of the electricity and/or gas systems; or
- c) A party to be in breach of any relevant legal requirements.

More information can be found at:

https://www.ofgem.gov.uk/system/files/docs/2016/02/urgency_criteria.pdf

Proposer's Justification vs Ofgem's Urgency Criteria

The Proposer recommends that this modification should be treated as an Urgent Modification proposal and go straight to Code Administrator Consultation

Ofgem's Urgency Criteria	Proposer's Justification
a) A significant commercial impact on parties, consumers or other stakeholder(s).	<p>The Proposer argues that in respect of the Authority's published urgency criteria this is a current issue which; as witnessed by, for example, the expediency directed, by the Authority, to the progression of CMP391; needs to be addressed with urgency.</p> <p>This is because without this legal certainty and transparency; as to the practical process to be performed by the ESO when undertaking the CUSC Calculation; then the assessment of whether (or not) the transmission charges paid by generators in GB fall within (or out-with) the range prescribed in the Limiting Regulation (and thus are, or are not, those transmission charges paid by generators in GB compliant with that regulation) will be uncertain and this gives rise to "a significant commercial impact on parties, consumers or other stakeholder(s)".</p>
b) A significant impact on the safety and security of the electricity and/or gas systems.	n/a
c) A party to be in breach of any relevant legal requirements	<p>The Proposer argues that, without this change, the ESO will be in "breach of legal requirements", when seeking to perform the said CUSC Calculation; absent of the legal certainty and transparency from this proposal; as to how practically to treat, on a case by case basis, the requisite physical assets (and charges) required for connection of each generator to the system in light of the Judgement.</p>

Timeline for CMP392 – Proposed Urgent Timeline - Workgroup

Milestone	Date	Milestone	Date
Modification presented to Panel	30 May 2022	Code Administrator Consultation (10 working days)	1 August 2022 to 15 August 2022 (5pm)
Workgroup Nominations (5 working days)	30 May 2022 to 8 June 2022 (5pm) <i>Now 31 May 2022 to 9 June 2022 (5pm)</i>	Draft Final Modification Report (DFMR) issued to Panel	18 August 2022
Ofgem grant Urgency	7 June 2022 (5pm)	Panel undertake DFMR recommendation vote	26 August 2022
Workgroups 1 to 4 (assuming Ofgem have granted Urgency) – education, agree principles, data and publication, finalise Workgroup Consultation	13 June 2022, 17 June 2022, 21 June 2022 and 23 June 2022	Final Modification Report issued to Panel to check votes recorded correctly	30 August 2022
Workgroup Consultation (10 working days)	24 June 2022 to 8 July 2022 (5pm)	Final Modification Report issued to Ofgem	7 September 2022
Workgroups 5 and 6 - Assess Workgroup Consultation Responses, finalise solutions and Workgroup Vote	12 July 2022 and 15 July 2022	Ofgem decision	By 1 October 2022
Workgroup report issued to Panel	21 July 2022	Implementation Date	1 Business Day after Authority Decision
Panel sign off that Workgroup Report has met its Terms of Reference	29 July 2022		

Timeline for CMP392 – Proposed Standard Timeline – Workgroup.

Milestone	Date	Milestone	Date
Modification presented to Panel	30 May 2022	Code Administrator Consultation	29 November 2022 to 20 December 2022 (5pm)
Workgroup Nominations (15 working days)	30 May 2022 to 22 June 2022 (5pm) <i>Now 31 May 2022 to 23 June 2022 (5pm)</i>	Draft Final Modification Report (DFMR) issued to Panel	19 January 2023
Workgroups 1 to 4 (assuming High in prioritisation stack) – education, agree principles, data and publication, finalise Workgroup Consultation	6 July 2022, 28 July 2022, 15 August 2022, 9 September 2022	Panel undertake DFMR recommendation vote	27 January 2023
Workgroup Consultation (15 working days)	19 September 2022 to 10 October 2022 (5pm)	Final Modification Report issued to Panel to check votes recorded correctly	30 January 2023
Workgroups 5 and 6 - Assess Workgroup Consultation Responses, finalise solutions and Workgroup Vote	19 October 2022 and 1 November 2022	Final Modification Report issued to Ofgem	7 February 2023
Workgroup report issued to Panel	17 November 2022	Ofgem decision	TBC
Panel sign off that Workgroup Report has met its Terms of Reference	25 November 2022	Implementation Date	TBC

What can only be changed by Urgency - CUSC

Milestone	Standard Timescale	Referenced in CUSC Section 8	Referenced in CACOP V5.1	Referenced in Terms of Reference	Comments
Workgroup Nominations	15 working days	No	No	No	15WD appears to be industry practice but nothing preventing Panel agreeing to a shorter period without the need for Urgency
Workgroup Consultation	15 working days	Yes – 8.20.7 and 8.20.8(d)	Yes - Principle 10 (<i>Standard 15 Business Days</i>)	Yes	CACOP Principle 10 states a standard 15 business days. In theory, Panel under 8.20.7 and 8.20.8(d) can set a shorter period (as part of the Terms of Reference; however the standard Terms of Reference states 15 WD) without the need for Urgency
Workgroup Report to Panel	5 working days	No	No	No	Panel can agree to a shorter period without the need for Urgency.
Code Administrator Consultation	15 working days (1 month if EBGL)	Yes – 8.22.2	Yes - Principle 10 (<i>Standard 15 Business Days</i>)	No	CACOP Principle 10 states a standard 15 business days. 1 month if EBGL.
DFMR to Panel	5 working days	Yes – 8.23.3	No	No	Must be 5WD notice (8.23.3)
FMR to Panel to check Votes	5 working days	Yes – 8.23.5	No	No	Must be 5WD notice (8.23.5)

CMP392 - the asks of Panel

- **AGREE** that this Modification should proceed to Workgroup
- **NOTE** that there appear not to be any impacts on the Electricity Balancing Regulation (EBR) Article 18 terms and conditions held within the CUSC
- **VOTE** whether or not to recommend Urgency
- **AGREE** timetable for Urgency
- **AGREE** Workgroup Terms of Reference
- **NOTE** next steps:
 - Under CUSC Section 8.24.4, we will now consult the Authority as to whether this Modification is an Urgent CUSC Modification Proposal
 - Letter to be sent to Ofgem 30 May 2022
 - Ofgem approval of Urgent treatment sought by 5pm on 7 June 2022
 - 1st Workgroup to be held - to be confirmed at Panel Meeting on 13 June 2022.

The background features several thick, flowing yellow lines. In the upper left, a series of curved lines form a shape reminiscent of a stylized 'C' or a protective shield. In the lower right, three parallel diagonal lines slope upwards from left to right. The overall aesthetic is modern and minimalist.

AOB

Close



Trisha McAuley

Independent Chair, CUSC Panel