

Retroactivity

The WACM 2 Proposer (backed by the Proposer) (referred to in this section as the **Proposers**) noted Ofgem's position that retrospective applications should generally be avoided, on the basis that they may undermine market confidence. However, the proposers note that Ofgem has made it clear that it will assess retrospectivity on a case-by-case basis and may allow retrospectivity where exceptional circumstances exist.

The Proposers submitted that retrospective application of WACM2 would not undermine market confidence, it would in fact do the opposite, and improve market confidence, not least by signalling to market participants that it is not an exercise in futility to raise mods addressing code defects, that they can benefit, rather than just those that come later.

The Proposers noted page 5 of Ofgem's guidance on Code Modification Urgency Criteria, dated 5 December 2024 (the **Guidance**) which deals with retrospectivity. In the Guidance it is explained that for a modification to be considered eligible for retrospectivity there must be:

- a situation where a fault or error giving rise to additional costs or losses was directly attributable to central arrangements – and that such costs/losses should be material;
- combinations of circumstances that could not have been reasonably foreseen; or
- the possibility of retrospective action has been clearly flagged to participants in advance, allowing the detail and process of the change to be finalised with retrospective effect.

The applicability of each of these limbs was discussed with the Workgroup, alongside Ofgem's position on retrospectivity in its Urgency Decision on CMP445 dated 5 December 2024 (the **Urgency Decision**).

The Proposers explained their view that there would be no material barriers to implementing WACM2, based on work carried out by NESO that suggests that the potential impact of WACM 2, as a proportion of the total demand residual, would not be prohibitive. (Less than 1%).

This was acknowledged by the Workgroup. WACM2 would apply retrospectively to the Charging Year in which the original defect was identified, and in which CMP445 was originally proposed (Charging Year 24/25). The Proposers note that this would be consistent with Ofgem's criteria for retrospectivity for the reasons set out below.

Was there a situation where a fault or error gave rise to material additional costs or losses that was directly attributable to central arrangements?

The Proposers presented examples of developers paying TNUoS without having actual use of the system (which the Original, WACM 1 and WACM 2 all attempt to rectify), in addition to other costs (including potentially significant lost revenue) associated with delayed connections. These examples included several large renewable generators (that the Workgroup has been made aware of, noted below) that have encountered significant costs as a result of delayed connections and the current operability of the CUSC, directly attributable to central arrangements. The Proposers noted that Ofgem stated in its Urgency Decision that "*The CUSC does not explicitly set out how TNUoS generation charges are paid during the Financial Year in which a generator first connects (or subsequently reconnects) to the transmission networks*". It refers to the status quo as the "*operative process*" and an "*interpretation*" applied by NESO. This, coupled with material, unforeseeable and uncompensated grid delays for certain significant renewable generators (explained below), is considered by the Proposers to be a failure of the central arrangements.

The Proposers explained that it is unacceptable and unfair that this uncertainty and lack of explicit drafting in the central arrangements of the CUSC should be allowed to continue for all generators

connecting from the date that the defect was identified and originally raised in November 2024 and 1 April 2027 - almost 2.5 years since the defect was identified and an urgent modification was submitted.

The Proposers explained that, in its Urgency Decision, Ofgem refers to the current means of charging TNUoS in this context as a “practice”. The Proposers expressed the view that this “practice” is not clear, undermines market confidence and does not warrant a nearly two-and-a-half-year period of uncertainty before the modification comes into force, hence the need for retroactivity.

Foreseeability

The Proposers explained that Ofgem, in its Urgency Decision noted that the “practice” of paying a full year’s value of TNUoS irrespective of date of connection is “well established” and “eminently predictable”. It also suggested the 2024/2025 charging year was not in any way exceptional, or that the charges would have been unforeseeable.

This was challenged by the Proposers during the Workgroup meetings.

In addition to the general point that the “interpretation” applied by NESO was not “eminently predictable” for all parties, it was submitted by the Proposers during the Workgroup meetings that the period from the defect being identified was, in any event, an exceptional period for the connections market, with significant grid infrastructure upgrades needed to counteract the ageing electricity network playing their part in an exceptional level of delays to the connection dates of nationally significant infrastructure projects. This was not foreseeable.

These connection delays, encountered by a number of projects, as a result of these wider network issues were noted by the Workgroup.

The Proposers explained their view that these delays could not have been reasonably foreseen.

The Proposers made the Workgroup aware of three nationally significant projects totalling over 1GW of renewable power that delivered through times of exceptional macroeconomic uncertainty (Moray West offshore wind farm, Lime Kiln onshore wind farm and North Kyle onshore wind farm). The developers submitted that each of these wind farms are situated in high TNUoS charging zones and have encountered exceptional and wholly unforeseeable delays to their contracted connection dates since the defect was raised. The developers noted that these exceptional delays have wholly been attributable to the Transmission Owner and could not have been reasonably foreseen. Furthermore, it was explained that reasons cited by the relevant Transmission Owner as contributors to these delays have been the significant and exceptional network upgrades taking place across Scotland and the global supply chain pressures which have been well documented and have been most acutely felt by those projects connecting during the Charging Years from 2024 onwards.

The current “*interpretation*” of the CUSC has led to the payment of over £10m of TNUoS that, in the view of the Proposers and other relevant developers was not foreseeable and not budgeted, causing very material financial impacts to those projects. It was explained that connection delays led to the payment of a whole year of TNUoS charges for network access for only a small fraction of the year. It was noted that there would likely be other projects that have been similarly materially impacted that have not been involved in the workgroup and others that will be forthcoming before the implementation of this modification. A retroactive implementation would correct this issue.

The Proposers noted that the lack of transparency from TOs around the delivery of critical network projects in recent years has led to a lack of confidence in contractual connection dates and means that the delays are often entirely unforeseeable. The Proposers noted OWIC’s report “Delivering the shared offshore network – OWIC recommendations for enabling offshore grid coordination” where it is stated at page 44 and 66 respectively that: *“TOs are not incentivised to provide information or engage in a timely manner to support Generator project timelines, leaving generators exposed to delays they cannot control”* and *“Whilst generators seek early involvement to optimise their projects and deliver*

transmission assets in time for energisation dates, TOs do not share this incentive and naturally prioritise their own objectives”.

The Proposers noted that this, again, undermines the assumption that the impacts suffered by developers were predictable.

Exceptional circumstances

The Proposers put forward evidence to suggest that exceptional circumstances were prevalent and there are significant counter arguments (noted above) to the assertion that incorrectly levied TNUoS charges for the period following the identification of the defect were *“eminently predictable”*, as stated by Ofgem in its Urgency Decision.

The Proposers presented evidence to show that it is well understood that the connections process has become unsustainable. According to Ofgem in its ***“Summary Decision Document: TMO4+ Connections Reform Proposals – Code Modifications, Methodologies & Impact Assessment”*** that *“waiting times in the electricity connections queue are too long, the connection rate is too slow... leading to inefficient network planning and risking the confidence of existing investors”*. It was noted that delays experienced by customers when seeking network connections are *“growing”*.

The Proposers submitted to the Workgroup that the period leading up to and the period from the defect being identified could reasonably be considered as an exceptional period for the connections market, with significant grid infrastructure upgrades needed to counteract the ageing electricity network playing their part in further delays to the connection dates of nationally significant infrastructure projects. Indeed, as noted above, these infrastructure upgrades have been material drivers behind unforeseeable connection delays.

Has the possibility of retrospective applicability been clearly flagged?

The Proposers noted that retrospectivity has been discussed as a potential for this modification since its inception. Whilst retrospectivity was originally rejected as part of the Urgency Decision, it was noted that *“the proposer’s intent for its proposal to apply retrospectively may negate the need for urgency”*. The Proposers explained that retrospectivity has therefore not been formally ruled out and the retrospective applicability of WACM2 has been flagged well in advance of the closure of the Workgroup phase of CMP445 and the currently proposed implementation date.

CMP445 - Urgency Decision – Panel support

The Proposers also noted that , although ultimately declined, the Proposer’s urgency application (which originally engaged retrospectivity) was recommended by a majority of CUSC Panel members. This was on the basis of the significant commercial impact on parties, consumers and other stakeholders and the fact that it would undermine investor certainty. The Proposers considered that the Panel’s view is relevant here, and these issues are still prevalent, irrespective of Ofgem’s urgency decision. Another reason that waiting for implementation until 1 April 2027 is not appropriate.

Precedent

The Proposers explained that there is clear precedent for retrospectivity having been allowed in CMP425. It was explained that a key driver for this decision was the importance of ensuring sites completing development in the near future were not impacted before NESO’s preferred implementation date. As noted above, the implementation date for CMP445 is currently 1 April 2027, almost 2.5 years after the defect was identified and the Proposer presented the Original. The Proposers explained that the retrospectivity proposal included within WACM2 could clear up this uncertainty and the need for all developers to wait a disproportionate period after the defect had been identified for the certainty proposed by CMP445 to be implemented in practice as generators connecting prior to 1 April 2027 would be materially affected.

The Proposers noted that, in its CMP425 decision, Ofgem noted that a “very limited number of affected parties will have any relevant charges corrected through reconciliation”. The Proposers explained that the situation here is the same, with NESO confirming that although the impact on individual generators and investor certainty is very material, the number of generators affected is a very small portion of TNUoS connected generators, and the financial value of the reconciliation would be immaterial (in the overall system context) relative to the usual annual reconciliations of TNUoS charges. This was confirmed by NESO during the Workgroup phase.

The Proposers submitted to the Workgroup that, although retrospectivity is rarely applied by Ofgem, this was an example where Ofgem could take action to restore investor confidence by recognising and rectifying the current situation in which the costs of TOs late delivery is borne entirely by the competitive market sector, which has no way to manage or mitigate the TO's delay, whilst the TO is actually paid for delivery, irrespective of delay. The Proposers considered that retrospectivity could be applied so that this situation did not prevail any longer than it needed to, following identification of the defect and the raising of CMP 445. The Proposers asserted that, without intervention it is likely that the abovementioned risks which sit outside of the control of generators will be factored into CfD bids in coming auction rounds which will be detrimental to the consumer.