

Code Administrator Consultation Response Proforma**CMP288: Explicit charging arrangements for customer delays and backfeeds**

Industry parties are invited to respond to this consultation expressing their views and supplying the rationale for those views, particularly in respect of any specific questions detailed below.

Please send your responses to cusc.team@nationalgrideso.com by **5pm on 18 July 2022**. Please note that any responses received after the deadline or sent to a different email address may not receive due consideration.

If you have any queries on the content of this consultation, please contact Jennifer Groome Jennifer.Groome@nationalgrideso.com or cusc.team@nationalgrideso.com

Respondent details	Please enter your details
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I wish my response to be:

(Please mark the relevant box)

☒ Non-Confidential☐ Confidential

Note: A confidential response will be disclosed to the Authority in full but, unless agreed otherwise, will not be shared with the Panel or the industry and may therefore not influence the debate to the same extent as a non-confidential response.

For reference the Applicable CUSC (charging) Objectives are:

- That compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity;*
- That compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard licence condition C26 requirements of a connect and manage connection);*
- That, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses;*
- Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency *; and*

- e. *Promoting efficiency in the implementation and administration of the system charging methodology.*

***The Electricity Regulation referred to in objective (d) is Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (recast) as it has effect immediately before IP completion day as read with the modifications set out in the SI 2020/1006.*

Please express your views in the right-hand side of the table below, including your rationale.

Standard Code Administrator Consultation questions						
1	Do you believe that the Original Proposal better facilitates the Applicable Objectives?	Mark the Objectives which you believe Original solution better facilitates:				
		<table border="1"> <tr> <td>Original</td> <td><input type="checkbox"/> A</td> <td><input type="checkbox"/> B</td> <td><input type="checkbox"/> C</td> <td><input type="checkbox"/> D</td> <td><input type="checkbox"/> E</td> </tr> </table> <p>No. There are a number of issues raised previously by SPR which have not been sufficiently addressed by NGET to date. On that basis, SPR does not consider there is sufficient evidence that the proposal better facilitates the Applicable Objectives.</p> <p>SPR considers that the objectives are better facilitated by the “best practice approach” which encourages open and transparent dialogue between NGET and Users at an early stage with a view to avoiding the issue raised by the proposed modification. This has been SPR’s position throughout.</p> <p>If the Original Proposal is to be taken forward, we think it is imperative that the proposal is justified with reference to (i) risk transfer and asymmetric risk allocation, (ii) cost reflectivity, (iii) importance of incentivising efficiency by the TOs, (iv) transparency, and (v) discrimination.</p> <p>The fundamental issues, as we understand them, are as follows.</p> <ol style="list-style-type: none"> i. A delay by a user can cause “temporary stranding” of TO works because they have been carried out earlier than actually required for the user’s project. ii. Where a user requests a backfeed, the TO works require to be brought forward to an earlier date (which NGET suggests may cause loss to the TO). <p>NGET suggests that there are three types of loss that might arise in the context of a delay / backfeed request.</p> <ol style="list-style-type: none"> 1. Specific additional works (e.g. site demobilisation and remobilisation costs). 2. Financing costs – additional costs required in financing spend for additional years due for works being undertaken earlier than they would, should the request not have been made. 3. Onshore TO price control performance costs (e.g. business plan deviations for any delays to delivering planned outputs). 	Original	<input type="checkbox"/> A	<input type="checkbox"/> B	<input type="checkbox"/> C
Original	<input type="checkbox"/> A	<input type="checkbox"/> B	<input type="checkbox"/> C	<input type="checkbox"/> D	<input type="checkbox"/> E	

	<p>The proposal represents a significant change to the charging methodology. NGET does not presently have the power to impose backfeed or delay charges under the CUSC. There is no explicit or implicit power to levy such charges. In our view, the proposal raises a number of concerns including the following. In that context, we consider that NGET should justify the significant change with reference to the concerns set out below.</p> <p>Risk transfer and asymmetric risk allocation</p> <p>We are concerned that the change involves a material transfer of risk to new entrant generators and new projects, in the context of delay charges. The proposal will alter the current risk allocation under the CUSC. The practical reality is that NGET rarely if ever compensate generators for delay to the connection of their projects. Thus the proposal creates an asymmetric regime for delay.</p> <p>The proposal will have its greatest effect in relation to the development of power stations on greenfield sites and offshore, which are common routes for new entry, and therefore additional competition in generation.</p> <p>Likewise the proposal represents a potentially material risk transfer to new generators / projects in respect of commissioning. A backfeed is essential for many new generation projects. It is reasonable for generators to expect that NGET understands the commissioning requirements of new power stations. It is also reasonable for a generator to expect that the charges proposed at the initial “offer stage” will take into account reasonable commissioning and backfeed costs. These should be predictable. However, the proposal exposes generators to unpredictable costs and additional risks.</p> <p>Cost reflectivity</p> <p>NGET’s position on cost reflectivity remains unclear. A number of issues were raised in our WG consultation response. We consider it is fundamental for NGET to address these points to enable an informed assessment of whether the proposed charges are cost reflective. It remains unclear how key issues are to be determined including:</p> <ol style="list-style-type: none"> NGET has not clearly set out and publicly quantified what the extent of the costs issue is for them or where their loss arises. We consider that understanding what the key problem is for the TOs is crucial to determining whether the proposed charges are cost reflective. Is the TO incurring some sort of irrecoverable cost as a result of a backfeed request / delay? This is not clear. The NGET view seems to be that any costs incurred by the TO as a result of a backfeed request / delay should be considered a user cost. This is contrary to the overall approach for transmission charging. For
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		<p>example, “plugs” moved recovery of the costs of material elements of works for connection to TNUoS. It appears to us that liability here is proposed to be re-imposed on the generator for costs that ought properly to be recovered through TNUoS.</p> <p>iii. In the context of backfeed charges, NGET has not addressed the extent of loss arising from such a request. In our view, a request for backfeed does not amount to an “additional cost”, but at most brings forward a cost that would have been incurred in any event at a later stage. It is important that NGET addresses the actual extent of loss arising as a result of these requests. In the absence of that, it is very difficult to assess cost reflectivity. Indeed, as regards most backfeeds, it is likely that there is no real question of premature expenditure. This is because commissioning of many power stations requires a backfeed. The costs arising are simply part of the overall cost of connecting the new power station. We do not see why these specific costs should be split off and charged separately.</p> <p>iv. Much of the paper focusses on the Totex Incentive Mechanism. A totex overspend can have a range of causes across a TOs’ expenditure. On what basis will the overspend be attributed to a generator delay as opposed to other causes, when the causes will almost inevitably be “mixed”?</p> <p>v. How the TO’s loss is to be quantified. This is difficult to assess without access to the relevant financial models. Any charges must cover actual costs and / or losses incurred. We do not consider there is enough information at present to allow us to make an informed assessment of whether the proposed charges will be cost reflective.</p> <p>vi. How a user delay causes loss to the TOs in the context of shared works (we address this more fully in Q3). We note that NGET has proposed to incorporate draft legal wording into the CUSC which states that where works are required to facilitate more than one User’s project, the first User seeking to request a change to the Completion Date will normally be fully liable for any delay or backfeed charges. We are particularly concerned at the use of the word “<i>normally</i>” in the context where no alternative position is stated. If that is not always to be the case, NGET must outline how exceptions would arise and be dealt with. In particular, what happens if (in one set of works) users 1 and 2 delay causing no stranding but a later delay by user 3 causes temporary stranding when combined with the preceding users 1 and 2 delays?</p> <p>Naturally, any charge must be subject to an appeal to Ofgem.</p>
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Importance of incentivising efficiency by TOs

SPR remains of the view that if the best practice approach (whereby the TO proactively engages with a user at an early stage) is followed, the inefficient costs that the consultation seeks to address could be avoided entirely.

To that end, we consider that TOs must be incentivised to act efficiently. Provided that TOs spend efficiently and engage in a transparent manner with users, the scenario should never arise that there is inefficient spend. In our view, this is where the majority of effort should be focussed in order that TOs are incentivised to invest and contract in as efficient a manner as possible.

SPR notes the section in the consultation paper which seeks to provide clarification on where delays may not be permitted. The section makes reference to instances where a User defers asset use until a date which suits them in circumstances where the TO has advised that a delay cannot be accommodated. It also makes reference to situations, where the TO might propose an alternative 'delayed' date which could be agreed to by the User.

In both instances, it strikes us that the key issues could be avoided where open and transparent communication is encouraged at an early stage. This would allow Users the opportunity to plan ahead and to take informed decisions in the event of potential delays. On one view, clarification on when delays may not be permitted would not be necessary where this active dialogue takes place between the TO and Users.

To date, most (if not all) TO expenditure incurred before a user has intimated a delay will have been incurred without the TO informing the user. We are concerned that, in practice, the proposal will cause TO inefficiency to be shifted on to users. In our view, TOs should be under a duty to mitigate their losses.

SPR are particularly concerned that NGET intends to apply charges to "all connection contract changes" (including modifications). This could lead to charges being levied in respect of previous TO expenditure where contracts are being updated as a result of a modification not related to such previous expenditure.

Transparency

The proposal creates significant uncertainty around connection costs for new entrant generators. The costs involved are unpredictable. The modification proposals do not make the costs more predictable. We understand that current energy policy is directed towards incentivising much greater competition in generation and a switch to low cost

	<p>offshore wind, (with a target of 40GW by 2030). We do not understand how these proposals are consistent with this policy objective.</p> <p>The CMP288 proposal does not ensure sufficient transparency for users. We note the suggestion in the consultation paper that the proposer's solution would add transparency to existing arrangements, helping users understand potential liabilities. The solution does not achieve what it proposes. In particular, it does not address the vital importance of providing high quality information to generators to enable them to predict and understand precise risks and liabilities under the proposed regime. Ultimately, this means that generators cannot make informed decisions and will result in the avoidable charges being incurred.</p> <p>We are particularly concerned that the draft legal wording contained in Annex 7 does not address precisely when a backfeed request / delay will be deemed to be inefficient. Similarly, it does not address the methodology for calculating such charges.</p> <p>In the context of backfeed, NGET initially indicated that a "short period" would be considered efficient (though this was never properly defined), but has since switched its approach to using an "<i>Efficient Charging Date</i>" by which to assess whether charges arise. Naturally, users have to be able to verify any assertions as to the times at which works can be completed and NGET's assertions as to efficient dates etc. NGET has not adequately addressed how it defines "efficiency" for that purpose. We are concerned that the specification of a precise date falls into the trap of being precise about something that is complex and not capable of such precision. In our view, it is far more likely that there will be a range of time during which completion is "efficient". The Charging Statements fail to provide a clear definition of the acceptable time for requesting a change to the backfeed. This means the application of this charge is at the discretion of the TO. We note that requiring a clear definition of "<i>Early Access Charge date</i>" caused some debate as members did not feel it was a phrase that had been used in the legal text, consultation nor workgroup discussions previously. Regardless of what "phrase" is used, SPR remains of the view that an appropriate term, e.g. "Efficient Charging Date", and a corresponding definition requires to be addressed in the CUSC by way of detailed drafting to ensure the imperative transparency required to enable Users to make informed decisions. We are not persuaded that a phrase not having been used in the past provides sufficient justification not to do so now. If NGET cannot</p>
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easily define, for example, the “Efficient Charging Date”, on one view this might suggest that it is difficult to determine precisely when charging is efficient, and when it is not. Even if NGET’s position is that the Efficient Charging Date will vary widely depending on the circumstances, our view remains that the method of identification of such a date should be capable of being clearly set out / defined in the CUSC.

In the context of delay charges, it remains unclear whether all delays will be caught. We note the draft legal wording in Annex 7 which includes a non-exhaustive list of examples. However, we consider that the modification requires to offer greater clarity for users on which delays will be caught. For example, would the delay charges apply if the generator encountered a force majeure issue? We consider that users require to be able to predict these charges in order to take informed decisions. This should be backed up by CUSC drafting. Where it is not addressed in the CUSC, the TO will instead have the discretion to choose when it will and will not apply the charge. This is likely to contribute to discrimination between users.

We are also concerned that the TO will incur costs without the user’s knowledge and that this will have implications for user delays. If the proposal is to go ahead, we consider it will be essential for the TO to ensure effective communication where any material spend is made. This will help inform any future decisions taken by the generator. Such increased user protections should be documented in the CUSC and should not rely on non-binding commitments.

The consultation paper states that delay / backfeed charges can be “*negotiated*” and “*agreed*”. In our view, if charges need to be negotiated, a sufficient level of clarity and transparency has not been afforded by the TO. In pursuit of effective competition, we consider that users must be able to determine their precise liability to NGET. It follows then that a charge cannot be something that is subject to any form of material negotiation.

If the proposal is taken forward, it will be fundamentally important in both instances that the methodology for calculating charges is clear and transparent.

In the event of a mistake in the calculation of a charge, transparency of methodology is vitally important to allow users to consider and challenge (if necessary). In the absence of clear methodology, mistakes will inevitably go unnoticed and the TO cannot then be efficiently held to account.

		<p>Our experience is that the current provisions of the CUSC do not always lead to the provision of high quality reliable information to users. Against that background it is not appropriate to rely on the existing provisions of the CUSC and informal additional processes. Rather, the CUSC must be modified to ensure that users are contractually entitled to robust information that enable them to ascertain potential delay liabilities with precision.</p> <p>Discrimination We are concerned that a lack of transparency will result in discrimination between users. On this, we note Standard Licence Condition 7 which contains a prohibition on discriminating between users. In the absence of clarity on when charges will be incurred (particularly in the context of backfeed charges), such charges are likely to be applied inconsistently. What might be deemed efficient by one person, could be inefficient to another. On that basis, if the proposal is taken forward, it is vitally important that the method of calculation is defined clearly in the CUSC and communicated to users from the outset.</p>
2	Do you support the proposed implementation approach?	<p><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>No. We note that the consultation paper confirms that <i>“the implementation approach for the original proposal would be apply to all connection contract changes (new contracts or modifications to existing contracts) after the implementation date or where these charges are already applied in the connections contracts.”</i></p> <p>We are particularly concerned that this could lead to charges being levied in respect of costs incurred prior to any modification of the CUSC. In our view, this is not competent given that there was (and remains) no existing legal basis for levying the charges under the CUSC and at the time when the original agreements were entered into. It follows that option 3 (applying only to brand new connection contracts signed after the implementation date) is the only competent option.</p> <p>Regulatory certainty and retrospectivity The CUSC does not presently allow for these types of charges to be levied. Users have entered into agreements for new or expanded connections on the basis of the CUSC terms at the date of their agreements.</p>

		<p>Indeed, the consultation states that <i>“No mechanism currently exists within the CUSC to ensure these costs are funded by the requesting party instead of being recovered through TNUoS.”</i></p> <p>Be that as it may, we understand that the charges are already being included in users’ contracts by the ESO despite the fact that the consultation paper appears to acknowledge that there is no legal basis for levying the charges. In the circumstances, we seek clarification on the point that states <i>“There will be no retrospective insertion of delay charges / backfeed charges into User agreements if these have not been previously agreed.”</i></p> <p>Given there is presently no legal basis for levying these charges, we do not consider that it is competent to levy the charges retrospectively. It is essential that this is clarified.</p> <p>Lack of protection for users</p> <p>We welcome the confirmation from the Proposers that working practice should be improved to include greater levels of communication. However, if users are to be liable for the proposed charges, a range of protections must be introduced to ensure that users can:</p> <ol style="list-style-type: none"> Understand the nature and calculation of the charges they will face; and Avoid charges by requesting a delay before a TO incurs relevant costs. <p>It follows that these protections will not have applied to expenditure incurred before any modification is made to the CUSC and so such charges cannot, in our view, competently apply to expenditure which pre-dates the modification.</p> <p>Additionally, NGET indicates in the consultation paper that these charges are intended as a <i>“last resort”</i>, however, we do not consider that this is adequately reflected in the proposal. Presumably, it is intended as a last resort, second to efficient communication and engagement between the TO and users. Additional measures ought to be taken to afford a level of protection to users that ensures “charges” do not take the place of effective engagement and that such charges will only be applied (as NGET suggests) as a “last resort”. Such measures should be contractually / legally binding.</p>
3	Do you have any other comments?	<p>Yes. SPR would like to emphasise that if the best practice approach (whereby the TO proactively engages with a user at an early stage) is followed, the inefficient costs that the consultation seeks to address could be avoided entirely.</p>

Levying charges via alternative route

For the avoidance of doubt, SPR does not accept the alternative route of capturing the delay charge / backfeed concept within the TO's charging statements.

One justification appears to be the avoidance of "annual iterative amendments", so as to avoid "inefficiency in CUSC governance arrangements" (page 7). This makes our point, eloquently. Appropriate scrutiny is not "inefficient" and the proposals appear to be drafted to avoid scrutiny.

The TOs' statements regulate the charges between NGESO and TOs (not the user). We do not understand how NGET's proposal is consistent with the "BETTA" structure put in place by Ofgem / DTI. The fundamental point of this structure is that Users deal with NGESO and are not required to "look behind" to the arrangements between NGESO and the TOs under the SO-TO Code and TOs' transmission licences. The proposed "Future System Operator" reforms enhance this structure.

Under the NGET proposal, the "detail" will be contained and modified in the TOs' charging statements, which is clearly contrary to these regulatory arrangements. Further, we do not understand how such an arrangement, under which the substance of charges is not dealt with in the CUSC. NGESO methodologies complies with NGESO's transmission licence.

We note from communication with NGET, its position that since T2, Ofgem's approval is much more scrutinising of any amended / additional TO Charging Statement context. Nevertheless, this approach is inconsistent with the BETTA structure put in place by Ofgem. Additionally, SPR considers the scope for the TOs to make changes to the Charging Statement without proper consultation continues to raise self-governance concerns. In our view, the detail should be set out properly in the CUSC. Whilst we note that the TOs are committed to working together to ensure consistency, there remains a risk of charges being applied inconsistently in circumstances where there becomes a divergence of views. This issue can be avoided where the detail is contained under the CUSC and is therefore subject to a lesser degree of 'interpretation' on the part of the TOs.

Shared Works Options

In our view, both of the options set out for Shared Works risk oversimplifying the position. Further detailed analysis is required.

NGET's justification on cost reflectivity remains unclear in the context of Shared Works. In particular, we raise the

		<p>following concerns.</p> <ul style="list-style-type: none">i. It remains unclear how the TO proposes to show that a delay by an individual customer causes loss. In many cases the TO would proceed in any event because the work is designed to accommodate several projects. If the TO would have proceeded with the work even if the individual user delayed, we do not see how there can be a loss to the TO here.ii. Even if there are circumstances where some form of loss arises, we consider that quantification of such loss will be complex. This raises issues of transparency on the basis that users are unlikely to be able to predict where charges will arise with any degree of certainty. In the absence of clarity and transparency of methodology in the CUSC, such charges will be applied and interpreted on a case by case basis. Inevitably, this will lead to discrimination amongst users.iii. Additional issues of transparency arise in the context of confidential arrangements. It is likely to prove difficult to achieve the necessary level of transparency due to these arrangements, despite it being essential for the efficient operation of such charges under the CUSC. In the absence of that, users cannot reasonably assess prospects of challenge on the basis of discrimination.iv. We consider that how any loss is allocated between multiple users in the context of shared works requires further analysis. As above, we are concerned at the suggestion that <i>“the first User seeking to request a change to the Completion Date will normally be fully liable for any delay or backfeed charges”</i>. (Emphasis added.) Where the word “normally” is used, the TO implies that there are situations where that may not be the case. Such exceptions should be detailed in the CUSC. As an example, what happens if (in one set of works) users 1 and 2 delay causing no stranding but a later delay by user 3 causes temporary stranding when combined with the preceding users 1 and 2 delays?
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