

Amendment proposal:	Connection and Use of System Code (CUSC) – Code Governance Review: Send Back Process (CAP186)		
Decision:	The Authority ¹ directs that this proposal be made ²		
Target audience:	National Grid Electricity Transmission PLC (NGET), Parties to the CUSC and other interested parties		
Date of publication:	19 October 2010	Implementation Date:	02 November 2010

Background to the amendment proposal

In November 2007, Ofgem initiated a review of the existing industry codes governance processes³ (known as the Code Governance Review (CGR)). During the CGR, we highlighted particular concerns we have that some final modification reports can be deficient. These deficiencies (such as insufficient or incorrectly drafted legal text, lack of clear and transparent reasoning and robust analysis) may lead the Authority to reject proposals and will affect the Authority's ability to make optimal decisions on those proposals. In our view, it would be more appropriate to address these deficiencies efficiently without the need to reject and re-submit proposals. We noted that one aspect of an effective governance regime should be rigorous and high quality analysis of the case for or against a proposed code change.

Our CGR initial proposals suggested that it would be reasonable and practical for the Authority to 'send back' final modification reports to code panels where the Authority could not make a decision on proposed code changes due to deficiencies in the reports, in preference to rejecting those code proposals. We noted that 'send back' powers ought to be used rarely and that Ofgem would participate in code modification processes at an early stage as often as possible to limit use of these powers.

The CGR final proposals were published in March 2010⁴. The final proposals confirmed our view on the need for 'send back' powers. The licence changes required to give effect to the CGR final proposals were implemented in network licences on 5 July 2010 and come into effect on 31 December 2010.

The amendment proposal

The proposer (NGET) raised CAP186 in July 2010. This proposal is one of a number of CUSC change proposals⁵ which NGET raised to address the changes to its licence as a result of the CGR final proposals.

The proposal would enable the Authority to 'send back' a CUSC final amendment report to the CUSC Panel where the Authority's view is that it is unable to make a decision on the proposed change(s) to the CUSC based on the existing report. The Authority would direct the Panel to take additional steps to put the report in a form that would enable the

¹ The terms 'the Authority', 'Ofgem' and 'we' are used interchangeably in this document. Ofgem is the Office of the Gas and Electricity Markets Authority.

² This document is notice of the reasons for this decision as required by section 49A of the Electricity Act 1989.

³ The open letter initiating the CGR (Doc Ref. 284/07) appears on the Ofgem website: <http://www.ofgem.gov.uk/Licensing/IndCodes/CGR/Documents1/Open%20letter%20announcing%20governance%20review.pdf>.

⁴ The final proposals (Doc Ref. 43/10) appear at: http://www.ofgem.gov.uk/Licensing/IndCodes/CGR/Documents1/CGR_Finalproposals_310310.pdf.

⁵ The other proposals are CAP183, CAP184, CAP185, CAP187 and CAP188.

Authority to make a decision. These steps could include the provision or amendment of legal text, revision (including revision to the timetable) of the report, and/or the provision of further analysis or information. The proposal also set out the steps to be taken by the Panel in response to a 'send back' Authority direction, including compliance with the Authority's direction and re-taking its recommendation vote on a revised final amendment report.

In the proposer's view, CAP186 would better meet applicable CUSC objective (a) 'efficient discharge by the licensee of the obligations imposed on it by the Act and by its licence', as the proposal arises from a mandatory requirement in NGET's Transmission Licence to which it must adhere. The proposer also considered that the proposal would improve the efficiency of the CUSC amendments process by addressing deficiencies in final amendment reports through use of the 'send back' power.

CUSC Panel⁶ recommendation

On 3 September 2010, the CUSC Panel voted by a majority in favour of CAP186. The majority of panel members considered that the proposal would better facilitate applicable objective (a). A minority of panel members considered that the proposal would adversely impact on the efficiency of the CUSC amendment process by removing Ofgem's incentive to engage in the process. The adverse impact would be despite the licence obligation placed on NGET to efficiently discharge its licence obligations and, therefore, the proposal would not better facilitate applicable objective (a). All panel members considered that the proposal would have a neutral impact on applicable objective (b).

The Authority's decision

The Authority has considered the issues raised by CAP186 and the final Amendment Report (AR) dated 17 September 2010. The Authority has considered and taken into account the responses to NGET's consultation on CAP186 which are attached to the AR⁷. The Authority has concluded that:

1. implementation of the amendment proposal will better facilitate the achievement of the applicable objectives of the CUSC⁸; and
2. directing that the amendment be made is consistent with the Authority's principal objective and statutory duties⁹.

Reasons for the Authority's decision

We note that all four responses to the CAP186 consultation agreed with the proposer that the proposal should be approved. We also note that a number of comments were made about ensuring the timely use of the 'send back' power; the need for more engagement by Ofgem in code workgroups to minimise the need to use the 'send back' power (a concern which was also raised by some panel members); and the placing of a limit on the number of times 'send back' is used.

⁶ The CUSC Panel is established and constituted from time to time pursuant to and in accordance with the section 8 of the CUSC.

⁷ CUSC amendment proposals, amendment reports and representations can be viewed on NGET's website at <http://www.nationalgrid.com/uk/Electricity/Codes/systemcode/amendments/>

⁸ As set out in Standard Condition C10(1) of NGET's Transmission Licence, see: http://epr.ofgem.gov.uk/document_fetch.php?documentid=5327

⁹ The Authority's statutory duties are wider than matters which the Panel must take into consideration and are detailed mainly in the Electricity Act 1989 as amended.

Applicable objective (a) 'efficient discharge by the licensee of the obligations imposed on it by the Act and by its licence'

The proposal would align the CUSC modification procedures with the licence obligation placed on NGET through its Transmission Licence regarding the introduction of a 'send back' power. In doing so, it ensures that it is clear and transparent on the face of the code that the 'send back' powers which are mandated by licence are in place and that there is consistency between the licence and the code.

There would also be a broader beneficial impact on the efficiency of the CUSC governance process by removing a risk that amendment proposals are rejected because of identified deficiencies which are not related to the merits of proposals. By addressing these deficiencies through 'send back', in a timely manner and without wastage of previous valid work on proposals, the governance process would operate more effectively and produce better and more robust decisions.

We therefore agree with NGET and the respondents to the CAP186 consultation that the proposal does efficiently discharge NGET's licence obligation and better meets applicable objective (a).

We note the concerns that a minority of panel members have about potential inefficiency introduced into the CUSC by the 'send back' power should Ofgem limit its engagement with the amendments process. We highlighted in our CGR final proposals the importance of timely resolution of deficiencies when these arise in final amendment reports. Ofgem will seek, as resources allow, to engage with the amendments process and to highlight any concerns in the development of amendment proposals. Resolving deficiencies through use of 'send back' would be preferable and more efficient than an Authority rejection of a proposal. We would anticipate that instances where deficiencies arise after the final report has been sent to the Authority ought to be rare.

We note one respondent's concerns about repeated use of the 'send back' power. While the Authority will seek to issue a clear direction to the panel to resolve deficiencies and engage with further code processes aimed at resolving those deficiencies, the possibility of further issues arising cannot be ruled out. The purpose of using the 'send back' power would be to ensure the delivery of a robust final report to the Authority that allows an optimal decision to be made.

We also note that the purpose of the 'send back' power and its use is clear and would not cover re-writing the intent of an amendment proposal.

CAP186 legal text

While reviewing the legal text accompanying the proposal, we identified a further change:

- the wording of Paragraphs 8.20.9 and 8.20.10 should include references to Working Group Alternative Proposals where there is a reference to the Proposal as the final Report submitted to the Authority includes information on both where applicable. This proposed change to the text was raised at the time of the Panel's recommendation vote on CAP186.

In our view, the proposed legal text changes address the intent of the proposal. However, our further suggested change would make the process more robust and add clarity and completeness to the proposed text.

We note that NGET discussed our further legal text change with the Panel and that where changes are made to the CUSC legal text to implement the CUSC proposals, any further text changes will be addressed through a CGR post-implementation review scheduled to start at the CUSC Governance Standing Group meeting in January 2011.

Decision notice

In accordance with Standard Condition C10 of NGET's Transmission Licence, the Authority, hereby directs that amendment proposal CAP186: "*Code Governance Review: Send Back Process*" be made.

Mark Cox,
Associate Partner, Industry Codes and Licensing

Signed on behalf of the Authority and authorised for that purpose