

December 2002

**INITIAL ASSESSMENT OF
MODIFICATION PROPOSAL P112 -
Removing the obligation on new
BSC Parties acceding to the BSC
Framework Agreement to comply
with Section A 2.2.5**

Prepared by ELEXON Limited

Document Reference	P112IR
Version no.	1.0
Issue	Final
Date of Issue	6 December 2002
Reason for Issue	Peer Review
Author	ELEXON

I DOCUMENT CONTROL

a Authorities

Version	Date	Author	Signature	Change Reference
0.1	04/12/02	Kathryn Coffin		For Peer Review
0.2	05/12/02	Kathryn Coffin		For Internal Review
1.0	06/12/02	Kathryn Coffin		For Panel Decision

Version	Date	Reviewer	Signature	Responsibility
0.1	04/12/02	Change Delivery		
0.2	05/12/02	Change Delivery		

b Distribution

Name	Organisation
Each BSC Party	Various
Each BSC Agent	Various
The Gas and Electricity Markets Authority	Ofgem
Each BSC Panel Member	Various
energywatch	energywatch
Core Industry Document Owners	Various

c Intellectual Property Rights and Copyright

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d Document References

1. IPR Litigation Requirements Document;
2. Panel Paper 52/020 - Recommendation to Raise a Modification Proposal: Removing the obligation on new BSC Parties acceding to the BSC Framework Agreement to comply with Section A 2.2.5.

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1 SUMMARY

Modification Proposal P112 'Removing the obligation on new BSC Parties acceding to the BSC Framework Agreement to comply with Section A 2.2.5' (P112), included in Annex 1, was submitted on 27 November 2002 on behalf of the Balancing and Settlement Code Panel ('the Panel') in accordance with Paragraph F 2.1.1(d)(iv) of the Balancing and Settlement Code ('the Code'). P112 was raised following a discussion of paper 52/020 which outlined the requirement for the removal of the obligation on new BSC Parties acceding to the Framework Agreement to comply with the provisions of Paragraph A 2.2.5, as the legal dispute to which this clause refers has now been resolved.

P112 seeks to amend the Code to reflect the fact that the obligations in Paragraph A 2.2.5 are no longer relevant to new Parties acceding to the BSC Framework Agreement.

An initial assessment of P112 has identified that it will only impact the Code, requiring a minor change to Section A to:

- Insert a new paragraph A 2.2.7 stating that the requirements contained in Paragraph A 2.2.5 and all related requirements in the Code shall not apply to new Parties acceding to the Framework Agreement.

No major issues have been identified by this Initial Assessment. However, one minor issue concerning the question of whether current BSC Parties should remain bound by their existing confidentiality undertakings in relation to the IPR Litigation Requirements was identified when drafting the legal text. A commentary on this issue is provided in Section 12 of this report.

On the basis of this Initial Written Assessment, the Panel is invited to:

- a) NOTE the results of the Initial Written Assessment;**
- b) DETERMINE that Modification Proposal P112 should be submitted to the Report Phase in accordance with Paragraph F2.7 of the Code;**
- c) AGREE the Report Phase timetable such that a draft Modification Report should be completed and submitted to the Panel for consideration at their meeting of 16 January 2003;**
- d) AGREE that the draft Modification Report contain a provisional recommendation that P112 should be made with an Implementation Date of 15 Working Days after the day of an Authority decision; and**
- e) AGREE that the date after which the provisions of A 2.2.5 shall no longer apply to new Parties acceding to the Code shall be the proposed Implementation Date of P112.**

2 INTRODUCTION

This Report has been prepared by ELEXON Ltd. on behalf of the Panel, in accordance with the terms of the Code. The Code 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 Code.

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

3 DESCRIPTION OF THE MODIFICATION PROPOSAL

P112 seeks to remove the obligation on new BSC Parties acceding to the Framework Agreement to comply with the provisions of Paragraph A 2.2.5 of the Code. Paragraph A 2.2.5 currently requires that a person wishing to enter into or accede to the BSC Framework Agreement and become a Party to the Code must comply with the requirements set out in the IPR Litigation Requirements document (and related undertakings of confidentiality). The IPR Litigation Requirements document refers to the litigation brought by Optimum Solutions Limited (OSL) against two Pool members (the OSL Claim) regarding alleged misuse of OSL's confidential information.¹ OSL claimed that the system implementing the 1998 Trading Arrangements was designed using confidential information developed by OSL and that its patents would be infringed by the performance of Stage 2 Settlement. There was also a threat that proceedings might be brought against the industry generally. New Parties to the Code were therefore requested to sign the IPR Litigation Document ensuring confidentiality in respect to the dispute.

The breach of confidence action was struck out and there has been no appeal by OSL. OSL subsequently went into liquidation, which is now close to completion, and the patents owned by OSL have recently been purchased from the liquidators by ELEXON Limited. Following resolution of the OSL Claim the contents of the IPR Litigation Requirements document and related confidentiality undertakings are no longer relevant to new Parties acceding to the BSC Framework Agreement.

ELEXON therefore believe that a Modification to the Code, to reflect the fact that compliance with A 2.2.5 is no longer necessary for new Parties, would better facilitate the objective in Condition C3(3)(d) of the Transmission Licence – i.e. promoting efficiency in the implementation and administration of the balancing and settlement arrangements. The removal of the requirement for new BSC Parties acceding to the BSC Framework Agreement to comply with Paragraph A 2.2.5 would reduce the administrative burden on both new Parties wishing to accede and ELEXON's administration of the accession process.

At the meeting of the Panel held on 14 November 2002 ELEXON recommended (Paper 52/020, Reference 2) that a Modification Proposal be raised in accordance with Paragraph F 2.1.1(d)(iv) of the Code, which enables the Panel to raise a Modification to rectify minor inconsistencies, manifest errors or other minor consequential changes within the Code. The Panel agreed that a Modification should be raised and presented to its meeting of 12 December 2002.

A copy of the Modification Proposal can be found at Annex 1 to this report.

4 IMPACT ON BSC SYSTEMS AND PROCESSES

None identified.

¹ Panel members are requested to note that the scope of the background information supplied is necessarily restricted by the confidentiality restraints associated with the litigation.

5 IMPACT ON OTHER SYSTEMS AND PROCESSES USED BY PARTIES

None identified.

6 IMPACT ON DOCUMENTATION

6.1 Impact on Balancing and Settlement Code

A new paragraph, A 2.2.7, will need to be inserted into the Code as follows:

“The requirements contained in Section A 2.2.5 and all related requirements in the Code shall not apply to any person acceding to the Framework Agreement after [date as determined by the BSC Panel]”.

6.2 Impact on Code Subsidiary Documents

None identified.

6.3 Impact on Core Industry Documents

None identified.

7 IMPACT ON OTHER CONFIGURABLE ITEMS

None identified.

8 IMPACT ON ELEXON

- There will be a minor impact on the register of BSCCo obligations maintained by ELEXON's Assurance Department, and it is estimated that half a man day will be required to make the necessary changes.
- There will be a minor impact on ELEXON Strategic Commercial Services who would need to ensure that the OSL litigation clause is removed from any future confidentiality undertakings/contracts. This would become standard practice should P112 be approved.

9 IMPACT ON FINANCIAL ARRANGEMENTS AND BUDGET

None identified.

10 IMPACT ON BSC AGENT CONTRACTUAL ARRANGEMENTS

None identified.

11 PROCESS AND TIMETABLE FOR PROGRESSING THE PROPOSAL

This Initial Assessment indicates that no further work is required to define or assess the proposed amendments. ELEXON therefore recommend that this Modification Proposal be submitted directly to the Report Phase with a provisional recommendation to the Authority that P112 be approved with an Implementation Date of 15 Working Days after the date of an Authority decision. The draft Modification Report, including consultation responses, should be presented to the Panel at their meeting to be held on 16 January 2003.

12 ISSUES

No major issues were identified during this Initial Assessment. However, one minor issue was identified during the drafting of legal text concerning whether current BSC Parties should remain bound by their existing confidentiality undertakings in relation to the IPR Litigation Requirements document. ELEXON has sought legal advice on this issue from the solicitors instructed to defend the OSL claim, and the advice received is that it would be desirable if these undertakings remained in place in part to enable ELEXON to exert continuing control over what information is disseminated regarding the litigation and associated proceedings. Rather than removing these requirements from the Code or applying changes retrospectively, it is therefore proposed that a new paragraph be inserted into the Code stating that the requirements contained in A 2.2.5 shall not apply to new Parties acceding to the Framework Agreement.

ELEXON recognise that there may be some Parties who have recently acceded to the Code but who have not yet signed the confidentiality undertakings as outlined in Paragraph A 2.2.5. The legal text for P112 has therefore been drafted to stipulate a date, to be determined by the Panel, after which Parties acceding to the Code will not be obliged to comply with these requirements. Parties acceding before this date, but who have yet to complete the requirements laid out in Paragraph A 2.2.5, would therefore still be expected to do so.

ELEXON recommend that this date be determined by the Panel to be that proposed as the Implementation Date of P112.

ANNEX 1 – MODIFICATION PROPOSAL

Modification Proposal	MP No: 112 <i>(mandatory by BSCCo)</i>
Title of Modification Proposal <i>(mandatory by proposer):</i>	
Removing the obligation on new BSC Parties acceding to the BSC Framework Agreement to comply with Section A 2.2.5.	
Submission Date <i>(mandatory by proposer):</i> 27 November 2002	
Description of Proposed Modification <i>(mandatory by proposer):</i>	
<p>The Proposed Modification seeks to obviate the obligation on new BSC Parties acceding to the Framework Agreement to comply with the provisions of Section A 2.2.5 i.e giving a confidential undertaking and complying with the requirements of the IPR Litigation Requirements document, whilst ensuring that the undertakings as to confidentiality remain in place in relation to existing BSC Parties.</p> <p>To give effect to the proposal and upon recommendation by ELEXON, the BSC Panel (in its capacity as Proposer), suggests by way of legal text the insertion of a new paragraph BSC Section A 2.2.7 as follows:</p> <p><i>"The requirements contained in Section A 2.2.5 and all related requirements in the Code shall not apply to any person acceding to the Framework Agreement after [date as determined by the BSC Panel]."</i></p>	
Description of Issue or Defect that Modification Proposal Seeks to Address <i>(mandatory by proposer):</i>	
<p>Section A 2.2.5 of the BSC requires that a person wishing to enter into or accede to the BSC Framework Agreement and become a Party to the BSC must comply with the requirements set out in the IPR Litigation Requirements document (and related undertakings of confidentiality). The dispute to which this document refers has now been resolved and therefore it is recommended that the BSC be amended to reflect the fact that the obligations in Section A 2.2.5 are not relevant to new Parties acceding to the BSC Framework Agreement.</p> <p>ELEXON has taken legal advice from the solicitors instructed to defend the OSL claim on the question of whether current BSC Parties should remain bound by their existing confidentiality undertakings in relation to the IPR Litigation Requirements document. The advice received is that it would be desirable if these undertakings remained in place in part to enable ELEXON to exert continuing control over what information is disseminated about the litigation and associated proceedings.</p>	
Impact on Code <i>(optional by proposer):</i>	
<p>Insertion of a new paragraph BSC Section A 2.2.7 as follows:</p> <p><i>"The requirements contained in Section A 2.2.5 and all related requirements in the Code shall not apply to any person acceding to the Framework Agreement after [date as determined by the BSC Panel]."</i></p>	
Impact on Core Industry Documents <i>(optional by proposer):</i>	
Not applicable	

Modification Proposal	MP No: 112 <i>(mandatory by BSCCo)</i>
Impact on BSC Systems and Other Relevant Systems and Processes Used by Parties <i>(optional by proposer):</i> Not applicable	
Impact on other Configurable Items <i>(optional by proposer):</i> Not applicable	
Justification for Proposed Modification with Reference to Applicable BSC Objectives <i>(mandatory by proposer):</i> In the proposer's view, the Proposed Modification would better facilitate the objective in Condition C3 (3)(d) of the Transmission Licence i.e promoting efficiency in the implementation and administration of the BSC. The removal of the requirement for new BSC Parties acceding to the BSC Framework Agreement to comply with Section A 2.2.5 would reduce the administrative burden on both new Parties wishing to accede and ELEXON's administration of the accession process.	
Details of Proposer: Name: BSC Panel Organisation: Telephone Number: Email Address:	
Details of Proposer's Representative: Name: Modification Secretary Organisation: ELEXON Telephone Number: 020 73804337 Email Address: chris.rowell@ELEXON.co.uk	
Details of Representative's Alternate: Name: Organisation: Telephone Number: Email Address:	
Attachments: NO If Yes, Title and No. of Pages of Each Attachment:	