

December 2001

ASSESSMENT REPORT
MODIFICATION PROPOSAL P28 –
REVIEW OF GOVERNANCE AND
MODIFICATION PROCEDURES

Prepared by the Governance Modification Group
on behalf of the Balancing and Settlement Code
Panel

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1 SUMMARY AND RECOMMENDATIONS

1.1 Recommendations

On the basis of the analysis, consultation and assessment undertaken in respect of this Modification Proposal during the Assessment Phase, and the resultant findings of this report, the Modification Group recommends that the BSC Panel should:

AGREE that P28 should proceed to the Report Phase and that the Draft Modification Report should contain a recommendation to the Authority either:

- **That the Alternative Modification described in this report be approved, with a proposed implementation date of two weeks following the Authority's determination;**
- or**
- **That the Proposed Modification (Consolidated Proposal) be approved, with a proposed implementation date of two weeks following the Authority's determination.**

NOTE that an amendment to the Transmission Licence would be required before P28 could be approved, as the licence conditions currently preclude the bringing forward of the implementation dates of Approved Modifications.

1.2 Background

P28 is the amalgamation of three separate Modification Proposals. In its initial consideration of the proposals, the Panel determined that P21, P23 and P24 should be amalgamated, since they all related to improving areas of concern with the Modification Procedures and/or the Panel and Panel Committees under the BSC. The Panel also agreed that a Definition Procedure should be followed, in order to establish a specific Modification Proposal for further consideration and assessment. The Definition Procedure was completed by the Governance Modification Group (GMG) and the P28 Definition Report was presented to the Panel at its meeting on 23 August 2001.

The original Modification Proposals, along with representations made by interested parties, suggested a number of potential changes in the areas of the operation of the Panel, Panel Committees, Modification Groups and the Modification procedures. It should also be noted that some representations suggested that it was either premature, or not appropriate to change the modification arrangements under the BSC at this stage.

The GMG took due account of all representations received, along with the original proposals, and set down a number of options that might be considered. Furthermore, recognising that a single proposal, or an alternative, must ultimately be determined upon, a single proposal (known as the 'consolidated proposal') was established. These potential changes and the consolidated proposal are all fully detailed within the P28 Definition Report, previously submitted to the Panel.

At its meeting on 23 August 2001, the Panel recommended that an Assessment Procedure should be undertaken by the GMG. The Panel also recommended that, as part of that Assessment procedure, the following specific activities should be pursued:

- A consultation should take place with interested parties.
- An interim report should be submitted to the Panel setting out the GMG's provisional findings.

- Commentaries on the proposals from the Authority (in accordance with clause 2.6.10 of section F of the Code), the Panel and ELEXON should be obtained.
- Consideration of the development of an Alternative Modification should be undertaken, in light of the above.

A Consultation Document was issued on 12/09/01, which sought to fulfil the first of the above activities. The representations subsequently received were considered by the GMG at its meeting on 03/10/01, together with a commentary provided by ELEXON. On the basis of these representations, the GMG produced two interim reports, which were considered by the Panel at its meetings on 18/10/01 and 15/11/01. In the light of the representations and commentary provided, along with an assessment of the consolidated proposal, possible variations and refinements were identified in the reports. The Authority's provisional views were provided at the Panel meetings and the Panel provided its views by identifying issues associated with the consolidated proposal (as refined). Where such issues were raised, the Panel identified where a variant on the particular aspect of the proposal dealt with the issue, thus identifying the composition of an Alternative Modification. The Panel instructed the GMG to assess both the consolidated proposal and the identified alternative, and to develop the proposed legal text in respect of the alternative only.

This report reflects these considerations and directions. In particular, this Assessment Report includes the alternative proposal that arises from the Panel's consideration of the potential variations put forward by the GMG, along with appropriate legal drafting and impact analyses. The legal drafting in respect of the alternative can be found in Attachments 1 and 2 to this report.

1.3 Applicable BSC Objectives

In the Definition Report, it is suggested that Modification Proposal P28 may better achieve the objective set out in Transmission Licence Condition C3(3)(d); 'Promoting efficiency in the implementation and administration of the balancing and settlement arrangements'

It is further suggested that, to a lesser extent, the proposal may better achieve Transmission Licence Condition C3(3)(c); 'Promoting effective competition in the generation and supply of electricity and (so far as is consistent therewith) promoting such competition in the sale and purchase of electricity'

It was also noted that any proposal to modify elements of the Modification Procedures themselves must fulfil the underlying requirements in Transmission Licence Condition C3(4) which also sets down certain requirements for modification of the BSC in general. Unlike proposed modifications to the rest of the Code, therefore, the Applicable BSC Objectives in relation to the proposed amendment of the modification procedures are the requirements of LC C3(4) (to the extent that they do not conflict with C3(3), along with the requirements of C3(3).

The GMG concluded that the alternative proposal better achieved the Applicable BSC Objectives, relative to the current drafting of the BSC. However, the GMG was split as to whether the alternative proposal better achieved the Applicable BSC Objectives, as compared to the consolidated proposal. The GMG was also of the view that those elements of both the consolidated and alternative proposals that seek to amend the BSC Modification Procedures were consistent with the underlying requirements of those procedures as set out in Transmission Licence Condition C3(4).

2 INTRODUCTION

This Report has been prepared by ELEXON Ltd., on behalf of the Balancing and Settlement Code Panel ('the Panel'), in accordance with the terms of the Balancing and Settlement Code ('BSC'). The BSC is the legal document containing the rules of the balancing mechanism and imbalance settlement process and related governance provisions. ELEXON is the company that performs the role and functions of the BSCCo, as defined in the BSC.

An electronic copy of this document can be found on the BSC website, at www.elexon.co.uk

3 PURPOSE AND SCOPE OF THE REPORT

BSC Section F sets out the procedures for progressing proposals to amend the BSC (known as 'Modification Proposals'). These include procedures for proposing, consulting on, developing, evaluating and reporting to the Authority on potential modifications.

The BSC Panel is charged with supervising and implementing the modification procedures. ELEXON provides the secretariat and other advice, support and resource required by the Panel for this purpose. In addition, if a modification to the Code is approved or directed by the Authority, ELEXON is responsible for overseeing the implementation of that amendment (including any consequential changes to systems, procedures and documentation).

The Panel may decide to submit a Modification Proposal to an 'Assessment Procedure'¹. Under this procedure, a Modification Group is tasked with undertaking a detailed assessment of the proposal to evaluate whether it better facilitates achievement of the Applicable BSC Objectives². The group may also develop an alternative proposal if it believes that the alternative would better facilitate achievement of the objectives.

The Governance Modification Group has prepared this report for the Panel, setting out the results of the assessment of modification proposal P28 and an alternative.

¹ See BSC F2.6

² As defined in the Transmission Licence, Condition C3

4 MODIFICATION GROUP DETAILS

This Assessment Report has been prepared by the Governance Modification Group (GMG). The Membership of the Modification Group was as follows:

Member	Organisation
Catherine Woods	ELEXON (Chair)
Alison Kuck	Amerada Hess Gas Ltd. (Proposer)
Lisa Waters	Dynegy (Proposer)
Terry Ballard	Innogy
Peter Bolitho	Powergen
Paul Chesterman	London Electricity
David Edward	Ofgem
Louise Elder	NGC
Martyn Hunter	St Clements
Abid Sheikh	Scottish Power
Simon Goldring	BGT
Gareth Forrester	ELEXON
Neil Cohen	ELEXON
Laone Roscorla	ELEXON

All meetings of the group were held in open session and the following individuals attended in addition to the core membership of the group:

Attendee	Organisation
Hanna McKinney	Conoco UK Ltd
Jerome Williams	Ofgem
Danielle Lane	BGT
Nick Elms	Enron
Rekha Patel	Dynegy
Jane Butterfield	Powergen

5 DESCRIPTION OF CONSOLIDATED AND ALTERNATIVE PROPOSALS

5.1 The Modification Proposals

Modification Proposal P28 is an amalgamation of three Modification Proposals:

- P21: Review of Modification Group and Panel Procedures;
- P23: Review Of The Imbalance Settlement Group (ISG); and
- P24: Review Of The Modification Procedures

These proposals all seek to improve the operation of the BSC governance arrangements, specifically in relation to the operation of the Panel, Panel Committees, Modification Groups and the Modification Procedures. Given the common ground of these modifications and the desirability of developing a consistent package of proposals in this area, the Panel directed that the three proposals should be amalgamated and progressed as a single modification.

P21

P21, raised on 20 June 2001 by Amerada Hess Gas Ltd., seeks to initiate a review of the Modification Procedures and the operation of the BSC Panel and associated subgroups to ensure maximum transparency to the industry and the efficient operation of the processes. Suggestions for change include:

- Specifying that all Modification Group and (non-confidential) Panel, ISG and SVG business should be held in open session;
- Revising the procedures for formation of Modification Groups; and
- Streamlining aspects of the Modification Procedures, including consideration of how issues may be identified prior to being submitted as Modification Proposals.

P23

P23, raised on 22 June 2001 by Dynegy, focuses on the ISG Panel Committee, suggesting that all meetings of the group should be held in open session and should allow attendees to make contributions. It is also suggested that the group's remit should be developed such that it becomes a standing 'workstream' to consider modifications and other energy and imbalance issues.

P24

P24, also raised on 22 June 2001 by Dynegy, seeks to initiate a review of the Modification Procedures to improve the efficiency and inclusivity of the BSC governance process. Specific suggestions for change include:

- Establishing Standing Groups to consider modifications in the same area;
- Opening all groups to attendees and allowing all attendees to contribute, removing any distinction between group members and attendees; and
- Reducing the number of stages during the lifecycle of a Modification Proposal to ensure timely progress.

5.2 The Consolidated (Original) Proposal

Under the Definition Procedure, The GMG developed a consolidated (original) proposal, a full description of which can be found in the P28 Definition Report. However, the consolidated (original) proposal may be summarised as follows:

a) Panel;

- i) All non-confidential Panel business to be held in open session
- ii) Any Panel Member to be able to invite comment from the floor

b) Panel Committees;

- i) ISG and SVG to operate in the same way to the Panel.

c) Modification Groups;

- i) Standing Groups to deal with Modifications in general areas
- ii) Standing Groups to consider issues in advance of specific Modification Proposals being raised
- iii) No core membership, self-selection, no impartiality and no indemnity for Standing and Modification Groups
- iv) ELEXON to be responsible to the Panel for delivery of reports etc.

d) Modification Procedures;

- i) Evaluation procedure to replace Definition and Assessment
- ii) Only one mandatory consultation
- iii) Panel recommendation to be made after consultation

Following consideration of consultation responses, the GMG also incorporated two refinements:

- iv) Re-consultation to be mandated if material changes arise for a Pending Modification.
- v) Panel to be able to bring forward implementation dates.

5.3 The Alternative Modification

Following discussion by the Panel of the two Interim Reports and the Authority's provisional thinking having been provided to the Panel, the GMG was instructed to develop the following alternative proposal:

a) Panel and Committees

- i) All non-confidential (Panel and Committee) business to be held in open session, where practical. The default position and presumption would be that a meeting would be in open session and it would be for the relevant Chairman to determine otherwise on grounds of practicality or confidentiality. The TDC and the PAB will remain entirely confidential.

b) Modification Groups

- i) All Modification Group business to be held in open session by default subject to confidentiality/practicality, as per Panel/Committees above.

- ii) The Panel may establish standing Modification Groups.
- iii) Modification Groups will be able to consider issues, ahead of there being any formal Modification Proposal. Terms of Reference will prescribe the scope and budgetary controls for such discussions and the Modification Group Chairman will exercise discretion in considering whether new issues are within scope. Routine reporting to the Panel will enable review of such business to be undertaken.

c) Modification Procedures

- i) Re-consultation and a commensurate extension to the Report Phase will be allowed for, if late material changes arise, at the Panel's discretion. The Panel's decision to extend the Report Phase will be subject to Authority consent.
- ii) The Panel may apply to the Authority to bring forward the proposed implementation date of an Approved Modification. Any such application will be preceded by consultation with parties to assess the impact of the revised date.

6 ASSESSMENT OF CONSOLIDATED PROPOSAL AND POTENTIAL VARIANTS AGAINST APPLICABLE BSC OBJECTIVES

6.1 Approach: Consultation and Modification Group Discussions

The approach adopted for the consultation was to put a series of questions to interested parties, inviting their views both on the proposition in general and in respect of each particular element of the consolidated proposal. A full set of the responses can be found in Attachment 3. In addition, the Panel directed that the Modification Group should seek the views of ELEXON on the consolidated proposal and the implications of such a proposal for ELEXON. The ELEXON commentary that was provided is attached in Annex 1.

The GMG assessed the responses to the consultation, both in terms of the general views expressed and in respect of the detailed points that emerged. The GMG also took account of the ELEXON commentary on the proposal and considered the provisional views provided verbally by the Authority representative at the Modification Group meetings, in advance of a written Authority commentary being provided to the Panel. These views are included in the assessment below.

6.2 Assessment

6.2.1 General

In the first instance, the GMG judged that the argument against the proposal in its entirety (such that any change would be premature at this time) was outweighed by the arguments in support of there being some change. These supporting arguments suggested that efficiency would be enhanced through the adoption of the Modification (and hence Applicable BSC Objective C3(3)(d); efficiency in the implementation and administration of the BSC, would be better achieved). However, the GMG noted the range of views amongst respondents who supported certain elements of the consolidated proposal but not others, and consideration was given to those areas where such partial support suggested some variation or enhancement to the proposal. These particular considerations fell into two distinct categories: those that addressed the specified elements of the proposal and those that suggested other changes not explicitly described by the consolidated proposal. For each of these suggestions, in the light of the relevant supporting arguments (and counter-arguments, where applicable), the GMG decided one of the following courses of action:

- Include the suggestion as a refinement to the consolidated proposal; or
- Put the suggestion forward as one of a number of potential variants to the consolidated proposal which, taken together, could form an Alternative Modification; or
- Reject the suggestion.

6.2.2 Openness of the Panel and Panel Committees

All Non-Confidential Panel and Committee Business to be Held in Open Session

The Modification Group considered that there is currently a lack of transparency on significant commercial issues that are discussed by the Panel and Panel Committees. However, there was also a recognition that confidential matters (as currently defined in the BSC) should remain so, including the deliberations of the Trading Disputes Committee (TDC) and Performance Assurance Board (PAB). It

was noted that, in broad terms, such confidential data items tend to be those that relate to a particular party and have no impact, from a BSC perspective, on other participants.

Smaller participants and new entrants to the market argued that the ability to attend meetings has an educational benefit, allowing them to familiarise themselves with the operation of the market and related issues faster and more effectively than would otherwise be possible. It was also suggested that permitting attendees at these groups generally facilitates development of expertise within the industry. Others suggested that they are able to make a better contribution to consultation processes (e.g. on modification proposals and BSC parameters) if they have been able to follow the debate at the group stage. It was therefore argued that openness would better facilitate the achievement of the BSC objectives of promoting competition and increasing efficiency.

Those who did not support open Panel meetings were concerned about the impact on the efficiency and dynamics of the Panel as a decision-making body. It was suggested by some that there are practical and logistical limitations to openness, e.g. if a Panel meeting can only be held by telephone conference call in certain circumstances or if the cost of a meeting is unreasonably inflated due to the number of Parties wishing to attend. It was argued, therefore, that in these respects, fully open Panel meetings would not meet the Applicable BSC Objective of promoting efficiency in the implementation and administration of arrangements. Others were also concerned that it was likely that only participants with sufficient resources would attend, leading to competitive advantage being given to a minority of participants, counter to the objective of non-discrimination.

Any Panel/Committee Member to be Able to Invite Comment from the Floor

The consolidated proposal includes the opportunity for all Panel/Committee members to be able to invite attendees at meetings to comment on proceedings from the floor. The arguments in favour were that this would allow broader discussion of issues, leading to increased understanding, a possible improvement in the quality of Panel and Committee decisions and improved confidence in outcomes, thus better achieving C3(3)(d).

Counter-arguments contended that such open involvement might undermine the pre-eminence of consultation and that the involvement of those seeking to learn, rather than contribute, could detract from the expediting of discussions.

In considering this element of the proposal, the GMG acknowledged the argument that there was a risk that the opportunity to extend comment from the floor during Panel and Committee meetings might unduly prolong such meetings. Furthermore, it was suggested that consultation was the primary means by which competition could be facilitated (in terms of expediting Modification proposals). The ELEXON view that any such contributions at Panel and Committee meetings should be limited to process issues (given the desire to avoid diminishing the pre-eminence of consultation) was also acknowledged. On the basis of these arguments, the GMG accepted that leaving the discretion to invite comment from the floor of Panel and Committee meetings with the Chairman might be further considered as a possible element of an alternative proposal, although, in any event, a number of GMG members considered that there should be more liberal and consistent use in exercising such discretion than has so far been the case. The GMG was similarly disposed with regard to the possibility of extending discretion to invite comment from the floor to Panel or Committee members but limiting comment to matters of process.

6.2.3 Modification Groups

Standing Modification Groups to Deal with Modifications in General Areas

Those in favour of this proposition suggested that this would facilitate continuity in developing proposals and would make it easier for participants to follow and contribute to a group's work.

One consultation response suggested that the ISG and SVG could be constituted to act as Standing Modification Groups. The GMG were of the view that the members of the ISG and SVG might well be appropriate individuals to attend Standing Group discussions. However, there were no arguments as to why it would be beneficial to conflate the roles of Groups and Committees. Given that the Definition Report had presented arguments as to the necessity of maintaining a distinction between Modification Groups and Committees, the GMG was minded to reject this proposition.

Standing Modification Groups to Consider Issues in Advance of Specific Modification Proposals being Raised

Original arguments in favour of the raising of issues at Standing Modification Groups were that such an arrangement would lead to more robust Modification proposals, or enable problems to be solved without recourse to Modification proposals at all, leading to better achievement of LC C3(3)(d).

Counter-arguments were concerned, primarily, with the risk that this approach could create a perception of prejudice towards a particular proposal and might unduly influence the direction of the BSC. Another view contended that consideration of broad market issues was a regulatory matter and that deliberations under the Code should confine themselves to specific Modification Proposals. The GMG noted that if an interested party considered that an issue required discussion, under the current drafting of the Code they would simply raise a Modification Proposal to initiate such discussions. On this basis the GMG did not feel that the counter-argument presented merited the exclusion of this element of the proposal. However, the GMG did acknowledge the ELEXON view that, in the interests of efficiency, there may be merit in imposing suitable controls over Standing Modification Groups. The GMG therefore considered that a potential variant to the consolidated proposal could be for the Panel to establish terms of reference for Standing Modification Groups and for those Groups to refer any items raised that might be outside those terms of reference back to the Panel.

No Core Membership. Self-Selection. No Impartiality and No Indemnity

In establishing the abandonment of impartiality and selection of Modification Group members, as a part of the original consolidated proposal, the view was that the impartial stance was an artifice and that a more robust development of Modifications would occur if individual perspectives were acknowledged. Hence, LC C3(3)(d) and, possibly, C3(3)(c) would be better achieved. Counter to this view, however, was the concern that the task of a Modification Group in objectively evaluating proposals within strict terms of reference and timescales set by the Panel could be undermined. There was also a concern as to the need to maintain the pre-eminence of consultation.

During the Definition Phase, leading to the development of the consolidated proposal, the GMG discussed the selection processes for core membership of the Modification Groups and Committees. Concerns were expressed that the current procedures may not result in equal distribution of responsibility and opportunity to contribute to such groups, that the resulting groups were unsustainable in the longer term and that, given the predisposition towards those already acknowledged to be experts in particular areas, this could result in a lack of succession planning.

As the group consensus under the consolidated modification was to recommend simple self selection for the standing Modification Groups, this was not discussed further. However, if core membership

were ultimately to form a part of an Alternative Modification, this issue may become significant. Whilst not a matter for major concern to all group members, some felt that there was merit in further considering this issue.

In addition to the above, concerns have been expressed in respect of the selection of members for the various Committees, in particular those carrying out confidential business in closed session on behalf of their peers. A subset of the GMG felt that under such circumstances, it would be appropriate to give consideration to some form of election and rotation of such Committee members.

Those members of the group supporting these concerns felt that revision to the arrangements would further the Applicable BSC Objectives by increasing transparency (in the case of non-confidential business) and facilitating competition, both by increasing present understanding and widening the pool of "suitably qualified" experts for the future."

A number of respondents to consultation on this point were of the view that removing core membership and impartiality (more particularly) could prejudice the interests of those who might not be able to attend meetings. Such an arrangement, it was suggested, could leave major players with an opportunity to shape the market. Those in favour suggested that this element of the proposal would streamline processes and improve efficiency. Some GMG members considered that the arguments of those against this element of the proposal were somewhat undermined because the current process did not function adequately. However, there were counter-views that the function of a Modification Group was such that impartiality and, to a lesser extent, continuity of attendance were important. If these aspects of Modification Groups were removed, the pre-eminence of consultation could be undermined. It was noted that ELEXON had commented that consultation should remain paramount. Furthermore, the Ofgem representative stated that the Authority was supportive of the principle of impartiality. In the light of the arguments for and against this element of the proposal, the GMG accepted that this variant might form an element of an Alternative Modification.

In the light of the above discussion, in particular the strength of opposition to removing impartiality specifically, the GMG also considered that allowing Standing Modification Groups to self-select, but retaining impartiality and indemnity might also be a candidate for inclusion in an alternative proposal.

ELEXON to be Responsible to the Panel for Delivery of Reports etc.

The GMG noted that this element of the proposal was, in any event, contingent on whether, or not, the Standing and Modification Groups involved self-selection. Hence, this variant of ELEXON not being responsible for delivering reports would naturally sit with Standing and Modification Groups being selected by the Panel. Conversely, if self-selection were to be introduced, then it would be necessary for ELEXON to adopt this responsibility.

6.2.4 Modification Procedures

Evaluation Procedure to Replace Definition and Assessment

A number of comments suggested that the current distinction between Definition and Assessment was unhelpful. Often there appeared to be protracted discussions at the Panel and at Modification Groups as to which stage was appropriate in particular circumstances and what the resulting remit of any group considering a proposal was. Furthermore, it was suggested that the need to produce and seek approval of a separate Definition Report sometimes lead to unnecessary delay and duplication of effort. Those in favour of a solution of this nature suggest that abandonment of the Definition/Assessment Procedure distinction would reduce the number of meetings and reports and make the modification process more timely and efficient.

A counter view was that the number of stages in the process needn't necessarily be reduced but that better use could be made of each stage. Another argument was that the modification process is currently in a period of stress due to the high volume of changes and, as such perceived problems could simply be due to high levels of activity currently being undertaken. It was suggested by some respondents that the current arrangements were generally operating successfully and that major change would not be advisable at this time.

Only One Mandatory Consultation

While there was some concern that the overall level of consultation should not diminish from that currently allowed for under the Modification Procedures, GMG members suggested that the opportunity to provide written comments, at any stage, on a proposal, combined with the flexibility for the Panel to direct additional consultations would ensure that the level of consultation would not reduce under the proposal, but would be more flexible and more efficiently timetabled. This aspect of the issue was therefore regarded as leading to the better achievement of LC C3(3)(d).

One respondent was of the view that existing Code drafting allowed for there only to be one mandatory consultation and hence, no change was necessary. However, the GMG confirmed that, with the exception of those proposals that were submitted directly to the Report phase, two consultations were currently mandated. A further point made was that the limitation of one mandated consultation following the substantive evaluation of a proposal might lead to wasted effort since consultation could suggest rejection or significant revision to such proposals. However, some GMG members were of the view that, given that the Authority was not bound to accept Modification proposals, this was a risk regardless of any change to consultation obligations.

The GMG concluded that the arguments in favour of retaining two mandatory consultations were not sufficiently compelling for it to be considered as a potential element of an alternative. Therefore, the GMG rejected this proposition. Notwithstanding these considerations, there were views that enhanced reporting from Modification Groups and Standing Groups should be considered. In particular, it was suggested that minutes of such meetings should be produced. It was accepted that this suggestion should form a prospective element of an alternative proposal.

Panel Recommendation to be Made After Consultation

It was suggested by some members of the GMG that the current step whereby the Panel makes its provisional recommendation on whether or not a Proposed Modification should be approved or not, prior to the consultation on the Draft Modification Report, might unduly influence the views of some participants. It was also suggested that the Panel ought not to be contemplating such recommendations, given that a consultation exercise would still be outstanding at that time and that, as a consequence, the Panel would not yet be privy to all relevant information. It was therefore proposed that the Panel should not make its recommendation until after the consultation had been concluded.

6.2.5 Refinements to Consolidated Proposal

Re-consultation to be Mandated if Material Changes Arise for a Pending Modification

It was noted that late changes had been made in respect of certain previous Modification Proposals. Of particular concern was that such changes, if known at the time, might have influenced consultees' views of the merits of the proposal. The GMG believed that it would be prudent to permit further consultation in such circumstances.

Panel to be Able to Bring Forward Implementation Dates

At present, it is only possible for the Panel to seek an extension to the proposed implementation date of an approved modification. In recognition that circumstances may also change such that an earlier implementation is possible, the GMG considered that it would be sensible and more efficient to allow the Panel to apply to bring forward implementation dates, so long as any impacts of so doing were properly considered in advance of any such decision.

6.2.6 Other Potential Variations Considered

The following table sets out the consideration and conclusions of the GMG in respect of the various additional points raised by respondents to the consultation which the GMG did not wish to include as refinements to the consolidated proposal:

Suggested Change	GMG Consideration	GMG Conclusion
Plans to be produced to prescribe review of BSC in respect of issues	Not efficient since issues arise in a non-prescribed pattern. Also, general review of BSC is already catered for	Reject
Authority obligation to attend Groups	Authority not a party to the Code	Reject
Authority to provide views/rulings on elements of proposals	It was clarified that this proposal was contingent on Ofgem having the ability to 'cherry-pick' elements of a proposal. No responses to consultation had suggested this	Reject
Unify Modification and Change Control processes	Outside scope of proposal	Reject
Adopt minimum notice for issue of papers	Outside scope of proposal	Reject
Parties to be able to request urgent treatment of proposals from Authority	Although Panel acts as a check against overuse of the urgent process, the Authority has the overall market perspective	Consider as a candidate for an alternative
Ability for alternatives to be separately progressed	It was difficult to understand how a true alternative could be separated from an original proposal. It was also noted that consideration of issues in Standing Groups would allow different elements to be considered more flexibly	Reject
Panel members to sponsor Groups	Already allowed for	Reject
Panel members to be invited to all Groups	Already allowed for	Reject

Suggested Change	GMG Consideration	GMG Conclusion
Panel members to chair Groups	Already allowed for	Reject
Proposer to have right of attendance and to speak at relevant Panel meeting	This proposal could form a further variant on limited abilities to speak at Panel meetings. It was further noted that all proposers should be treated in the same way	Consider as a candidate for inclusion in an alternative proposal
Ability to progress more than one alternative	Since alternative proposals should better achieve BSC Objectives, relative to an original, it was unclear how there could be more than one	Reject
Payment of expenses for self-selecting Group members	Appeared to be inappropriate	Reject

7 INITIAL PANEL VIEWS

7.1 Background

At its meeting of the 18/10/01, the Panel considered the first interim report from the GMG pertaining to Modification Proposal P28. The Authority provided preliminary views on the proposal at the meeting.

The report presented the views of the GMG to date, in the form of a series of refinements to the proposal as well as a number of potential variants that might form an alternative proposal. The Panel was invited to note the work to date and to provide any additional Terms of Reference to the Modification Group that it believed to be appropriate, including directing the GMG to produce an Alternative Modification, if required, to better meet the Applicable BSC Objectives, and to complete the assessment process.

7.2 Panel Views

7.2.1 General

The Panel made one general observation that a number of the elements of the proposal were somewhat prescriptive and that they perceived a risk of the BSC being too cumbersome if all of the aspects of the proposal were 'hard-wired' into drafting. The Panel took the view that, so far as was possible, the agreed elements of the proposal should be enshrined in guidelines which would sit outside the BSC. On that basis, the following reflects the Panel's initial views:

7.2.2 Openness of the Panel and Panel Committees

All Non-confidential Panel/Committee Business to be Held in Open Session

The Panel suggested that there should be a presumption of openness, recognising that it might not always be practical to hold a meeting in open session. The Authority suggested that this issue could be dealt with by allowing the relevant chairman to exercise discretion.

Any Panel/Committee Member to be Able to Invite Comment From the Floor

The Panel suggested that this might leave the Panel open to lobbying, particularly given the entirely open attendance arrangements. The Panel concluded that the BSC should remain unchanged, but that guidelines could suggest that the proposer would be invited to speak at any relevant Panel meeting and that consideration would be given for other contributions to be made, as appropriate. The Authority was in agreement with these points.

7.2.3 Standing/Modification Groups

Standing Groups to Deal With Modifications in General Areas

The Panel made no specific remarks in this area, other than the Authority suggesting that hard-wiring of the need for Standing Groups was not required.

Standing Groups to Consider Issues

The Panel considered that, whilst ToRs for Standing Groups would be required, 'strict' control was regarded as being excessive.

No Core Membership, Self-selection, No Impartiality, No Indemnity for Standing/Modification Groups

The Authority considered impartiality and core membership as being preferable. Panel Members agreed, although it was recognised that impartiality was an ideal, not necessarily achieved. One Panel member suggested that another term might be found for 'impartiality'. Another Panel member considered that the guidelines should suggest that contributions to Standing/Modification Group discussions should identify the companies to whom the individual belonged.

ELEXON to be Responsible for Delivery of Reports etc.

One Panel member linked the possibility of ELEXON taking this responsibility to the weakening of the obligation of impartiality (see above). However, the Authority did not support this view.

7.2.4 Modification Procedures

Evaluation to Replace Definition and Assessment

The Panel made no specific remarks on this element of the proposal.

One Mandated Consultation

The Panel considered that two mandated consultations should continue.

Re-consult for Material Change

The Authority emphasised this initiative. Panel members considered that this need not be hard-wired into the BSC.

Panel Recommendation After Final Consultation

The Panel made no specific remarks on this element of the proposal.

Panel Can Bring Forward Implementation Dates

The Panel made no specific remarks on this element of the proposal.

Content of Report to Authority Unchanged

The Panel made no specific remarks on this element of the proposal (nor on the possibility of producing minutes of Standing Group meetings).

Urgent Modification Process Unchanged

The Panel strongly rejected the suggestion that interested parties should request urgency directly from the Authority.

7.3 Panel Instructions to GMG

The Panel instructed the GMG to produce legal drafting for an alternative proposal. The basis of the alternative was taken to be the consolidated proposal, with all refinements, as amended in light of the views of the Panel and the Authority (described above).

8 FURTHER MODIFICATION GROUP DISCUSSIONS

The main area of interest for these further discussions was that of the views provided by the Panel and the Authority in response to the Interim Report presented to the Panel at its meeting of the 18th of October 2001. There were some suggestions by Modification Group members that these views should be treated as inputs to the GMG's ongoing discussions. However, it was ultimately accepted that the Panel and Authority views, particularly in view of the explicit Panel instruction to undertake legal drafting of an alternative, should be regarded as compelling and that an alternative should be constructed. The GMG therefore considered each element of the consolidated proposal (as refined) and sought to modify such elements, as appropriate, to reflect the views of the Panel and the Authority. As a result of these considerations a number of particular issues emerged, in respect of; the suggested set of guidelines, membership of Modification Groups, impartiality at Modification Groups, mandatory consultations and minutes for Modification Groups.

In so far as the guidelines were concerned, a number of GMG members were not supportive of such an approach as an alternative to 'hard wiring' the various aspects of the consolidated proposal into the Code. There was a view that, if guidelines were to be introduced, formalising them via a reference in the BSC would be preferable, since that would afford greater transparency, certainty and would prescribe a process for changing the guidelines. The precise scope of the guidelines was not clear to the group. The GMG concluded that the BSC should oblige the Panel to establish guidelines (for the conduct of all Panel, Committee and Group proceedings), and that such guidelines should be made widely available and should be reviewed from time to time.

The GMG had some continuing concerns with the concept of a core membership of Modification Groups, particularly in respect of the basis of selection being a list of experts. One suggestion was that the membership could be established simply by nominating whoever attended and wished to become a member. Further consideration of this point led to the conclusion that it would be prudent to interpret the criteria for inclusion on the standing list (having relevant experience and/or expertise) as broadly as possible. It was further concluded that the process of individuals being placed on the list should be as open as possible, for example, allowing individuals to nominate themselves, as issues arise in Groups. The concern relating to rotation of members (both in Committees as well as in Groups) was re-iterated. It was agreed that there should be a balance struck between retaining continuity and expertise within a Committee or Group and ensuring a breadth and relevance of input to such meetings by rotating membership. It was agreed that these sentiments could be enshrined in the guidelines.

In so far as impartiality was concerned, the GMG considered the suggestion from a Panel Member that an alternative term to 'impartiality' should be used. One suggestion was that the phrase 'reasonable endeavours to better achieve BSC objectives' could be used. However, it was recognised that Modification Groups are obliged, in any event, to act with a view to achievement of BSC objectives (clause 2.4.14 of section F of the BSC) and that this described an aim, whereas impartiality reflected style or behaviour. The GMG concluded that there was no obvious alternative to the term 'impartiality'.

The GMG did suggest that, as one Panel Member had remarked, consultations might more efficiently be undertaken if they were event-led, rather than being timescale-led. Hence, mandating two consultations could be regarded as otiose. However, given that the first mandatory consultation could be undertaken at any appropriate stage of an Evaluation, the GMG considered this to be an acceptable element of the alternative proposal.

Finally, the GMG considered the potential variant of requiring minutes to be produced for Modification Groups. In recognition that issues would normally be described in some form of report from a

Modification Group, it was concluded that the particular form of reporting should be established in Terms of Reference for a Modification Group, as appropriate.

At a broad level, the GMG determined that they would be unable to reach any conclusions in respect of the foregoing, since a number of issues required further clarification.

Firstly, there was a level of uncertainty within the group as to the precise views of the Panel and the Authority. In addition, the group believed that some areas of the alternative proposal required further consideration, in order to allow the group to provide the Panel with sufficient information and analysis to make an informed recommendation. The GMG was also conscious of the fact that the Panel had expressed a desire for Modifications Groups to reach a recommendation wherever possible. Given the divergence of opinion within the GMG on some aspects of P28, the Group recognised that they might not be able to reach true consensus on all points. However, the group wished to be able to provide the Panel with a full understanding of the source of all viewpoints.

Secondly, there was uncertainty as to the status and content of the guidelines suggested by the Panel as an alternative to hard-wiring aspects of the proposal into the BSC. The concept of guidelines had emerged relatively recently in discussions and, in seeking to assess this proposal and complete the legal drafting, it had been recognised that some further detail and discussion on the guidelines would be required. Indeed, the group believed that there would be merit in consulting on this matter, given that the concept was not discussed in the previous consultation.

The GMG therefore took the view that a second Interim Report should be presented to the Panel, seeking clarification on these points. There was also recognition that such an Interim Report could provide a further opportunity to seek the Authority's provisional thinking on all aspects of the proposal, as refined, in order to supplement the earlier views already provided by the Authority.

Notwithstanding the above, the GMG considered that, in the light of their discussions, two further elements should be considered for inclusion in the Alternative Modification;

- The process for establishing the membership of Modification Groups should allow for a broad interpretation of 'suitable expertise and/or experience' and allow for individuals to nominate themselves for consideration.
- Modification Group Terms of Reference should include explicit requirements for reporting.

9 FURTHER PANEL VIEWS AND AUTHORITY PROVISIONAL THINKING

9.1 Background

At the Panel's meeting of 15/11/01, a further Interim Report (Panel Paper ref. 33/013) from the GMG was presented. This report described the issues raised by the GMG. The provisional thinking of the Authority, which had been previously requested by the Panel, in accordance with clause 2.6.10 of section F of the BSC was provided in writing to the meeting. A copy of the Authority's provisional thinking is reproduced in Annex 2 of this report. Specifically, the Interim Report sought the Panel's views on each particular element of the putative alternative proposal and on the further development of guidelines. The Panel's views and the provisional thinking of the Authority may be summarised as follows:

9.2 Panel Views

9.2.1 Establishment of guidelines

The Panel suggested that guidelines already existed to the extent that case history was evolving. The bureaucracy of formal guidelines did not appear to be merited and it was concluded that there should be no reference to such guidelines in the BSC. The Authority had suggested that if the concept were to be introduced then consultation on guidelines would be prudent. However, the Authority was content that this would not be required, as there was no new concept involved.

9.2.2 Panel and Committees

All Non-confidential Panel/Committee Business to be Held in Open Session Where Practical

The Panel reaffirmed its support for this potential variant to form part of the alternative proposal. The Authority supported this view.

Panel/Committee Chairman's Discretion to Invite Attendees to Speak

The Panel reaffirmed its support for this potential element of the alternative. Hence, no change to the current BSC drafting was required. The Authority supported this view.

9.2.3 Modification Groups

Modification Groups to deal with Modifications in general areas

The Panel reaffirmed its support for this potential element to form part of an alternative proposal. The Authority supported this view.

Modification Groups to consider issues in advance of specific Modifications being raised

The Authority considered that there were competition and resource concerns with this element of the alternative. However, the Panel noted the arguments that a proposal could be raised to stimulate such discussions, if this element were not included. The Panel also noted the issue of competing or sequential Modifications which could be alleviated via this initiative. Subject to the Terms of Reference being appropriately structured, the Panel supported this element of the alternative.

Core membership, impartiality and indemnity for Modification Groups to remain unchanged

The Panel reaffirmed its support for this element of the current arrangements to form part of the alternative. The Authority supported this view.

Modification Groups to retain responsibility to produce reports etc.

The Panel supported this approach (the status quo), as did the Authority.

Process for establishing Modification Group membership should allow for broad interpretation of 'suitable expertise and/or experience' and allow for individuals to nominate themselves for consideration.

The Panel and the Authority supported this variant forming part of the alternative, noting that no change to the BSC was required.

Modification Group Terms of Reference should include explicit requirements for reporting

The Panel, supported by the Authority considered that a particular report would form the output of a Modification Group. Terms of Reference could always stipulate other reporting, if required. Hence, no change to the BSC was required for this aspect of the alternative.

9.2.4 Modification Procedures

Evaluation to replace Definition and Assessment

The Panel considered that streamlining of reporting would potentially deal with the deficiency highlighted by this initiative, in a more effective manner. Hence, no change to the current BSC drafting was required. This view was supported by the Authority.

Two mandated consultations

The Panel, supported by the Authority, reaffirmed its support for this element of the current arrangements forming part of the alternative.

Content of the report to the Authority to remain unchanged

The Panel, supported by the Authority, reaffirmed its support for this aspect of the current arrangements being retained for the alternative.

Urgent Modification arrangements to remain unchanged

The Panel, supported by the Authority, reaffirmed its support for this aspect of the current arrangement being retained for the alternative proposal.

Re-consultation to be undertaken if material changes arise for a Pending Modification

The Panel, supported by the Authority, supported the principle of this aspect of the alternative. However, it was noted that the need to re-consult could apply to any Modification that was still in its report phase, rather than to a Pending Modification and that, in effect, the requirement was to be able to extend the report phase timescales.

Panel to be able to bring forward implementation dates

The Panel, supported by the Authority, agreed that it was desirable to be able to bring forward the implementation dates for agreed Modifications, subject to the outcome of a consultation process.

Panel recommendation to be made after the final consultation

The Panel agreed with the Authority in considering that participants would not be unduly influenced by seeing an initial Panel view on Modifications in their report phase. Furthermore, it was noted that, without such a preliminary view, legal drafting would always be required which would detract from efficiency. The Panel rejected this potential element of the alternative.

The Panel concluded that, on the basis of the balance of arguments made in response to consultation, the above alternative (comprising those elements of the above supported by the Panel) better facilitated the applicable BSC objectives and, under the auspices of clause 2.6.10 of section F of the BSC, directed the GMG to produce the legal drafting for that alternative.

10 ASSESSMENT OF ALTERNATIVE MODIFICATION AGAINST APPLICABLE BSC OBJECTIVES

10.1 Assessment Compared to Status Quo

In the first instance, the GMG considered the merits of the alternative proposal, as compared to the status quo. On balance, the GMG concluded that the arguments in support of those elements of the consolidated proposal that also formed part of the alternative remained valid. The elements common to both proposals are:

- All non-confidential Panel and Committee business to be held in open session;
- Standing Groups to deal with Modifications in general areas;
- Standing Groups to consider issues in advance of specific Modification Proposals being raised;
- Re-consultation to be mandated if material changes arise for a Pending Modification; and
- Panel to be able to apply to bring forward implementation dates.

The arguments in favour of these propositions can be found earlier in this report, in Section 6.2.

In addition, the GMG gave further consideration to the following individual elements:

Standing Modification Groups to Consider Issues in Advance of Specific Modification Proposals Being Raised

The Authority provided some further elaboration on their concerns in this area, suggesting that larger, London based organisations could dominate the raising of issues and might cause consequent expenditure in terms of the support and analysis of such issues raised. It was also questioned whether this initiative would be of any benefit, given that a Modification proposal can always be raised. The counter to this view was that spurious proposals could be avoided, thus preventing unnecessary recourse to the Definition and Assessment procedures. Also, where a number of possibilities might emerge, consideration of issues would allow a consolidated or phased approach to be taken. In so far as the risk of additional expenditure was concerned, it was suggested that the original intent of the proposal was to allow consideration of new ideas, not for there to be significant expenditure. The GMG was of the view that such a risk could be mitigated via appropriate limitations on time and cost forming part of the Terms of Reference for standing Modification Groups that will be set by the Panel. Furthermore, the GMG reinforced the arguments supporting this element of the alternative; that it allowed new entrants to test ideas, that costs might reduce if meetings were subject to a routine timetable and that such groups under the BSC led to more transparency, compared to industry sponsored discussions.

Re-Consultation for Material Change

With particular reference to the requirements set out in Transmission Licence Condition C3(4)(b)(iii), the GMG noted that this proposal would ensure that the Modification process enabled the proper evaluation of a Modification, a key aspect of which is full and timely consultation.

Panel to be Able to Apply to Bring Forward Implementation Dates

The GMG noted that Transmission Licence Condition C3(4) sets the requirements for the BSC Modification Procedures and that those requirements form the Applicable BSC Objectives in relation to a proposed modification of the Modification Procedures (to the extent they do not conflict with the other

Applicable BSC Objectives). It was further noted that Condition C3(4) does not currently anticipate the bringing forward of implementation dates, only their extension. The Group considered whether this fact would constitute a legal barrier either to the inclusion of this element or to the approval of the proposal. It was concluded that there was no barrier to the recommendation of this change, as Condition C3(4) only applies to the extent that its requirements do not conflict with the Applicable BSC Objectives and this element of the proposal would clearly further the efficiency objective.

However, The GMG noted that, until such time as an appropriate amendment of the Transmission Licence allowed for the bringing forward of implementation dates, Licence Condition C3(4) did not support this proposal and that such an amendment would be required before the proposal could be progressed.

10.2 Assessment Compared to Consolidated Proposal

On the basis of the foregoing, the GMG concluded that the alternative proposal better achieved applicable BSC objectives, as compared to the status quo. However, the GMG was split as to whether the alternative better achieved the Applicable BSC Objectives, as compared to the consolidated proposal.

11 IMPACT ASSESSMENT

Because the nature of the changes proposed in P28 (alternate) are largely administrative, no system impacts are anticipated. Instead impacts are considered to fall into two main areas; administrative arrangements for interested parties and administrative arrangements for ELEXON. The potential impact on interested parties has been considered in consultation and suggests that a short period of notice is required to enable parties to adjust their administrative processes. It is further considered that, while on the one hand, there may be an increased burden in terms of supporting increased Committee and Group activity under P28 (alternate), conversely, the potential efficiency improvements may lead to reduced costs and Committee and Group activity. However few comments were received on this point and it has not been possible to quantify the potential impact.

Three key elements of the proposal are considered to impact on the activities of ELEXON:

- Panel Committees in Open Session; Panel meetings are already open for part of their business. Hence, no incremental cost is anticipated. However, ISG and SVG meetings will need to be administered on this basis. This may lead to larger rooms being required (with the usual facilities), with consequent cost implications. On the assumption that the size of meetings might be similar to that of the Panel, this implies an additional cost of some £2k per meeting. A further assumption behind this cost is that, currently, ISG and SVG meetings are accommodated within ELEXON's offices.
- Consideration of issues by Modification Groups; although Modification Groups meet on a frequent basis (overall), it could be argued that meeting frequency will increase if Modification Groups consider issues in addition to actual modifications. As an example, it might be postulated that a Pricing Group, a Notification Group, a Governance Group, a Credit Group and a Reporting Group may come into being (as a first guess) and meet on some appropriate frequency. In addition, further Modification Groups may still be required from time to time for specific Modifications. However, the use of standing Modification Groups (with pre-booking) and the opportunity to develop thinking via discussion of issues ahead of Modifications being raised (shortening the period spent developing the Modification proposals themselves) may lead to efficiency gains. Currently, there are approximately 8 Modification Group meetings per month on average. Given the uncertainty of levels of activity in the future (the assumption is that the number of Modifications being raised would remain the same), the assumption is that this will remain unchanged.
- Bringing forward implementation dates; the ability to bring forward implementation dates may lead to there being a need to re-consult occasionally. This will constitute a modest increase in the preparation and issue of consultation documents. However, this needs to be offset against the possibility that Modifications might now be capable of being implemented more quickly and thus deliver benefits more quickly.

The introduction of the ability to bring forward the implementation dates of Approved Modifications may have a consequential impact on Condition C3(4) of the Transmission Licence (see discussion in Section 10.1 above).

ANNEX 1 – ELEXON COMMENTARY

BACKGROUND

At its meeting of the 23 August 2001, the Panel agreed that, as part of the assessment of Modification Proposal P28, a commentary on the proposal should be provided by ELEXON, given the company's integral role in administering and supporting the BSC governance procedures. The views of interested parties, the BSC Panel and a preliminary view from Ofgem are also being sought in parallel.

BACKGROUND

In compiling this note, the context in which ELEXON has considered its views is that of ELEXON's primary duties in respect of the governance arrangements under the BSC. These duties may be summarised as follows:

- Supporting the Panel and Panel Committees in discharging Panel responsibilities under the Code.
- Secretarial and administrative support to the Panel and Panel Committees
- Analytical and administrative support to the Modification Procedures.
- Provision and procurement of resources, services and systems to implement the Code.

A more comprehensive description of ELEXON's duties is provided in Appendix I.

EXPERIENCE TO DATE

At the time of writing, some 37 Modification Proposals have been considered and the Panel has held some 15 meetings at which Modification business has been discussed. Furthermore, the Panel has met to discuss other business on some 30 occasions (some of these meetings being convened after the designation of the BSC, but before the live operation of the BSC arrangements). Although the expectation was that the Panel would meet on a monthly basis the volume of work (and in particular that relating to Urgent Modifications business) has been such that a number of additional meetings and telephone conference calls were necessary. Panel Committees have also been held on a regular basis since April 2001. All parts of Panel meetings where non-urgent Modification Proposals have been discussed have been held in open session, as this is expressly provided for under the BSC. In addition, the Panel has exercised its discretion under the BSC to stipulate that all Modification Group meetings should be held in open session.

The first few months of operation of the Modification Procedures has given rise to a significant body of development work across most aspects of the balancing and settlement arrangements, demonstrating that interested parties now have a real opportunity to drive change. The procedures have been proven to be generally workable, although the workload to support the process has been extremely high both for the Panel and ELEXON staff throughout the Company. Some areas of concern have emerged and potential refinements to the process are being pursued within the existing provisions of the Balancing and Settlement Code. A number of Urgent Modification Proposals have been progressed within timescales of one to six weeks depending on the complexity of the issues raised and the degree of impact on central and other systems. Considerable work has been required in developing the remaining

Proposals, some of which entail significant changes such as changes to the price calculations, dual contract notification and the extension of the definition of central systems.

A number of different Modification Groups have been established to take forward the proposals raised to date. Where possible, Groups specialising in certain subject areas (for example, credit, contract notification, pricing, and governance related issues) have been asked to take forward consideration of related proposals. The Modification procedures specified in the BSC require Modification Group members to be available to consider a particular Proposal throughout its lifecycle. Some Group members have found it difficult to commit to the level of involvement required to date.

In addition to operation of the Modification Procedures, the Panel has many other responsibilities under the BSC, including the setting of a number of key parameters and approving changes to systems and documentation. The parameters to be set include the Balancing Reserve Level (BRL), Credit Assessment Load Factors (CALF) and the Credit Assessment Price (CAP). The Panel also acts as an appellate body to hear requests for redetermination of CALF values and referrals of Trading Disputes. These responsibilities have generated an extremely large workload for both the BSC Panel and ELEXON in supporting the Panel. In order to ensure the full and timely discharge of these functions, the Panel has established four Panel Committees (ISG, SVG, PAB and TDC) and has delegated responsibility to those bodies to take many of the decisions listed. To date, all meetings of the Panel and Panel Committees where these matters have been discussed have been held in closed session, as open sessions are currently precluded by the BSC.

SPECIFIC COMMENTS

The P28 Definition Report identified that the proposal addresses three broad areas of potential change; openness of meetings (of the Panel, Panel Committees and Modification Groups), constitution and operation of Panel Committees and Modification Groups and amendment of the Modification Procedures. ELEXON has considered the issues raised in these three areas and makes the following observations on each:

Openness of Panel, Panel Committee and Modification Group Proceedings

ELEXON believes that the ability for parties to attend Panel meetings and Modification Groups considering modifications business has helped to ensure transparency of the Panel's decision-making and to assist the industry in increasing its understanding of the BSC and associated issues. ELEXON supports the extension of this approach to other non-confidential Panel and Panel Committee proceedings. ELEXON would suggest that the opportunity to attend meetings should be extended to all interested parties, not just BSC Signatories, since it is the broader constituency that is consulted on modification proposals.

However, the Panel and Panel Committees must retain the flexibility to expedite decisions and, hence, on occasion, it should be recognised and accepted that it may not be practical to hold a meeting in open session (for example, where telephone conference facilities are used). Furthermore, any Panel or Panel Committee business that is clearly confidential must be held in closed session.

The logistics of arranging and holding such a number of meetings in open session are significant and will have associated costs. ELEXON would, of course, seek to minimise such costs if such modified arrangements are introduced.

With regard to the ability to speak at meetings, ELEXON would suggest that this facility is limited to points of process. Otherwise, the pre-eminence of consultation as the basis to inform decisions would be undermined. If contributions to Panel or Panel Committee proceedings became seen to be of potential advantage to attending parties, this mechanism would grow in significance and reduce the standing of the consultative process. The Panel consults parties on all modification proposals and has generally adopted a consultative approach to taking other decisions. The cost and time (and hence the efficiency) of meetings would be likely to deteriorate if there are insufficient controls on the ability of attendees to address meetings.

Modification Groups/Standing Groups

The formal creation of generic Modification Groups, to be called Standing Groups, appears to be sensible. Indeed this would largely be a reflection of current practice, whereby related modifications are submitted to the same Modification Group to ensure consistent treatment. Holding these meetings on fixed dates would assist both the industry and ELEXON in planning activities. However, the Panel must retain the ability to establish additional Modification Groups outside of this framework and/or to schedule ad-hoc meetings of the Standing Groups to progress Urgent Modification Proposals or Modification Proposals that do not naturally fall within the remit of any of the predefined Standing Groups.

The potential for improving the constitutional arrangements of Modification Groups is acknowledged. However, ELEXON would wish to be assured that if such changes were to be progressed, that they would neither result in any diminution of the pre-eminence of consultation in the Modification Procedures, nor create arrangements that could give rise to discrimination or bias.

If self-selection (as opposed to Panel nomination) is to be adopted, as with invitations to Panel and Committee meetings, this facility should be extended to all interested parties. However, it is not clear that the quality of contribution to Modification Groups would necessarily increase under this arrangement; as is acknowledged by some who support this initiative, there may be times when no invitees attend, or that attendees are there to learn, rather than contribute.

Another aspect of this proposal is the provision for discussion of issues ahead of any Modification proposal emerging. This, in principle, is allowed for now in that there is no prohibition against groups of interested parties convening to discuss such matters outside of the BSC framework. Hence, the key issue is whether such meetings should be supported by the Panel and ELEXON and be circumscribed by terms and conditions set down in the BSC. Such an arrangement would give standing to these discussions and there would need to be careful consideration of the potential for undue discrimination. There would be cost implications and potential resource implications for ELEXON. There is also the question of efficiency. One mechanism that could assist in mitigating these risks would be to ensure that the Panel exercised appropriate control over the terms of reference and agendas for these Standing Groups, but that in turn might inhibit the flexibility that the Proposers seek to achieve.

Finally, if the present obligations and independence requirements placed on Modification Groups were to be removed then there is the issue of on whom the responsibility of ensuring that Proposals are progressed and consulted upon lies. It might be inappropriate for the Standing and Modification Groups to make recommendations if attendees are no longer obliged to be impartial and not indemnified. An alternative could be for ELEXON to make a recommendation to the Panel drawing in the advice and views from the Standing Groups. As the proposals stand at present ELEXON would fulfil this role, acting as the 'agent' of the Panel. In practice this may look little different to present, as ELEXON

produces all the Modification Group reports, consultation documents and analysis. However, ELEXON would suggest that, if this were to be progressed, it would be appropriate for ELEXON to remain impartial. In recognition of this, it is suggested that, whilst conclusions may be drawn in reports to the Panel, recommendations relating to the merits of a proposal should not be made. An example of this would be to conclude that a majority of Modification Group attendees considered the weight of argument to be in favour of a Modification, but avoid making the recommendation that the Panel should commend the proposal to Ofgem. Such an approach might make the Panel's role more onerous.

Amendment of the Modification Procedures

Finally, in respect of potential changes to the Modification Procedures, ELEXON would support any procedures, so long as they met the pre-requisites described in Condition 7A(4) of the Transmission Licence and, where applicable, better achieved the Applicable BSC Objectives (which is to say, in practice, that they were more efficient and did not imply any undue discrimination).

However, in arriving at any such conclusion, due cognisance of the ongoing evolution of the arrangements, within the context of the existing BSC, should be taken into account. For example, ELEXON is currently considering streamlining reports and consultation documents, and is considering how Initial Written Assessments could focus on clarifying the detail of a Modification Proposal, allowing for a quicker progression to Assessment for many proposals. Other initiatives could also be considered, such as refining when consultations take place to ensure that optimal contributions are forthcoming (the BSC does not mandate that consultations take place at the earliest opportunity). ELEXON would suggest, therefore, that any assessment of modified arrangements against the existing arrangements should take due account of these potential improvements.

ELEXON also recognises the potential benefits of being able to consider a number of options, rather than always being limited to one Alternative Modification Proposal. However, ELEXON would wish to make the observation that progressing many alternatives could imply progressing many impact assessments and preparing many assessment reports, and so on. Hence, if it were clarified that more than one alternative was possible, it would be prudent to build in some protection against a multitude of options emerging, causing severe impacts on cost and efficiency. Clearly a number of options can be considered at an early stage in the development of a Modification Proposal, but every effort should be made to limit the number of alternatives emerging from the process.

Appendix I: ELEXON Obligations Under the BSC

As described in clause 1.2.1 of section C of the BSC, the primary role of ELEXON is to provide and procure facilities, resources and services required for the proper, effective and efficient implementation of the Code. These resources should include those required by the Panel and Panel Committees.

Furthermore, ELEXON is obliged to exercise its powers and discharge its functions and responsibilities with a view to achieving the following objectives:

- That the Code is given effect fully and promptly and in accordance with its terms
- That the Code is given effect in such manner as will facilitate achievement of the objectives (so far as applicable to the manner in which the Code is given effect) set out in Condition 7A(3)(a) to (c) of the Transmission Licence
- That the Code is given effect without undue discrimination between Parties or classes of Party

- Consistent with the full and proper discharge of the functions and responsibilities of the Panel and BSCCo, that the Code is given effect as economically and efficiently as is reasonably practicable
- Subject to the express provisions of the Code and to any other duties of confidence owed to third parties, that there is transparency and openness in the conduct of the business of the Panel and BSCCo

More particularly, as described in clause 3.1.1 of section B of the BSC, ELEXON has specific obligations that are of relevance to the modification arrangements under the BSC:

- To advise the Panel and keep it advised as to and in respect of the matters which it is necessary or appropriate that the Panel should consider in order to discharge the Panel's functions and responsibilities in accordance with the Code
- To provide or arrange the provision of such facilities, resources and other support as may be required by the Panel to enable the Panel or any Panel Committee or Modification Group to discharge its functions and responsibilities under the Code
- To provide secretarial and administrative services in connection with meetings of the Panel and Panel Committees and Modification Groups, including the convening and holding of such meetings and taking and circulation of minutes
- To provide or arrange the provision of facilities resources and other support in connection with the procedures for modifying the Code in accordance with Section F.

Finally, ELEXON may make recommendations to the Panel as to possible Modification Proposals in the circumstances mentioned in clause 3.8.8 of section C and clause 2.1.1 of section F of the BSC.

ANNEX 2 – OFGEM'S PROVISIONAL THINKING ON MODIFICATION PROPOSAL P28



Mr Nick Durlacher
Chairman of the BSC Panel
ELEXON Limited
3rd Floor 1 Triton Square
London
NW1 3DX
13 November 2001

Dear Nick,

Ofgem's Provisional thinking on Urgent Modification Proposal P28 "Review of Governance and Modification Procedures"

These comments are provided in response to the Panel's request, under BSC F2.6.10 (b) for the Authority's view as to whether the findings of the interim report are consistent with the Authority's provisional thinking on P28 "The Review of Governance and Modification Procedures." The following view is therefore without prejudice to the Authority's consideration after receipt of a final Modification Report on this Modification Proposal.

1. Background to the Modification Proposal

Modification Proposal P28 arose as a result of the amalgamation of three modification proposals: Mod P21, Mod P23 and Mod P24. The proposal seeks to reform the operation of the BSC governance arrangements specifically in relation to the operation of the Panel, Panel Committees, Modification Groups and the Modification Procedures. The intent of the proposal is to initiate a broad view of how these arrangements can be made more efficient and transparent. During the Definition phase of the process the Governance Modification Group outlined a number of suggested reforms and the Panel at its meeting of August 23rd agreed that the Group proceed to examine those proposals in more detail during the assessment phase. The major issues arising from the deliberation of the modification group were (1) Openness of the Panel, the Modification Groups and the Panel Committees. (2) The constitution and operation of Modification Groups and Panel Committees. (3) Increasing the efficiency of the Modification Procedures.

2. Openness

On the question of openness, it was considered that the proceedings of the key bodies involved in the BSC modification process were not sufficiently transparent and open. It is Ofgem's provisional thinking that transparency and openness are of paramount importance when considering the operation of bodies involved in the process of modifying the Balancing and Settlement Code. This is particularly so with regard to fulfilling the requirement of 7A(3)(c) of the NGC Licence Condition: 'promoting effective competition in the generation and supply of electricity and promoting such competition in the sale and purchase of electricity.' It is important that all parties but above all new entrants and smaller participants have the opportunity to gain insight into the practical

operation of the market and related issues and Ofgem recognises openness as a means to demystify what is in fact a new process.

However in this regard, two aspects of openness have to be clearly acknowledged: freedom to attend meetings and the more extensive freedom to speak at those meetings. It is Ofgem's preliminary view that when considering the extent of transparency to be afforded, each aspect should be determined by reference to the particular function of the BSC body under consideration. Further, that any proposed broadening of the openness of the proceedings of these key bodies should not be viewed in isolation from the efficiency considerations described under 7A(3) d of the NGC Licence Condition.

What follows is a consideration of the two aspects of openness (freedom to attend and freedom to speak) as they relate to the key bodies involved in the Balancing and Settlement Code.

2.1 Openness of the BSC Panel (Modification Business)

Under the current provisions of the BSC, representatives of any Party to the BSC may attend that part of the Panel meeting concerned with modification business. The central London venues in which these monthly meetings take place are often chosen with a view to accommodate a large number of attendees. However, attendees can only speak at these meetings if invited to do so by the Panel Chair. In practice the Chairman has been inviting proposers of modifications under consideration to address the meeting but additional comment from the floor has only been permitted under exceptional circumstances.

In the interest of improving openness, it has been proposed that an obligation should be placed on the Chair to invite representations from attendees and further, those individual Panel members should be empowered to invite such representation from the floor. The rules of natural justice dictate that having invited a representation from the floor, the Chair or the Panel member would then be obliged to invite comment representing an opposing view.

Ofgem observes how the list of agenda items becomes more extensive as the Panel's modification business develops. Already time constraints and the logistical challenge of convening such a large group of professionals at short notice have meant Panel meetings have had to be concluded the following day or the following week using tele-conferencing facilities. Ofgem is concerned that approval of a proposal introducing a right to speak in this way would lead to the prolonging of Panel meetings and consequently the increased incidence of tele-conferencing as a means of concluding Panel meetings. Given the obvious limitations of this facility as a means of conducting free and open discourse and its limited availability to all Parties wishing to take part in Panel proceedings, there is a danger that this development will pose a threat to overall transparency in that it could potentially jeopardise the fundamental aspect of openness – namely the right to attend Panel meetings concerned with modification business.

Also, there is a concern that the imposition of an obligation on the Chair to invite representations from the floor would be more beneficial to better resourced and/or London-based Parties who would obviously be better placed to provide personnel at the central London locales where Panel Meetings invariably take place. Ofgem would find difficulty in reconciling this with the objective of facilitating competition. It is Ofgem's provisional thinking that consultation is the more egalitarian means by which Parties can make their views known. It is open to all participants, the cost is comparatively low and it should continue to be the primary means by which Parties express their view.

It has been argued that the Chair or Panel Members should be obliged to invite representations from the floor only when a new and material factor has emerged. Ofgem's provisional view is that it would appear equitable for such matters to be heard at the Report Stage in advance of the Panel coming to a decision. However, in the interest of running the meeting in an efficient and orderly way, a preferable course would be for the obligation to invite representations on new and material factors to rest solely on the Chair and not on individual Panel members.

2.2 Openness of the BSC Panel (Non modification Business)

At present, all the non-modification business of the Panel is conducted in closed session. One element of the proposal is that Parties at least be entitled to attend when issues such as BRL, CAP and CALF come up for consideration because these issues are of commercial significance to some of the parties. Ofgem recognises that these issues may have commercial significance to market participants and that transparent decision making may be desirable but it is also careful to observe that any broadening of the transparency provided can only be achieved with reference to issues of confidentiality, and market sensitive information. The Chair might use discretion to determine where openness might be practical in this regard.

2.3 Openness of Panel Committees

Same considerations as apply to the proposed increased openness of Panel proceedings.

2.4 Openness of Modification Groups

Modification Groups, because of the nature of their business, meet more frequently than the Panel. At present, the default position is that Modification Groups are closed. However, in practice, the Panel has exercised its discretion to open these meetings to representatives of Parties who wish to attend. Further, the Chair of the Modification Group has the discretion to invite representations from attendees and on the whole their contributions have been greatly valued.

With the exception of the confidentiality considerations, the same arguments advanced above in respect of Panel Committees and against hardwiring a general right to attend and speak would apply here. It is Ofgem's provisional thinking that it is preferable in the interest of both efficiency and the promotion of competition that the Panel and the Chair of the Modification group retain a discretion to limit attendance and the right to speak at these groups respectively.

3. Constitution and Operation of Modification Groups

Section B of the BSC establishes that the Panel appoints Panel Committee members from a standing list of experts. Similarly, Section F2.4.4 of the BSC states that Modification Group members should be appointed by the Panel from a standing list of experts. In selecting these experts the Panel shall ensure as far as possible that an appropriate cross-section of experience, interest and expertise is represented on these Groups. Attendees do not form part of the membership of these groups.

One element of the proposal for reform is the removal of the distinction between members and non-members. The view is that these Groups should be formed as a result of a process of self-selection in that Parties who have an interest in a particular modification proposal would naturally seek to attend meetings relating to the progress of that proposal. It is argued that those with knowledge of the issues would contribute more effectively than an appointed group and that what is necessary, is some acknowledgement that genuine impartiality in this regard is a fiction. As a result, there would be no obligation on these self-selected groups to act impartially and so the indemnities provided to members would no longer be required.

What follow is Ofgem's provisional thinking on the implications of this part of the proposal for Panel Committees and then for Modification Groups when viewed in the light of efficiency and the promotion of competition in the industry.

3.1 Panel Committees

It is Ofgem's view that because the responsibilities of Panel Committees are explicitly delegated from the Panel and clearly prescribed under the BSC, these bodies would not be able to carry out their function in an efficient manner in the absence of a core membership against whom responsibility could be attached. It would follow that an obligation to be impartial would be necessary. This is especially so with regard to the decision-making aspect of its functions where voting is an essential element of the decision making process.

3.2 Modification Groups

As regards Modification Groups, it is Ofgem's provisional thinking view that they have specific obligations to fulfil under the BSC and that as a result, it is preferable in the interest of efficiency for those responsibilities to be attached to a defined group. Ofgem does recognise however that there have been practical problems regarding the attendance of modification group members. Although section F 2.4.6 of the Code stipulates that each proposed member of the Modification Group shall be required to confirm to the Panel that he/she will be available as required throughout the relevant Definition or Assessment Procedure, the reality has been that attendance of members at Modification Groups has fluctuated greatly. This is of concern because despite the code stipulation, Modification Group members cannot be coerced into attending meetings and a danger arises that non-attendance may be used as a filibustering ploy by Modification group members unsympathetic to the successful progress of a particular modification.

It has been suggested that as a means of avoiding filibustering that the ultimate responsibility for producing reports within timescales should be placed on Elexon, with the input of modification groups restricted to providing definitions, impacts and arguments.

As presently constituted, the company Elexon is incorporated to provide secretariat and administrative support to the Panel. It is Ofgem's provisional view that the modification group should retain the responsibility to produce reports for the Panel. This is in keeping with one of the rationales of the code - that the onus should be on the participants to progress modifications to the code.

Further, if self-selection were to be the basis for composition of these groups, again the danger of larger participants bringing their resources to bear on influencing Modification Groups would present itself.

3.3 Impartiality

To date, Ofgem has not heard any compelling argument to change the present arrangements. It is Ofgem's provisional view that as regard modification groups, impartiality is more conducive to making decisions based on the BSC objectives than the adversarial atmosphere that an acknowledged partisanship might engender.

3.4 Standing Groups

Another element of the proposal is to enable the Panel to form Standing Groups to consider Modification Proposals under the delegated authority of the Panel in general areas. These groups might meet on regular, fixed dates, albeit with some flexibility to deal with Urgent Modification Proposals. The rationale behind this suggestion is that this would aid continuity in developing proposals in areas of specified interest such as credit, energy balancing or governance.

Ofgem's provisional thinking is that the existing arrangements allow for such flexibility and sees no need to introduce such a new term into the code.

3.5 Process for establishing Membership

One suggestion is that the process should allow for a broad interpretation of what constitutes suitable expertise. Given that the code is comparatively new and that the understanding is the participants will develop expertise, Ofgem is sympathetic to this element of the proposal. However, Ofgem has more reservations about that element of the proposal regarding individuals being able to nominate themselves for consideration. It is Ofgem's provisional view that the present arrangements provide a better means of ensuring that experts sitting on modification groups are drawn from an appropriate range of backgrounds.

3.6 Terms of Reference to include explicit requirement for reporting

Ofgem's provisional thinking is that such a change may inhibit free discourse at expert group meetings and may also lead to increased bureaucracy and expense in administration.

4. Improving the Efficiency of Modification Procedures

Members of the Modification Group on Governance suggested that aspects of the modification procedures could be made more flexible and efficient in the light of the experience of the first few months of Go Live.

4.1 Discussion of Issues in advance of Modification Proposals being Raised

Specifically, it was suggested that Standing Groups or Modification Groups should be able to consider and discuss potential Modification Proposals in advance of these being formally raised through the Modification Procedures. This would be without prejudice to the right of a Party to raise the Modification Proposals at any stage.

One member in favour of this proposition argued that this change would encourage forward thinking and would allow for a more efficient consideration of the issues.

It is Ofgem's provisional view that there are both competition and resource considerations to take into account here. Ofgem is concerned that such a change might simply enable the larger and London based participants to develop modification proposals at the expense of the Balancing and Settlement Company.

4.2 Increased Flexibility of Modification Procedures

Members of the Group were of the opinion that the rules could be made more flexible without prejudice to due process. The distinction between the Definition and Assessment Procedures was said to be unhelpful. It was argued that this is because time better spent on evaluating a proposal is currently taken up in producing a Definition report on a proposal that may often have been sufficiently well-defined by Elexon at the initial written assessment phase.

The suggested solution is that the two parts of the procedure should be conflated and that the Panel ought to be given the flexibility to approve an appropriate programme of work in the circumstance of each individual Modification Proposal.

Ofgem's preliminary view is that the rules as set out in Section F of the BSC provide for a consistent approach to the development of all modification proposals, with fixed timescales and minimum requirements regarding consultation. The effect serves to eradicate or at least limit the occasion for a Party to assert that their modification proposals have been progressed in a less favourable way than others have been. In addition, it is the Ofgem provisional thinking that a separate Definition phase is vital for the avoidance of misunderstanding in that clear parameters are set for the discussions which are to take place in the Assessment phase.

It is Ofgem's view that the Code does provide for such flexibility as is required to meet the exigencies of different circumstances.

4.3 Consultation

One suggestion from the group was that in the interest of efficiency, there should be a reduction in the level of consultation: the specific criticism was that consultation was undertaken too early in the process before critical issues in relation to the process had been defined. As pointed out above, it is Ofgem's view that consultation constitutes the most egalitarian means by which participants make their views known. Given the practical limitations on the right to speak at Panel and Modification Group meetings, Ofgem would interpret any reduction in the level of consultation as an effective distancing of the participants from the modification process.

It is Ofgem's provisional view that re-consultation should be undertaken if material changes arise for a pending modification.

4.4 Panel Recommendations

Some members of the group expressed the opinion that the Panel should not provide a preliminary recommendation prior to the report going out to consultation as the Panel preliminary recommendation might unduly and prematurely influence the responses of the consultees.

Ofgem credits the participants with sufficient independence of mind to provide reasoned responses to consultation.

4.5 Implementation Dates

At present the Code allows the Panel, on the advice of ELEXON, to apply to the Authority for an extension to an implementation date. This facility does not extend to bringing forward implementation dates. Hence it is not presently acceptable for a recommendation with a set implementation be made to the Authority but with an additional recommendation that the modification be implemented sooner if possible.

It is Ofgem's provisional thinking that changes to the code ought to be implemented as soon as is practicable. However, Ofgem acknowledges that the Parties operate in a market and Ofgem recognises the importance of certainty in this regard. It is Ofgem's provisional thinking that any bringing forward of implementation should be only be made after appropriate consultation.

4.6 Determination in respect of elements of a Modification Proposal

The so-called Ofgem cherry-picking ability whereby the Authority could determine in favour of elements of a modification proposal and its alternative. As mentioned above, Ofgem would be wary of any development that might be construed even remotely as distancing Parties from the proposal development process. The process was designed to empower Parties to advance their own improvements to the Code and the onus should be on Parties via consultation and in the Modification groups to deliver fully developed proposals which the Authority can either accept or reject on the basis of their duties under the Electricity Act and on whether the proposal facilitates the applicable BSC objectives.

4.7 Urgent Modification Arrangements

One element of the proposal suggest that request for urgency should go direct to the Authority. It is Ofgem's provisional view that such a change would not be in keeping with the rationale behind the code. Such a move may be construed as in effect by-passing the Panel from the proposal development process and distancing industry from the proposal development process.

4.8 Two mandatory consultations

Ofgem recognises the need for appropriate consultation but is concerned that making two consultations mandatory could create unnecessary bureaucracy and delay for simple modifications that may elicit a unanimous response.

4.9 Guidelines

The Panel considered that guidelines should be established for matters that might otherwise render the BSC too cumbersome. In response some members of the GMG group expressed doubts as to the status of guidelines and their amenability to change. It is Ofgem's provisional view that the concept of guidelines is new to the BSC and that further consultation may be advisable to ensure that parties have the opportunity to comment on this element of the proposal.

Yours sincerely,



David Edward
Head of Electricity Code Development