

Workgroup Consultation Response Proforma

CMP435: Application of Gate 2 Criteria to existing contracted background

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 06 August 2024**. 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 cusc.team@nationalgrideso.com

Respondent details	Please enter your details	
Respondent name:	Garth Graham	
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Which best describes your organisation?	<input type="checkbox"/> Consumer body <input type="checkbox"/> Demand <input type="checkbox"/> Distribution Network Operator <input checked="" type="checkbox"/> Generator <input type="checkbox"/> Industry body <input type="checkbox"/> Interconnector	<input checked="" type="checkbox"/> Storage <input checked="" type="checkbox"/> Supplier <input type="checkbox"/> System Operator <input type="checkbox"/> Transmission Owner <input type="checkbox"/> Virtual Lead Party <input type="checkbox"/> Other

I wish my response to be:
 (Please mark the relevant box)

- Non-Confidential** (*this will be shared with industry and the Panel for further consideration*)
- Confidential** (*this will be disclosed to the Authority in full but, unless specified, will not be shared with the Workgroup, Panel or the industry for further consideration*)

For reference the Applicable CUSC (non-charging) Objectives are:

- a) *The efficient discharge by the Licensee of the obligations imposed on it by the Act and the Transmission Licence;*
- 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;*
- c) *Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency *; and*

d) *Promoting efficiency in the implementation and administration of the CUSC arrangements.*

*The Electricity Regulation referred to in objective (c) 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.

Standard Workgroup Consultation questions		
1	Do you believe that the Original Proposal better facilitates the Applicable Objectives?	Mark the Objectives which you believe the Original solution better facilitates: Original <input type="checkbox"/> A <input type="checkbox"/> B <input type="checkbox"/> C <input type="checkbox"/> D
<p>We are supportive of the need for connections reform and we believe this proposal has the potential to better facilitate Applicable CUSC Objectives a) b) and d).</p> <p>However, we are mindful that this is a rapidly changing environment and, since being raised, it is no longer clear that prioritising readier projects will deliver the outcomes required nor align with emerging (and consequential for connection reform) UK Government policy developments, including the Clean Power Plan for 2030 and longer-term net zero targets.</p> <p>We are neutral in respect of Applicable Objective c). This is based on the expectation that the proposed changes to the Terms & Conditions for connection continue to conform with the requirements to comply with the retained EU Law (as well as reflecting the long-established legal principles in terms of retrospective changes to contracts that have been agreed and accepted on both sides).</p>		
2	Do you support the proposed implementation approach? (See page- 57-58)	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
<p>We are extremely mindful of the retrospective nature of this modification and the potential adverse implications that this has on investor confidence. However, we recognise the need for action: we need to ensure that projects that can contribute to net zero targets whilst delivering a secure and sustainable energy system can access the scarce Transmission capacity that is available.</p> <p>Therefore, it is in these rare circumstances that we give our support to retrospective application.</p>		

	<p>Notwithstanding this, we recognise that implementation of this proposal, being contractual in nature, will need to be legally robust. Recognising the Connection Action Plan produced by DESNZ and Ofgem in the Autumn of 2023 and the ESO's TMO4 and TMO4+ documents published in December 2023 and April 2024 respectively, we had - up until very recently - the view to support the introduction of this change in a timely manner.</p> <p>However, as we noted in our answer to Q1 above, the connection reform landscape is rapidly developing.</p> <p>In light of this changing situation, it is important that we are clear from the start what we are trying to achieve through a reformed connections process and that the 'end point', and any steps towards it, are clearly signposted to all stakeholders. Changes brought in through TMO4+, including in particular CMP435, followed by subsequent iterative changes over the coming weeks, months and years will result in wasted development expenditure and have an adverse impact on investor confidence.</p> <p>Notwithstanding the above, if implementation of CMP435 (as currently proposed) proceeds, then in our view a transition period may be warranted, given the proximity between the Authority decision date, the festive period and the implementation date. This transitional should be greater than two to four weeks, but no longer than twelve weeks.</p>
3	<p>Do you have any other comments?</p> <p>Yes.</p> <p>As we noted in our answer to Q1 above, given the rapidly developing changes in the connection reform landscape, we are no longer clear that prioritising readier projects will deliver the outcomes required or align with emerging policy developments and our net zero targets.</p> <p>We are also mindful of the recommendation in the Royal Academy of Engineering Report, which was issued Tuesday 23rd July, that identified the need for "a more radical process" for connection reform.</p> <p>Regardless of how this unfolds, it is important that any reformed connections process puts GB on the glidepath to delivering net zero and does not send signals (even if only for a short period of time) that are counter to that aim as this will increase costs and damage investor confidence.</p> <p>Separately, we believe that TMO4+ should ensure that developers are allowed the option to reduce their capacity in line with acreage requirements between Gate 1 and Gate 2. This approach is entirely reasonable and provides developers with the flexibility needed to make informed investment decisions based on their secured land rights and therefore enables legitimate projects the opportunity to be built and</p>

<p>supports the transition towards net zero. CMP435 should be amended accordingly.</p> <p>Without this provision, developers would be forced to make a decision by mid-September 2024 to achieve a signed contractual position prior to the CMP435 deadline of 31st January 2025. Allowing developers to reduce their TEC closer to this deadline ensures both developers and ESO have a clear understanding and high degree of certainty of their project’s TEC; and will enable better informed decisions on the infrastructure investment needed.</p> <p>We also wish to note that stakeholders have not seen the critical detail pertaining to ‘Derogation 2’ (as referred to by the ESO) - which may be relevant for CMP435 - with regards to the transitional arrangements. Therefore, in the absence of seeing a) that detail or b) the Authority’s decision; we refrain from commenting further at this time on the purported transitional arrangements, regarding ModApps for existing projects, until a) and b) are available.</p> <p>In this regard, the current scope of what ModApps will be allowed (and not allowed) between August 2024 and January 2025 needs to be understood.</p>	
4	<p>Do you wish to raise a Workgroup Consultation Alternative Request for the Workgroup to consider?</p> <p><input type="checkbox"/> Yes (the request form can be found in the Workgroup Consultation Section)</p> <p><input checked="" type="checkbox"/> No</p>
<p>Not at this time.</p>	

Specific Workgroup Consultation questions	
5	<p>Do you agree with the elements of the proposed solution for CMP435? <i>Please note that the application of these elements may be different to CMP434, therefore please answer the questions in respect to CMP435.</i></p> <p>Elements 2,4,6,7,12,15,17 and 18 are not part of the CMP435 Proposal and is only part of the CMP434 Proposal. Element 10 is proposed to be codified within the STC through modification CM095.</p> <p>Please provide rationale for your answer and any suggestions for improvement to each element?</p>
<p>Element 1: Proposed Authority approved methodologies and ESO guidance (see Page 8-10,29)</p>	
<p><input type="checkbox"/> Yes</p> <p><input checked="" type="checkbox"/> No</p>	

We can support the use of controlled methodologies, with Authority oversight through an imposed licence obligation, as this maintains both the checks and balances that investors require, as well as ensure conformance with Article 37 Para. 6(a) of Directive 2009/72, which requires that:

“The regulatory authorities shall be responsible for fixing or approving sufficiently in advance of their entry into force at least the methodologies used to calculate or establish the terms and conditions for:

(a) connection and access to national networks, including transmission and distribution tariffs or their methodologies. Those tariffs or methodologies shall allow the necessary investments in the networks to be carried out in a manner allowing those investments to ensure the viability of the networks.”

However, we do not support the proposed widespread use of guidance documents by the ESO (and by implication reduced change control) that risks imposing unilateral and disproportionate new and additional obligations/requirements onto connecting Parties. This position is based on experience with fault ride-through where the ESO’s documentation was unilaterally changed shortly after it was sent to stakeholders:

- a) without prior consultation to that change; or
- b) even more importantly, without notification that it had changed.

We explored this further in our GC0151 proposal (see “What’s the Issue” on Pages 3-9 in the proposal form [download \(nationalgrideso.com\)](https://nationalgrideso.com)).

It is important that documents pertaining to or containing Parties’ Terms & Conditions for connection are subject to Authority approval, as per Article 37 Para. 6 (see quote above); as it has been recognised in law, the inherent unfairness that could arise from the monopoly Party to whom all Parties wishing to connect are required to contract with, being able to impose, at will (and without regulatory approval), changes to those Terms & Conditions.

It is a long-established legal position that guidance is to assist the understanding of what is set out in the Code, rather than to set out new or additional obligations and/or rights (that do not sit within the Code itself). We would respectfully refer the ESO to papers that were provided to the BSC Panel previously on this topic, including external legal advice obtained, which reinforced the understanding (and is applied in practice through BSC ‘Code Subsidiary Documents Architecture Principles’ [Code Subsidiary Documents Architectural Principles - Elexon Digital BSC](#)).

<p>Given this and taking into consideration the lack of legal certainty for stakeholders that guidance creates (and history has shown), we believe that guidance must be limited to aiding the understanding of what is written in the Code, and not place any additional obligations and/or rights on Parties (that do not sit within the Code itself).</p> <p>Nevertheless, if this element was to remain as currently drafted, then moving forward and recognising the imminent introduction of the NESO, it would be within the gift of a Court to determine if the practical application by the NESO of such guidance could be considered, upon reflection, to be “Wednesbury unreasonable”.</p>	
<p>Element 3: Clarifying which projects go through the Primary Process (See pages 10-11,29-31)</p>	<p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p>
<p>This element has merit in our view, as it is consistent with the intent of TMO4+ arrangements and, assuming it is applied in the way shown above (to all existing contracted projects that are within the scope - as shown in the table at the top of Page 11 of the consultation document); and is legally robust, it should be non-discriminatory.</p>	
<p>Element 5: Clarifying any Primary Process differences for customer groups (See pages 11-12,32)</p>	<p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p>
<p>For offshore, we believe that the case has been made for a different approach when it comes to the application of the primary process when compared to onshore projects, given the seabed leasing arrangements in GB waters.</p>	
<p>Element 8: Longstop Date for Gate 1 Agreements (See pages 12-13, 32-33)</p>	<p><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p>
<p>Given the change to the solution (from a financial security charge to a longstop date), we believed that this element of the proposed solution may have provided the ESO with a ‘housekeeping’ mechanism.</p> <p>Notwithstanding the above, if CMP435 original is to proceed in its current form, our project development experience suggests that the negotiations can be prolonged and subject to disruption by representatives of counterparties.</p>	

<p>As a result, securing agreements can take significantly longer than the proposed period, as set out in CMP435 original, and may prejudice negotiating positions to the detriment of the developer, who is caught between the needs (as set out in CMP435) of connection to the system and the desires of the counterparties, overlaid with the short time period allowed.</p> <p>Therefore, we suggest that a Gate 2 Criteria Exemption be considered to allow for developers who need to obtain land via compulsory purchase order (CPO) powers. As is well understood, CPO is a legitimate strategy for developers in certain scenarios and is a key part of the NSIP/DCO consenting regime. This exemption will mitigate protracted negotiations and support developers in securing necessary land agreements without undue delay (which conforms with the timely delivery of net zero).</p>	
<p>Element 9: Project Designation (See pages 14-15, 33-34)</p>	<p><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p>
<p>Whilst we understand the rationale for bringing this Element into TMO4+ and agree that TMO4+ (as currently proposed, in CMP435) runs the risk of not bringing forward developers' projects that deliver or meet the needs of the energy system; we are concerned about aspects of this Element and the lack of detail at this stage.</p> <p>In this regard we are also very mindful of the rapidly changing policy within the UK Government that pertains directly to connection reform, and thus CMP435.</p> <p>Accordingly, we believe that a more markets-based approach with transparency over what the system requires (rather than unilateral designation by the ESO) would be a better way to ensure that the specific criteria set out in Element 9 are met.</p> <p>In addition, consideration of course needs to be given to the planning regime for Transmission asset and project developer asset build out, which we note may be subject to significant change over the coming weeks, months and years to reflect the new aspirations of the UK Government.</p>	
<p>Element 11: Setting out the criteria for demonstrating Gate 2 has been achieved and setting out the obligations imposed once Gate 2 has been achieved (See pages 16-21, 34-39)</p>	<p><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p>

We appreciate that the introduction of Gate 2 is a core element in delivering the TMO4+ arrangements (as set out in the CMP435 original proposal). It does this by acting to increase the 'bar' against which project developers obtain a connection offer from the Network Operator.

As set out elsewhere in this response, in terms of the changing landscape brought about by the UK Government, we have concerns.

By allocating Transmission capacity, on the basis of first-to-secure land, it is not clear that TMO4+ (in the form of CMP435 original) will allocate this scarce resource to the projects necessary to deliver a secure and sustainable energy system that meets net zero.

We believe it is important to ensure that TMO4+ (in the form of CMP435 original) puts us on the glidepath to delivering net zero and does not send signals (even if only for a short period of time) that are counter to this, as this will increase costs and damage investor confidence.

In addition to the above, we are also mindful of the RFI analysis provided yesterday (5th August) by the ESO. Given the short period of time available to us, we have not been able to fully consider this RFI analysis in detail; however, our initial consideration is that this indicates that the proposed solution may not have the desired effect (especially in respect of this CMP435 modification).

In respect of planning, we believe that the timescales set out in the proposal are unworkable, as they need to recognise the challenges (in planning terms, as outlined in the recent UK Government announcements regarding the impediments within the current planning regime) that projects face both in terms of obtaining permission in the first place; as well as in the context of where the connection date is many years in the future and the planning permission lapses.

Notwithstanding the above, if CMP435 original is to proceed, then it needs to take account of the Development Consent Order (DCO) process.

The reason for this is that throughout a typical DCO process the red line boundaries will have a high degree of alteration following conversation with the local community, planning authorities and statutory undertakers.

It is important to recognise that the use of Compulsory Purchase Order (CPO) powers is a standard provision granted under DCO decisions. These decisions pertain to Nationally Significant Infrastructure Projects (NSIPs), where the DCO consenting regime is designed to bestow substantial powers upon developers.

In regard to NSIPs, we are mindful that the UK Government has, during the course of this consultation period, issued a consultation entitled '[Proposed reforms to the](#)

<p>National Planning Policy Framework and other changes to the planning system - GOV.UK (www.gov.uk). This timely publication indicates both the importance that the UK Government attaches to changing the planning regime and also that this regime is currently subject to ongoing (and very much 'live') policy development.</p> <p>For specific land rights, it is entirely legitimate for a developer to adopt a strategy that includes the use of CPO powers. The DCO, when justified, will grant these powers.</p> <p>Furthermore, the short period of one year for LPA and two years for DCO places a significant burden on developers to complete complicated and detailed land surveys for planning. This incurs significant costs, with huge project uncertainty, all ahead of the conclusion of land acquisition.</p> <p>Investing such substantial amounts without a confirmed point of connection (POC), which is only provided at Gate 2, is unreasonable and poses an unrealistic financial burden on developers. The expectation to proceed with significant investments in planning without confirmed infrastructure creates a high-risk scenario for project developers. This approach fails to account for the uncertainties and substantial costs associated with preliminary planning and land acquisition activities (as being proposed within CMP435).</p> <p>We suggest that a more realistic timeframe, and therefore balanced approach, for DCO projects would be three years; and LPA projects would be two years; to take account of the need for a comprehensive public consultation and extensive preparatory work. This is required to ensure successful project development, with a higher likelihood of planning approval.</p>	
<p>Element 13: Gate 2 Criteria Evidence Assessment (See pages 22-23, 39-40)</p>	<p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p>
<p>In our view this element is a necessary part of the solution to deliver the aims of TMO4+.</p> <p>In respect of the sample checking to be undertaken by the appropriate network operator, in our view the level of sampling should be determined by the Authority to ensure an optimum balance between market risk assurance and developer compliance on the one hand, and a 'reasonable, efficient and proportionate' process on the other hand.</p>	
<p>Element 14: Gate 2 Offer and Project Site Location Change (See pages 23-24, 40-41)</p>	<p><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p>
<p>This element is a pragmatic aspect of the proposed solution that will allow a degree of flexibility to developers where circumstances between Gate 1 and Gate 2 applications result in a need to alter, within reasonable limits, site boundaries.</p>	

<p>In this regard, we believe there would also be merit in allowing for the possibility of a project moving to somewhere that is the same distance from the connection point as the original location.</p> <p>Notwithstanding the above, the current proposed provision, within CMP435, of twelve months for a developer to relocate a significant proportion of the land following a reassignment of their POC location causes significant issues for large-scale projects with significant land requirements.</p> <p>This time period may be suitable for technology types with low land requirements, but it unduly discriminates against large-scale projects who may be forced into negotiations for up to 50% of the required land within a 12 month deadline. The very nature of this deadline will have significant impact on land negotiations, which in some cases could make a legitimate investable project commercially unviable.</p> <p>In light of the above, we believe that the confirmation of a POC should be open to dialogue between ESO and the developer and should not be imposed upon the project.</p>	
<p>Element 16: Introducing the proposed Connections Network Design Methodology (CNDM) (See pages 24-25, 41-42)</p>	<p><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p>
<p>Whilst in principle we are supportive of the use of the methodology that flows from a licence condition, we have yet to see the details of said licence conditions and the detail of how it is proposed to operate in practice. Therefore, we cannot support this Element within the CMP435 original at this stage.</p>	
<p>Element 19: Contractual changes (See pages 26-28, 43-46)</p>	<p><input type="checkbox"/> Yes <input type="checkbox"/> No</p>
<p>With specific reference to Group 4, we do not disagree with this grouping per se, but by seeking the Authority’s approval for implementation of Transitional Arrangements (which, as noted in response to Q3 above, we have seen neither the critical details of the ESO’s derogation submission nor the Authority’s decision) prior to a decision on CMP435, it appears to pre-empt the outcome of this CMP435.</p>	
<p>Element 20: Cut Over arrangements (See page 28, 47)</p>	<p><input type="checkbox"/> Yes <input type="checkbox"/> No</p>
<p>Whilst we can see merit in this element of the proposal, given the revised timescales for an Authority decision and the fact that this cut over period would not start until 10 Business Days after the Authority’s decision, we consider these cut over arrangements to have limited impact.</p> <p>If implementation of CMP435 (as currently proposed) proceeds, then in our view a longer transition period may be warranted, given the proximity between the</p>	

	Authority decision date, the festive period and the implementation date. This transitional period should be greater than two to four weeks, but no longer than twelve weeks.	
6	<p>Are there any elements of the proposed CMP435 solution - as per Q5 - which you believe are not appropriate to include when you consider how to most effectively implement TMO4+ to projects in the existing contracted background (as opposed to the process for new applicants via CMP434)? If yes, please provide supporting justification.</p>	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
	<p>As we detail in Q5, there are some Elements (listed below) that are now no longer required, in whole or in part in our view (and in those cases amendment to the Element are necessary); taking into account both the changing connection reform landscape arising from the UK Government’s ongoing policy development and broader concerns with the solution as proposed.</p> <p>Element 1 – Methodologies and Guidance Element 5 – DFTC/Offshore Element 8 – Longstop Date Element 9 – NESO Designation Element 11 – Gate 2 Criteria Element 16 – CNDM</p>	
7	<p>In relation to Q6, are there any features which you believe are missing in the proposed CMP435 solution that would more effectively facilitate implementation of TMO4+ to the existing contracted background. If yes, please provide details and justification.</p>	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
	<p>As set out elsewhere in this response, we are concerned that TMO4+ (as proposed in CMP435 – as well as CMP434: see our separate response for further details) does not sufficiently signpost or align with the ‘end point’ for connections reform; as is emerging from the UK Government’s rapidly developing policy in this area. We believe it is key that in implementing a reformed connections process we clearly signpost to all stakeholders what projects will be supported as a result of this new process and that the signals it sends are transparent and enduring.</p>	
8	<p>Do you believe any groups of projects should be exempt from the scope of CMP435 or from some elements of the proposed solution? If so, please advise on which groups and elements and provide rationale to why.</p>	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No

	<p>We recognise the need for measures to reduce the queue. However, we note that what is being proposed here is a broad brushstroke approach applied to all projects regardless of technology type (excluding Offshore Wind). Please see our comments against each element elsewhere in this response.</p> <p>We believe that large-scale technology classes with complex land leasing requirements may be unduly discriminated against with the application of CMP435 relative to smaller-scale or simpler technologies.</p>	
9	<p>Do you believe that the proposed solution could duly or unduly discriminate against any particular types of projects? If so, do you believe this is justified?</p>	<p><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p>
<p>Based on the deliberations of the workgroup to date (and not having seen any draft legal text), it is our belief that the proposed solution would not be unduly discriminatory.</p> <p>This concern around discrimination could nevertheless arise with any potential alternatives, or indeed with the proposed solution, when examining the legal text (once provided).</p> <p>This is based on the expectation that the proposed retrospective changes to the Terms & Conditions for connection conform with the requirements to comply with the retained EU Law (as well as reflecting the long-established legal principles in terms of retrospective changes to contracts that have been agreed and accepted on both sides).</p> <p>Whilst perhaps not unduly discriminatory, we believe TMO4+ (as currently proposed, in the form of CMP435 original) favours technologies or projects that are less complex and/or have a smaller geographical footprint. We note that these technologies or projects are not necessarily aligned with the delivery of an efficient and secure energy system or our net zero goals.</p>		