

**Minutes**

<b>Meeting name</b>	CUSC Modifications Panel
<b>Meeting number</b>	206
<b>Date of meeting</b>	12 May 2017
<b>Location</b>	Teleconference

**Attendees**

<b>Name</b>	<b>Initials</b>	<b>Position</b>
Mike Toms	MT	Panel Chair
John Martin	JM	Code Administrator
Heena Chauhan	HC	Panel Secretary
Louise Schmitz	LS	National Grid Panel Member
Garth Graham	GG	Users' Panel Member
Simon Lord	SL	Users' Panel Member
Cem Suleyman	CS	Users' Panel Member
Paul Jones	PJ	Users' Panel Member
James Anderson	JA	Users' Panel Member
Paul Mott	PM	Users' Panel Member
Kyle Martin	KM	Users' Panel Member
Andy Pace	AP	Consumer Panel Member
Nadir Hafeez	NH	Authority Representative

**1 Introductions and Apologies for Absence**

Apologies were provided by Nick Ruben (NR).

All presentations given at this CUSC Modifications Panel meeting can be found in the CUSC Panel area on the National Grid website:

<http://www2.nationalgrid.com/UK/Industry-information/Electricity-codes/CUSC/Panel-information/>

**2 Workgroup Updates**

6340. **CMP261 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)'**. CMP261 seeks to ensure that there is an ex post reconciliation of the TNUoS paid by GB Generators during charging year 2015/16 to take place in Spring 2016 with any amount in excess of the €2.5/MWh upper limit being paid back, via a negative Generator residual levied on all GB Generators who have paid TNUoS during the period 1st April 2015 to 31st March 2016 inclusive.

6341. MT confirmed that this Special CUSC Panel meeting had originally been arranged to discuss the CMP261 Workgroup Report. Following a recent CMP261 Workgroup meeting on Friday 5 May 2017, the CMP261 Workgroup required the Panels' advice on the legal opinion produced by the Proposer (SSE) in relation to the permissible nature of Alternatives in the event of an Authority send back.
6342. Therefore, the purpose of this Special CUSC Panel meeting was to review the legal opinion and for the Panel to take a view on whether it should amend the 'Terms of Reference' that had been set for the CMP261 Workgroup.
6343. MT invited GG to share his view with the Panel. GG, as the Proposer of CMP261 provided a summary of the legal advice (which had been provided in writing beforehand to the Panel and the Workgroup) and referred to a presentation slide titled 'CMP261 Send Back CUSC Panel 1 Pager', which contained nine questions that the Workgroup sought guidance on and which had been discussed at the CUSC Panel meeting in March 2017. For the avoidance of doubt, at the March Panel meeting, questions one to six were addressed but not question seven, eight or nine. For reference, the nine questions are shown below;
1. Are legal text 'corrections' (as set out in the legal text section of the Ofgem send back letter dated 22 February) to the four existing Proposals permissible?
  2. Are legal text 'corrections' not identified (i.e. the sign of the GDSadj term also needs to be corrected for the Original Proposal and WACM1) in the send back letter permissible to the four existing Proposals?
  3. Are other changes to the Proposals presented in the FMR amendable under send back powers?
  4. Are changes for the passage of time (shunting entire Proposals forward 1 year in legal text) related to the decision permissible?
  5. Are changes for the passage of time (changing references from Charging Year 2016/2017 to 2017/2018 in legal text) related to the decision permissible?
  6. Are new WACM's permissible that address what is in the send back letter?
  7. Are new WACM's permissible that go beyond what is in the send back letter (passage of time)?
  8. Are new WACM's permissible that go beyond what is in the send back letter?
  9. If new WACM's are raised is a re-vote prudent on all Proposals?
6344. GG noted that it had been helpful to get legal advice for CMP261 and that the summary of this advice had been shared verbally with the Workgroup at their meeting on 5 May 2017. The legal advice summary document had been checked by SSE's legal counsel and permitted to be shared with the Workgroup and Panel.
6345. GG confirmed that based on the legal opinion provided and as the Proposer of CMP261, he was of the view that the raising of new WACM's would not be permissible in the event of a send back from the Authority.
6346. MT asked GG to clarify if his concerns raised regarding the development of new WACMs in the event of a send back were broadly the same as those which GG had already raised at previous Panel meetings. GG confirmed that this was essentially the same point.
6347. MT asked GG if, in his view as the Proposer of CMP261, the decision of the Panel, as well as that of Ofgem, could be subject to a judicial review in a court of law. GG was not able to confirm his view on the matter and noted that in reality a challenge could be raised by any party. MT highlighted that this was not about where the challenge

came from but more about where it goes to. MT also assumed that the summary legal advice presented to the Panel may be limited and not contain the full advice prepared for SSE by their legal counsel.

6348. MT confirmed that he had spoken with Lesley Nugent of Ofgem prior to this Special CUSC Panel meeting and that Lesley had confirmed that this matter was for the Panel to resolve and the Authority would not provide further guidance. With this in mind, MT asked the Panel if they wished to consider obtaining their own legal advice in addition to that provided by SSE. SL noted that the Panel was a body in its own right and should not rely on the advice provided by the SSE legal counsel. SL also stated that the only legal advice that the Panel should consider should be that commissioned by either the Panel or by National Grid. SL confirmed that he was uncomfortable with the present situation that the Panel had found themselves in, and asked the Panel to bear in mind that it might be setting a precedent which went beyond its powers.
6349. MT asked the Panel members if they felt that they should seek their own legal advice. LS considered that if all Panel members sought their own legal advice then this would have limited value as it would be likely to lead to slight variations of the same response and slow the resolution of the matter in hand.
6350. MT asked the Panel for their opinion of the SSE legal advice noting that this could be viewed in one of three ways. Firstly, that the legal advice should not be taken into account, or secondly that the SSE legal opinion was helpful and noted by the Panel but that the Panel was not inclined to change the advice it has already given to the Workgroup. The third option was that the Panel took on board the legal opinion and direct the Workgroup to not raise any new WACMs.
6351. MT asked the Panel to confirm their views on these options.
6352. PM did not believe that the legal opinion provided by SSE held any special status that seemed relevant to the original decision made by the Panel and therefore supported the Panel's original March decision to allow additional WACMs to be raised.
6353. CS stated he was inclined to take on board the legal advice provided by SSE and would prefer to re-direct the Workgroup to not to raise any new WACMs. JA noted that he shared the same view as CS. PJ confirmed that his original March view on the matter had not changed, and he considered that the reason for the send back had been to provide further clarity on the legal text and analysis and should not have been seen as an opportunity to change the essence of the proposal. PJ stated that in his view, the Panel should also be advising the Workgroup to not change any material aspects of any of the original WACMs or the original proposal. SL confirmed that he was of the same opinion as PJ and confirmed that the Panel should be advising the Workgroup to not raise any new WACMs or allow any material changes to any existing WACMs or the original. KM noted that at the March 2017 Panel meeting he had originally supported the Workgroup considering new WACMs however in light of the legal advice; he now supported the emerging view of the majority of the Panel. AP agreed with KM's assessment of the situation.
6354. LS was undecided about which option she supported and asked if the Panel could recommend that Ofgem get a legal opinion on the matter prior to making its decision and that she was keen to move forward with this proposal.

6355. As the Proposer of CMP261, GG declined the right to present a view as a Panel member. GG had spoken with MT prior to the meeting and agreed to recuse himself.
6356. MT noted the shift in the balance of the Panel view in terms of not allowing new WACMs to be raised. PJ re-iterated that in his opinion this meant no material changes to options from the original report and this advice should apply to all future and existing modifications that had been sent back.
6357. GG helpfully read out the questions (reproduced above at paragraph 6345) from the Workgroup to the Panel in March (they were not immediately to hand for all Panel members to refer too). PJ and JA confirmed that the Panel's original March view of questions one and two remained and that any amendments to the legal text, whether they are highlighted within the send back letter or not, are permissible so long as the intention of the original solution and WACMs did not change.
6358. GG confirmed that the Workgroup had considered other options that addressed some of the concerns set out by Ofgem in their send back letter with CMP261 and that these would be within the report but would not be crystallised into WACMs if no new WACMs were permitted.
6359. PJ noted that the original proposal for CMP261 had changed and suggested that the Panel's advice would suggest that the Proposer should revert back to their original solution. LS highlighted that the Workgroup had identified deficiencies within the report which had achieved a Workgroup consensus and asked if the decision to make changes to the original or WACMs should be one for the Authority to make and not the Panel.
6360. MT referred the Panel to review question three of the nine questions (provided within minute 6345) again and consider if other changes to the Proposals presented in the FMR were amendable under the send back powers. PJ, SL, CS, KM and JA did not believe they were. LS, PM and AP believed that changes should be permissible.
6361. LS highlighted that if the Panel did not permit the Workgroup to make some changes, then in its current state, this could lead to recovering monies twice. LS also questioned whether this was an example of a deficiency, which should be addressed by the Workgroup by putting solutions to Ofgem. PJ responded confirming that an example such as this was an issue that fell under question 2 rather than question 3. MT noted that the Workgroup would therefore need to use a degree of judgement in determining if issues fell under the category of Q2 rather than Q3 and should be permitted a level of discretion.
6362. The Panel discussed questions four and five and agreed that changes to the legal text due to the passage of time noted in those questions was permissible and concluded that these implementation dates were a matter for the Authority to address.
6363. MT confirmed that the Panel had made its decision and that although they did not necessarily endorse the SSE legal opinion, they had taken it in to account in their revised advice and advised the Workgroup to only consider questions one, two, four and five, and that they would not encourage the Workgroup to promote any new WACMs to be raised or for any substantial changes to the original solution or existing WACMs to be made.

6364. LS raised the subject of the Workgroup vote as voting took place by noon on 12 May prior to the Panel's discussion. PJ confirmed that in his view, after a modification has been sent back, the Workgroup would be required to vote again.
6365. MT confirmed that in summary the Panel had agreed by a majority that the Workgroup should not consider further options to address the defect, which could lead to changes to the intent of the original or working group alternative proposals, or to new alternatives being raised.
6366. MT concluded that although the Panel had changed its original March advice to the Workgroup following the legal opinion that had been shared with them, this had not been the sole reason for changes agreed and that the Panel had taken the exceptional step of revising its decision after careful consideration of all the relevant issues.
6367. **CMP268 'Recognition of sharing by Conventional Carbon plant of Not-Shared Year-Round circuits'**. CMP268 proposes to change the charging methodology to more appropriately recognise of the impact of "Conventional Carbon" generation on transmission network investment costs in areas with low diversity of generation ideally ahead of the December 2016 Capacity Auction.
6368. The Panel agreed that in keeping with the advice for CMP261, no changes to the intent of original proposal or the raising of further WACMs should be permitted in respect of send back.
6369. The Panel discussed the duration of the consultation and agreed to a five day Code Administration Consultation period for this modification on the basis that the proposal had not changed significantly and this would be sufficient time for the industry to be given an opportunity to comment.

### 3 Next meeting

6370. The next normal Panel meeting will take place on 26 May 2017 at National Grid House, Warwick.