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value for all customers*

Mr Duncan Burt  
GCRP Chairman  
National Grid Electricity Transmission plc  
National Grid Transco House  
Warwick Technology Park  
Gallows Hill  
Warwick  
CV34 6DA

Direct Dial: 020 7901 7355

24 May 2007

Our Ref: Grid Code Objectives

Dear Duncan,

**The Environment and the Grid Code Objectives**

On 17 April, in response to a letter from the Connection and Use of System Code (CUSC) Panel Chairman, Ofgem issued a letter providing an interpretation of the CUSC objectives in relation to an amendment proposal that had raised a series of environmental issues. I attach both the original letter and our response to it. Given the similarities between the CUSC and the Grid Code objectives, Ofgem considers it appropriate to notify the GCRP of this issue, and suggest that the GCRP monitors the progress of this issue via the industry cross-working mechanisms it has developed.

If you have any questions, please contact me on the above number.

Yours sincerely,

A handwritten signature in black ink, appearing to read "M. Feather".

**Mark Feather**  
**Associate Director, Industry Codes and Licensing**

Steve Smith  
Managing Director Markets  
The Office of Gas and Electricity Markets  
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Simon Cocks  
CUSC Panel Chairman

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6 March 2007

Dear Steve,

**Efficient discharge of activities by the CUSC Amendment Panel**

I am writing in capacity as CUSC Amendment Panel Chairman to request your guidance and assistance as to how the following matter might be most efficiently progressed. The CUSC Amendment Panel is established under the CUSC with a view to ensure that the CUSC facilitates the applicable CUSC objectives, which are:

- (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.

During the CUSC Amendment Panel meeting held on Friday 23 February 2007, the CUSC Panel considered a new Amendment Proposal raised by Mike Davies of Wind Energy (Forse) Limited. The Amendment proposes to change the CUSC to prioritise the use of the GB Transmission System by renewable generators by:

- Providing firm access to the GB Transmission System up to their full capacity by a fixed date irrespective of whether or not any of the wider reinforcement works required to accommodate their output have been constructed;
- Constraining off conventional generators, where technically possible, rather than renewable generators.

The full Amendment Proposal is attached as Appendix A.

The basis for Wind Energy's Amendment Proposal is its view that NGET's current Transmission Licence (the 'Licence') is not consistent with Article 7 of the Renewables Directive (2001/77/EC) (the 'Directive'). The Directive requires Member States to take the necessary measures to ensure that transmission system operators guarantee the transmission of electricity produced from renewable sources and may allow priority access to the grid system for electricity produced from renewable energy sources.

The proposed amendment creates a difficulty for myself in terms of ensuring efficient progression of Panel work in that the Amendment Proposal would be assessed against the current licence objectives and, as such, would fail on the grounds of discrimination and inefficient operation. The view that the Amendment would be rejected represents the unanimous opinion of the CUSC Panel.

Following the discussion at the Panel meeting, Mike agreed to withdraw the Amendment Proposal, thereby putting on hold any work on the proposal, whilst a view is obtained from the DTI and Ofgem as to whether National Grid's Licence is consistent with the Directive. The intention of this letter is to request such a view. Once such opinion as you can offer has been received, the CUSC Panel is likely to progress on one of two paths:

- (a) If your opinion is that the Licence complies with the Directive, then it is possible that Mike will withdraw the Amendment and avoid unnecessary CUSC work;
- (b) If, however, your opinion is that the Licence does not comply with the Directive, then clearly National Grid, Ofgem and the DTI need to jointly consider the implications of any possible Licence change.

If no view is forthcoming from Ofgem and/or DTI on this matter, then I anticipate that the Amendment proposal will be re-submitted and the CUSC Panel will commence work on the formal assessment process.

As I stated above, the Panel's unanimous view that this proposal would be rejected as it would not meet the current Licence objectives of non-discrimination and efficient operation. As CUSC chair I have a responsibility to ensure the business of the panel is efficiently progressed and I would therefore request that such an opinion on this matter is provided by DTI and/or Ofgem at your earliest convenience and in any event prior to the next Panel meeting, scheduled for Friday 30 March 2007.

Please contact me at the number above if you would like to discuss any of the issues raised in this letter.

Yours sincerely,

**Simon Cocks**  
**CUSC Panel Chairman**

cc	Mike Davies	Wind Energy (Forse) Limited
	David Edward	Ofgem
	Jim Campbell	Department of Trade and Industry
	Neil Feinson	Department of Trade and Industry
	Sonia Brown	Ofgem
	David Gray	Ofgem





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17 April 2007

Dear Simon,

**RE: Efficient discharge of activities by the CUSC Amendment Panel**

Thank you for your letter of 6 March 2007 to Steve Smith, also sent to Jim Campbell at the DTI, regarding CUSC Amendment Proposal 147 (CAP 147) raised by Wind Energy (Forse) Limited and considered by the CUSC Amendment Panel on 23 February 2007. This letter has also been considered by the DTI and can be taken to represent our joint view on the matter.

The letter states that in the (unanimous) view of the CUSC Panel given the intent of CAP 147 to give priority grid access to energy from renewable sources, it would not pass the current licence objectives as it would fail on the grounds of discrimination and inefficient operation and therefore would be rejected as a CUSC amendment. You also refer to the Renewables Directive (Directive 2001/77/EC) and seek our (and DTI's) view on the compliance with that Directive of NGET's current Transmission Licence.

Firstly, I can confirm that in both our and the DTI's view we do not consider that your transmission licence requires any amendment to be compliant with the Directive 2001/77/EC. **We therefore consider that this proposal can arguably be considered within the scope of the current CUSC (and therefore transmission licence) objectives and should therefore be permitted to proceed through the amendment process.**

I am able to share with you our thinking that has taken us to this place. It is however, obviously open for National Grid and/or the CUSC Panel to take its own legal advice on these matters. I should be clear that in setting out our thinking we are in no way fettering the discretion of the Authority on the merits of the proposal. We will take a decision on the merits of this amendment at a future suitable point in time taking into account the evidence of the proposer, interested parties and of course the CUSC Panel.

In your letter you raise the concern that the proposal would be inefficient and discriminatory. In relation to the question of whether the proposal would introduce

discrimination, as you will be aware, our consistent view has been (and remains) that the term requires (subject to what is said further below) not only that like situations be treated alike, but equally that non-equivalent situations may be required to be treated differently. This is typically referred to as "due discrimination". It is also the case that no discrimination arises where like situations are treated differently provided that the difference in treatment can be objectively justified i.e. provided that the difference in treatment is pursuing a legitimate aim and is a proportionate means of achieving that aim. In reaching this interpretation we would rely not only on the normal meaning of the word and the intention of the provision in question, but also on the requirement not to "discriminate" in the relevant EC internal market directives and the meaning of that term as well elaborated by the jurisprudence of the European Court. It should be open to Wind Energy to argue either that certain forms of generation are not equivalent and so a difference in treatment need not necessarily be ruled out as "discriminatory", or (even where certain forms of generation are equivalent) that a difference in treatment is objectively justified. These are factors that the CUSC Panel should consider in its deliberations of CAP 147. In making these considerations our legal advisors took into account the in *Foster v British Gas*<sup>1</sup> case<sup>2</sup>.

Next, in relation to the question of economic and efficient operation, we consider it would be possible to make an argument that it is more economic and efficient for generators that do not emit carbon to have grid access than for carbon emitting generators to have access when you consider the environmental costs associated with higher carbon emissions. It is of course open to those carbon emitting generators to make an argument for no change on the basis that the EU ETS is designed to internalise the costs of carbon into their decision making. We believe that the CUSC process should facilitate this discussion and debate.

I would conclude by noting that in our own consideration of the proposal we will (as in our view you must) interpret the conditions in National Grid Electricity Transmission's (NGET's) licence, as well as our statutory duties, in line with directly effective provisions in EC legislation.

I hope that this response is helpful to you in your considerations. You will see that I have copied this response to Mike Davies of Wind Energy (Forse) Limited as the proposer of CAP 147. I would also be happy for this letter to be circulated to the rest of the CUSC Panel for their consideration. If you have any questions please do feel free to contact me or alternatively Jo Witters on 020 7901 7159.

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<sup>1</sup> Case C-188/89 *Foster and Others v British Gas PLC* [1990] ECR I 3313

<sup>2</sup> the House of Lords found British Gas to be an emanation of the State such that private individuals were entitled to rely on directly effective provisions of Directives (in that case, a duty of non-discrimination) against British Gas. There is no reason to think that National Grid is in any different position to its predecessor. It would also in our view follow from the well-established duty to interpret domestic legal provisions consistently with EC law (the *Marleasing*<sup>2</sup> principle as this relates to Directives) that legislation and National Grid's licence are required to be interpreted in a manner consistent with binding EC rules. This has particular relevance to the interpretation of the concept of "non-discrimination" as mentioned above. It may arguably also have relevance when it comes to the Renewables Directive and the interpretation of "efficient operation"; that is to say, while we are content that the licence does not require any amendment to implement the Directive, one may need to have regard to certain of its provisions (as with the other EC Directives) in considering the correct interpretation of certain provisions of the licence.

Yours sincerely



Sonia Brown

**Director, European Strategy and Sustainable Markets**

CC Jim Campbell  
Mike Davies

Department of Trade and Industry  
Wind Energy (Forse) Limited