

**DRAFT FOR CUSC PANEL**  
**VOTE on 14<sup>th</sup> December**

## **AMENDMENT REPORT**

### **CUSC Proposed Amendment CAP157**

#### **Extension of Qualified Company Definition**

*The purpose of this report is to assist the Authority in their decision of whether to implement Amendment Proposal CAP157*

Amendment Ref	CAP157
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Prepared by	National Grid

**I DOCUMENT CONTROL****a National Grid Document Control**

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0.2	10/12/07	National Grid	Draft for Amendments Panel Vote
0.3		National Grid	Draft for Amendments Panel comment
1.0		National Grid	Formal version for submission to the Authority

**b Document Location**

National Grid Website:

[www.nationalgrid.com/uk/Electricity/Codes/](http://www.nationalgrid.com/uk/Electricity/Codes/)

**c Distribution**

Name	Organisation
The Gas and Electricity Markets Authority	Ofgem
CUSC Parties	Various
Panel Members	Various
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## 1.0 SUMMARY AND RECOMMENDATIONS

### Executive Summary

- 1.1 CAP157 Extension of Qualified Company Definition (the Amendment Proposal) proposes to extend the definition of “Qualified Company’ or ‘Qualifying Company’” to enable Users to procure security, which is required to be provided under Paragraph 2.22.1 of the CUSC and under the provisions of Bilateral Connection Agreements and Construction Agreements, by way of a Performance Bond from a wider range of companies than is currently provided for.
- 1.2 Specifically, the Amendment Proposal seeks to widen the definition of “Qualified Company’ or ‘Qualifying Company’” to enable affiliates of a User rather than solely a User’s shareholders or holding companies to provide security via a Performance Bond.
- 1.3 The Amendment Proposal in no way affects the requirement that a Qualified Company or Qualifying Company must have the Required Credit Rating.
- 1.4 During the CAP157 Working Group’s assessment a risk associated with the existing arrangements was identified, where in some situations (e.g. when a domino effect of companies failing within a corporate group occurs) it might be difficult to call upon a security guarantee to the full amount secured. The proposed amendment does not materially impact this risk.
- 1.5 Further to this, the Working Group developed a Working Group Alternative Amendment (WGAA) to clarify the assurances that National Grid would require to alleviate concerns that it may not be possible under the Amendment Proposal to draw upon a Performance Bond where both the User and the provider enter receivership.
- 1.6 The Working Group believed that both the original Amendment Proposal and the Working Group Alternative Amendment better facilitate the Applicable CUSC Objectives compared with the existing baseline. The Working Group considers that the WGAA best facilitates the Applicable CUSC Objectives.

### National Grid Recommendation

- 1.7 National Grid believes that both the original CAP157 Amendment Proposal and the Working Group Alternative Amendment better facilitate the Applicable CUSC Objectives compared with the existing baseline.
- 1.8 National Grid believes WGAA best facilitates the objectives of the CUSC, as the added transparency would enable the relating Performance Bonds to be provided more efficiently.

### Amendment Panel Recommendation

- 1.9 **To be added following Panel vote**

## 2.0 PURPOSE AND INTRODUCTION

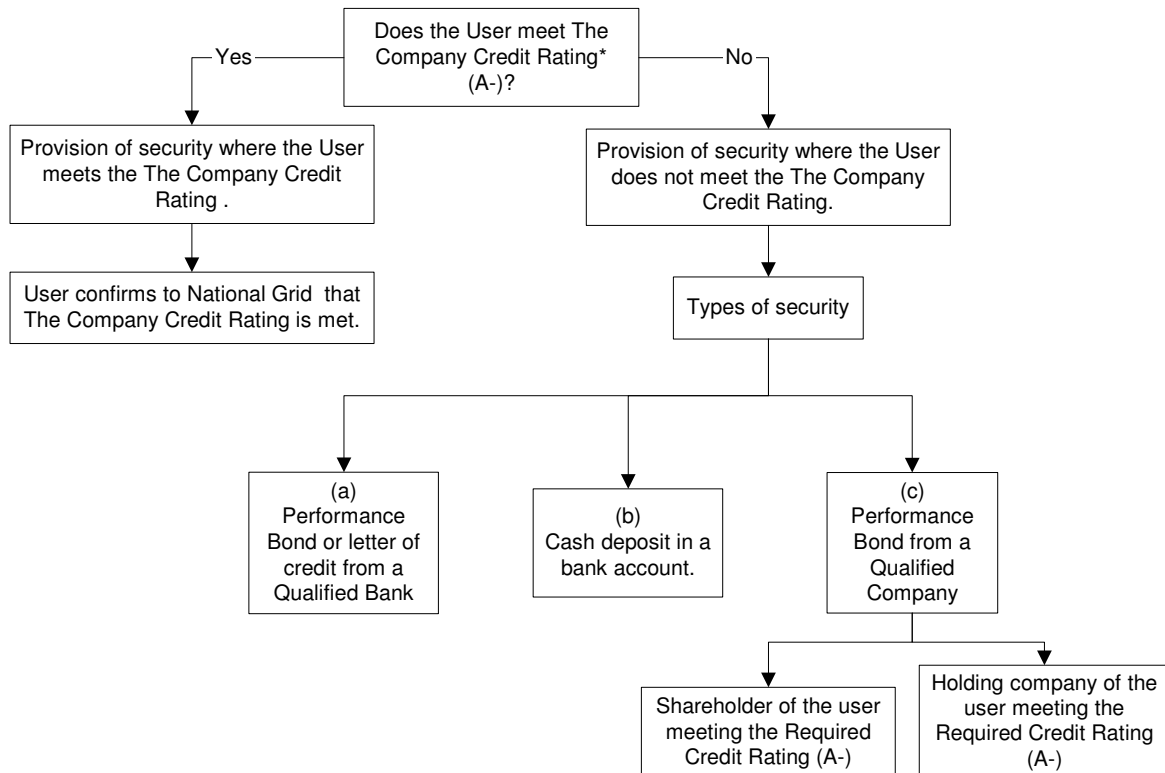
- 2.1 This Amendment Report has been prepared and issued by National Grid under the rules and procedures specified in the Connection and Use of System Code (CUSC) as designated by the Secretary of State.
- 2.2 Further to the submission of Amendment Proposal CAP157 (see Annex 3) and the subsequent wider industry consultation that was undertaken by National Grid, this document is addressed and furnished to the Gas and Electricity Markets Authority (“the Authority”) in order to assist them in their decision whether to implement Amendment Proposal CAP157.
- 2.3 CAP157 was proposed by CRE Energy Limited and submitted under the urgency arrangements to the Amendments Panel for their consideration on 23 July 2007. The Panel agreed unanimously to recommend to Ofgem that CAP157 should not be treated as an Urgent Amendment Proposal. Ofgem, as the Authority, agreed with the Panel in its letter of 24 July 2007, attached as Annex 7. Subsequently, at its meeting on 27 July 2007, the Amendments Panel determined that the Amendment Proposal should be considered by a Working Group and that the Working Group should report back to the Amendments Panel within three months. The CAP 157 Working Group Report was submitted to the CUSC panel meeting on 26 October 2007. Following evaluation by the Working Group, the Amendments Panel determined that CAP157 was appropriate to proceed to wider industry consultation by National Grid.
- 2.4 This document outlines the nature of the CUSC changes that are proposed. It incorporates National Grid’s recommendations to the Authority concerning the Amendment. Copies of all representations received in response to the consultation have been also been included and a ‘summary’ of the representations received is also provided. Copies of each of the responses to the consultation are included as Annex 4 to this document.
- 2.5 A glossary for key terms and acronyms of CAP157 can be found in Annex 1 of this document.
- 2.6 This Amendment Report has been prepared in accordance with the terms of the CUSC. An electronic copy can be found on the National Grid website, at [www.nationalgrid.com/uk/Electricity/Codes/](http://www.nationalgrid.com/uk/Electricity/Codes/)

### **3.0 PROPOSED AMENDMENT**

- 3.1 CRE Energy Limited (the Proposer) proposed a change to the definition of “Qualifying Company’ or ‘Qualified Company’” in Section 11 (Interpretation and Definitions) and Schedule 2 Exhibit 3 Appendix M (Construction Agreement Security Arrangement) of the CUSC. Currently the definition means that a User can obtain a Performance Bond from one of its immediate shareholders or any holding company of such a shareholder. The Amendment Proposal proposes to extend the definition to include affiliates of a User, without weakening the level of security provided.
- 3.2 It is intended that CAP157 shall only apply to Termination Amounts (as calculated in accordance with the Charging Statements) and Final Sums (as defined in a User’s Construction Agreement).
- 3.3 Under the current definition of Qualified Company or Qualifying Company, in order to qualify to supply a Performance Bond, the provider must first meet the Required Credit Rating (A- in Standard and Poor’s or A3 in Moody’s long

term debt ratings, please see Annex 1 for the full definition). CAP157 does not change this requirement.

- 3.4 The current process under the CUSC for securing Termination Amounts and Final Sums is described in the following diagram:



\*The Company Credit Rating as defined under the CUSC. This is the credit rating that a User must meet to obtain unsecured credit. The Required Credit Rating refers to that which a Performance Bond Provider must meet.

- 3.5 Of the three types of security currently available to Users that do not meet the Required Credit Rating, the provision of a Performance Bond from a Qualified Company is frequently used because sourcing security from a bank may be expensive, and cash deposits may cause cash flow difficulties.
- 3.6 CAP157 would allow companies with complex corporate structures, for example those with both regulated and non-regulated entities, and groups structured for taxation purposes, to seek credit cover within the group. This would enable Users to avoid having to use one of the more costly forms of security, which the Proposer believed would better facilitate competition.
- 3.7 In addition, numerous smaller companies involved in joint ventures with companies from part of a large group could also benefit from implementation of the Amendment Proposal, as it would provide more flexibility in obtaining security for related projects.
- 3.8 It is believed that the Amendment Proposal does not weaken the definition of Performance Bond, as the term “shareholder” may be interpreted to mean a holder of one share in the User. This means that the party providing security under the current arrangements may have an interest in but no direct control over the User, unlike a parent company to its sibling. There is therefore nothing to stop a sibling company from becoming the holder of a single share in the User in order to provide them security under the current arrangements.

- 3.9 Under the current arrangements a risk of insufficient funds being received from draw down of a Performance Bond does exist. Numerous companies within a corporate group may all fail within a short period of time in a “domino effect” causing a possibility that a Performance Bond may not be fully drawn upon if the Provider and the User are included in those that fail. As this is a result of accepting security from within the same corporate group as the User which is the case under both the current arrangements and those introduced by CAP157. It should be noted that this risk is not affected by the Amendment Proposal. This view was confirmed by two independent credit agencies from which National Grid procured for the CAP157 assessment.
- 3.10 However, under the proposed arrangements, a further issue may be associated with the provision of Performance Bonds from non-parent affiliates, but this can be mitigated if National Grid seeks certain assurances before accepting the bond. This relates to the following set of events:
- (a) The User defaults;
  - (b) National Grid attempts to draw down on a Performance Bond provided by a sibling; and
  - (c) The bond provider enters receivership before paying out on the Performance Bond.
- 3.11 In such circumstances there is a risk that the receiver of the provider of the Performance Bond may deem the provision of the bond that is being drawn upon as inappropriate, as it does not appear to serve the best interests of the provider. In this event, the bond may not be considered for settlement. It is not considered that this risk exists under the existing arrangements, as it is expected that a holding company or shareholder of a User is acting in its own best interests by providing a Performance Bond.
- 3.12 In order to mitigate this risk under the Proposed Amendment, the bond provider will be required to assure National Grid that the Performance Bond is being provided in their best interests and not just to the benefit of the wider group by:
- (a) satisfying National Grid that its corporate governance allows the Provider to put a Performance Bond in place for companies that are not its subsidiary;
  - (b) providing an extract from the minutes of the meeting of the Provider’s directors recording that they believe that the Performance Bond is being provided in its interests or in order to promote the success of the provider; and
  - (c) providing certified copies of the authorisation by every holding company up to and including a holding company of both the User and the Provider.
- 3.13 Whilst the current contractual framework allows National Grid to deem the form of a Performance Bond unacceptable where these assurances have not been provided, for transparency and to aid efficiency, it has suggested that these requirements be codified. This led to the development of a single Working Group Alternative Amendment (WGAA).

## 4.0 ALTERNATIVE AMENDMENT

### Working Group Alternative

- 4.1 In an identical fashion to the original Amendment Proposal, the WGAA enables Users to obtain security via Performance Bonds provided by an affiliate from within the corporate group.
- 4.2 In addition, the WGAA clarifies what the Provider of such a Performance Bond will be required to supply to National Grid, before it is deemed acceptable (i.e. those requirements specified in paragraph 3.12).
- 4.3 For the avoidance of doubt, this information would still be required by National Grid under the original Amendment Proposal prior to accepting a related Performance Bond and the WGAA seeks to add transparency to this element of the process. This would assist Users when providing Performance Bonds.

## 5.0 ASSESSMENT AGAINST APPLICABLE CUSC OBJECTIVES

### Proposed Amendment

- 5.1 Based on the views of the Working Group, CAP157 would better facilitate the CUSC Objective:
  - (b) *facilitating effective competition in generation and supply of electricity and facilitating such competition in the sale, distribution and purchase of electricity.*
- 5.2 Although for some market participants, the effect of CAP157 would be neutral, it would allow companies with more complex structures to post security in a more cost effective manner by obtaining it from within their group.

### Working Group Alternative Amendment

- 5.3 Based on the views of the Working Group, the CAP157 Working Group Alternative would better facilitate the CUSC Objectives:
  - (a) *the efficient discharge by the Licensee of the obligations imposed upon it by the act and the Transmission Licence; and*
  - (b) *facilitating effective competition in generation and supply of electricity and facilitating such competition in the sale, distribution and purchase of electricity.*
- 5.4 Whilst sharing the benefits of the original Amendment Proposal, in making the assurances that National Grid requires from the bond Provider more transparent, the Working Group Alternative Amendment should make the process of putting the relating Performance Bonds in place more efficient than the original amendment.

## 6.0 PROPOSED IMPLEMENTATION

- 6.1 The Working Group and National Grid propose that CAP157 in either of its forms should be implemented 10 working days after an Authority decision because the impact of the change on National Grid processes is expected to

be minimal. Only those Users who sought to make use of the extended range of Qualifying or Qualified Companies as providers of Performance Bonds would be affected by the change. No further views were submitted in response to the CAP157 Consultation Document.

## **7.0 IMPACT ON THE CUSC**

- 7.1 CAP157 in either of its forms requires amendments to Section 11 and Schedule 2 Exhibit 3 Appendix M of the CUSC.
- 7.2 The text required to give effect to the Original Proposal is contained as Part A of Annex 2 of this document.
- 7.3 The text to give effect to the Working Group Alternative Amendment is attached as Part B of Annex 2 of this document.

## **8.0 IMPACT ON CUSC PARTIES**

### **Proposed Amendment**

- 8.1 CAP157 has limited impact upon CUSC parties because only those Users who sought to make use of the extended range of Qualifying or Qualified Companies as providers of Performance Bonds would be affected by the change.

### **Working Group Alternative Amendment**

- 8.2 The CAP157 Working Group Alternative has limited impact upon CUSC parties because only those Users who sought to make use of the extended range of Qualifying or Qualified Companies as providers of Performance Bonds would be affected by the change.

## **9.0 IMPACT ON INDUSTRY DOCUMENTS**

### **Impact on Core Industry Documents**

- 9.1 CAP157 in either of its forms has no impact upon Core Industry Documents.

### **Impact on other Industry Documents**

- 9.2 CAP157 in either of its forms has no impact upon other Industry Documents.

## **10.0 IMPACT ON INDUSTRY COMPUTER SYSTEMS OR PROCESSES**

- 10.1 CAP157 has no impact upon on Industry Computer Systems or Processes because only the changes involved only seek to extend the provision of existing security tools to include additional providers.

## **11.0 VIEWS AND REPRESENTATIONS**

- 11.1 This Section contains a summary of the views and representations made by consultees during the consultation period in respect of the Proposed Amendment and the Alternative Amendment.

### **Views of Panel Members**



- 11.2 No views or representations were made by Panel Members in their capacity as Panel Members

**View of Core Industry Document Owners**

- 11.3 No views or representations were made by Core Industry Document Owners.

**Working Group**

- 11.4 The Working Group believed that its Terms of Reference had been met and CAP157 and the WGAA had been fully considered, and recommended to the Amendments Panel that a Consultation Document<sup>1</sup> should proceed to wider Industry Consultation.
- 11.5 The Working Group considered that both the original Amendment Proposal and the Working Group Alternative Amendment better facilitate the Applicable CUSC Objectives compared with the existing baseline.
- 11.6 The Working Group believes that the WGAA best facilitates the Applicable CUSC Objectives. A summary of the Working Group vote is as follows:

Amendment	Better meets the Applicable CUSC Objectives	Does not better meet the Applicable CUSC Objectives	Best meets the Applicable CUSC Objectives
CAP157 (Original)	4	0	0
CAP157 Working Group Alternative Amendment	4	0	4

Abstentions: 1

<sup>1</sup><http://www.nationalgrid.com/NR/rdonlyres/4FF40EE8-489A-4347-9BF9-C42C0AE18ACA/21105/CAP157ConsultationReportFinal.pdf>

## Responses to Consultation

11.7 The following table provides an overview of the representations received. Copies of the representations are attached as Annex 4.

Reference	Company	Supportive	Comments
CAP157-CR-01	<b>ScottishPower</b> (on behalf of ScottishPower Energy Management Ltd, ScottishPower Generation Ltd, ScottishPower Renewable Energy Ltd and CRE Energy Ltd)	WGAA	<p>ScottishPower supports the Working Group Alternative Amendment and believes that it better meets the applicable CUSC objectives.</p> <p>By widening the choice of Performance Bond provider, the proposal increases the range of options available to a User and thus better facilitates competition.</p> <p>ScottishPower does not believe that either the original Proposal or the Working Group Alternative Amendment weaken the level of security provided to National Grid by a Performance Bond.</p>
CAP157-CR-02	<b>RWE Npower</b> (on behalf of RWE Trading GmbH, RWE Npower plc, Npower Ltd, Npower Northern Ltd, Npower Northern Supply Ltd, Npower Yorkshire Ltd, Npower Yorkshire Supply Ltd, Npower Direct Ltd and Npower Cogen Trading Ltd)	Both (WGAA best)	<p>RWE considers that the changes proposed under the original amendment better meet the CUSC objectives than the baseline version of the CUSC in ensuring that appropriate levels of security are provided in the most efficient manner. The proposed original amendment better facilitates CUSC objective B by allowing companies with more complex structures to post security in a more cost effective manner by obtaining it from within their group.</p> <p>RWE also believes that the Working Group Alternative Amendment would better facilitate the applicable CUSC Objectives than the original proposal. The Working Group Alternative Amendment facilitates CUSC objective B in the same manner as the original proposed amendment and also better facilitates CUSC objective A by making the process of placing the relevant Performance Bonds more efficient than the original amendment.</p>

Reference	Company	Supportive	Comments
CAP157-CR-02	<b>Welsh Power</b> (owner of Uskmouth Power, Haven Power and Severn Power)	WGAA	<p>Welsh Power supports the principle of permitting Users to procure security required under CUSC and the Bilateral Connection Agreements and Construction Agreements from a wider range of companies than is currently allowed.</p> <p>Welsh Power supports the WGAA and agrees with the Working Group's rationale that the additional transparency provided through codification in the CUSC would assist Users when providing Performance Bonds.</p> <p>Welsh Power believes that the WGAA better facilitates applicable CUSC objectives (a) and (b) compared to the original proposal. The WGAA improves competition among generators, particularly developers of new generating stations by allowing them to meet security within its corporate grouping, similar to the original proposal. However WGAA also ensures that the process of putting Performance Bonds in place is more efficient.</p>

## 12.0 COMMENTS ON DRAFT AMENDMENT REPORT

12.1 National Grid received no responses following the publication of the draft Amendment Report. The following table provides an overview of each representation.

## 13.0 AMENDMENT PANEL RECOMMENDATION

*13.1 To be added following Amendment Panel vote*

## 14.0 NATIONAL GRID RECOMMENDATION

14.1 National Grid believes that both the original CAP157 Amendment Proposal and the Working Group Alternative Amendment better facilitate the Applicable CUSC Objectives compared with the existing baseline.

14.2 Whilst National Grid sees the advantages of enabling Users to provide Performance Bonds from any affiliate, these would only be deemed acceptable if assurances are provided to certify that the Performance Bond will be honoured by a receiver of the provider in the event that both the user and the provider enter receivership.

- 14.3 National Grid believes that there are additional merits in the WGAA proposal, as the required assurances have been added to the legal drafting for transparency. This would enable the relating Performance Bonds to be provided more efficiently.
- 14.4 National Grid would like to reiterate the fact that under the current arrangements there is risk that Performance Bonds supplied from within the same corporate group as the User may not be drawn down to the full amount if the Provider fails alongside the User. Whilst this risk still exists under both CAP157 and the WGAA, National Grid believes that neither of these proposals weakens the definition of Performance Bond.
- 14.4 Therefore, National Grid believes WGAA best facilitates the objectives of the CUSC.

**ANNEX 1 – GLOSSARY AND ACRONYMS****Companies Act**

Means section 736, Companies Act 1985 as supplemented by section 144(3), Companies Act 1989, a copy of which is included in Annex 6.

**Credit Rating**

a long term debt rating by Standard and Poor's Corporation or Moody's Investor Services, or a correlating short term rating.

**Final Sums**

The amount payable by a User on termination of a Construction Agreement as calculated under the terms of the Construction Agreement. Depending on the agreed methodology for calculation, this may include amounts such as:

- a. all of National Grid's relating engineering charges that have arisen prior to the date of termination;
- b. fees, expenses and costs incurred by National Grid as part of any construction works that have been carried out prior to the termination date;
- c. fees, expenses and costs incurred by National Grid arising from the termination of any contract with a third party in relation to any construction works;
- d. the reasonable costs of removing any connection assets and making good any remaining plant and apparatus; and interest on any costs incurred (at Base Rate + 2%).

**Holding Company**

As defined by section 736, Companies Act 1985 as supplemented by section 144(3), Companies Act 1989.

**Performance Bond**

An on first demand without proof or conditions irrevocable performance bond or performance guarantee executed as a deed in a form reasonably satisfactory to National Grid, allowing for partial drawings and providing for the payment to National Grid on demand.

**Letter of Credit**

An irrevocable standby letter of credit expressed to be governed by the Uniform Customs and Practice for Documentary Credits 1993 Revision ICC Publication No. 500 or such other form as may be reasonably satisfactory to National Grid and allowing for partial drawings and providing for the payment to National Grid on demand.

<b>Ofgem's Best Practice Guidelines for Gas and Electricity Network Operator Credit Cover</b>	Ofgem's conclusions document on best practice guidelines for gas and electricity network operator credit cover, published in February 2005: <a href="http://www.ofgem.gov.uk/Licensing/IndCodes/CreditCover/Documents1/9791-5805.pdf">http://www.ofgem.gov.uk/Licensing/IndCodes/CreditCover/Documents1/9791-5805.pdf</a>
<b>Required Credit Rating</b>	a rating of at least A- in Standard and Poor's long term debt rating or A3 in Moody's long term debt rating or such lesser rating which National Grid may in its absolute discretion allow.
<b>Subsidiary</b>	As defined by section 736, Companies Act 1985 as supplemented by section 144(3), Companies Act 1989.
<b>Termination Amounts</b>	The amount charged when a User wholly or partially disconnects from the Transmission System, as calculated under the terms of The Statement of Connection Charging Methodology. This includes amounts such as (taking into account any capital contributions): <ul style="list-style-type: none"> <li>e. the remaining Net Asset Value of any relating connection assets that are made redundant as at the end of the Financial Year;</li> <li>f. the reasonable costs of removing such assets;</li> <li>g. any outstanding Use of System charges (some of which are secured outside of Termination Amounts Security); and</li> </ul> the remaining connection charges for the current Financial Year;
<b>The Company Credit Rating</b>	As defined in the CUSC, any one of the following:- <ul style="list-style-type: none"> <li>(a) a credit rating for long term debt of A- and A3 respectively as set by Standard and Poor's or Moody's respectively;</li> <li>(b) an indicative long term private credit rating of A- and A3 respectively as set by Standard and Poor's or Moody's as the basis of issuing senior unsecured debt;</li> <li>(c) a short term rating by Standard and Poor's or Moody's which correlates to a long term rating of A- and A3 respectively; or</li> <li>(d) where the User's Licence issued under the Electricity Act 1989 (as amended by the Utilities Act 2000) requires that User to maintain a credit rating, the credit rating defined in that User's Licence.</li> </ul>
<b>The Proposer</b>	CRE Energy Ltd

**Ultimate Parent**

The highest company in the chain of corporate ownership. Note that there may be multiple ultimate parent companies if joint ownership exists within the chain.

## ANNEX 2 – PROPOSED LEGAL TEXT TO MODIFY THE CUSC

### Part A - Text to give effect to the Original Proposed Amendment

The proposed Legal text to modify the CUSC is detailed below by inserting the coloured underlined text and deleting the coloured struck through text. It is proposed that these amendments are made to the definitions of “Qualified Company’ or ‘Qualifying Company’” in Section 11.3 of the CUSC and Appendix M Part 1 of the standard form of the Construction Agreement (Schedule 2 Exhibit 2 of the CUSC). The wording in both sections is currently identical.

“Qualified Company” or  
“Qualifying Company”

a company which is a public company or a private company within the meaning of section 1(3) of the Companies Act 1985 and which is either a shareholder of the **User** or any holding company of such shareholder or any subsidiary of any such holding company (the expressions ‘holding company’ and ‘subsidiary’ having the respective meanings assigned thereto by section 736, Companies Act 1985 as supplemented by section 144(3), Companies Act 1989) and which has throughout the validity period of the **Performance Bond** it gives in favour of **The Company**, a rating of at least A- in Standard and Poor’s long term debt rating or A3 in Moody’s long term debt rating or such lesser rating which **The Company** may in its absolute discretion allow by prior written notice given pursuant to a resolution of its board of directors for such period and on such terms as such resolution may specify provided that such company is not during such validity period put on any credit watch or any similar credit surveillance procedure which gives **The Company** reasonable cause to doubt that such company may not be able to maintain the aforesaid rating throughout the validity period of the **Performance Bond** and no other event has occurred which gives **The Company** reasonable cause to have such doubt;



## Part B - Text to give effect to the Working Group Alternative Amendment

The proposed Legal text to modify the CUSC is detailed below by inserting the coloured underlined text and deleting the coloured struck through text. It is proposed that these amendments are made to the definitions of “Qualified Company’ or ‘Qualifying Company’” in Section 11.3 of the CUSC and Appendix M Part 1 of the standard form of the Construction Agreement (Schedule 2 Exhibit 2 of the CUSC). The wording in both sections is currently identical.

### “Qualified Company” or “Qualifying Company”

a company which is a public company or a private company within the meaning of section 1(3) of the Companies Act 1985 and which is either :

(a) a shareholder of the **User** or any holding company of such shareholder ~~(the expression “; or~~

(b) any subsidiary of any such holding company, but only where the subsidiary

(i) demonstrates to **The Company’s** satisfaction that it has power under its constitution to give a **Performance Bond** other than in respect of its subsidiary;

(ii) provides an extract of the minutes of a meeting of its directors recording that the directors have duly concluded that the giving of the **Performance Bond** is likely to promote the success of that subsidiary for the benefit of its members;

(iii) provides certified copies of the authorisation by every holding company of the subsidiary up to and including the holding company of the **User**, of the giving of the **Performance Bond**,

(the expressions “holding company” and “subsidiary” having the ~~meaning~~respective meanings assigned thereto by section 736, Companies Act 1985 as supplemented by section 144(3), Companies Act 1989) and which has throughout the validity period of the **Performance Bond** it gives in favour of **The Company**, a rating of at least A- in Standard and Poor’s long term debt rating or A3 in Moody’s long term debt rating or such lesser rating which **The Company** may in its absolute discretion allow by prior written notice given pursuant to a resolution of its board of directors for such period and on such terms as such resolution may specify provided that such company is not during such validity period put on any credit watch or any similar credit surveillance procedure which gives **The Company** reasonable cause to doubt that such company may not be able to maintain the aforesaid rating throughout the validity period of the **Performance Bond** and no other event has occurred which gives **The Company** reasonable cause to have such doubt;

## ANNEX 3 – AMENDMENT PROPOSAL FORM

### URGENT AMENDMENT PROPOSAL

#### **Title of Amendment Proposal:**

Extension of Qualified Company Definition

#### **Description of the Proposed Amendment:**

It is proposed to amend the CUSC to permit Users to procure that security which is required to be provided under Paragraph 2.22.1 of the CUSC and under the provisions of Bilateral Connection Agreements, BELLAs, BEGAs and Construction Agreements by way of a Performance Bond from a Qualified Company may be provided by a wider category of companies than is currently provided for.

Specifically, it is proposed to widen the definition of 'Qualified Company' or "Qualifying Company" to enable affiliates of a User rather than solely a User's shareholders or immediate holding companies to provide security. The proposed drafting amendments are set out in Appendix I. The proposed amendment in no way affects the requirement that a Qualified Company or Qualifying Company must have the specified credit rating.

#### **Description of Issue or Defect that Proposed Amendment seeks to Address:**

Currently the definition of 'Qualified Company' or 'Qualifying Company' only permits a User to obtain a guarantee from one of its immediate shareholders or from a holding company of one of such shareholders.

This narrow definition is unduly restrictive and may cause problems for Users within more complex group structures where such Users wish to provide a guarantee from a related group company which is not immediately above the User in the corporate ownership structure of that group.

This presents a barrier to Users in providing the most economic and efficient form of security available to that User.

#### **Impact on the CUSC:**

The following changes are expected:

- Amendment required to definition of "Qualified Company" and "Qualifying Company" in Section 11 of the CUSC.
- Amendment required to definition of "Qualified Company" and / or "Qualifying Company" in Appendix M to the standard form Construction Agreement appended at Schedule 2 Exhibit 3 to the CUSC.

The wording of the proposed amendment is set out in Appendix I to this CUSC Amendment Proposal.

#### **Impact on Core Industry Documentation:**

The proposed amendment would require amendment to be made to Appendix M of Construction Agreements.

#### **Impact on Computer Systems and Processes used by CUSC Parties:**

None

**Details of any Related Modifications to Other Industry Codes:**

None

**Justification for Proposed Amendment with Reference to Applicable CUSC Objectives:**

The proposed amendment better facilitates the achievement of the Applicable CUSC Objectives as follows:

*a) the efficient discharge by the licensee of the obligations imposed upon it under the Act and by this licence*

The Company has a range of statutory duties and licence obligations which include ensuring the efficient, economic and co-ordinated operation of the GB Transmission System, the facilitation of competition and non-discrimination. The proposed amendment better facilitates the efficient discharge by The Company of these obligations and, in particular, it is observed that the proposal would:

- aid an efficient and economic operation of the GB Transmission System by ensuring that Users do not incur extra costs to connection which they would otherwise be able to avoid;
- improve competition among generators, particularly developers of new generating stations by allowing them to meet security requirements under their agreements with The Company more easily;
- ensure that Users which are members of a more complex corporate group structure than other Users are not unfairly discriminated against by reason of this structure (which may have been put in place for other group reasons such as tax or efficiency);
- update the CUSC to reflect the more modern innovative group company arrangements being employed by CUSC Participants; and
- not lead to any increase in risk on the part of The Company.

For these reasons, the proposed amendment would better facilitate Applicable CUSC Objective (a) the efficient discharge by the licensee of the obligations imposed upon it under the Act and by the 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*

Users which have requested a connection to the GB Transmission System and which have signed up to Construction Agreements with The Company are often required to provide security in respect of substantial potential liabilities under such agreements.

In the absence of being able to provide security by way of guarantee from a 'Qualified Company', a User must provide security by other means such as letter of credit or cash in escrow – these other forms of security can often be significantly more expensive than providing a group company guarantee.

If Users cannot continue to provide security then The Company is entitled to terminate the relevant Construction Agreement and call up the security already provided.

The ability of and cost to Users to provide security for such connections is a significant barrier to entry for new generation and the proposal would remove an element of this barrier and to a certain extent greatly simplify and improve matters for Users within more complex corporate structures.

For these reasons, the proposed amendment would better facilitate Applicable CUSC Objective (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.

**Details of Proposer:**

**Organisation's Name:** CRE Energy Limited

**Capacity:** CUSC Party

**Detail of Proposer's Representative:**

**Name:** Roger Seshan

**Organisation:** CRE Energy Limited

**Telephone Number:** 0141 568 2870

**Email Address:** Roger.Seshan@ScottishPower.com

**Details of Representative's Alternate:**

**Name:** Keith Anderson

**Organisation:** CRE Energy Limited

**Telephone Number:** 0141 568 3143

**Email Address:** keith.anderson@ScottishPower.com

## Appendix I

Proposed new definition of "Qualified Company" (with new changes highlighted):

a company which is a public company or a private company within the meaning of section 1(3) of the Companies Act 1985 and which is either a shareholder of the **User** or any holding company of such shareholder or any subsidiary of any such holding company (the expressions 'holding company' and 'subsidiary' having the respective meanings assigned thereto by section 736, Companies Act 1985 as supplemented by section 144(3), Companies Act 1989) and which has throughout the validity period of the **Performance Bond** it gives in favour of **The Company**, a rating of at least A- in Standard and Poor's long term debt rating or A3 in Moody's long term debt rating or such lesser rating which **The Company** may in its absolute discretion allow by prior written notice given pursuant to a resolution of its board of directors for such period and on such terms as such resolution may specify provided that such company is not during such validity period put on any credit watch or any similar credit surveillance procedure which gives **The Company** reasonable cause to doubt that such company may not be able to maintain the aforesaid rating throughout the validity period of the **Performance Bond** and no other event has occurred which gives **The Company** reasonable cause to have such doubt;

**ANNEX 4 – REPRESENTATIONS RECEIVED DURING CONSULTATION**

This Annex includes copies of any representations received following circulation of the Consultation Document (circulated on 1<sup>st</sup> November 2007, requesting comments by close of business on 29<sup>th</sup> November 2007).

Representations were received from the following parties:

<b>No.</b>	<b>Company</b>	<b>File Number</b>
1	ScottishPower	CAP157-CR-01
2	RWE Npower	CAP157-CR-02
3	Welsh Power	CAP157-CR-03

<b>Reference</b>	CAP157-CR-01
<b>Company</b>	ScottishPower

Beverley Viney  
Amendments Panel Secretary  
Electricity Codes  
National Grid  
National Grid House  
Warwick Technology Park  
Gallows Hill  
Warwick  
CV34 6DA

29 November 2007

0141 568 4469

Dear Beverley,

**CAP157 Consultation Document**  
**Extension of Qualified Company Definition**

Thank you for the opportunity to respond to this consultation document. This response is submitted on behalf of ScottishPower Energy Management Ltd, ScottishPower Generation Ltd, ScottishPower Renewable Energy Ltd and CRE Energy Ltd.

ScottishPower supports the Working Group Alternative Amendment and believes that it better meets the applicable CUSC objectives.

CAP157 extends the number of companies within a corporate group which are entitled to provide a Performance Bond on behalf of an affiliated company in respect of Termination Amounts and Final Sums. By widening the choice of Performance Bond provider, the Proposal increases the range of options available to a User and thus better facilitates competition.

ScottishPower does not believe that either the original Proposal or the Working Group Alternative Amendment weaken the level of security provided to National Grid by a Performance Bond.

I hope you find these comments useful. Should you have any queries on the points raised, please feel free to contact us.

Yours sincerely,

James Anderson  
**Commercial & Regulation Manager**

<b>Reference</b>	CAP157-CR-02
<b>Company</b>	RWE Npower

RWE npower



Ms B Viney  
Amendments Panel Secretary  
Electricity Codes  
National Grid Electricity Transmission plc  
National Grid House  
Warwick Technology Park  
Gallows Hill  
Warwick  
CV34 6DA

Name Robin Healey  
Phone +44 01905 340 436  
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E-Mail robin.healey@npower.com

E-mail: [beverley.viney@uk.grid.com](mailto:beverley.viney@uk.grid.com)

29 November 2007

Dear Beverley

RE: CUSC Amendment Proposal CAP157 - Extension of Qualified Company Definition

Thank you for the opportunity to comment on the above consultation. The following response is provided on behalf of the following CUSC parties within the RWE group of companies: RWE Trading GmbH, RWE Npower plc, Npower Ltd, Npower Northern Ltd, Npower Northern Supply Ltd, Npower Yorkshire Ltd, Npower Yorkshire Supply Ltd, Npower Direct Ltd and Npower Cogen Trading Ltd.

RWE considers that the changes proposed under the original amendment better meet the CUSC objectives than the baseline version of the CUSC in ensuring that appropriate levels of security are provided in the most efficient manner. The proposed original amendment better facilitates CUSC objective B (facilitating effective competition in generation and supply of electricity and facilitating such competition in the sale, distribution and purchase of electricity) by allowing companies with more complex structures to post security in a more cost effective manner by obtaining it from within their group.

RWE also believes that the Working Group Alternative Amendment would better facilitate the applicable CUSC Objectives than the original proposal. The Working Group Alternative Amendment facilitates CUSC objective B in the same manner as the original proposed amendment and also better facilitates CUSC objective A (the efficient discharge by The Company of the obligations imposed on it by the Act and the Transmission Licence) by making the process of placing the relevant Performance Bonds more efficient than the original amendment.

RWE was pleased to participate in the Working Group that considered the above-referenced proposed amendment to the CUSC. We are satisfied that most of our comments raised in the Working Group have been reflected in the proposed legal text of the Working Group Alternative. We therefore have no further comments to add.

If you wish to discuss our response further please do not hesitate to contact me.

Yours sincerely

By e-mail

Robin Healey  
Commercial Analyst, Electricity Codes

RWE npower

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Wiltshire SN5 6PB  
Registered in England  
and Wales no. 3653277



<b>Reference</b>	CAP157-CR-03
<b>Company</b>	Welsh Power



Beverley Viney  
Amendments Panel Secretary  
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National Grid House  
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Welsh Power Group Limited  
West Nash Road, Newport,  
South Wales, NP18 2BZ  
Tel: +44 (0)1633 294140  
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info@welshpower.com

29<sup>th</sup> November 2007

Dear Ms Viney

**CAP157: Extension of Qualified Company Definition**

Welsh Power is the owner of Uskmouth Power, Haven Power and Severn Power. Welsh Power welcomes the opportunity to comment on the consultation document of CUSC amendment proposal CAP157. Welsh Power supports the principle of permitting Users to procure security required under CUSC and the Bilateral Connection Agreements and Construction Agreements, by way of a Performance Bond from a wider range of companies than is currently allowed. Welsh Power believe widening the definition of "Qualified Company" or "Qualifying Company" to enable affiliates of a User to provide security is an appropriate approach, especially in the current environment, where Users which have requested connection to the GB Transmission System have signed up to Connection Agreements that require substantial security to be provided.

Welsh Power supports the Working Group Alternative Amendment (WGAA) enabling Users to obtain security via Performance Bonds provided by an affiliate from within the corporate grouping, along with codification in CUSC of the information required by National Grid before it is deemed a Performance Bond is acceptable. Welsh Power agrees with the Working Group's rational that this additional transparency provided through codification in the CUSC, would assist Users when providing Performance Bonds.

Welsh Power believes that WGAA better facilitates the applicable CUSC objectives (a) and (b) compared with the original proposal. The WGAA improves competition among generators, particularly developers of new generating stations by allowing them to meet security within its corporate grouping, similar to the original proposal. However WGAA also ensures that the process of putting Performance Bonds in place is more efficient through being codified in CUSC.

If you have any queries in relation to this response, please do not hesitate to contact Rekha Patel on 020 8286 2784.

Rebecca Williams  
Head of Trading

## **ANNEX 5 – REPRESENTATIONS RECEIVED UPON THE DRAFT AMENDMENT REPORT**

No responses were received

**ANNEX 6 – COMPANIES ACT 1989 SECTION 144**

The following is taken from the Office of Public Sector Information website ([http://www.opsi.gov.uk/acts/acts1989/ukpga\\_19890040\\_en\\_17#pt5-pb5-l1g147](http://www.opsi.gov.uk/acts/acts1989/ukpga_19890040_en_17#pt5-pb5-l1g147)), and is reproduced under the terms of Crown Copyright Policy Guidance issued by HMSO:

144 “Subsidiary”, “holding company” and “wholly-owned subsidiary”

(1) In Part XXVI of the [1985 c. 6.] Companies Act 1985 (general interpretation provisions), for section 736 substitute—

“736 “Subsidiary”, “holding company” and “wholly-owned subsidiary”

(1) A company is a “subsidiary” of another company, its “holding company”, if that other company—

- (a) holds a majority of the voting rights in it, or
- (b) is a member of it and has the right to appoint or remove a majority of its board of directors, or
- (c) is a member of it and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in it,

or if it is a subsidiary of a company which is itself a subsidiary of that other company.

(2) A company is a “wholly-owned subsidiary” of another company if it has no members except that other and that other’s wholly-owned subsidiaries or persons acting on behalf of that other or its wholly-owned subsidiaries.

(3) In this section “company” includes any body corporate.

736A Provisions supplementing s. 736

(1) The provisions of this section explain expressions used in section 736 and otherwise supplement that section.

(2) In section 736(1)(a) and (c) the references to the voting rights in a company are to the rights conferred on shareholders in respect of their shares or, in the case of a company not having a share capital, on members, to vote at general meetings of the company on all, or substantially all, matters.

(3) In section 736(1)(b) the reference to the right to appoint or remove a majority of the board of directors is to the right to appoint or remove directors holding a majority of the voting rights at meetings of the board on all, or substantially all, matters; and for the purposes of that provision—

(a) a company shall be treated as having the right to appoint to a directorship if—

- (i) a person’s appointment to it follows necessarily from his appointment as director of the company, or
- (ii) the directorship is held by the company itself; and

(b) a right to appoint or remove which is exercisable only with the consent or concurrence of another person shall be left out of account unless no other person has a right to appoint or, as the case may be, remove in relation to that directorship.

(4) Rights which are exercisable only in certain circumstances shall be taken into account only—

(a) when the circumstances have arisen, and for so long as they continue to obtain, or

(b) when the circumstances are within the control of the person having the rights;

and rights which are normally exercisable but are temporarily incapable of exercise shall continue to be taken into account.

(5) Rights held by a person in a fiduciary capacity shall be treated as not held by him.

(6) Rights held by a person as nominee for another shall be treated as held by the other; and rights shall be regarded as held as nominee for another if they are exercisable only on his instructions or with his consent or concurrence.

(7) Rights attached to shares held by way of security shall be treated as held by the person providing the security—

(a) where apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in accordance with his instructions;

(b) where the shares are held in connection with the granting of loans as part of normal business activities and apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in his interests.

(8) Rights shall be treated as held by a company if they are held by any of its subsidiaries; and nothing in subsection (6) or (7) shall be construed as requiring rights held by a company to be treated as held by any of its subsidiaries.

(9) For the purposes of subsection (7) rights shall be treated as being exercisable in accordance with the instructions or in the interests of a company if they are exercisable in accordance with the instructions of or, as the case may be, in the interests of—

(a) any subsidiary or holding company of that company, or

(b) any subsidiary of a holding company of that company.

(10) The voting rights in a company shall be reduced by any rights held by the company itself.

(11) References in any provision of subsections (5) to (10) to rights held by a person include rights falling to be treated as held by him by virtue of any other provision of those subsections but not rights which by virtue of any such provision are to be treated as not held by him.

(12) In this section “company” includes any body corporate.”.

(2) Any reference in any enactment (including any enactment contained in subordinate legislation within the meaning of the [1978 c. 30.] Interpretation Act 1978) to a “subsidiary” or “holding company” within the meaning of section 736 of the [1985 c. 6.] Companies Act 1985 shall, subject to any express amendment or saving made by or under this Act, be read as referring to a subsidiary or holding company as defined in section 736 as substituted by subsection (1) above.

This applies whether the reference is specific or general, or express or implied.

(3) In Part XXVI of the [1985 c. 6.] Companies Act 1985 (general interpretation provisions), after section 736A insert—

“736B Power to amend ss. 736 and 736A

- (1) The Secretary of State may by regulations amend sections 736 and 736A so as to alter the meaning of the expressions “holding company”, “subsidiary” or “wholly-owned subsidiary”.
- (2) The regulations may make different provision for different cases or classes of case and may contain such incidental and supplementary provisions as the Secretary of State thinks fit.
- (3) Regulations under this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.
- (4) Any amendment made by regulations under this section does not apply for the purposes of enactments outside the Companies Acts unless the regulations so provide.
- (5) So much of section 23(3) of the Interpretation Act 1978 as applies section 17(2)(a) of that Act (effect of repeal and re-enactment) to deeds, instruments and documents other than enactments shall not apply in relation to any repeal and re-enactment effected by regulations made under this section.”.
- (4) Schedule 18 contains amendments and savings consequential on the amendments made by this section; and the Secretary of State may by regulations make such further amendments or savings as appear to him to be necessary or expedient.
- (5) Regulations under this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.
- (6) So much of section 23(3) of the [1978 c. 30.] Interpretation Act 1978 as applies section 17(2)(a) of that Act (presumption as to meaning of references to enactments repealed and re-enacted) to deeds or other instruments or documents does not apply in relation to the repeal and re-enactment by this section of section 736 of the [1985 c. 6.] Companies Act 1985.

**ANNEX 7 – THE AUTHORITY’S DECISION ON URGENCY**

Promoting choice and  
value to customers

Beverley Viney  
CUSC Panel Secretary  
National Grid  
Warwick Technology Park  
Gallows Hill  
Warwick CV34 6DA

Your Ref:  
Direct Dial: 020 7901 7355  
Email: mark.feather@ofgem.gov.uk

24 July 2007

Dear Beverley,

**Request for Urgency in relation to Code Amendment Proposal CAP157:  
Extension of Qualified Company Definition.**

Thank you for your email dated 23 July 2007, containing the Panel’s unanimous recommendation that CAP157 should not be treated as an Urgent Amendment Proposal.

**Characteristics of urgent Amendments**

Our view is that, in general, urgent amendments are likely to exhibit at least one of the following characteristics:

- There is a very real likelihood of significant commercial impact upon NGET, industry parties, or customers if an Amendment Proposal is not urgent;
- Safety and security of the network is likely to be impacted if a proposed Amendment is not urgent; and
- The proposal is linked to an imminent date related event.

**Applying these characteristics to CAP157**

This amendment proposal seeks to widen the definition of ‘Qualifying Company’ to enable a User to procure security required under CUSC paragraph 2.22.1 from a wider range of companies than the CUSC currently allows.

Whilst the merits of this proposal have yet to be considered, we have not received any information relating to the extent of the materiality that would lead us to consider there is a real likelihood of a significant commercial impact on NGET, industry parties or customers nor for there to be an impact on the safety or security of the network, if urgent status is not granted to this proposal.

Our understanding is that the current terms of the CUSC impact the proposer because of a corporate restructuring exercise within the proposers corporate group. This restructuring we believe is due to take effect on or around 17 August 2007. We note that the date was put forward by the proposer’s corporate group and did not arise owing to extraneous factors. In view of this and in the absence of any evidence of the broader impacts on industry parties, NGET or customers of not granting urgency, we do not consider that urgency status is merited for this proposal.

**Our decision on urgency**

Ofgem therefore agrees with the CUSC Panel and does not consent to CAP157 being treated as an Urgent Amendment Proposal for the purposes of section 8.21.1.4 of the CUSC.

**Reservation of rights**

Ofgem has not, by refusing consent to the request that CAP157 be treated as an Urgent Amendment Proposal, made any judgement on its merits.

If you have any queries in relation to the issues raised in this letter, please feel free to contact me on the number above.

Yours sincerely



**Mark Feather**

**Associate Director, Industry Codes & Licensing**

Signed on behalf of the Authority and authorised for that purpose by the Authority