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21 November 2002

The National Grid Company, BSC Signatories and
Other Interested Parties

Our Ref: MP No P94

Dear Colleague,

Modification to the Balancing and Settlement Code ("BSC") - Decision and Notice in relation to Modification Proposal P94: "Introduction of a Process to Allow the Panel to Recall Modification Reports from the Authority to Allow the Legal Drafting to be Corrected if Working Assumptions Prove to be Incorrect"

The Gas and Electricity Markets Authority (the "Authority")¹ has carefully considered the issues raised in the Modification Report² in respect of Modification Proposal P94, "Introduction of a Process to Allow the Panel to Recall Modification Reports from the Authority to Allow the Legal Drafting to be Corrected if Working Assumptions Prove to be Incorrect."

The Balancing and Settlement Code Panel (the "Panel") recommended to the Authority that Modification Proposal P94 should be made with an implementation date of

- 30 September 2002 if an Authority determination is made on or prior to 9 September 2002 or
- 15 working days of such Authority determination if that determination is made after 9 September.

The Authority has decided not to direct a Modification to the BSC.

This letter explains the background and sets out the Authority's reasons for its decision.

¹ Ofgem is the office of the Authority. The terms "Ofgem" and "the Authority" are used interchangeably in this letter.

² ELEXON document reference MR094, Version No. 1, dated 20 August 2002

Background

Modification Proposal P94, "Introduction of a Process to Allow the Panel to Recall Modification Reports from the Authority to Allow the Legal Drafting to be Corrected if Working Assumptions Prove to be Incorrect", was raised on 8 July 2002 on behalf of the BSC Panel. The justification for the Modification Proposal was that it better facilitated achievement of the Applicable BSC Objective³ C3 (3) (d) of National Grid Company's Transmission Licence. At a meeting on 18 July 2002, the Panel considered the Initial Written Assessment and agreed that Modification Proposal P94 should be submitted to the Report Phase.

A draft Modification Report was issued for consultation on 26 July 2002.

The Modification Proposal

In circumstances where

(a) The baseline against which the legal text for any Pending Modification Proposal or its Alternative awaiting Authority Decision has changed because of the introduction of legal text consequent on approval of another Modification Proposal (this may include the necessity to change the paragraph numbers, cross references to other paragraphs within the Code or to change the legal text where there has been a clear impact on the proposed legal text by the recent approval); or

(b) Where an error has been identified in the legal text of a Modification Report currently with the Authority for determination

Modification Proposal P94 proposes to allow the Panel to apply to the Authority to amend the proposed legal text included in the Modification Report that has already been submitted for determination. It is proposed that a supplement to the Modification Report will be prepared containing the revised legal text. The Panel will then consider whether a consultation on the supplement is appropriate. It is envisaged that the Panel would normally undertake a consultation where there is a change to the meaning contained within the legal text.

ELEXON published a draft Modification Report on 24 April 2002, which invited respondents' views by 9 May 2002.

³ The Applicable BSC Objectives, as contained in Condition C3 (3) of National Grid Company's Transmission Licence, are:

- a) the efficient discharge by the licensee of the obligations imposed upon it by this licence;
- b) the efficient, economic and co-ordinated operation by the licensee of the licensee's transmission system;
- c) promoting effective competition in the generation and supply of electricity, and (so far as consistent therewith) promoting such competition in the sale and purchase of electricity;
- d) promoting efficiency in the implementation and administration of the balancing and settlement arrangements
- e) the undertaking of work by BSCCo (as defined in the BSC) which is:
 - (i) necessary for the timely and effective implementation of the proposed British Electricity Trading and Transmission Arrangements (BETTA); and
 - (ii) relevant to the proposed GB wide balancing and settlement code;and does not prevent BSCCo performing its other functions under the BSC in accordance with its objectives.

Respondents' views

ELEXON received twelve responses to the consultation on Modification Proposal P94. Eleven responses (representing 41 Parties) expressed support for the recommendation that the Proposed Modification should be made. One response (representing 1 Party) made no comment.

The cutting of bureaucracy and the introduction of flexibility into the Code was a common rationale among those in favour of the Modification Proposal. Notwithstanding their support for the Modification Proposal as a whole, concern was expressed by one Party that the phrase "manifest error" in this context was not defined. Two other Parties who supported the Modification Proposal expressed the view that they would expect changes that may involve material impacts to be consulted upon.

The respondents' views are summarised in the Modification Report for Modification Proposal P94, which also includes the complete text of all respondents' replies.

Panel's recommendation

The Panel met on 15 August 2002 and considered the Modification Proposal P94, the draft Modification Report and the consultation responses received.

The Panel recommended that the Authority should approve Modification Proposal P94. The view of the Panel was that Modification Proposal P94 would promote efficiency in the implementation and administration of the balancing and settlement arrangements (Applicable BSC Objective C3(3)(d)). The rationale for this view was that it would allow the correction of the text in an efficient manner without the need to raise a subsequent Modification Proposal to correct the legal text of a Proposed Modification following approval of such a Proposed Modification. The Panel stated that, if approved, the Proposed Modification should be implemented on 30 September 2002 if an Authority determination is made on or prior to 9 September 2002; or 15 Working Days after such Authority determination if that determination is made after 9 September 2002.

Ofgem's view

Ofgem considers that the presence of a mechanism within the Code to enable the Panel to amend legal text in the circumstances outlined in the Modification Proposal might serve to undermine the integrity of Modification Proposals submitted by Parties and assessed by Modification Groups. It may also compromise the BSC Modification Proposal evaluation process and so would not better facilitate achievement of the Applicable BSC Objectives.

It is proposed that one of the circumstances under which the Panel may apply to amend legal text submitted by a Party or developed by a Modification Group would be to make it consistent with a prior Modification. Ofgem notes the consultation responses on this issue and the fact that alterations to the text to make it more consistent with a prior Modification might involve a change of meaning of the text and might therefore involve a material impact on Parties. There were concerns put forward by two consultation respondents in this regard. One response urged that Parties should be consulted when changes resulting from this process may lead to a potential impact on market participants' systems or commercial operations. Another response indicated that Parties should be able to express views on what might be significant material changes.

It is Ofgem's view that where significant material changes may occur as a result of approval of a Modification Proposal submitted under the BSC, then, irrespective of whether these changes have been consulted upon, good process would dictate that instead, a new Modification Proposal should follow, allowing the proposed changes and the envisaged impacts to be properly evaluated.

Ofgem is mindful however, that this Modification Proposal was raised on the grounds of efficiency and recognises that in defined circumstances, for example where the prior Modification renders inconsistencies with aspects of proposed text relating to paragraphing numbering and cross-references, the correction of which would clearly not lead to a significant material impact on Parties, then it would be useful to implement an enabling mechanism to allow for the recall, amendment and resubmission of the legal text without having to rely on a new Modification Proposal to remedy the inconsistency. In any case the criteria under which such an enabling mechanism might operate would need to be more tightly defined than those outlined in the legal text accompanying Modification Proposal P94.

Similarly, as regards the element of the Modification Proposal relating to the ability to recall Modification Reports when the Panel becomes aware of a manifest error or a minor inconsistency in such proposed text, Ofgem considers that if the remedial change to the text would occasion a material impact on Parties, then due process would dictate that the impacts should be assessed during evaluation. Further, one consultation respondent expressed the view that it was unclear from the legal drafting exactly what would constitute a manifest error. Ofgem considers that such a mechanism to enable recall to correct such errors should operate under more tightly-framed criteria than those put forward in the legal text accompanying the Modification Proposal. Such criteria might include circumstances where the current wording creates an absurdity, the correction of which would result in no significant material impact on parties.

Ofgem therefore does not agree with the Panel's recommendation that Modification Proposal P94 should be made.

The Authority's decision

The Authority has therefore decided not to direct that Proposed Modification P94, as set out in the Modification Report for Modification Proposal P94, should be made and implemented.

Having regard to the above, the Authority, in accordance with Section F1.1.4 of the BSC, hereby notifies NGC that it does not intend to direct NGC to modify the BSC as set out in the Modification Report.

If you have any questions, please contact me on the above number.

Yours sincerely,



David Edward

Head of Electricity Codes Development

Signed on behalf of the Authority and authorised for that purpose by the Authority