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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 23<sup>rd</sup> 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,



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