

National Grid Electricity Transmission plc

CUSC

**CAP 148 – Deemed Access Rights to the GB Transmission System for Renewable Generators**

**June 2007**

**1. Introduction**

- 1.1 This paper contains the advice for NGET in relation to certain specific questions raised in relation to the CUSC and set out later in this paper. The questions have arisen out of the consideration by the CUSC Panel of a CUSC Amendment Proposal, CAP 148 – Deemed Access Rights to the GB Transmission System for Renewable Generators. The CAP includes reference to the Renewables Directive and in the context of that there is a question as to the extent to which the provisions of the Directive have been reflected in GB.
- 1.2 It is helpful to note some of the background points on the position of the CUSC and amendments to it, and this introduction seeks briefly to set out the relevant points.
- 1.3 **Under the transmission licence** there is a condition providing for the CUSC. It is Condition C10. It provides that the licensee shall establish conditions for connection and use of system.....which are calculated to facilitate the achievement of the following objectives:
  - (a) the efficient discharge by the licensee of the obligations imposed upon it under the Electricity Act and by 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.
- 1.4 The licence also provides that the licensee shall establish and operate procedures for the modification of the CUSC....so as to better facilitate achievement of the applicable CUSC objectives. The applicable CUSC objectives are (with an exception for modifications to the modification process itself) the objectives set out above.
- 1.5 There are also conditions prohibiting discrimination between persons or class or classes of persons in the provision of use of system or in the carrying out of works for the purpose of connection to the GB transmission system.
- 1.6 **Under the CUSC** itself, it is provided (in Section 8) that the Amendments Panel shall endeavour at all times to operate:
  - (a) in an efficient, economical and expeditious manner, taking account of the complexity, importance and urgency of particular Amendment Proposals: and
  - (b) with a view to ensuring that the CUSC facilitates achievement of the Applicable CUSC Objectives (which term has the same meaning as above).

1.7 **Under the Electricity Act**, the main requirement on a transmission licence holder is set out in section 9. It provides that the duty is to develop and maintain an efficient, co-ordinated and economical system of electricity transmission and to facilitate competition in the supply and generation of electricity.

## 2. The Questions are as follows:

### 2.1 What is the current legal status of the Renewables Directive 2001/77/EC (the “Directive”) in particular Article 7 in the UK?

2.1.1 *Directive Provisions:* Article 9 of the Directive requires Member States to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive not later than 27 October 2003. The obligation is to implement changes where necessary to meet the requirements of the Directive, and the question therefore is whether there is a further requirement on the UK in relation to the Directive over and above what is already reflected in the statutory and licensing regime in respect of the transmission system and use of and connection to it.

2.1.2 *Priority Access:* In terms of the Directive itself, the provision dealing with priority access to the Grid system (which in effect is what is being suggested here) is a permissive one, namely Member States **may** so provide, but there is no requirement to do so.

2.1.3 *DTI/Ofgem View:* The Ofgem letter of 17 April 2007 confirms Ofgem’s (and DTI’s) view that they do not consider that the NG Transmission Licence requires any amendment to be compliant with the Directive.

2.1.4 *Legal Position:* There is nothing to suggest that Ofgem and DTI’s view is not correct here and although it is clear that thought has been given to them to implementing the Directive, nothing has specifically been instigated by Ofgem/DTI with regard to making changes to the current regime in respect of this.

2.1.5 *Unlawful or Illegal Acts:* The issue has also been raised as to whether it would, in some way, be unlawful or illegal for a body other than the Member State to suggest or make changes to the current regime which had the effect of further reflecting any directive requirements or to give effect to the option under the Directive which states that a Member State “may” provide for priority access.

2.1.6 *Ofgem:* Ofgem could be regarded as an ‘emanation of State’, and it could also be argued that it is the ‘Member State’ in the context of energy related directives (although in the past it has stated that it regards itself as an emanation of State). In all relevant respects it does not matter what it is termed; it is simply a label attached to an entity with an obligation to implement a firm directive requirement.

2.1.7 *Amendments:* There is nothing to prevent any party proposing amendments to the CUSC as provided for by the CUSC, but as explained below the test for whether an amendment can be made is whether it better facilitates the achievement of the Applicable CUSC Objectives, and if it does so Ofgem may choose to implement it.

2.1.8 *Nature Of Amendment:* Therefore if an amendment proposal is made, as here, which proposes some changes to access rights for renewable generation, it would need to be considered by the CUSC Panel, Working Group and The Company in the context of the existing CUSC Applicable Objectives.

- 2.1.9 *Ofgem's Role:* In its role as an emanation of the State, or Member State in this context, Ofgem could choose to, but does not have to, implement the option in the Directive. However, in considering an Amendment Report, Ofgem's role is to decide whether the changes better meet the Applicable CUSC Objectives and if so whether to approve them. In doing this it would need to satisfy itself that the proposal better met the Applicable CUSC Objectives so that it could be implemented and also that, taking into account its other statutory obligations, it should be implemented.
- 2.1.10 If Ofgem thought that the proposed change was outwith those objectives, and still believed, taking into account its statutory obligations, that the change should be made, then it would need to consider changing the Applicable CUSC Objectives by for example proposing changes to the NG Transmission Licence, before it could approve the CUSC change. It would in making that change need to be fulfilling its wider statutory obligations in relation to making those changes.
- 2.1.11 The CUSC Panel, Working Group and the Company may have views on the nature of the proposal and whether it better meets the Applicable CUSC Objectives, whilst these should be noted in the respective reports or in comments made as part of any consultation on the proposal, the decision is Ofgem's. Any decision on this point or Ofgem's decision to implement can be the subject of a challenge.
- 2.1.12 *Effect of Directive:* The Directive, as with most laws, does not provide that matters must not be considered unless they are envisaged or described in the Directive. It instead sets out some requirements and options, which can be implemented by a Member State. Laws rarely exhaustively set out what can be done; they normally set out what is specifically required. The Directive would only prevent something additional or different being implemented if that cut across a firm Directive requirement or if it cut across an option in the Directive which had been implemented by the Member State.
- 2.2 Confirmation that under the provisions of CUSC Section 8 where required to evaluate whether a proposal better meets the Applicable CUSC Objectives, those objectives are framed by the Act and licence provisions in force at the time of that evaluation.**
- 2.2.1 The general requirement on the Panel is that it shall endeavour at all times to operate with a view to ensuring that the CUSC facilitates achievement of the 'Applicable CUSC Objectives', as set out in paragraph 1.3 above.
- 2.2.2 A Working Group can be established to assist the Panel in evaluating whether a proposed amendment better facilitates the Applicable CUSC Objectives, or whether there is a Working Group alternative amendment that would better so facilitate.
- 2.2.3 The "Company" under the CUSC, namely NG, is required to include in the Amendment Report to Ofgem an analysis of whether (and if so to what extent) the proposed amendment (and any Working Group alternative amendment, and/or one which has arisen in the Consultation) would better facilitate achievement of the Applicable CUSC Objectives.
- 2.2.4 As indicated above, the objectives against which the amendment is to be evaluated are framed pointing to the requirements under the Electricity Act and the NG Transmission Licence and can only be evaluated against the provisions under the act or licence as they stand at the time of the evaluation, not the Directive or any other requirements.

**2.3 Confirmation that the evaluation is limited to consideration against the Applicable CUSC Objectives and not to general principles of law etc (including the directive) on assumption that the current regulatory framework meets all statutory requirements.**

- 2.3.1 As indicated above, the Company is required to include in the Amendment Report to Ofgem an analysis of whether (and if so to what extent) the proposed amendment etc would better facilitate achievement of the Applicable CUSC Objectives.
- 2.3.2 In accordance with the transmission licence, and as provided for in the CUSC, Ofgem may approve a proposed change if it believes it better achieves the Applicable CUSC Objectives.
- 2.3.3 Again, as indicated in relation to the question at para 2,2 above, the definition of Applicable CUSC Objectives is clear, and limited in that it refers to two areas, namely the Electricity Act and the NG Transmission Licence. There is no requirement arising out of the CUSC amendment process, whether in the working group evaluation or in the putting together of the report, to interpret the Act or the NG Transmission Licence requirements in accordance with other principles or statutory or other requirements.
- 2.3.4 It is important to remain focused on what the requirements are in relation to amendments and not to think that there may be general requirements which apply.

**2.4 That the CUSC Section 8 process is to scope out the detail of a proposal and in doing so to evaluate whether it better facilitates the achievement of the Applicable CUSC Objectives and to put this evaluation with views as to whether it does or doesn't before the Authority but that it is for the Authority to determine whether it does so and if so whether to approve the modification.**

- 2.4.1 The question correctly describes the process under the CUSC and the NG Transmission Licence, which describes the scope which Ofgem has to approve changes.
- 2.4.2 First, the proposer must indicate that the proposal better meets the Applicable CUSC Objectives. Then, once the Panel process is completed, The Company must include in the Report to the Authority the issue of whether it believes the proposal (and any alternatives) better meets the Applicable CUSC Objectives. It is then, under the transmission licence, for the Authority to determine whether it does and if so it may then approve the change.