Summary of responses from BSC Parties on consultation paper dated 31 July 2002 on the Balancing and Settlement Code Section P6 – Past Notification Errors

List of Respondents

AEP Energy Services Ltd

British Energy plc (on behalf of British Energy Power and Energy Trading, British Energy Generation and Eggborough Power Ltd)

Centrica (on behalf of British Gas Trading Ltd, Accord Energy Ltd, Centrica Peterborough Ltd, Centrica King's Lynn Ltd and Regional Power Generators Ltd)

Corby Power Limited

Derwent Cogeneration Ltd

Edison Mission Energy (on behalf of First Hydro Company and Edison First Power).

Electricity Direct (UK) Limited

Entergy-Koch Trading Limited

Innogy plc

London Electricity Group (on behalf of itself and London Electricity, Jade Power Generation, Sutton Bridge Power and West Burton Power)

NEDL/YEDL

Powergen plc (on behalf of itself and Powergen Retail Limited, Diamond Power Generation Limited and Cottam Development Centre Limited)

Scottish and Southern plc (on behalf of Scottish and Southern Energy, Southern Electric, Keadby Generation Ltd and SSE Energy Supply Ltd)

Scottish Power plc (on behalf of Scottish Power UK plc, Scottish Power Generation Limited, Scottish Power Energy Trading Limited, Scottish Power Energy Retail Limited and Emerald Power Generation Limited).

TotalFinaElf Gas and Power Ltd

TXU Energy UK Trading (on behalf of all 21 TXU Europe BSC Parties)

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DRAFT

AEP's response to Balancing and Settlement Code Section P6 – Past Notification Errors – Consultation Paper

AEP welcomes the opportunity to comment on the proposed procedures.

Question 1 – Do you agree with the proposed model for a decision making body? If not, please suggest an alternative body and explain why this better meets the requirements of the Code and applicable law, in your view.

We welcome Elexon's proposal to establish a BSC Panel Committee which is independent of any particular interest groups. However we have a number of concerns. Firstly we believe 3 members to be too small, particularly if claims will be determined by a majority vote. Secondly we do not believe that familiarity with the electricity sector is required, given the detailed knowledge about operations that is required and the fact that any panel member will need to learn about this from scratch, we believe an expertise in operational risk or operations or risk would be more appropriate. Thirdly we believe that it would be extremely difficult to find two industry insiders without any particular affiliation. In this area we are particularly concerned about using consultants who may be biased to large companies who are likely to employ their services in future.

We propose that the panel consist of 5 members, perhaps with 2 "spares" one of them with judicial or arbitral experience who would be appointed chairman and the other 4 consisting of a selection of operational or risk experts. Claimants would be able to choose which 4 members from 6 available plus the Chairman would decide their claim. We suggest that Elexon publish the proposed panel members, their area of expertise and their current employers and that affected parties are given the opportunity to comment in confidence on their suitability.

Question 2 – Do you agree with the proposed approach for gathering information to assist in the assessment of prudence? If not, please identify which elements of the approach are inappropriate, and identify additional elements that better meet the requirements.

We agree that an industry survey is appropriate, although we have reservations about how much any investigation can achieve, especially when trying to keep costs down. We have concerns about the use of independent expert advice where Elexon may use consultants who are subsequently likely to work for large parties. We believe that the industry should have an opportunity to comment on any expert advice that is provided. We would prefer that a panel of operational experts from those parties most affected by the claims could be called upon to provide advice.

Question 3 – Assuming that the Industry Survey is part of the process (see previous question) do you agree that the request for evidence from Claimants

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should take place after the results of the Industry Survey have been published? If not, what would you propose and why?

We agree with the proposal although we would prefer the panel of experts to assess the responses before publication of the summary and we continue to be concerned about how exactly any investigation could hope to establish whether systems and processes in place so long ago were prudent.

Question 4 – Do you agree with the model proposed for the investigation of claims? If not, please identify which elements of the approach are inappropriate, or identify additional elements that better meet the requirements.

We agree with the model subject to our comments. We strongly believe that if information is critical to a claim's acceptance then the company should not be able to deem it commercial in confidence. All critical information should be made public. We also have reservations about how the process is paid for set out in "other issues" below.

Question 5a – Do you agree with other interested parties should be given the opportunity to comment in writing on claims? If not why not? (b) Does the process as outlined above go far enough, or should these parties be given the right to attend a face to face meeting with the Committee where it has an interest (or an interest above a given threshold) in the outcome of the claim? If you think a meeting is required, why? How could this process be managed efficiently, bearing in mind that all Trading Parties will be affected by rectification of a Past Notification Error, to a greater or lesser extent.

We agree that interested parties should be given the opportunity to comment in writing on claims. We agree that parties with an interest in the outcome of the claim above a certain threshold should be given the right to attend a face to face meeting with the Committee. We believe that transparency and consultation wherever possible is the best principle – it maintains confidence in the process and reduces the cost of bringing in "experts".

Question 6 – The suggested process for investigating and determining claims is based on an inquisitorial, rather than adversarial model. Do you agree that this is the most appropriate model? If not, why not? If you would prefer an adversarial model, should claimants and other interested parties be given the right to a full hearing in front of the Committee? How should this process be managed?

We prefer the inquisitorial approach.

Question 7 – Do you agree that the suggested process is appropriate? If not please identify which elements of the suggested procedures are inappropriate, or identify alternative or additional elements that better meet the requirements of the Code and applicable law?

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We have no suggestions for improvement in this area at this time.

Question 8 – The process must comply with Section P6 and the requirements of natural justice. However, within these confines, there are cost and timetable issues to be borne in mind. Are there any aspects of the process that could sensibly be removed, and why? Or should the process be bolstered up in any way, and why?

We have no suggestions for improvement in this area at this time.

Question 9 – Summary Question – In light of your responses to the questions, do you support the process as outlined in the Paper? If not what alternative or additional features must the process have in order to comply with Section P6 and the requirements of natural justice?

We support the process subject to our comments.

Other issues

We remain particularly concerned about the cost of this process above £5000 per claim being smeared across the industry. The £5000 charge was originally levied to cover the cost of administration. Now it is evident that this cost will be much higher we believe this issue should be revisited. Claimaints should cover the real cost of their claim.

Balancing and Settlement Code Section P6 – Past Notification Errors – Consultation

Question 1: Do you agree with the proposed model for a decision-making body? If not, please suggest an alternative body and explain why this better meets the requirements of the Code and applicable law, in your view?

British Energy agrees with the proposed model for a decision-making body. The independence of the body will help promote fair and just decisions, and the inclusion of a legal professional would help ensure the BSC provisions are fully and accurately interpreted and followed.

The BSC Panel would welcome any suggestions which Parties may have as to suitable candidates to provide expert advice to the PNE Committee, or what the criteria might be for a suitable candidate.

British Energy hopes that experts chosen to give advice to the PNE Committee will be appropriately qualified and will prove to be impartial to all claimants and parties affected by the claims.

Question 2: Do you agree with the proposed approach for gathering information to assist in the assessment of prudence? If not, please identify which elements of the approach are inappropriate, and identify additional elements that better meet the requirements.

British Energy believes that gathering appropriate information using an industry questionnaire will help inform committee decisions. BE offers to assist in the preparation of appropriate questions.

Question 3: Assuming that the Industry Survey is part of the process (see previous question) do you agree that the request for evidence from Claimants should take place after the results of the Industry Survey have been published? If not, what would you proposed and why?

British Energy suggests that Claimants are not asked for evidence until the results of the Industry Survey are known. The results will provide a measure of good industry practice which will assist Claimants in seeking to demonstrate that their own systems and processes were prudent.

The Consultation Paper indicates that a Claimant must submit evidence, and that the Panel Secretary will publish a short note which will presumably set out, among other things, what evidence is needed. It seems to British Energy that time will be saved and the PNE Committee greatly assisted if that note sets out far more fully than the Consultation Paper the matters which the Claimant's evidence will need to cover.

The proposed note will need to make clear that the Claimant's evidence must be capable of showing that the Claimant has a claim. The ingredients of a claim are set out below. If the evidence does not cover every single one of those ingredients the PNE Committee has no power to order a rectification.

The proposed Note will also need to point out is that the Claimant must establish each of the ingredients of the claim by evidence. Mere assertion will not do; and mere assertion will not gain force simply by being repeated. Evidence is likely to mean evidence from the Claimant's records.

To get a claim before the PNE Committee, the Claimant has to demonstrate 'a Past Notification Error'. This requires the Claimant to adduce evidence to establish

- a notification of, or a failure to notify (BSC P6.1.1(b)(ii)), Energy Contract Volume Data or Metered Volume Reallocation Data (P6.1.1(a));
- that the notification or failure to notify was by a Volume Notification Agent or relevant Contract Trading Party (P6.1.1(a));
- that the relevant contract Trading Parties had, at that time, a demonstrably settled and shared intention to notify a different amount (P6.1.1(c)(i));
- that the different amount was ascertained (the evidence will need to show what the different amount was, that the intention to notify it was settled before the notification was made, that the intention was shared, and with whom it was shared) (P6.1.1(c)(i));
- that it is clear that a mistake occurred in giving effect to that intention (the evidence will need to show what the mistake was) (P6.1.1(c)(ii);
- that the claim was notified by the cut-off date (P6.2.1);
- that the relevant Contract Trading Party or relevant Volume Notification Agent had in place prudent systems and processes (which is likely to involve showing that prudent systems and processes would not have avoided he error) (P6.4.7(a));
- that the relevant Contract Trading Party or relevant Volume Notification Agent promptly took all appropriate steps to reverse the effects of the error (which is likely to involve showing that the systems and processes included arrangements for drawing such errors to the Claimant's attention promptly) (P6.4.7(b)(i));
- that, if there was a repetition of the error, the relevant Contract Trading Party or the relevant Volume Notification Agent took all appropriate steps to avoid the repetition (P6.4.7(b)(ii)).

In addition, the claim must be accompanied by a statement from the other relevant Contract Trading Party and the relevant Volume Notification Agent (P6.2.3). The Claimant, the other Contracting Party and the relevant Volume Notification Agent must confirm that the evidence is complete and not misleading (P6.4.4(c)). Furthermore, if challenged, the Claimant must be able to show that the error was not rectified before Gate Closure, and that the rectified Volume Notification would not have been invalid or treated as rejected (P6.4.6).

These are demanding requirements for the Claimant to meet; that it is why it is so desirable that the Claimant be made fully aware of them before the Panel Secretary takes the next step in the procedure by writing to the Claimant requesting the evidence.

Question 4: Do you agree with the model proposed for the investigation of claims? If not, please identify which elements of the approach are inappropriate, or identify additional elements that better meet the requirements.

Overall BE supports the approach suggested in the consultation and has commented where appropriate.

Question 5: a) Do you agree that other interested parties should be given the opportunity to comment in writing on the claims? If not why not?
b) Does the process as outlines above go far enough, or should these parties be given a right to attend a face to face meeting with the Committee where it has an interest (or an interest above a given threshold) in the outcome of the claim? If you think a meeting is required, why? How could this process be managed efficiently, bearing in mind that all Trading Parties will be affected by rectification of a Past Notification Error, to a greater or lesser extent?

The Consultation Document proposes that the PNE Committee makes provisional findings, and submits these to the Claimant before making the final decision. If the provisional findings are favourable to the Claimant, the Claimant may have nothing to say; if they are unfavourable, the Claimant is given in effect the opportunity of conducting an appeal against the conclusions. On the other hand, provisional findings favourable to the Claimant are likely to be adverse to other BSC Parties. Yet they are to be deprived of the opportunity of commenting. What the Consultation Paper proposes is highly unusual. And it is highly unusual because it is unfair. In a process such as this that unfairness is likely to amount to illegality. We strongly urge the Panel and Elexon to remove this taint of illegality. Our preferred option is to remove any power to show provisional findings to any BSC Party.

Question 6: The suggested process for investigating and determining claims is based on an inquisitorial, rather than an adversarial model. Do you prefer an adversarial model, should claimants and other interested parties be given the right to a full hearing in front of the Committee? How would this process be managed?

Overall BE supports the approach suggested in the consultation and has commented where appropriate.

Question 7: Do you agree that the suggested process is appropriate? If not, please identify which elements that better meet the requirements of the Code and applicable law?

Overall BE supports the approach suggested in the consultation, subject to comments on detail made elsewhere in this response.

Question 8: The process must comply with Section P6 and the requirements of natural justice. However, within these confines, there are costs and timetable issues to be borne in mind. Are there any aspects of the process that could sensibly be removed, and why? Or should the process be bolstered up in any way, and why?

Overall BE supports the approach suggested in the consultation. While keen that central administrative costs should be carefully controlled, this issue is of significant importance and materiality and should be dealt with accordingly.

Question 9; Summary Question: In light of your response to the questions, do you support the process outlines in the Paper? If not what alternative or additional features must the process have in order to comply with Section P6 and the requirements of natural justice?

BE supports the approach suggested in the consultation, subject to the comments on detail made above.

taking care of the essentials

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23 August 2002

Linda Coe
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Dear Ms Coe

BSC Section P 6: Past Notification Errors - Consultation Paper
Centrica welcomes the opportunity of responding to this consultation. This response is made on behalf of British Gas Trading Ltd, Accord Energy Ltd, Centrica Peterborough Ltd, Centrica King's Lynn Ltd and Regional Power Generators Ltd.

Please find below the answers to the questions posed in the consultation paper.

Question 1: Do you agree with the proposed model for a decision making body? If not, please suggest an alternative body and explain why this better meets the requirements of the Code and applicable law, in your view.
In principle, we agree with the proposed model for a decision making body. However, please note that we consider that:

- in the interests of expediency it would be beneficial if the sessions of the PNE Committee were closed, provided that the parameters that define the Committee's work are known;
- it is essential that the industry has confidence that the PNE Committee is able to carry out its role effectively, without intervention at every stage from industry participants. Such intervention would invariably extend the process unnecessarily;
- it may prove difficult to find two people who are familiar with the electricity sector but are truly independent of any interests; and
- it is essential that the Chairman is the member with the judicial/arbitral experience.

Question 2: Do you agree with the proposed approach for gathering information to assist in the assessment of prudence? If not, please identify which elements of the approach are inappropriate, and identify additional elements that better meet the requirements.
We agree with the proposed approach for information gathering although believe that there will be the same difficulties as noted above; i.e. that it will prove difficult to obtain impartial expert advice.

Question 3: Assuming that the Industry Survey is part of the process (see previous question) do you agree that the request for evidence from Claimants should take place after the results of the Industry Survey have been published? If not , what would you propose and why?
We do not believe the survey should be published prior to receipt of claim submissions as this may unduly influence the content of any claim made. We would suggest that claimants make submissions and answer the industry survey simultaneously and that there is no opportunity to

amend or supplement submissions after the results of the survey have been published. We believe this approach would be the most efficient and cost effective one, which is important when considering the potential deficit in costs versus administration fees recovered.

Question 4: Do you agree with the model proposed for the investigation of claims? If not, please identify which elements of the approach are inappropriate, or identify additional elements that better meet the requirements.
Yes, we support this model.

Question 5: (a) Do you agree that other interested parties should be given the opportunity to comment in writing on the claims? If not, why not?
(b) Does the process as outlined above go far enough, or should these parties be given a right to attend a face to face meeting with the Committee where it has an interest (or an interest above a given threshold) in the outcome of the claim? If you think a meeting is required, why? How could this process be managed efficiently, bearing in mind that all Trading Parties will be affected by rectification of a Past Notification Error, to a greater or lesser extent?
On the basis that all parties have an interest in every claim to the extent that a claim will impact on the redistribution of RCRC, we consider that the assessment phase should not involve comment, in writing or in person, from interested parties. Otherwise, the process becomes over complicated and unnecessarily time consuming and goes far beyond the process set out in P6.4.4(e).

Question 6: The suggested process for investigating and determining claims is based on an inquisitorial, rather than an adversarial model. Do you agree that this is the most appropriate model? If not, why not? If you would prefer an adversarial model, should claimants and other interested parties be given the right to a full hearing in front of the Committee? How would this process be managed?
We consider that an adversarial approach to this exercise is unnecessary provided that all claims are dealt with in a consistent and transparent manner as described above.

Question 7: Do you agree that the suggested process is appropriate? If not, please identify which elements of the suggested procedures are inappropriate, or identify alternative or additional elements that better meet the requirements of the Code and applicable law?
We agree the suggested process is appropriate.

Question 8: The process must comply with Section P6 and the requirements of natural justice. However, within these confines, there are cost and timetable issues to be borne in mind. Are there any aspects of the process that could sensibly be removed, and why? Or should the process be bolstered up in any way, and why?
We would question the need to publish all the submissions. Any comments from interested parties on claims could be made on the assessment reports provided by the PNE Committee.

Question 9: Summary Question: In light of your responses to the questions, do you support the process as outlined in the Paper? If not what alternative or additional features must the process have in order to comply with Section P6 and the requirements of natural justice?
Subject to the above comments, we support the process as outlined in the Paper.

We hope these comments are helpful. Should you wish to discuss any of the issues further please do not hesitate to contact me on the above number.

Yours sincerely

Danielle Lane
Transportation Analyst

21 August 2002

BSC Section P6
Past Notification Errors – Consultation Paper
Comments by Derwent Cogeneration Ltd. ("DCL")

These comments are provided in response to the Elexon Consultation Paper dated 31 July 2002.

Question 1 – Do you agree with the proposed model for a decision making body?

DCL agrees with the proposed model. Given the financial background to claims made under Modification P37, independence of the Committee is a key issue. We therefore see it as important that candidates for the Committee must not be currently employed either directly or as consultants to any BSC Signatory and must declare any past, present or anticipated associations with any party affected by a claim.

Question 2 – Do you agree with the proposed approach for gathering information to assist in the assessment of prudence?

We agree with the principle of an Industry Survey. This should be kept simple and objective as far as possible by use of a questionnaire approach to avoid, for instance, the need to analyse lengthy and detailed technical specifications. The survey should include contextual information regarding the relative size of the Party, e.g. annual electricity production/consumption and/or number of ECVN/MVRN processed per year. The published results of the survey should be kept anonymous to ensure candour and honesty.

Question 3 – Assuming that the Industry Survey is part of the process do you agree that the request for evidence from Claimants should take place after the results of the Industry Survey have been published?

The request for evidence should occur after the results of the Industry Survey are published.

Question 4 – Do you agree with the model proposed for the investigation of claims?

In general DCL agrees with the proposed model, however we do not agree with the need for a further consultation phase, i.e. the publication of written submissions or the acceptance of comments from other interested parties on individual claims (see answer to question 5).

Question 5 – Do you agree that other interested parties should be given the opportunity to comment in writing on the claims?

(a) Interested Parties have had ample opportunity to debate the issues of principle surrounding P37 and these comments have been taken into account by Ofgem in reaching their decision to approve the Modification. Within the proposed process, the Industry Survey will again give interested parties opportunity to influence the setting of the series of hurdles which claimants will have to satisfy in terms of robustness of systems etc. It is then for an independent panel to form a view as to whether individual cases satisfy the requirements of P37 as so defined, and it is not necessary for third parties to be involved in this latter stage of the process.

If it is deemed that, despite the above, third parties can make representations then as a minimum they must be limited to BSC signatories (including subsidiaries and parents) and exclude individuals or groups representing individuals to prevent a flood of supporting and dissenting opinion that will add nothing to the process. Interested Parties that wish to submit comments on claims must reveal the financial implications that they (or subsidiaries, parents, or groups) would incur in the event that the individual claim were to succeed (Elexon could draw up a Schedule of RCRC beneficiaries relating to each claim). This is an important point in Natural Justice as it goes to establishing motive.

(b) Interested/Third parties should not have the right to a face to face meeting with the Committee as it is unlikely that any merit would be gained from this that cannot be adequately expressed in a written submission. It is important to recognise that allowing one party access requires all parties to have access. It should be expected from the outset that those who have enjoyed positive net RCRC positions as a result of total claims will be incentivised to provide submissions urging grounds for dismissal of the claims whilst those who are in the opposite camp will be incentivised to provide written submissions urging acceptance of the claim. Each claim can be multiplied by the total number of BSC signatories in terms of expected number of submissions. See Question 8.

Question 6 – Do you agree that an inquisitorial model is the most appropriate for investigating and determining claims?

The model proposed is a reasonable effort to ensure parity for all. It is however cumbersome and will be both costly and time consuming, and, if its administration is allowed to get out of hand, will run the risk of not achieving the BSC objective of efficient implementation and administration of the balancing and settlement arrangements.

It is important to note that a situation has been created where every BSC Party is either a potential winner or potential loser and, more importantly, that there is no incentive on the current winners to find a solution. All efforts need to be made to streamline the process by use of the independent panel as focus rather than opening up a series of multi-lateral cross industry debates on each individual claim which can only prolong, potentially frustrate and add cost.

Question 7 – Do you agree that the suggested process is appropriate?

Claims below a certain monetary threshold (linked claims to be assessed as one claim in terms of value) should be dealt with in a summary fashion utilising the resources of Elexon. Provided these claims meet the conditions of Section P6 to a reasonable standard they should be approved irrespective of when, how or why they occurred, remembering that even successful claims carry a substantial penalty which serves in the interests of Natural Justice. Only in the event that such claims fail should they be referred to the Panel. This will greatly improve the process in terms of time and money.

Question 8 – Are there any aspects of the process that could sensibly be removed, or alternatively be bolstered up in any way?

Considerable time and resources have already been exerted in reaching a decision to direct Modification P37. Interested Parties who wish to make submissions about claims have had ample opportunity to voice both favourable and contrary views to the merits of P37. Attempts to delay or bog down the process go against 'Natural Justice' and should be discouraged. In order to assist in controlling this area, a fee of £5,000 should be payable by any Interested Party (including subsidiaries, parents and groups) wishing to make a written submission regarding a claim where that Interested Party (inclusive) has a financial interest in the outcome of that claim.

Question 9 – Do you support the process as outlined in the Paper?

Given the above comments, DCL are generally in support of the process outlined in the Paper.

Edison Mission Energy's response to Consultation on BSC section P6 - Past Notification Errors

Initially we would like to dispute some of the numbers on page 1 of your consultation document relating to the potential materiality of the PNE claims.

Our calculations are that, if all the claims were to be accepted, the maximum total value of imbalance charges affected is £46M - this amount would be returned to the Parties involved and would reduce RCRC for all Parties. The 20% penalty would reclaim a maximum of £12.6M from the Parties involved - this would then be re-distributed to all Parties. Therefore there would be a maximum of about £33M of re-distributed cash.

We calculate only 8 claims as having a value above £1M, that no individual claim has a value above £9M and only two claims (18 and 163) have a value of above £4M.

In arriving at these figures we made the following assumptions:

- The volumes published in the Elexon spreadsheets (or metered volumes for MVRNA claims) were used as a basis of calculation, together with the SBP and SSP values.
- Each claim (or grouped collection of claims) results in one party receiving SBP rebates and the other paying back SSP receipts for the volume involved in each settlement period (i.e. a party never moves between being long and short as a result of the approval of a claim, or group of claims).
- Claims are grouped for the above calculations if they include the same two parties on the same settlement periods (e.g. the Scottish Power claims).
- The penalty is calculated by claim (not group of claims), and again it is assumed that one party receives SBP rebates and the other pays back SSP receipts for the volume involved in each settlement period. A party making a net gain will pay the penalty. This is in accordance with the BSC and will substantially increase the penalty (particularly for Scottish Power) above what it would have been had the penalty been calculated on a group of claims.
- An adjustment is made for the three-way nature of the Innogy-Npower-Yorkshire claims, where the net effect on Innogy is zero (but they do incur a penalty).
- The volumes for the SSE claim of 5 April 2001 have been halved. This is because SSE have obviously (by reference to the S0142 settlement report) filled in the form with double the true volumes (MW rather than MWh?). It is still assumed that this claim is approved (with the halved volumes), although in reality it might by rejected for this reason, or if approved with the double volumes would not result in a reduction of imbalance costs to SSE.

Responses to specific questions

Question 1
We agree with the proposed model for the decision making body. However we would prefer that the statement that two people should 'have *some* familiarity with the electricity sector' should stipulate a more detailed familiarity of the operation of the electricity markets under NETA.

Question 2
We are happy with the use of an Industry Survey and Expert Advice to collect information in the assessment of prudence. The reference to systems put in place at Go-live may not be sufficient for all claims as many do not relate to the period close to Go-Live. For parties entering the market after Go-Live, it might be expected that their initial systems should be more robust, due to the software developers having more time to refine their products.

Question 3
This is reasonable. As Parties had the opportunity to submit evidence with the initial claims, any such evidence should also be taken into account and perhaps be viewed as being of higher worth than any later evidence that may be modifed as a result of the industry survey.

Question 4
We agree with the proposed model. We recognise that expert advice relating to software systems may be required, and believe that a fair way of assessing this must be found. We are concerned that independent experts (i.e. not from the Parties involved) are most likely to be from the software providers, who may have an interest in casting the blame for errors onto the operators of the software rather than admitting a deficiency of their own.

Question 5
a) Yes - other parties will be affected through RCRC so should be able to comment. They may also have valid comments relating to the same systems.
b) Parties should be able to include in their comments a request for a face-to-face meeting. Such meetings could reasonably group together claims in the same way as Modification P84 (thus keeping the potential number of meetings to a manageable level). Such open meetings need only be held if there is sufficient interest, and it might be possible to hold a number of them in series on the same day.

Question 6
We would prefer the inquisitorial nature proposed, as the assessment of claims should be based on the gathering of the necessary information. If the meetings of Question 5 were held, these might provide a forum for the claimant to answer any more adversarial comments from other Parties.

Question 7
The process is, on the whole, appropriate. The paragraphs on '*Assessment by PNE Committee'* rightly state that the PNE Committee should assess the prudence of systems and processes. It is also important that they should be satisfied that the Parties identified the error at an early opportunity (given the reports they were receiving) and took appropriate steps to rectify errors promptly.

Question 8
We would prefer that the process could be completed more quickly, but recognise that thorough assessment is more important. As far as the costs are concerned there may be some opportunity for the fee receipts to increase above 30*£5000 if the panel do not approve all claim linkages - for example if a repeated act or omission of a person is made, this does not constitute claims linkage under P6.2.6.

Question 9
Other than the points mentioned above, we support the assessment process as outlined.

Mark Edwards
Edison Mission Energy

From: **Gareth Swales [SMTP:Gareth.Swales@electricity-direct.co.uk]**
Sent: Thursday, August 01, 2002 10:52 AM
To: Communications
Subject: RE: BSC section P6 - Past Notification Errors

Hello

With regards to the Consultation paper on Past Notification Errors.

Firstly let me thankyou for allowing Electricity Direct (UK) Limited to respond to the consultation. Overall we are in agreement with the contents of the paper but would like to make reference to Question 8

"Question 8:
The process must comply with Section P6 and the requirements of natural justice.
However, within these confines, there are cost and timetable issues to be borne in mind.
Are there any aspects of the process that could sensibly be removed, and why? Or should
the process be bolstered up in any way, and why?"

This process is a one off process and is to only benefit those parties that have made a claim. Therefore the costs (i.e. the deficit) should be born by those parties using this 'one off service' and not the industry.

Kind Regards

Gareth Swales
Electricity Direct (UK) Limited

Balancing and Settlement Code Section P6 – Past Notification Errors Consultation Paper

From: Chris Leeds

Date: 22/08/02

Responding on Behalf of BSC Party: Entergy Koch Trading Europe

Question 1:
Do you agree with the proposed model for a decision making body? If not, please suggest an alternative body and explain why this better meets the requirements of the Code and applicable law, in your view.

Yes

Question 2:
Do you agree with the proposed approach for gathering information to assist in the assessment of prudence? If not, please identify which elements of the approach are inappropriate, and identify additional elements that better meet the requirements.

Yes

Question 3:
Assuming that the Industry Survey is part of the process (see previous question) do you agree that the request for evidence from Claimants should take place after the results of the Industry Survey have been published? If not, what would you propose and why?

Yes

Question 4:
Do you agree with the model proposed for the investigation of claims? If not, please identify which elements of the approach are inappropriate, or identify additional elements that better meet the requirements.

Yes

Question 5:
(a) Do you agree that other interested parties should be given the opportunity to comment in writing on the claims? If not, why not?

Yes

(b) Does the process as outlined above go far enough, or should these parties be given a right to attend a face to face meeting with the Committee where it has an interest (or an interest above a given threshold) in the outcome of the claim? If you think a meeting is required, why? How could this process be managed efficiently, bearing in mind that all Trading Parties will be affected by rectification of a Past Notification Error, to a greater or lesser extent?

Part 1Yes
Part 2 No

Question 6:
The suggested process for investigating and determining claims is based on an inquisitorial, rather than an adversarial model. Do you agree that this is the most appropriate model? If not, why not? If you would prefer an adversarial model, should claimants and other interested parties be given the right to a full hearing in front of the Committee? How would this process be managed?

Yes

Question 7:
Do you agree that the suggested process is appropriate? If not, please identify which elements of the suggested procedures are inappropriate, or identify alternative or additional elements that better meet the requirements of the Code and applicable law?

Yes

Question 8:
The process must comply with Section P6 and the requirements of natural justice. However, within these confines, there are cost and timetable issues to be borne in mind. Are there any aspects of the process that could sensibly be removed, and why? Or should the process be bolstered up in any way, and why?

No

Question 9: Summary Question:
In light of your responses to the questions, do you support the process as outlined in the Paper? If not what alternative or additional features must the process have in order to comply with Section P6 and the requirements of natural justice?

Yes

Innogy's Response to Elexon's Consultation Paper

Decision Making Body

Question 1:
Do you agree with the proposed model for a decision making body? If not, please suggest an alternative body and explain why this better meets the requirements of the Code and applicable law, in your view.

We are in agreement with the general scope and framework for the decision making body that has been proposed. However, it would be preferable to extend its size to 5 members to enable the inclusion of the range of necessary expertise and experience that is likely to be required to perform the role envisaged in Clause P6. Our preference would be for a PNE committee which was a "TDC look-alike", possibly supplemented by some expertise from the PAB. An alternative to this approach would be to establish an 'expert group' under 'PAB rules' to support the PNE Committee by assessing claims and making recommendations regarding decisions. This would have the merit of avoiding the publication of sensitive information, which could prejudice claimants' ability to make their case reasonably.

Prudence

Question 2:
Do you agree with the proposed approach for gathering information to assist in the assessment of prudence? If not, please identify which elements of the approach are inappropriate, and identify additional elements that better meet the requirements.

We do not believe the full survey of participants' systems that is contemplated by the process is either necessary or relevant. It will prove excessively costly to conduct and result in information that is likely to be superficial and of dubious relevance and is unlikely to produce an effective benchmark. The test of whether the claimant had prudent systems and processes in place is qualified by the circumstances then prevailing. Such circumstances will generally pertain to the position of the claimant rather than the market at large, which makes the proposed survey of little relevance.

It also our view that the requirement in P6.4.4 (b)(i) was intended to apply to parties affected by the claim rather than all BSC Parties. Our interpretation was that "each" referred to the Trading Parties involved and their Volume Notification Agents, since paragraph P6.4.7 refers to whether *"the relevant Contract Trading Party"* had or did certain things. Another Trading Party could legitimately argue that a request for such information was not reasonable, and this would have the consequence that publishing information about the systems of a Contract Trading Party or Agent for which the request was reasonable could be held to unfairly discriminate.

Rather than undertake an "Industry survey" it would be better to concentrate on getting relevant evidence from claimants, and assessing this on a confidential basis. This would avoid conflicts between the need to provide sufficient information to satisfy the Panel/Committee, issues of commercial sensitivity and the requirement to "confirm to the Panel that the evidence and information provided are complete and not misleading" (Paragraph P6.4.4(c)(ii)). Such conflict would of itself seem to be contrary to the principles of natural justice.

Procedure

Question 3:
Assuming that the Industry Survey is part of the process (see previous question) do you agree that the request for evidence from Claimants should take place after the results of the Industry Survey have been published? If not, what would you propose and why?

As we have argued above we do not believe the Industry Survey to be either necessary or appropriate. However, if it were to be undertaken then claimants should be given the opportunity to review their positions in the light of the outcome of the survey. There would be little point in incurring further expense on processing individual claims if the survey established principles that a claimant could not meet.

Notwithstanding this claimants could be asked to provide outline descriptions of incidents and relevant systems and processes prior to the outcome of any survey if this were beneficial to the overall timetable.

Question 4:
Do you agree with the model proposed for the investigation of claims? If not, please identify which elements of the approach are inappropriate, or identify additional elements that better meet the requirements.

Although the proposed format for the factual matrix looks reasonably comprehensive, the idea that this would then be published seems wholly inappropriate. The BSC deliberately places trading process risks on participants. Confidentiality of 'know-how' about processes for managing these risks is clearly a key factor in maintaining competitive advantage and therefore the value of investing in better systems. The idea of publishing details not only of errors but also of processes of all participants appears to be contrary to both Natural Justice and common sense.

Furthermore this "transparency" is quite the opposite of the confidentiality that has been adopted for Trading Disputes and PAB, and for no apparent reason. What is needed is transparency of process and the principles/basis on which decisions are made, not of the data and sensitive information involved. It is wholly inappropriate for commercially sensitive information concerning systems and processes and details of individual incidents to be published. In any case this may be precluded by commercial contracts for many

participants. The evidence should be considered confidentially by Elexon and the PNE Committee.

Question 5:
(a) Do you agree that other interested parties should be given the opportunity to comment in writing on the claims?
If not, why not?

(b) Does the process as outlined above go far enough, or should these parties be given a right to attend a face to face meeting with the Committee where it has an interest (or an interest above a given threshold) in the outcome of the claim? If you think a meeting is required, why? How could this process be managed efficiently, bearing in mind that all Trading Parties will be affected by rectification of a Past Notification Error, to a greater or lesser extent?

All Parties might reasonably be consulted on issues of principle (or perhaps given illustrative examples to help establish principles), but details of individual cases should be kept confidential. It may be helpful to have a single forum where issues of principle can be raised and discussed with the PNE Committee by all Contract Trading Parties.

Question 6
The suggested process for investigating and determining claims is based on an inquisitorial, rather than an adversarial model. Do you agree that this is the most appropriate model? If not, why not? If you would prefer an adversarial model, should claimants and other interested parties be given the right to a full hearing in front of the Committee? How would this process be managed?

Broadly we would agree that the process should be “inquisitorial” rather than “adversarial”. However, we believe that the Inquisitor should have sufficiently well defined terms of engagement to enable him to discharge his responsibilities effectively and reasonably.

Question 7
Do you agree that the suggested process is appropriate? If not, please identify which elements of the suggested procedures are inappropriate, or identify alternative or additional elements that better meet the requirements of the Code and applicable law?

We do have a number of serious reservations about the process that is proposed. Firstly we have noted above that we believe the “industry survey” to be inappropriate. Prudent systems and processes should be capable of definition without recourse to surveying the practices of all parties where there is likely to be little relevance to the circumstances of a specific claim.

Secondly, confidentiality of information about individual incidents and participants systems & processes needs to be respected, although it may be appropriate for the PNE to consult participants generally about issues of principle.

A major lacuna in the methodology is the lack of any mechanism for validating information or evidence that is provided by a claimant. In adopting an "inquisitorial" approach there needs to be an ability to audit data that is produced by a claimant and which could form the basis for any adjustment to settlement. Audit may be appropriate at various stages in the process. Indeed this would be a better approach than the relativity concept that seems to be embodied in the idea of an Industry Survey.

We would challenge the assertion that there may be a significant 'shortfall' in revenues from 'fees' to cover the costs of processing claims under Clause P6. It was made clear in discussions on Modification P84 (and P37) that the £5000 fee was considered as a reasonable estimate of the cost of an 'investigation'. It was also recognised in the discussions about Mod P84 that an investigation was really about the nature of an incident and the processes involved, and the amount of work involved was therefore largely independent of the number of individual Volume Notifications affected. (The £5000 fee could therefore be taken to be a 'budget' for the cost per investigation, based on working assumptions about the practical nature of the process defined in section P6.) The effect of Modification P84 was simply to remove the discrimination that would be suffered by various parties who make use of a particular design for the notification of contract information. Without P84 these parties would have effectively been precluded from raising claims by the penal nature of the associated fee. If P84 had not been approved, claims would undoubtedly have been made in respect of a smaller number of incidents (and a much smaller number of Volume Notifications), and therefore the revenue from fees would have been much closer to the £150k than the £3.5 million suggested.

The process would benefit from the inclusion of "rests" at which point a claimant would have the opportunity to withdraw a claim if the governing principles indicated that the claim had no hope of success, or even the cost of pursuing the claim was clearly uneconomic. For example if there were doubt whether notification claims were linked, which would result in a liability to multiple claim fees, then this matter should be determined first before proceeding to the substance of the claim. It seems likely that such timetables will be specific to the circumstances of each claim and thus will need to be determined in respect of each claim.

Question 8:
The process must comply with Section P6 and the requirements of natural justice. However, within these confines, there are cost and timetable issues to be borne in mind. Are there any aspects of the process that could sensibly be removed, and why? Or should the process be bolstered up in any way, and why?

Our proposals concerning aspects of the proposed process that could be removed or added are noted in the answer to the previous question. In addition we think that it would be helpful to reaching a satisfactory outcome to a claim for the size and expertise of the PNE Committee to be increased to

enable it to perform the role laid down in Clause P6. Additionally, a consultation about issues of principle may be required.

Question 9: Summary Question:
In light of your responses to the questions, do you support the process as outlined in the Paper? If not what alternative or additional features must the process have in order to comply with Section P6 and the requirements of natural justice?

We believe a better and more cost-effective framework would be based on:

- Request/provision of information re the specific incidents/circumstances and the processes directly involved
- Review by Elexon, expert group and/or PNE committee to assess key issues/questions
- Brief on-site audit of claim evidence
- Review by an 'expert' PNE committee of at least 5 people, i.e. of sufficient size to allow it to include a range of expertise from within the industry and/or from other industries with similar characteristics
- Final face-to-face 'clarification' meetings with claimants, if requested by either the committee or the claimant
- Confidentiality of all participant specific data, with consultation only on example/issues of principle on an 'anonymous' basis
- The ability to withdraw a claim at various pre-determined decision points or even generally.

Such a process would be consistent with relevant elements of processes used elsewhere in the industry, e.g. for Trading Disputes and for qualification of Suppliers under the Master Registration Agreement.

20 August 2002

Linda Coe
Elexon Ltd
Third Floor, 1 Triton Square
London
NW1 3DX

Dear Linda

PROPOSED PROCEDURES FOR DETERMINING CLAIMS UNDER SECTION P6

London Electricity Group ('London') welcomes the opportunity to comment on Elexon's 31 July consultation paper on proposed procedures for determining notification error claims under Section P6 of the BSC.

The comments contained in this submission represent the views of London and the following other BSC parties**:** London Electricity, Jade Power Generation, Sutton Bridge Power, and West Burton Power. The submission consists first of some general comments of principle, which are given below, and then a more detailed commentary, which is set out at Attachment 1.

Broadly speaking, London considers the procedures outlined in the consultation paper to be appropriate for determining claims of notification error. However, we do wish to raise a fundamental objection to one substantial element of the proposals, namely the role envisaged for BSC parties other than the claimant in the overall claims process.

Essentially, other BSC trading parties have two separate 'interests' (in a non-technical) sense in the outcome of any particular claim**:**

1. First, such parties may be able to provide evidence about their own trading systems which would be relevant to any determination as to whether the claimant's systems and processes were 'prudent' at the material time, and whether the claimant took appropriate steps to avoid the repetition of any error.

2. Secondly, such parties will stand to gain or lose money according to the outcome of any particular claim, as a result of any adjustment to prior financial settlements.

We consider that it is perfectly proper for the claims procedure to provide a facility for all relevant evidence to be collated and taken into account in determining whether a claimant's systems and processes were prudent, and whether he took appropriate steps to avoid the repetition of any error.

In contrast, there is no good reason to allow any BSC party (other than those who are directly party to any error claim) to make any further submissions or representations to the tribunal which is ultimately to determine the claims. By acceding to the BSC (which includes procedures for its own modification) BSC parties have consented to having the claims determined by the tribunal entrusted with that task, and have agreed to be bound by its determinations.

It is for that tribunal, being mindful of the effect of its determinations on third parties, to ensure that its essentially inquisitorial process is effective fully to explore all relevant issues of fact and law, and thereby to reach in each case a determination which correctly applies the BSC and is fair to all BSC parties. This approach is, of course, consistent with the manner in which Trading Disputes are conducted under existing BSC provisions.

In summary, therefore, we consider that the role of other BSC parties should be limited to providing relevant evidence to assist Elexon in preparing the report contemplated by paragraph P6.4.4, and that they should have no further role in the process. This will, of course, also assist towards the more efficient and expeditious dispatch of the determination of claims, consistent with the overall objectives of the BSC, without jeopardising the fairness of the outcome.

If evidence is to be gathered from BSC parties to assist Elexon (and ultimately the BSC Panel Committee) in determining claims, then a question arises as to how such evidence should be gathered and evaluated. We consider that the present proposal – namely that Elexon should issue a questionnaire/survey to all parties – is not appropriate.

The collation and evaluation of evidence from such a large number of parties, some of whom can be expected to have a financial incentive to support or resist particular claims, will require considerable care and skill. There is an obvious risk that, if BSC parties are simply asked to complete a questionnaire, they will choose to answer it in a manner which is conducive to attaining the outcome which best suits their own financial interest.

We therefore propose instead that an independent expert should be appointed to assist Elexon and the BSC Panel Committee in the task of gathering and evaluating evidence. The independent expert should**:**

- Prepare a suitable questionnaire to be answered by other trading parties, and conduct such interviews with them as he thinks appropriate, in order to probe and evaluate their evidence. The expert might prefer to dispense with a questionnaire altogether, and to proceed principally via interviews.

- Provide his advice, in the form of a report to Elexon, to assist Elexon in reaching its own findings for the purposes of paragraph P6.4.4. In compiling his report, the expert should be entitled to draw on other evidence and also on his own experience (for example, of trading systems in other markets).

- Be available to the Panel Committee for questioning about the evidence on which he has relied in his report, and also about his evaluation of it.

It should be borne in mind that, while the above proposals contemplate that all BSC parties might be called upon to contribute relevant evidence, it may be that an independent expert will regard this as unnecessary. By way of analogy, if a doctor is accused of medical negligence, it would be neither normal nor desirable for an expert witness to gather evidence by way of a survey from all other medical practitioners as to what they would do in similar circumstances. Instead, the expert would rely on his own personal expertise to opine on what a reasonably competent person would have done. Similarly, it may be that, in considering claims under P6, an independent expert would advise Elexon and the BSC Panel Committee that it is unnecessary to take evidence about other BSC parties' systems and processes.

In contrast, it would, in London's view, be important for an expert to acquaint himself, by appropriate means, with the factual context in which many errors occurred – including facts about the timetable within which trading parties had to complete their systems and processes in readiness for the commencement of trading at Go-Live, the errors generated by central systems during the first days of trading, the volume of trading activity undertaken, and the additional burden introduced where (for example) parties were trading for the first time with new counterparties.

The independent expert might well consider it necessary to take evidence from BSC parties generally to understand and evaluate these matters.

Yours sincerely

Roger Barnard

Regulatory Law Manager
LEG plc

Attachment 1

Comments on Particular Aspects of Elexon's Proposals

The comments in our covering letter represent London's principal concerns with the proposed procedures for determining claims of notification error. In addition, we have the following comments on particular aspects of the proposals (references to page numbers and headings are references to Elexon's 31 July consultation paper).

Except where otherwise stated, and subject to our general comments above about the role of BSC parties and our suggestions for the role of an independent expert, London agrees with the approach proposed by Elexon.

Decision making body: pages 4/5

1. *Chairman.* We support the proposal that the Chairman alone should be responsible for deciding procedural and other preliminary matters, or recommending to the BSC Panel that some part of the process should be amended.

2. *Replacement.* We consider that, if a Committee member were to become incapacitated at a late stage, the BSC Panel should have a discretion, once a replacement member has been appointed, to go back over parts of the assessment and/or determination process in relation to particular claims (for example, where the Committee member who has withdrawn had taken the lead in considering particular aspects of a claim, or where it is important that all Committee members should hear particular evidence).

3. *Sequence.* We believe that, while it would be acceptable for claims to be considered in parallel, there would be benefits if the claims were to be considered in sequence, according to the chronological order of the dates on which the relevant errors occurred. In this way, the Committee would best be able to construct a coherent picture of the development of NETA systems and processes from the period immediately following Go-Live through to the most recent claimed error. Indeed, since some degree of sequencing is inevitable, there would appear to be obvious benefits in doing this.

4. We also think it is important that, in framing its early determination decisions, the Committee should bear in mind that future cases may raise additional issues, which it would be wrong to prejudge in early cases. Accordingly, the Committee would be well advised to avoid, in its early determinations, adopting broadly framed principles, exceptions to which are likely to arise in later cases. By focusing on the precise issues raised by the particular case in hand, the Committee will effectively retain its discretion to decide later cases in accordance with their merits, without creating the appearance of inconsistency between decisions.

5. *Closed session.* It is not clear what is meant by the proposal that the PNE Committee should meet and make its determination in closed session. Although it is right that the Committee's internal deliberations should take place in closed session (in the same way that magistrates retire to consider their verdict), all oral hearings of the parties

to a claim should take place in open session. That is not to say, however, that those present to observe proceedings should have any right (or be permitted) to be heard. Parties to a claim should be heard in closed session only exceptionally, where issues of commercial sensitivity justify a private hearing.

Prudence – gathering information: pages 6/7

6. See our general comments above about the role of BSC parties and of an independent expert.

Procedures – submission and investigation phase: page 8

7. See our general comments above about the role of BSC parties and of an independent expert. In particular, 'interested parties' should not be invited to comment in respect of claims. There should therefore be no need for the publication by Elexon of written submissions, evidence, and Elexon reports.

Procedures – determination phase: page 9

8. See our general comments above on the role of BSC parties and of an independent expert. In particular, 'interested parties' should not be invited to comment in respect of the PNE Committee's provisional findings.

Investigation of systems and processes: page 10

9. We accept that the onus is on the claimant to prove his case. But, in demonstrating that he had in place prudent systems and processes, the claimant should only be required to demonstrate prudence in respect of those aspects of his systems and/or processes that caused or resulted in the notification error. If it were otherwise, the claimant would need to amass (and Elexon and the PNE Committee would need to consider) a large quantity of evidence relating to elements of the claimant's systems and processes in respect of which there is no reason to doubt their prudence.

Question 5: page 12

10. See our general comments above on the role of BSC parties and our suggestions for the role of an independent expert. We are strongly opposed to the direct involvement of BCS parties in the assessment of individual claims.

Question 6: page 12

11. As noted above, to the extent that BSC parties generally have an interest in the outcome of claims (in that there may be an adjustment to the residual cashflow reallocation cashflow), responsibility for protecting that interest has been entrusted to the BSC Panel pursuant to Section P6 of the BSC. Accordingly, there is no 'adversary' as such to any claim.

    An adversarial approach is not therefore an option, since this would be inconsistent with the scheme for the assessment of notification error introduced by P37.

Confidentiality: page 15

12. We have already explained why, in our view, it is inappropriate that other 'interested parties' should be able to 'participate' ('meaningfully' or otherwise) in the assessment process. See our general comments above about the role of BSC parties.

Timetable: page 16

13. We are disappointed with Elexon's preliminary assessment that the notification error claims process will not be completed until around October 2003. We are not satisfied that Elexon has to date committed an appropriate degree of resource to the resolution of these claims. It is not acceptable that it has taken 11 weeks from the date of Ofgem's decision to approve P37 (under urgent modification procedures) for the present consultation paper to be produced.

    We look to Elexon to do all that it can to expedite the completion of the determination of claims. In this regard, the proposals set out in this submission for eliminating the direct (and misplaced) involvement of BSC parties in the assessment of claims should go some way towards shortening the timescales.

London Electricity Group
August 2002

From: Sue.Calvert@yedl.com [SMTP:Sue.Calvert@yedl.com]
Sent: 05 August 2002 11:19
To: linda.coe@elexon.co.uk
Subject: RE: BSC section P6 - Past Notification Errors

Linda

As we have no involvement in contracts with generators etc.

Our response is "Not applicable to NEDL/YEDL".

Thank you

Ann Penford

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Peter Bolitho
Trading Arrangements Manager

POWERGEN

Linda Coe
ELEXON Limited
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21 August 2002
Reference P37ProcessCons

Dear Linda

Balancing and Settlement Code Section P6 - Past Notification Errors - Consultation Paper, issued 31 July 2002, (the "Consultation Paper")

Thank you for giving us the opportunity to comment on these proposals. Powergen UK plc ('Powergen') provides this response on behalf of itself and the following BSC Parties: Powergen Retail Limited, Diamond Power Generation Limited and Cottam Development Centre Limited. These comments should be read in conjunction with the letters of 15 May 2002 and 12 July 2002 from Dr. Paul Golby to the chairman of the BSC Panel and the copy of the opinion of counsel ("Counsel's Opinion") sent with the second letter (a further copy of each of which is enclosed) .

In the correspondence Paul Golby voiced Powergen's concerns about the process for consideration of claims for past notification errors. We were anxious to ensure that any process adopted should be demonstrably fair and just to all concerned and suggested a number of features that should ideally be included in the process.

Many of our concerns seem to have been addressed in the Consultation Paper, but the proposals still appear to have a number of shortcomings. Critical elements of this process are the collection, disclosure, review and testing of evidence, consideration of expert opinion and the ability of all affected parties to have their views properly heard. Each of these elements will be of particular importance in ascertaining the prudence or otherwise of each claimant's conduct, which in our view, necessarily must be compared to the conduct of others operating under similar circumstances at the time. Only if all these stages are

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conducted thoroughly and properly will it be possible for the decision-making committee to make well-informed robust decisions in accordance with the safeguards and requirements of section P6 of the Balancing and Settlement Code.

Our responses to the consultation questions are detailed below. Where relevant, we have cross-referenced our responses to Counsel's Opinion. I should be grateful if you would circulate our response, together with the enclosures, to all BSC parties as part of the normal ELEXON consultation process. Please feel free to contact me on 02476 42 5441 if you wish to discuss any of the issues raised in this letter.

Yours sincerely,

Encs.

Consultation Questions and Powergen UK plc's Comments

Question 1:

Do you agree with the proposed model for a decision making body? If not, please suggest an alternative body and explain why this better meets the requirements of the Code and applicable law, in your view.

With some qualifications we support the proposed model for the decision making body. A three-person committee consisting of two lay members and chaired by a retired judge or barrister seems to offer the reasonable prospect of a robust decision-making process without hopefully incurring excessive cost.

We are, however, somewhat sceptical that it will be possible to find two non-legal members with appropriate electricity industry experience who can genuinely be described as independent of Trading Party interests. Assuming that we are correct in this view, we believe candidates from other 'similar' industries should be sought. For example, someone from the City who is involved in the trading of other commodities could be appropriate.

Given the prospect that the members of the PNE Committee may have little or no direct electricity industry experience, greater reliance will have to be placed on other parts of the claims process. Processes for the collection and disclosure of information, consideration of expert opinion and the ability of all affected parties to have their views properly heard will be of utmost importance, not least in 'educating' the independent committee in the intricacies of market participants' processes and systems.

We would prefer that the PNE Committee should be required to meet and make its determinations in open session, in order to provide an opportunity for all interested parties to scrutinise the process and to consider whether determinations are consistent, fair and just to all concerned. Additionally, if the constitution of the PNE Committee were not the same for all claims (because of incapacity or as a result of the judicial appointment being split between two people) then it would be important to ensure that consistency of approach should be adopted for all claims. It is unlikely that this could be properly ascertained without transparency. Our view on this matter, however, is coloured by our concerns in relation to the effectiveness of the process leading up to any determination and the necessity for the process to follow the requirements of P6.

The BSC panel would welcome any suggestions which Parties may have as to suitable candidates to provide expert advice to the PNE Committee, or what the criteria might be for a suitable candidate.

We believe it is unrealistic to expect to find truly independent experts with the relevant detailed knowledge of participants' systems and processes who are not employed either by Trading Parties or relevant IT providers. Candidates who have suitable qualifications to act as 'experts' to the PNE Committee are likely to be those who have worked on the NETA Trading Party Implementation Programme and are able to demonstrate close involvement with day-to-day participant notification processes. Such candidates are likely to be found amongst the membership of the Error Notification Modification Group and the P4 Modification Group. However, such people are unlikely to be truly independent, which is one of the reasons why we consider that it will be necessary for all

processes to be transparent and to ensure that all parties have the opportunity of presenting such evidence as they consider is relevant.

Question 2

Do you agree with the proposed approach for gathering information to assist in the assessment of prudence? If not, please identify which elements of the approach are inappropriate, and identify additional elements that better meet the requirements.

We welcome the concept of an industry survey and the use of experts in the assessment of prudence. This should prove particularly valuable in helping the PNE Committee to consider what is good industry practice and to ask insightful questions of claimants. We also consider that experts should assist in the assessment of whether past notification errors have been made (see Counsel's Opinion, sections 10 to 14 inclusive) and in their evaluation (see Counsel's Opinion sections 15 to 24 inclusive.

The industry survey should provide useful background to the PNE Committee in considering a claim. However, the particulars of any claim remain important and the survey should not limit the ability of all market participants to include additional relevant information in their responses and also to make written comments or oral representations to the PNE Committee during the assessment of any claim.

Question 3

Assuming that the Industry Survey is part of the process (see previous question) do you agree that the request for evidence from Claimants should take place after the results of the Industry Survey have been published? If not, what would you propose and why?

Yes. This would seem reasonable because the survey and advice from experts should enable such requests for evidence to include insightful questions that might otherwise be difficult to pose at an earlier stage. In our view more focused questioning and presentation of evidence is more likely to result in quicker decision making.

A fundamental aspect of the assessment phase is that both the claimant and other affected parties have the opportunity to comment on the evidence provided. It is important that all determinations must specifically address the points raised and the requirements of P6. Failure to do this could increase the probability of a subsequent legal challenge.

In this respect we consider that the square brackets in the first point under the "determination phase" section on page 9 of the Consultation Paper, "the claimant [and other interested parties]…" should be deleted.

Question 4

Do you agree with the model proposed for the investigation of claims? If not, please identify which elements of the approach are inappropriate, or identify additional elements that better meet the requirements.

Generally, yes. The section on submission of written evidence refers to the onus being on the claimant to demonstrate that a Past Notification Error has occurred;

this includes the requirement to demonstrate a settled commitment to notify particular ascertained volume data and that a mistake occurred in giving effect to that commitment (see Counsel's Opinion, sections 7 and 10 to 14, inclusive). It is important that the process should specifically address the procedure to be adopted for the PNE Panel to determine whether each claimant has satisfied these requirements, unless they are satisfied then the PNE Panel must make an adverse decision and the question of prudent systems will not be relevant.

In relation to the appointment of experts, it would be important for the PNE Committee to heed the advice of suitable independent experts appointed to advise the PNE Committee, particularly given that ELEXON's primary expertise relates to the Central Systems and not participants' systems. Please note that we believe experts can only be described as such if they have knowledge of participants' systems.

Question 5

(a) Do you agree that other interested parties should be given the opportunity to comment in writing on the claims? If not, why not?

Yes. All parties should be given the opportunity to check whether each claimant has demonstrated that a past notification error has occurred (see our comments above and sections 7 and 10 to 14 of Counsel's Opinion) and also that the requirements in relation to the demonstration by each claimant of the required conduct have been satisfied (see sections 8 and 15 to 25, inclusive, of Counsel's Opinion). If an interested party does not consider that the relevant requirements have been satisfied then they should be given the opportunity to comment. In particular, interested parties may be able to provide additional information to the PNE Panel to assist it in both its assessment of whether a past notification error has occurred and in its comparison of the conduct of each claimant with that of other Trading Parties operating under similar circumstances at the relevant time. Unless all Trading Parties have the right to comment it is unlikely that the process could ever be described as demonstrably fair and just to all.

To satisfy parties that the procedures set out in P6 have been followed and to enable parties to make informed comments it is important that there is full disclosure of evidence in all but very exceptional circumstances. This information should be made available to all interested parties. If too little information is disclosed it will not be clear whether the procedures have been properly followed and there is a very real possibility that new evidence may come to light after a determination has been made, resulting in parties appealing any decision to the Authority.

(b) Does the process as outlined above go far enough, or should these parties be given the right to attend a face to face meeting with the Committee where it has an interest (or an interest above a given threshold) in the outcome of the claim? If you think a meeting is required, why? How could this process be managed efficiently, bearing in mind all Trading Parties will be affected by rectification of a Past Notification Error, to a greater or lesser extent?

Each affected party should have the opportunity to request and attend a face to face meeting with the PNE Committee, if it believes that the PNE Committee has not properly addressed its written comments, or new relevant evidence becomes available. Such a right should not be limited by an arbitrary threshold given that

such representations are likely to relate to the conduct of market participants, which may or may not be relevant to the size of any claim.

Question 6

The suggested approach for investigating and determining claims is based on an inquisitorial, rather than an adversarial model. Do you agree that this is the most appropriate model? If not, why not? If you would prefer an adversarial model, should claimants and other interested parties be given the right to a full hearing in front of the Committee? How would this process be managed?

Generally we believe that the inquisitorial approach is likely to be more efficient and cost effective. However, it requires greater trust in the competence of the PNE Committee and this trust could be eroded if the process were to take place behind 'closed doors'. We must therefore ensure that the views of all affected parties are properly considered at all stages of the process. In this respect, the review, documentation, disclosure and testing of evidence (to determine whether it has been demonstrated that a prior notification error has been made and that the requirements in relation to the demonstration by each claimant of the required conduct have been satisfied) prior to determination will be critical to ensuring robust decisions. The industry is likely to have more confidence in the process if this is done in a transparent way and the rationale for decisions is fully articulated.

Question 7

Do you agree that the suggested process is appropriate? If not, please identify which elements of the suggested procedures are inappropriate, or identify alternative or additional elements that better meet the requirements of the Code and applicable law?

It is not entirely clear from the Consultation Paper what information is to be provided to the Parties and at which stage. At the top of page 9 there is a reference to the provisional finding being issued to the claimant, but the paper then refers to the claimant and other interested parties being invited to submit comments on the provisional finding. On page 13, under provisional findings it states that it is not expected to publish the PNE Committee's provisional views. We consider that all Parties should be kept informed during the assessment phase and should be given the opportunity to comment on the PNE Committee's provisional findings, if comments are not invited until after the final determination has been issued then it is more likely that an appeal may be made.

We have sought a legal opinion on the process for consideration of claims for past notification errors and have provided you with a copy of Counsel's Opinion, to which we draw your attention. .

Question 8

The process must comply with Section P6 and the requirements of natural justice. However, within these confines, there are cost and timetable issues to be borne in mind. Are there any aspects of the process that should sensibly be removed, and why? Or should the process be bolstered up in any way, and why?

Provided that our concerns and comments outlined in this letter and the details in the enclosed Counsel's Opinion are addressed, the process described seems to provide a satisfactory framework in which the requirements of Section P6 and natural justice might be met. Each of the elements of the process described is important in ensuring fairness to all affected parties. In reaching its decision the PNE Panel should have due regard to all relevant considerations as outlined in Section P6 (see also Counsel's Opinion) and should take into account of the necessity to incentivise participants to make correct notifications. We therefore do not believe it is feasible to remove any aspects of the proposal.

Question 9 Summary Question

In the light of your responses to the questions, do you support the process as outlined in the Paper? If not what alternative or additional features must the process have in order to comply with Section P6 and the requirements of natural justice?

Subject to our comments outlined above we would be prepared to give the process qualified support. Nevertheless the real test will be how ELEXON and the PNE Committee manage the process in practice.

In order to avoid the likelihood of appeals arising from claims that the procedures have not been followed properly and consistently, we suggest that all final decisions should be issued simultaneously after a review by the PNE Committee.

OPINION

ON THE OPERATION OF
SECTION P6 OF THE BALANCING AND SETTLEMENT CODE
FOLLOWING IMPLEMENTATION OF
ALTERNATIVE MODIFICATION PROPOSAL P37

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1. In this Opinion I consider the effect and operation of Paragraph 6 of Section P of the Balancing and Settlement Code (***BSC***), following the implementation of Alternative Modification Proposal P37 (***MP/P37***). MP/P37 concerns the remedy of certain past errors in Energy Contract Volume Notifications (***ECVNs***) and Metered Volume Reallocation Notifications (***MVRNs***).

2. MP/P37 was introduced into the BSC as a result of a direction to NGC by the Gas and Electricity Markets Authority (***the Authority***), exercising its powers under Condition C3(5)(a) of NGC's Transmission Licence. The Authority gave notice of this direction, and its reasons for giving it, in its letter dated 10 May 2002 (***the Authority's Decision Letter***). As I explain below, the reasons given by the Authority for its direction are important factors to be taken into account in the actual operation of the modified BSC provisions in Section P Paragraph 6 (hereinafter ***P6***).

3. In considering the requirements of P6, I address (1) the requirements laid down in the provisions of P6, together with the burden of proof, and (2) procedural issues, including the extent to which other BSC Parties should have the opportunity to provide relevant evidence and submissions.

The Panel, Panel Committee and the Authority

4. Under P6.4.1, it is the Panel which has responsibility for considering and determining claims of Past Notification Errors (***PNEs***). The Panel is entitled by P6.4.2 to appoint a Panel Committee (including the Trading

Disputes Committee) to discharge its functions under P6. (In this Opinion references to the Panel include references to any Panel Committee appointed by the Panel under P6.4.2).

5. P6.7 provides that a reference may be made to the Authority, on limited grounds, of any determination which the Panel or Panel Committee makes under P6.4.4(d). The right to refer determinations to the Authority may be exercised not only by the Contract Trading Party who is claiming rectification (***a Claimant Party***) but by any other Party to the BSC: see P6.7.1. This is understandable, since a determination may lead to adjustments affecting the financial position of other Parties. The grounds of reference to the Authority under P6.7 are, however, limited by P6.7.3. They are (a) that the procedures set out in P6 have not been followed or (b) that new information has emerged which is or is likely to be relevant to the determination.

The requirements set out in BSC P/6 (as modified by MP/37)

6. In order for a Claimant Party to benefit from a rectification under P6 it must satisfy a number of requirements. These requirements can be broadly organised in three groups:

(1) whether a Past Notification Error (as defined) did in fact occur;

(2) if so, whether the Claimant Party's conduct satisfied the requirements of P6 – e.g. having prudent systems and processes in place at the time of the error, and acting promptly to reverse and to avoid repeating the error; and

(3) if so, whether, as a matter of discretion, the Panel (or Panel Committee) considers that the error should be rectified.

The precise drafting of the requirements is important. They are stringently drafted – evidently to avoid opening the floodgates to claims.

7. First, the Claimant Party must "demonstrate" to the Panel that a Past Notification Error (***PNE***) has in fact occurred: see P6.4.4(d)(i), with P6.4.4(a). This requires it to demonstrate, in particular:

   (i) that it (and any other relevant Contract Trading Party) had a "demonstrably settled commitment to notify particular ascertained volume data for the Settlement Period in question": see the definition of PNE in P6.1.1, especially at P6.1.(c)(i); and

   (ii) "it is clear that a mistake occurred in giving effect to that commitment": again, see the definition of PNE in P6.1.1 especially at P6.1.1(c)(ii).

   These are threshold hurdles – unless each of these matters is demonstrated by the Claimant Party, the Panel must make an adverse determination under P.6.4.7(d)(i).

8. Next, the Claimant Party must "demonstrate" to the Panel:

   (i) that it had in place "prudent systems and processes in connection with Volume Notifications" at the time that the PNE occurred: see P6.4.7(a), with P6.4.4.(d)(iii) and 6.4.4(a).

   (ii) that it "promptly [took] all appropriate steps … to rectify, reverse or otherwise mitigate the effect of the error … after it became aware of the error": P6.4.7(b)(i), with P6.4.4.(d)(iii) and 6.4.4(a); and

   (iii) that it "promptly [took] all appropriate steps … to avoid a repetition of the said error, following discovery of the error": P 6.4.7(b)(ii), with P.6.4.4.(d)(iii) and 6.4.4.(a).

Again, these are necessary hurdles. If the Claimant Party "fails to demonstrate" any of these three matters, the Panel is under a duty to decline to rectify: " the Panel shall decline to rectify …": P6.4.7.

9. Finally, the Panel must "determine in its opinion … whether the PNE should in all the circumstances be rectified": P6.4.4(d)(iii). Satisfying the hurdles above is not enough – it then falls to the Panel to weigh all relevant considerations and to decide whether the PNE should be rectified.

(1) This is essentially an exercise of discretion and judgment by the Panel (or Panel Committee), in which the Panel must have regard to "all the circumstances": see P6.4.4(d)(iii) itself.

(2) Certain factors are in particular identified in P6.4.8 as permissive factors to which the Panel "may have regard ... where the Panel considers such factors to be relevant". They are (1) the extent to which, in the Panel's view, the PNE was "directly attributable" to a failure of BSC Systems or to an inaccuracy in or unavailability of the Forward Notification Summary: P6.4.8(a) and (b); (2) the extent to which the PNE or the magnitude of the loss caused by the PNE was attributable to circumstances "which could not reasonably have been foreseen": P6.4.8(c); and (3) the extent to which the magnitude of the loss caused by the PNE was "wholly disproportionate" – "due weight being given to the desirability of incentivising Contract Trading Parties to avoid mistakes in the submission of Volume Notifications". So three groups of factors are identified as permissive factors (whether there were "system causes" for the PNE; whether the PNE or the magnitude of the loss could not have been reasonably foreseen; and whether the magnitude of the loss was "wholly" disproportionate, taking into account the desirability of incentivising accurate notifications), but these are not exclusive.

(3) As I discuss below, other relevant circumstances can be identified from the Authority's Decision Letter.

The first set of requirements: demonstrating a Past Notification Error

10. The Claimant Party must, at this stage, demonstrate two things. See P6.4.4(d)(i) – "*the Panel shall determine … (i) whether the Party claiming the [PNE] has demonstrated that there was a Past Notification Error in relation to the relevant Settlement Period"*. And then see the definition of PNE in P6.1.1(a) and P6.1.1(c) ("*an error … will be considered to have occurred only where …"*).

11. First, it must demonstrate that it (and any other relevant Contract Trading Party) had a "*demonstrably settled commitment to notify particular ascertained volume data for the Settlement Period in question"*. This follows from the definition of PNE in P6.1.(c)(i). The following are worth noting:

    (i) The burden of proof is on the Claimant Party – that party must "demonstrate" these matters.

    (ii) It is not enough simply to claim that there was some "error" or a "mistake" in failing to notify, or in making a particular notification. A PNE must satisfy the requirements of the definition in P.6.1(c) – it must be an error of the special character which falls within that definition.

    (iii) The Claimant Party must demonstrate that there was a "demonstrably settled commitment" to notify "particular ascertained volume data".

    (iv) So, first, it is not enough to claim that some notification of some data was intended. There must be proof that an actual particular ascertained amount was in fact established by the Claimant Party

prior to the PNE. And this is, of course, the amount which the Claimant party now claims should be rectified as a PNE.

(v) Secondly, it must be established that there was a settled commitment to notify that particular ascertained amount. It is not enough that (e.g.) there may be papers showing that a particular amount was in fact calculated prior to the PNE. There must be evidence that the Claimant Party (and any other relevant Contract Trading Party) had a "settled commitment" to notifying that very amount.

These are very important requirements. There can be no PNE unless these matters are demonstrated.

12. It would be wholly inadequate for a Claimant Party simply to claim that the volume data notified was different from the actual volumes for the settlement period in question. That is not a PNE as defined. The data notified must be different from some prior ascertained amount which the Claimant Party had a settled commitment to notify. This is a quite different thing.

13. Secondly, the Claimant Party must demonstrate (again see P6.4.4.d(i)) that "*it is clear that a mistake occurred in giving effect to that intention*" (see the definition of PNE at P6.1.1.(c)(ii)).

(i) Again, the burden of proof is on the Claimant Party: see the word "demonstrate" in P6.4.(d)(i).

(ii) This is reinforced by the words "it is clear that" in P6.1.1.(c)(ii).

(iii) Not only is the burden of proof on the Claimant Party – but the standard of proof is high. The Panel (or Panel Committee) must be satisfied that the Claimant Party has demonstrated that it is clear that a mistake occurred.

14. The requirement that the Claimant Party must identify and prove that a mistake occurred is clearly an additional requirement to P6.1.1(c)(i). What it requires is that the Claimant Party must go beyond showing that volume data was notified which was not the volume data which that party had a settled commitment to notify. It must also show that it is clear that the failure to notify that volume data was due to a "mistake" – i.e. some misconception, misapprehension or error. The Claimant Party must identify the misconception, misapprehension or error. Relevant questions are – (a) what was the mistake; (b) who held it or made it; (c) is it clear that there was such a mistake ?

The second set of requirements: conduct of the Claimant Party

15. The next set of requirements relate to the Claimant Party's conduct, and that of any relevant Volume Notification Agent.

16. Once again, these are necessary hurdles, and the burden of proof is on the Claimant Party: because the Panel is under a duty to decline to rectify if the Claimant Party has "failed to demonstrate" these matters – see the opening 4 lines of P6.4.7.

17. The first requirement here is that the Claimant Party must demonstrate that it (and any relevant Volume Notification Agent) had in place "prudent systems and processes in connection with Volume Notifications" at the time that the PNE occurred: see P6.4.7(a), with P6.4.4.(d)(iii) and 6.4.4(a). This is to be "judged in the light of the circumstances then prevailing".

18. This requires the Claimant Party to show the Panel (or Panel Committee):

    (i) what systems and processes it actually had in place, and

    (ii) that these were prudent.

    The Panel (or Panel Committee) must then decide whether it accepts that the actual systems and processes were in fact prudent.

19. The reference to the "circumstances then prevailing" point to the need on the part of the Panel (or Panel Committee) to consider the systems and processes which other Contract Trading Parties had put in place at the relevant time. If the Claimant Trading Party's systems and processes fall short of the systems and processes which other Parties had put in place, this would indicate that they were not in fact prudent.

20. Moreover, as the Authority noted: "*it would be reasonable to expect all Parties to ensure that they have in place appropriate systems to deliver accurate notifications*" – Decision Letter para 49. The rectification process is only available to prudent operators – not to operators whose systems were deficient.

21. The next requirements that the Claimant Party must demonstrate are that:

    (i) it "*promptly [took] all appropriate steps … to rectify, reverse or otherwise mitigate the effect of the error … after it became aware of the error*": P6.4.7(b)(i), with P6.4.4.(d)(iii) and 6.4.4(a); and

    (ii) it "*promptly [took] all appropriate steps … to avoid a repetition of the said error, following discovery of the error*": P 6.4.7(b)(ii), with P.6.4.4.(d)(iii) and 6.4.4.(a).

22. In order to demonstrate these matters, the Claimant Party must inform the Panel (1) when it discovered the error; (2) what steps it took (a) to rectify, reverse or mitigate the error and (b) to avoid repeating the error; and (3) when it took those steps. It is then for the Panel (or Panel Committee) to judge whether those steps were "all appropriate steps", and whether they were taken "promptly". Again, information from other Contract Trading Parties is likely to be material in assessing whether other steps could have been taken, which in fact were not.

Repeated errors

23. There is one very obvious point here. These requirements render it virtually impossible for a Claimant Party to seek rectification of a series of similar

errors. This is because, once it is aware of any given error, it must then act promptly both to rectify, reverse and mitigate that error and to avoid repeating it. A Claimant Party must, as a matter of fact, become aware of any particular error within a very short time. Indeed (going back a stage) it is difficult to see how it could possibly have "prudent systems" in place if those systems did not bring errors to light in an early and timely way.

FCNR - 7 day report

24. Another important point relates to the availability of the Forward Contract Notification Report (or "7 day report"), produced from notification data held in the central settlements systems. I understand that the 7 day report was provided in advance of gate closure, in response to requests from market participants, and that it gave parties the opportunity to check the notifications relevant to their positions. As the report was available before gate closure, it enabled parties, if necessary, to submit revised notifications if the ECVNs recorded in the central system did not represent correctly the committed position actually agreed between parties.

25. The 7 day report is therefore relevant in a number of ways. Where use of the 7 day report and the information it contained would have detected the error, and enabled it to be corrected in advance of gate closure, it is very difficult to see how a claim could be maintained.

    (1) First, a failure to use the 7 day report and the information it provided would strongly indicate that the Claimant Party did not have in place "prudent systems and processes" (see P.6.4.7(a)). This would itself bar a claim.

    (2) Secondly, once one error is detected, it becomes necessary for the Claimant Party "promptly" to take "all appropriate steps" to avoid a repetition of the error (see P.6.4.7(b)). Again, use of the 7 day

report would be such an “appropriate step”, and a failure to employ it would add an additional hurdle to any further claims.

Both of these points are “hurdle” points – if the Claimant Party fails to get over these hurdles, the claim must be disallowed.

(3) Finally, it is worth noting that, even if the Claimant Party gets over the hurdles at the first two stages, one of the relevant discretionary factors at the third stage (to which I now turn) is the extent to which the PNE was directly attributable to a failure of BSC Systems or to unavailability of or inaccuracy in the Forward Notification Summary. So, even at the third, discretionary, stage, if the error was not caused by any unavailability of the Forward Notification Summary or inaccuracy in it, that is a specified ground for exercising the discretion to disallow a claim.

Third stage: the Panel’s opinion

26. The Claimant Party must demonstrate the matters set out above as necessary prerequisites for a claim. But even after these have been demonstrated, there is no right to rectification. Rather, the Panel (or Panel Committee) must then “determine in its opinion … whether the PNE should in all the circumstances be rectified”: P6.4.4(d)(iii).

27. I have noted above that P6.4.8 identifies certain factors to which the Panel "may have regard ... where the Panel considers such factors to be relevant”. These are, broadly, (1) whether there were “system causes” for the PNE; (2) whether the PNE or the magnitude of the loss could not have been reasonably foreseen; and (3) whether the magnitude of the loss was “wholly” disproportionate, taking into account the desirability of incentivising accurate notifications). These are not exclusive factors. In particular cases they may point in different directions – and it is for the Panel to weigh them (and other relevant considerations) in forming its opinion whether the PNE should be rectified.

28. Again, evidence and submissions from other Parties are likely to be of assistance in assessing foreseeability. It is also relevant to recall that the Authority itself has noted: "*There will always be a risk of high imbalance prices*" – Decision Letter para 49. So, in the Authority's view, high imbalance prices in themselves were always foreseeable.

29. Other relevant circumstances, and the appropriate degree of stringency in balancing considerations, can be identified from the Authority's Decision Letter.

The Authority's Decision Letter

30. The Authority's Decision notes that the decision to direct implementation of the modified P37 proposals was taken because the Authority considered that, on balance, it better facilitates the promotion of effective competition (see C3(3)(d) of NGC's Licence: para 53. It noted that the arguments for and against the rule change were "finely balanced": para 38. This itself strongly suggests that the safeguards and requirements in the new rule must be carefully applied.

31. The Authority also noted a number of considerations which weighed against introducing a rule change to allow rectification of past errors. These included:

    (1) The need to provide incentives for proper systems, both to preserve efficiency and to avoid the potential for intentional post-Gate adjustments:

    "*We were mindful of the fact that, in a commercial setting, one of the strongest incentives to efficient trading is the knowledge that insufficiently robust risk management systems can result in trading errors and that losses are a likely consequence of such errors… Ofgem was of the opinion that <u>it is essential that there should be strong incentives on participants to deliver correct notifications</u>. If*

the incentives to have robust risk management systems in place were inadequate, it would be likely that notifications would need to be frequently adjusted for errors that could adversely affect the efficient administration of the BSC. A correction mechanism for erroneous notifications could also create a possibility of intentional post-Gate adjustments to traded quantities. There could be a risk of undermining the strong commercial incentives on participants to balance their own positions ahead of real time" – para 8 (on reasons for rejecting MP 19).

This point was expanded, in the context of MP P37 itself, at paras 39-40. Ofgem noted that it and the DTI had made clear at the outset that there would be no error correction provision. "*There were significant concerns that allowing any form of error correction … could dilute the incentives to provide accurate notifications.*" The Authority continues to believe that there should be "*strong incentives*" to deliver correct notifications. This was both for efficient administration, and to prevent ex post facto trading.

(2) The need to limit the operation of any error correction regime, because retrospective changes to the BSC would damage market confidence in, and the efficient operation of, NETA. Retrospective changes were also contrary to "generally accepted and well-understood legal reasons": see para 10 (again on reasons for rejecting MP 19) and para 41.

The Authority's conclusion here was: "*that there may be a small number of particular circumstances that could give rise to the need for a retrospective rule* change". The small number of circumstances which they identified included (1) where the error was "directly attributable to central arrangements"; and (2) "combinations of circumstances that could not have been reasonably foreseen". These are mirrored in the factors mentioned in P6.4.8. It is worth noting that if these circumstances are not made out, that does point against allowing rectification.

(3) The need to consider the position of other Parties, who had acted in reliance on the then rules.

"*(I)t is clear that at least some participants, having regard to their perception of the risks of the rules that were in place at Go-live, acted in ways that they might not have done had a correction mechanism for notification errors been in place from Go-live*".

This feeds into the analysis of prudence. If some operators introduced robust systems to guard against error, which contain features which the Claimant Party did not have in place, then the Claimant Party has the burden of demonstrating that its systems were prudent even though they did not adopt these features. But the point is also a relevant consideration in the Panel's weighing of all the circumstances – and one which points against allowing rectification.

The stringency of these hurdles

32. Finally, it is worth noting again at this point that the requirements of P37 discussed above are deliberately stringent. As the Authority noted, the possibility for rectification applies "*in the very strictly defined circumstances*" (Decision Letter, para 45). It is limited to "*prudent Parties*" (ibid, para 44). And as the Authority stated (para 46):

"Ofgem expects that if the relevant tests set out in P37 are rigorously applied by the Panel very few, if any, errors will warrant correction".

Procedural issues

33. The procedure includes the following steps:

(1) The Claimant Party (and any other relevant Contract Trading Party) must "provide evidence and information supporting its claim" – P6.4.4(a)(i), (ii). In this context, it should be recalled

that the burden is on the Claimant Party to “demonstrate” that the various requirements are satisfied.

(2) The relevant Volume Notification Agent and the ECVAA are to provide comments in relation to the claim: P6.4.4(a)(iii).

(3) BSCCo is to investigate the matters in P6.4.7. That is – (a) whether the Claimant Party and the relevant Volume Notification Agent had prudent systems and processes in place; (b) whether they promptly took all appropriate steps to rectify, reverse and mitigate the effect of the error and (b) whether they promptly took all appropriate steps to avoid repeating it.

(4) All BSC Trading Parties (not just the Claimant) are obliged to provide BSCCo with “such information as BSCCo may reasonably request for these purposes”: P6.4.4(b)(i). This underlines the fact that information as to the processes adopted and steps taken by other Parties is obviously relevant to a proper investigation of whether the Claimant’s systems and processes were in fact prudent, and whether the Claimant did take all appropriate steps under P6.4.7. Clearly, BSCCo must make inquiry of other trading parties in order to carry out a proper investigation.

(5) BSCCo provides a copy of its report to the Panel and to the Claimant Party: P6.4.4(b)(ii).

(6) The relevant Contract Trading Parties and Volume Notification Agent are under a duty to provide the Panel with such further information as it may reasonably request to assist it in making its determination: P6.4.4(c)(i). I have referred above to matters on which the Panel is likely to need information, if that is not provided in the initial submission. I list them in the next paragraph.

(7) The relevant Contract Trading Parties and Volume Notification Agent must confirm to the Panel "that the evidence and information provided to the Panel are complete and not misleading": P6.4.4(c)(ii). This is an important procedural requirement. There must be complete disclosure of relevant documents. And complete disclosure of relevant information.

(8) The Panel makes its determinations (1) whether a PNE has in fact occurred; (2) what it was; (3) whether the "prudence" and "all reasonable steps" hurdles are satisfied; and (4) whether in all the circumstances the PNE should be rectified: see P6.4.4(d), P6.4.6-8.

(9) The Panel must give reasons for its determination: P6.4.4(d).

(10) The Panel's determination and reasons are sent to all BSC Contract Trading Parties: P6.4.4(e).

Information needed from Claimant Parties

34. The information and evidence which is needed from Claimant Parties includes:

(1) what was the "particular ascertained volume data" which the Claimant Party actually intended to notify for the settlement period in question – and what is the evidence that demonstrates this;

(2) was there a "settled commitment" to notify that particular ascertained data; who held it; what is the evidence for such a commitment;

(3) what was the "mistake" that occurred; who made the mistake; how did it come about; what is the evidence for it;

(4) what were the systems and processes actually in place to avoid errors in notification; how were these prudent to avoid the risks of misnotification;

(5) when did the Claimant Party become aware of the error;

(6) what steps were then taken to rectify, reverse or otherwise mitigate the effect of the error;

(7) what steps were then taken to avoid a repetition of the error;

(8) if the Claimant Party is alleging a failure of BSC Systems or an inaccuracy in or unavailability of the Forward Notification Summary – details of these.

Other Contracting Parties

35. As we have seen, P6.4.4(b)(i) provides that the other Contract Trading Parties must provide to BSCCo information which BSCCo

reasonably requests for the purposes of its investigation of the matters set out in P6.4.7.

36. Further, in my opinion, other Contract Trading Parties who would be adversely affected by any decision to rectify a PNE (because the necessary recalculations would adversely affect their financial position) also have the right, in accordance with the duty of fairness, to make submissions and/or provide information directly to the Panel (or Panel Committee) which makes the relevant determination. The ordinary principles of administrative law require those who take decisions which affect others detrimentally to comply with the duty of fairness. In my opinion they apply in this context. The powers of the Panel (or Panel Committee) under the rule change derive ultimately from a direction given by the Authority under NGC's Licence, which is itself a public law instrument, granted under the Electricity Act 1989. The duty of fairness applies *a fortiori* since this rule change, and any adverse effect on the position of other Contracting Parties, are retrospective in operation.

37. The Authority has itself recognised that other parties have an interest – because of the potential adverse effect on their financial position: see eg paras 52 and 54 of the Decision Letter. Ofgem considered that "in the limited circumstances in which we expect that error corrections may be allowed under the terms of P37 alt, the loss of such benefits [does not] outweigh the better facilitation by the Modification of effective competition". But this balance does of course depend upon P6 being implemented within the stringent requirements of P6 itself, as Ofgem expected. This gives other Contracting Parties a relevant interest in making submissions and providing information relevant to the operation of P6.

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Paul Golby
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15 May 2002

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Dear Mr Durlacher

I am aware that the BSC Panel will be seeking to construct a process for the consideration of claims made by BSC participants relating to notification errors. I understand that this is to be discussed at the next BSC Panel meeting on 16 May 2002.

Clearly this is a very important issue to all BSC participants and we are therefore anxious, as no doubt are you, that any process adopted is demonstrably fair and just to all concerned. In furtherance of this concern might I suggest the following features for inclusion within any process to be considered by the Panel:

- The decision making body and its determinations should be impartial and free from the commercial interests of the industry and its participants.
- The form and content of any claim made under the process should be made available to all BSC participants.
- BSC participants interested in or affected by the circumstances giving rise to the claim (financially or otherwise), or potentially so affected by the determination of such claim, should be entitled to make formal representation to the decision making body prior to any decision being made.
- Any hearing conducted by the decision making body should be open to BSC participants.
- Any determination should be given with full reasoning and be made available in writing to BSC participants.

I feel that the ability of BSC participants to consider claims and thereon make formal representation is of the utmost importance. In reaching any decision on the prudence of the behaviour of a claimant the decision making body must have before it sufficient materials to compare such behaviour with that of others submitting notifications in similar circumstances at that time. Further, it is also important to consider any claims process in the light of the '7 day report'. Clearly such report enables a party to check it's notifications and therefore one might question whether any claim should be entertained where a party has failed to properly utilise such reports.

I hope that you will find the above comments to be of assistance. Please feel free to contact Peter Bolitho on 02476 42 5441 if you wish to discuss any of the issues raised in this letter.

Yours sincerely,

Paul Golby

Executive Director UK Operations

cc Callum McCarthy, Chairman and Chief Executive of the Gas and Electricity Markets Authority

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Dr. Paul Golby
CEO, Powergen UK

12 July 2002

Mr Nicholas Durlacher
Chairman, BSC Panel
Elexon Limited
Third Floor
1 Triton Square
London
NW1 3BX

Dear Mr Durlacher

On 15 May 2002 following Ofgem's approval of Modification Proposal P37 I wrote to you voicing Powergen's concerns about the process for consideration of claims by participants relating to past notification errors. We were anxious to ensure that any process adopted should be demonstrably fair and just to all concerned and suggested a number of features that should ideally be included in that process.

Since then Powergen has obtained a detailed legal view from Counsel interpreting both Section P6 of the Balancing and Settlement Code and advice on how to best construct a process to ensure fairness to all parties affected by the determination of any claim.

I appreciate the difficulties faced by the BSC Panel and Elexon in considering this matter, especially in the light of the large number of claims that have been submitted. I therefore trust you find the views and guidance of Counsel of assistance in your deliberations.

It has also been brought to my attention that a workshop has been scheduled for 17 July 2002 to consider the claims process. I would therefore be grateful if you could arrange for Elexon to circulate the attached Counsel's Opinion to members of the BSC Panel and all BSC signatories ahead of that meeting.

Yours sincerely,

cc Callum McCarthy, Chairman and Chief Executive
Gas and Electricity Markets Authority

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Linda Coe
Elexon Limited
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1 Triton Square
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Dear Linda,

P6 Past Notification Errors - Consultation Paper Response

This response to your consultation paper of 31 July 2002 is sent on behalf of Scottish and Southern Energy, Southern Electric, Keadby Generation Ltd. and SSE Energy Supply Ltd.

General

In formulating responses to the consultation we have been mindful of the need on one hand to have a practical robust process for dealing with claims, and ensuring that there is an open, transparent and inclusive process to settle them.

We believe that "natural justice" means that anyone who has an interest must be allowed to participate. This in effect means that sessions must not only be open, but must allow for active participation. It would be wrong if there was not an opportunity to challenge claims. On the other hand, we feel it would be inappropriate if this led to courtroom style proceedings.

The diverse nature and values of the claims gives rise to an inherent problem. For small claims it is likely that no legal counsel will be used, but for the very large claims, use of legal counsel will be economic for the claimant, but not for all the affected parties. A method which gives equal opportunity to both sides has to be found, and we believe that the claims should be dealt with in a participative way in a commercial rather than a legal sense. One way to help this would be to have full disclosure of the facts to all parties in advance of a hearing. We also believe that open hearings will reduce the risk of appeals.

Whilst we support the need to carry out a survey of systems we believe that this should only be to provide background information, and the temptation to formulate a standard against which claims would be measured should be avoided. After all, the fact that an error has been made is implicit in all the claims. The settlement of each claim should rest on the "merits" of the mistake rather than a judgement against a yardstick.

We do believe that consideration should be given to dealing with the claims in descending order of value. The large claims would then be dealt with whilst there is freshness and energy in the process before it gets bogged down.

The responses to the specific questions are set out below.

Question 1

> We support the concept of the PNE Committee as a BSC Panel Committee. Some judicial input is key, but we believe that the judiciary should not be the chairman, but rather act as an expert. This might then enable better continuity if more than one person has to be used. How will the transparency of the process be ensured if sessions are held in camera? We believe that sessions should be open for the reasons outlined above. In fact the counterclaimant for each claim is the rest of the industry - and a way has to be found to enable all those parties to participate in the process, if they so wish.

Question 2

A survey of practice is useful as background, but these need to be seen in the context of the NETA project implementation. Certainly the emphasis of the London claim which formed the basis of P37 was that systems were new and processes unfamiliar which resulted in an error being made. If an objective assessment is made of the state of systems in the first few weeks of Go Live is attempted, then the immediate conclusion will be that there wasn't a prudent operator to be found, not because of imprudence or negligence, but simply due to naivity and the sheer effort of bundling the whole thing over the line in the enforced timescales. It was not pretty at the time, and hindsight will make it doubly ugly, and expose the state of unreadiness that truly did exist.

Whilst we support the need to carry out a survey of systems we believe that this should only be to provide background information, and the temptation to formulate a standard against which claims would be measured should be avoided. After all, the fact that an error has been made is implicit in all the claims. The settlement of each claim should rest on the "merits" of the mistake rather than a judgement against a yardstick. A much better assessment would be to establish when companies became "stable" and "prudent" on an ongoing basis rather than try to judge the circumstances in the early days.

The whole issue of prudence in this context is very much time based. A company that is making a claim for an error that occurred 1 year after Go Live must be viewed in a different light to one that made an error in the first week, and subsequently took corrective action.

Question 3

Conditions Precedent - it is assumed that an assessment of the "conditions precedent" listed under "Background" for a claim to be considered will be included as part of this phase.

Completion of one Phase before the next - for the process to be fair, precedence is important. Therefore, the process needs to be in stages, and all claims need to be processed through that stage before any claim progresses to the next phase, or the results from that phase published. This then gives opportunity for claims to be revisited in the light of all the other cases as part of the phase. Otherwise the cases considered early on in the process could suffer from the learning curve effect. Each phase therefore needs a "normalisation" process at the end to ensure consistency and natural justice is applied throughout each phase.

Value - Unfortunately one of the criteria for a claim is that the cost of the error is disproportionate, so it may not be possible to judge an error purely on its merits. A situation could arise where the "same" error has been made, but one claim is successful because the cost was high and another is not because the cost was low.

The other aspect of cost is should the most expensive claims be dealt with first in order that justice be done to those, and to avoid a large claim succeeding or failing on the basis of a precedent set for a lower value claim ? Again, the precedence issue above could address this. We think that consideration should be given to settling the large claims first. Assuming one phase completes before another begins, it is appropriate to ask for evidence after the results of the Industry Survey.

Question 4

Subject to the above comments, Yes, we do agree with the model proposed .

Question 5

Every other party is an interested party because of the redistribution in RCRC, and therefore, ought to have an opportunity to comment. Sessions should be open, despite the numbers that may be involved. Having a potentially large number of attendees should not be a reason for not doing it, on the contrary, it may be the only fair way for the "counterparties" to be given a chance to challenge the claims being made.

In addition, if as suggested above, no claim is published/passed to the next phase until all claims have reached the same stage, then commenting on all claims in a short timeframe would be impractical.

Question 6

In the interest of natural justice there has to be a “participative” approach to the process to give the “counterparties” an opportunity to challenge the claims presented. The word “participative” is used in preference to “adversarial” because we do not believe that the claims should become courtroom dramas. This would also give the Panel Committee an opportunity to hear the views of other companies who operate in the market and get their views on the error made as well as that of the appellant. It may be necessary for companies to nominate representatives to ensure empowerment and ensure continuity, and for companies and attendees to sign confidentiality agreements, as much of the information is commercially sensitive, either directly or by implications. It probably also needs to be a condition of claiming that the claimant consents to such disclosures.

Question 7

Small claims: whilst these may be for small amounts, it is important that they be dealt with rigorously. Precedence will be an important aspect, and unless small claims are settled without prejudice we may be storing up trouble for the bigger ones.

Straightforward claims: - beware of any special arrangements. Declaring something straightforward involves pre-judgement which can be dangerous. Claims could be couched to look straightforward in the hope of getting them through. If they are truly straightforward they shouldn’t take long to go through the proper process anyway.

Question 8

This is largely answered by the responses to the previous questions. However, in summary, in the interest of natural justice there has to be a rigorous and challengeable process because there is a significant sum of money at stake. It also has to be transparent, auditable and fair.

Question 9

We support the process as outlined subject to the qualifications highlighted in the responses to the individual questions.

Regards

Garth Graham
Scottish & Southern Energy plc

Balancing And Settlement Code Section P6 – Past Notification Errors
Response To Consultation Paper

Introduction

This response is submitted on behalf of Scottish Power UK Plc, Scottish Power Generation Limited, ScottishPower Energy Trading Limited, ScottishPower Energy Retail Limited and Emerald Power Generation Limited. (Referred to collectively as "ScottishPower").

Q1: Do you agree with the proposed model for a decision-making body? If not, please suggest an alternative body and explain why this better meets the requirements of the Code and applicable law, in your view.

ScottishPower agrees that the PNE Committee should comprise of three people, two of whom should have some experience of the electricity sector. It is imperative that the two industry members are independent of any BSC Party or interest group.

In the event that it was thought appropriate to make a second judicial appointment in order to deal with the volume of business coming before the PNE Committee, it would be important that a third party be given responsibility for ensuring consistency in approach between the two judicial appointments given that there would be no precedents to guide either chairmen. The outcome of a claim should not depend upon which of the two chairmen dealt with the matter.

Q2: Do you agree with the proposed approach for gathering information to assist in the assessment of prudence? If not, please identify which elements of the approach are inappropriate, and identify additional elements that better meet the requirements.

ScottishPower does not support the proposal that there be an industry survey inviting all Trading Parties to submit a description of the systems and processes which they put in place at Go-live and any material changes made to them since then.

ScottishPower recognise that there needs to be some form of objective assessment as to what constitutes prudence for the purposes of P6. Nevertheless, the principal responsibility for judging whether the Claimant has been prudent lies with the PNE Committee assisted by the investigations which Elexon would carry out. ScottishPower firmly believe that the proposal for an industry survey is misconceived for the following reasons:-

1. It is based upon a belief that those who are asked to participate in the survey will have any desire to respond.

2. It ignores the costs involved in what would be a substantial exercise for each BSC Party. Only those who have a material interest in the outcome are therefore likely to respond. The results would not therefore necessarily reflect the position across the whole industry.

3. It requires the parties to disclose confidential and business sensitive information.

4. Complicated safeguards would need to be put in place to ensure that each party responding to the industry survey submits a complete and accurate response. If not, the results of the industry survey could be flawed. Such safeguards would need to include the right of each claimant to "interrogate" any survey responses.

5. It would be surprising if the cause of the errors which form the basis of each of the 697 claims are similar. Therefore, unless the survey was extremely detailed and designed to capture information which would be relevant to each and every individual claim, the chance of it capturing useful information is low

6. The analysis of the information received would be expensive and time consuming. The time and expense involved would far outweigh the benefits that it could bring to the decision-making process and would be far in excess of any comparative analysis that takes place in any judicial procedures.

It is better for the Panel Committee to be responsible for judging prudence based upon their analysis of the appropriate standard in the light of independent evidence. This will allow them to conduct a sensible analysis of the issue.

In forming this view they would be assisted by Elexon and the investigations carried out as part of a claim. Further, the proposal presently recognises that the PNE Committee will be able to obtain assistance from an expert witness. Any expert appointed as part of this process should have experience of managing large IT projects and also be fully aware of the issues which required to be addressed by the Trading Parties in the period leading to Go-Live and thereafter. The expert should also be required to give undertakings in respect of confidential information made available as part of the process. If a properly qualified expert is appointed to assist the PNE Committee in this way then there should be sufficient information to allow the PNE Committee to form a view on the issue of prudence. This level of expert assistance is considered quite sufficient in judicial proceedings. ScottishPower would recommend that this process be followed rather than proceeding with an Industry Survey.

Q3: Assuming that the Industry Survey is part of the process (see previous question) do you agree that the request for evidence from Claimants should take place after the results of the Industry Survey have been published? If not, what would you propose and why?

For the reasons set out in the answer to Question 2 ScottishPower do not accept that there should be an Industry Survey. However, if the Industry Survey forms part of the procedure for claims under P6, ScottishPower believe that the system should be fair and should be seen to be fair. The arguments/evidence of each claimant should not be contrived or "motive driven" to fit neatly with the findings of any industry survey. Any evidence previously submitted by the claimants should stand. In the event, however, that the industry survey throws up any issues that any claimant would wish to address in their arguments/evidence, they should be given the opportunity to supplement those arguments/evidence to deal with those issues in the light of the industry survey information.

Q4: Do you agree with the model proposed for the investigation of claims? If not, please identify which elements of the approach are inappropriate, or identify additional elements that better meet the requirements.

In terms of P6 it is recognised that Elexon should have a central role in investigating the claims. ScottishPower support the proposals in relation to the investigation of the claim other than those points which are specifically noted as being inappropriate in this submission.

ScottishPower agree that Elexon should have a central role in investigating the claims. It should be stressed, however, that Elexon's role should be limited to one of "investigation" and

(in certain limited circumstances) "recommendation". The process should allow for a fast track mechanism where the outcome of the investigations leads to an immediate conclusion that the claim is valid. In those circumstances, a claimant should be entitled to apply to the PNE Committee for an immediate decision without the need for any further procedure. The guiding principle should remain, i.e. that it is for the PNE Committee to determine whether the tests set out in P6 have been met.

Q5(a): Do you agree that the other interested parties should be given the opportunity to comment in writing on the claims? If not, why not?

ScottishPower does not agree that the other interested parties should be given the opportunity to comment in writing on the claims.

The procedure requires to balance the need to promote a system which is transparent and just with the need to ensure that claims are dealt with effectively and quickly. ScottishPower has submitted a claim in relation to events which took place in the period from immediately after Go-Live until 27 April 2001. It is now over 14 months since those events occurred. It now seems probable that the claim will not be resolved until October 2003. If every party to the BSC Code were able to make written submissions upon individuals' claims, the procedure will become unwieldy and time consuming. It will be incapable of producing a fair result quickly. ScottishPower cannot see how this proposal would benefit the process. It is up to the PNE Committee "after Elexon has investigated each claim" to reach a decision on the merits of each claim. Comment from BSC parties with a clear vested interest in the outcome of that decision does nothing to help. It will simply serve to slow the process down. If the PNE Committee is to adopt an inquisitorial approach it is inappropriate that parties with a vested interest should have a platform from which to oppose claims as if the system was adversarial.

ScottishPower consider that the proposal for interested parties to comment on the claims throws up similar problems to the proposal for an industry survey. These include the following:-

1. The process would become far too expensive and time consuming.

2. Safeguards would need to be put in place to ensure that the arguments/evidence of each interested party are subjected to the same scrutiny as those of the claimant. In particular, each interested party should be required to disclose all documents which might be relevant to the issue of the prudence of their own systems and processes. They should also be required to make available for cross examination any witnesses who support their position.

3. In each case the claimant should be allowed to rebut the arguments/evidence of the interested party. This would make it very difficult for claims to be handled expeditiously.

If, however, it is decided that other interested parties should have the opportunity of commenting in writing then any party which chose to do so should be subject to stringent conditions. These should be as follows:-

1. The Interested Party should be required to disclose its own interest in respect of the claim and the extent to which it would benefit from the claim being refused.

2. If an Interested Party chooses to comment it would then be obliged to respond to enquiries from both Elexon and the Claimant about its own systems. Effectively if it wishes to comment on the Claimant's position then it must be open to scrutiny itself. The procedure would require to be sufficiently flexible to allow Elexon to obtain information and for the Claimant to seek disclosure from the Interested Party.

3. An Interested Party who chooses to participate in this way will be responsible for bearing their own costs.

4. Any submissions made by an Interested Party would require to be certified by a Director of that Party, confirming that the comments made were true and accurate and had been verified.

If Interested Parties are allowed to comment in writing and the safeguards set out above are not provided in the system, then there will be an opportunity for those who stand most to gain from having claims refused to oppose those claims at little cost or exposure to themselves. This would be against the rules of natural justice. The parties would not be on an equal footing.

As ScottishPower has already stated, the role for investigating the claim should lie with Elexon. Elexon would effectively act as the representative of the other Interested Parties in ensuring that the claim is properly investigated and that the information provided by the Claimant is properly scrutinised.

Q5(b): Does the process as outlined above go far enough, or should these parties be given a right to attend a face to face meeting with the Committee where it has an interest (or an interest above a given threshold) in the outcome of the claim? If you think a meeting is required, why? How could this process be managed efficiently, bearing in mind that all Trading Parties will be affected by rectification of a Past Notification Error, to a greater or lesser extent?

ScottishPower does not believe that Interested Parties should have the right to scrutinise and comment on the claims. However, if such a right was to be retained in the procedure we are of the view that it would be unmanageable to allow every Interested Party to have a face to face meeting with the Committee. If this were to occur the Claimant should have the opportunity to be represented at that meeting as a fundamental requirement of natural justice. The agenda for the meeting would need to be set in advance and the information to be considered at that meeting would also require to be known. In order to avoid prejudicing the Claimant all of these points would require to be determined well in advance of the meeting, for example 21 days. As regards the meeting itself, the comments put forward by the interested parties should be subjected to the same scrutiny that would be expected in ordinary judicial proceedings. The safeguards referred to above should apply. The comments should be subject to evidence and cross examination and should provide for a rebuttal by the claimant. If such a system was instituted then the whole process could become bogged down, depending on the number of Interested Parties who chose to comment in respect of a claim.

Q6: The suggested process for investigating and determining claims is based on an inquisitorial rather than an adversarial model. Do you agree that this is the most appropriate model? If not, why not? If you would prefer an adversarial model should

Claimants and other Interested Parties be given the right to a full hearing in front of the Committee? How would this process be managed?

If the suggestions with regard to the role of the PNE Committee and Elexon set out above together with the remaining recommendations of the proposal are incorporated into the final procedure ScottishPower would support an inquisitorial rather than an adversarial model. It should be recognised that the guiding principle is that it is for the PNE Committee to determine whether the tests set out in P6 have been met without any preconception as to the outcome of their deliberations.

If the view is formed that other Interested Parties should have a substantial role in commenting on the claims then ScottishPower continue to see the role of the PNE Committee as inquisitorial. They should ensure that the safeguards referred to above are upheld.

If an adversarial model was adopted then Elexon should adopt the adversarial role, including taking the responsibility, if any, of representing the views of the other Interested Parties.

Q7: Do you agree that the suggested process is appropriate? If not, please identify which elements of the suggested procedures are inappropriate, or identify alternative or additional elements that better meet the requirements of the Code and applicable law.

See our comments above.

Q8: The process must comply with Section P6 and the requirements of natural justice. However, within these confines, there are cost and timetable issues to be borne in mind. Are there any aspects of the process that could sensibly be removed, and why? Should the process be bolstered up in any way, and why?

We have already sought to address these issues in the context of the answers given above. ScottishPower fully support any process which is not only fair, but also seen to be fair. At a time when civil proceedings in England and Wales are being streamlined to allow better access to justice, it is surprising that the proposed procedures for P37 claims should be so unwieldy. ScottishPower believe that the P37 procedure should, as far as practicable, adhere to the "Overriding Objective" of the Civil Procedure Rules. The process should:-

- Ensure that the parties are on an equal footing,
- Save expense,
- Be proportionate,
- Deal with each claim expeditiously and fairly.

Since this is an internal process (albeit involving significant amounts of money) it is surprising that the proposed procedure should be more complex than that available in ordinary court proceedings. ScottishPower is of the view that the process could be made more efficient by omitting the industry survey and the comments of Interested Parties in respect of individual claims. In order to counteract any suggestion that this would favour the Claimants, Elexon's role in investigating the claim for the PNE Committee should be bolstered as highlighted above.

Q8: In light of your responses to the questions, do you support the process as outlined in the Paper? If not, what alternative or additional features must the process have in order to comply with Section P6 and the requirements of natural justice?

ScottishPower does not believe that additional elements should be introduced into the procedure which was approved by the Panel and the Authority and is now set out in Section P6 of the BSC.

To summarise the points we have set out above, we do not support the use of an industry survey, and we do not support allowing parties other than the claimant to comment on the portfolio of evidence which Elexon will compile for submission to the PNE Committee. By removing this latter element from the proposed process there will then be no need to publish the portfolio of evidence, thus avoiding any problems of confidentiality associated with the submissions of the Claimant.

Should the process be implemented substantially as has been proposed however, the issue of confidentiality will need to be addressed. Many Claimants, including Scottish Power UK plc, submitted additional information beyond that contained within the claim form prior to the deadline for submitting claims. At that time, there was no indication given that this information would be published, since there is no reference to this in the text of Section P6. The procedure proposed recognises that there may be commercially sensitive information which the Parties would not wish to have published in this way. However, it is also anticipated that the PNE Committee would only restrict publication in exceptional circumstances. Given that this procedure was only proposed after information had been submitted, individual Claimants should have the opportunity of reviewing the information which has been submitted and removing any information which they believe is commercially sensitive and should not be published.

One other point relates to the claim fee. The proposed procedure does not address the stage at which the PNE Committee will decide whether claims which have a single cause should be treated as a single claim for the purposes of calculating the fee. It is submitted that this should be dealt with as a preliminary matter by the PNE Chairman following a recommendation by Elexon as a preliminary issue. This would allow individual Claimants to form a view as to the cost effectiveness of proceeding with a claim in the event that they were exposed to a series of claim payments.

Mike Harrison
Commercial Manager, Trading Arrangements
ScottishPower Energy Trading Limited

Consultation Response

1) **Do you agree with the proposed model for a decision making body? If not, please suggest an alternative body and explain why this better meets the requirements of the Code and applicable law, in your view.**

The inclusion of a chairman with significant legal experience is welcome given the obvious concerns about impartiality, however, an obvious conflict may arise from the desire to appoint two committee members that possess sufficient understanding of the industry/issues but are not affiliated to any interest groups. It may be useful for the BSC panel to circulate the criteria by which they will determine the eligibility of candidates and ensure their non-affiliation to interest groups.

2) **Do you agree with the proposed approach for gathering information to assist in the assessment of prudence? If not, please identify which elements of the approach are inappropriate, and identify additional elements that better meet the requirements.**

Clearly the range of risk management activities will vary according to the size and type of participant and whether the party engaged in particularly unique contractual arrangements. The proposed assessment for prudence would therefore benefit from classifying these participants accordingly and explicitly stating, within the report to the committee, whether any novel contracting arrangements existed.

Retrospective assessment of prudence should identify the context within which risk management processes were developed and should accurately depict the wealth, disparity and dynamic nature of the interface systems/proposals to support NETA prior to its implementation. It may also be of assistance to review the nature and timing of systems testing, to identify whether it was feasible for these errors to have been identified prior to NETA go-live.

3) **Assuming that the Industry Survey is part of the process (see previous question) do you agree that the request for evidence from Claimants should take place after the results of the Industry Survey have been published? If not, what would you propose and why?**

Before submitting their evidence participants should rightly be aware, if natural justice is to apply, of the criteria against which their claims are likely to be assessed. We note an Officer of the company will be required to attest to the factual accuracy of the submission. This should provide a strong disincentive to submit inaccurate evidence and reduce the resource intensive nature of the process for both Elexon and other parties.

4) **Do you agree with the model proposed for the investigation of claims? If not, please identify which elements of the approach are inappropriate, or identify additional elements that better meet the requirements.**

The opportunity to comment and agree upon the status report prepared by Elexon, with unresolved differences of opinions highlighted in the final report is welcome. This aspect of the process should also be extended to Elexon's report upon the claimants systems and processes.

We suspect the issue of confidentiality will be a difficult area for the committee due to the conflicting industry concerns regarding conduct of the process i.e. transparency / impartiality and treatment of commercially sensitive information. The consent for information to be treated confidentially must be applied consistently and not be unreasonably withheld.

Clarification from the committee upon how they intend to approach this issue would provide additional comfort to industry parties.

Please note, however, that despite the commercial sensitivity of information being reviewed by the committee all determinations must provide sufficient reasoning to enable full understanding by other interested parties. Not only would this provide additional comfort to all parties but it would provide a strong incentive upon the committee to be internally consistent in their determinations.

5) **(a) Do you agree that other interested parties should be given the opportunity to comment in writing on the claims? If not, why not?**

Given the financial implications of this process the desire for other parties to comment upon claims is understandable, however, this will need to be carefully balanced against the concern that it may lead to perverse incentives arising within the process. One practical option may be to limit parties who may challenge/comment upon decisions of the committee and limit the grounds upon which these parties may comment/challenge. It would be helpful if the BSC panel or delegated committee could produce a guideline for suitable grounds for challenge, for e.g. if the determination of the panel did not appear to be consistent with those of similar claims.

(b) Does the process as outlined above go far enough, or should these parties be given a right to attend a face to face meeting with the Committee where it has an interest (or an interest above a given threshold) in the outcome of the claim? If you think a meeting is required, why? How could this process be managed efficiently, bearing in mind that all Trading Parties will be affected by rectification of a Past Notification Error, to a greater or lesser extent?

We expect the committee would exercise discretion and quickly disregard obstructive and spurious challenges. In this scenario provided the scope for comments/challenge were limited and fell within the broad area of guidelines provided by the panel we do not anticipate an objection to face to face meetings with the committee.

6) **The suggested process for investigating and determining claims is based on an inquisitorial, rather than an adversarial model. Do you agree that this is the most appropriate model? If not, why not? If you would prefer an adversarial model, should claimants and other interested parties be given the right to a full hearing in front of the Committee? How would this process be managed?**

Provided the measure that we have indicated in the summary question are implemented we consider the inquisitorial method should be appropriate.

7) **Do you agree that the suggested process is appropriate? If not, please identify which elements of the suggested procedures are inappropriate, or identify alternative or additional elements that better meet the requirements of the Code and applicable law?**

We note there are limited grounds for appeal and that appeals may only be made within 5 working days of the final decision by the Panel or it's delegated committee. TFE consider it may be preferable for all determinations by the committee to be provisional until the determination of the last claim. This coupled with full explanation of the committees decisions should, as indicated earlier, provide a strong incentive for the committee to be internally consistent in their determinations and provide claimants with a realistic opportunity to appeal if the process is not followed consistently.

8) **The process must comply with Section P6 and the requirements of natural justice. However, within these confines, there are cost and timetable issues to be borne in mind. Are there any aspects of the process that could sensibly be removed, and why? Or should the process be bolstered up in any way, and why?**

Please note responses to questions 1, 2, 3, 4, 5 and 7.

Summary Question:

9) **In light of your responses to the questions, do you support the process as outlined in the Paper? If not what alternative or additional features must the process have in order to comply with Section P6 and the requirements of natural justice?**

We recognise the difficulties faced by Elexon and the Panel or it's delegated committee in performing the functions described and consider elements of the proposal to be elegant and pragmatic. TFE G&P recommend the inclusion of the following elements within the process:

- Circulation, by Elexon, of the criteria by which the Panel will select committee members and determine impartiality and relevant industry expertise.

- Classification of prudence survey according to class, size and type of participant with explicit recognition of novel contracting forms.

- Retrospective identification of prudence within the report to accurately depict the context within which risk management processes were developed.

- Requests for evidence to take place after the industry survey.

- Explicit recognition of, within all reports by Elexon, unresolved differences of opinions between Elexon and the claimant.

- Clarification from the committee upon how they intend to approach the confidentiality issue.

- Despite the commercial sensitivity of information being reviewed by the committee all determinations to provide sufficient reasoning to enable full understanding by other interested parties

- Limit the parties who may challenge/comment upon decisions of the committee and limit the grounds upon which these parties may comment/challenge. It would be helpful if the BSC panel or delegated committee could produce a guideline for suitable grounds for challenge, for e.g. if the determination of the panel did not appear to be consistent.

- All determinations by the committee to be provisional until the determination of the last claim so as to provide claimants a realistic opportunity to appeal if the process is not followed consistently.

We consider the above recommendations should serve to alleviate much of the resource burden by Elexon, the Committee, Claimants and other Parties. It should also provide additional comfort and security to interested parties that the process will be conducted in a fully transparent and impartial manner.

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20 August 2002

Dear Linda

Balancing and Settlement Code Section P6 - Past Notification Errors - Consultation Paper

Thank you for the opportunity to comment on the above consultation. This response is on behalf of all TXU Europe BSC Parties (21).

Question 1: Do you agree with the proposed model for a decision making body? If not, please suggest an alternative body and explain why this better meets the requirements of the Code and applicable law, in your view.

TXU agrees that it is appropriate for the BSC Panel to delegate its functions under Section P6 of the Code. We also agree with the proposed structure of 3 independent members, including one with judicial/arbitral experience to act as chairman.

It is recognised that it will be very difficult to find people who are both sufficiently expert yet impartial. Our suggestion for resolving this issue would be to find people who did work in the Industry at the time NETA and its systems and processes were being designed and implemented but who has now left the Industry and working in a neutral capacity (e.g for a consulting firm). The only person we know of who fits in this category is Peter Bedson who used to work for Barking Power and now works for IPA Consulting.

Question 2: Do you agree with the proposed approach for gathering information to assist in the assessment of prudence? If not, please identify which elements of the approach are inappropriate, and identify additional elements that better meet the requirements.

Yes, an industry survey of systems and processes in place at the time of go-live, and subsequent changes is an eminently sensible approach. We believe that there may also be some benefit in the PNE Committee visiting a handful of companies to see how Parties operate in the normal day to day running of the NETA environment.

Question 3: Assuming that the Industry Survey is part of the process do you agree that the request for evidence from Claimants should take place after the results of the Industry Survey have been published? If not, what would you propose and why?

No, we had assumed that Parties would submit evidence in support of their claim independently of the Survey. We had also assumed that the purpose of the Survey was to provide background information for the PNE Committee to gauge whether or not the applicants claim was or was not reasonable. In view of this we are not convinced that it is necessary to wait for the Survey results before Parties submit their evidence in support of their claims.

Question 4: Do you agree with the model proposed for the investigation of claims? If not, please identify which elements of the approach are inappropriate, or identify additional elements that better meet the requirements.

Yes, we agree with the model proposed for investigating claims.

Question 5 a: Do you agree that other interested parties should be given the opportunity to comment in writing on the claims? If not, why not?

Yes, we agree that interested parties should be able to submit written comments on claims. This will ensure that any statements made by claimants can be disputed not only by the committee, but also by parties who were operating under the same regime.

Question 5 b: Does the process as outlined above go far enough, or should these parties be given a right to attend a face to face meeting with the Committee where it has an interest (or an interest above a given threshold) in the outcome of the claim? If you think a meeting is required, why? How could this process be managed efficiently, bearing in mind that all Trading Parties will be affected by rectification of a Past Notification Error, to a greater or lesser extent.

We can understand the reservation about giving all trading parties the right to attend a face to face meeting given the potentially time consuming nature of such a right. One alternative would be for there to be a single meeting at which a Group of like minded Parties could make a presentation to the PNE Committee which sets out what they consider to be the main issues which need to be determined in evaluating claims. Even if the idea of parties having any right to be heard by the Committee is rejected, the Committee should have the option of seeking such views from parties in person in response to their written submissions.

Question 6: The suggested process for investigating and determining claims is based on an inquisitorial, rather than an adversarial model. Do you agree that this is the most appropriate model? If not, why not? If you would prefer an adversarial model, should claimants and other interested parties be given the right to a full hearing in front of the Committee? How would this process be managed?

Provided that other interested parties are able to submit written comments and have the possibility of being heard by the PNE Committee, we support the inquisitorial model.

Question 7: Do you agree that the suggested process is appropriate? If not, please identify which elements of the suggested procedures are inappropriate, or identify alternative or additional elements that better meet the requirements of the Code and applicable law?

Other than the comments made above in respect of questions 3 and 5b, we agree that the suggested process is appropriate.

Question 8: The process must comply with Section P6 and the requirements of natural justice. However, within these confines, there are cost and timetable issues to be borne in mind. Are there any aspects of the process that could sensibly be removed, and why? Or should the process be bolstered up in any way, and why?

We do not think that any areas of the process that should be removed.

Question 9: In light of your responses to the questions, do you support the process as outlined in the Paper? If not what alternative or additional features must the process have in order to comply with Section P6 and the requirements of natural justice?

For the most part we support the process outlined in the Paper, but see our comments in relation to questions 3 and 5b.

The Paper also refers to a shortfall in the budget due to the linking of claims for the purposes of paying the £5,000 administration fee. We believe that any such shortfall should be charged back to claimants (and not to all Trading Parties) and pro-rated for the number of claims submitted.

We hope you have found these comments useful and should you have any questions please contact me on the above number.

Yours sincerely

Nicola Roberts
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