

Modification proposal:	Balancing and Settlement Code (BSC): Prevention of "Timing Out" of Authority decisions on Modification Proposals (P250)		
Decision:	The Authority ¹ directs that the alternative proposal be made ²		
Target audience:	National Grid Electricity Transmission Plc (NGET), Parties to the BSC and other interested parties		
Date of publication:	19 May 2010	Implementation Date:	3 June 2010

Background to the modification proposal

The BSC³ states which information is to be provided in a Final Modification Report (FMR) to the Authority when it is to make a decision on a BSC modification. This information includes the recommendation of the BSC Panel regarding the proposed Implementation Date to implement a Proposed Modification or Alternative Modification.

The proposed Implementation Date is not determined by a set formula. The Panel may choose to set either an open ended date linked to the Authority's decision, e.g. 'x' days after an Authority decision, or a fixed calendar date, e.g. 1 April 2011. The Panel may choose to set a fixed date based on its view of the likely time required to make changes to BSC central systems and/or to the systems of BSC parties to provide them with certainty about implementation. Where the proposed implementation date is fixed, the date by which the Authority needs to make its decision to ensure timely implementation (the 'decide by' date) also becomes fixed.

The issue of timing out of a Modification Proposal pending an Authority decision arose in the case of a number of BSC modifications concerning the introduction of changes to the calculation of transmission losses⁴. The Authority was unable to make a decision on these modifications before the last 'decide by' date, in part owing to the need to carry out a revised assessment of the original proposals when that which had been submitted to it was called into question. The Authority subsequently indicated its intention to defer a decision, taking it beyond the date set out within the FMR. This decision to defer was subsequently challenged in court by a number of parties. The judge ruled that the Authority has no power to make a decision about a proposed BSC Modification if a proposed implementation date or decision 'decide by' date in the FMR has passed. This ruling highlighted a risk that the Authority may be 'timed out' of its ability to take a decision.

Subsequent to the challenge, we undertook two consultations⁵ to address the risk of timing out. Each consultation proposed options to modify the licences of the code owners of the BSC, the Uniform Network Code (UNC) and the Connection and Use of System Code (CUSC) in order, in our view, to remove the risk of timing out. We identified the BSC, UNC and the CUSC as the industry codes with the greatest commercial impact. We considered that the removal of the risk of timing out would be beneficial in two ways:

- Wasteful loss and duplication of resources – if a Pending Modification is timed out, there would be a potential loss of work done by code panels and the Authority which would need to be duplicated if the Modification was raised again.

¹ The terms 'the Authority', 'Ofgem' and 'we' are used interchangeably in this document. Ofgem is the Office of the Gas and Electricity Markets Authority.

² This document is notice of the reasons for this decision as required by section 49A of the Electricity Act 1989.

³ Section F2.7.7 of the BSC.

⁴ BSC transmission losses modifications P198, P200, P203 and P204 are available on the Elexon website.

⁵ The "timing-out" of Authority decisions on modification proposals (Ref. 152/08, November 2008) and the "timing-out" of code modification proposals (Ref. 51/09, May 2009) appear on the Ofgem website.

- Loss or delay to consumer and industry benefits – re-raising a Modification could delay passing on benefits of the original timed out Modification to consumers and to the industry.

The court judgment also highlighted these issues as reasons to avoid ‘timing out’.

In the second consultation, we presented an option of a licence change allowing the Authority to require code panels to revise a proposed implementation date for a Pending Modification where there was a risk of timing out. Panels would undertake a consultation with all interested stakeholders and present a revised proposed implementation date(s). The Authority could also require panels to update any analysis submitted in the FMR (also after consultation) if this was out of date.

Most respondents to the consultations did not support Ofgem’s proposed licence changes for a variety of reasons. The main concerns were that:

- There would be a reduced incentive on the Authority to make timely decisions on Pending Modifications if all proposed implementation dates were open ended.
- The use of licence powers was disproportionate to the problem of timing out.
- The lack of an Authority decision over an extended period would increase regulatory uncertainty and risks to market participants and consumers.

A number of respondents also referred to an Authority decision on a previous BSC Modification, P93⁶, in which the Authority had stated that allowing a power to the BSC Panel to revise proposed Implementation Dates for Pending Modifications with the Authority would introduce unnecessary regulatory uncertainty with no gains in efficiency.

In our view, P93 is not analogous to the current circumstances. In particular, the power to revise implementation dates under P93 would have been sought by the BSC Panel and not the Authority. Use of the power, after consultation with BSC parties, would have been limited to the context of the BSC and not to the context of the wider statutory duties to which the Authority has regard. We also consider that a material change of circumstances has occurred since the P93 decision as a modification proposal has fallen away as a result of a ‘decide by’ date passing before an Authority decision was reached (the transmission losses proposals). A power was created under the BSC following P180⁷ for the Panel to consult on and revise proposed Implementation Dates in the event of a legal challenge to an Authority decision *which has been made* (by Competition Commission appeal or judicial review). No such power exists where an Authority decision *is not yet made* as was the case with the transmission losses modification proposals.

National Grid (NG), in its responses to our consultations, noted its preference to deal with the issue of timing out through appropriate modifications to codes rather than licence.

The modification proposal

NG raised P250 in January 2010. The proposed modification obliges the BSC Panel to construct implementation dates for all modifications so as to never time out the Authority from making a decision, i.e. implementation dates would always be constructed to be ‘open-ended’, e.g. ‘x’ days after an Authority decision. P250 would also formalise the Panel’s ability (currently a working practice only) to seek indicative decision dates from the Authority in writing and advise the Authority if the original analysis in the FMR has become (or will shortly become) out of date.

⁶ The P93 ‘Introduction of Process for Amendment of Proposed Modification Implementation Dates’ decision letter appears on the Elexon website.

⁷ The P180 ‘Revision to BSC Modification Implementation dates, where an Authority determination is referred to appeal or judicial review’ decision letter appears on the Elexon website.

During assessment, the modification group developed an alternative modification. The alternative would continue to allow the Panel to set implementation dates, including fixed dates, as currently. However, it would also enable the Authority to instruct the Panel to consult with the industry on revised implementation dates if there is a risk it will be timed out on making a decision and the Panel would be required to come back with revised dates allowing the Authority time to make a decision. The Panel would also be able to consult on whether the original analysis in the FMR was 'time sensitive' and likely to be affected by revising implementation dates and report any views back to the Authority. If subsequently the Authority was unable to meet any revised implementation dates, it could return to the Panel at a future time.

Neither proposal requires the Panel to revise its original analysis or make a fresh recommendation.

NG considered that the proposed modification would better facilitate Applicable BSC Objective (d) (promoting efficiency in the implementation and administration of the trading arrangements) by ensuring that original modifications are not timed out, thereby reducing the risk of a waste of resources that would occur if the modification had to be re-raised. The proposed modification would also allow the Panel to raise any questions around the validity of the original analysis with the Authority through a formal process.

BSC Panel⁸ recommendation

The BSC Panel considered the draft Final Modification Report at its meeting on 8 April 2010. The Panel unanimously agreed that the Proposed Modification did not better facilitate any of the Applicable Objectives and, by majority, agreed that the Alternative Modification did not better facilitate the Applicable BSC Objectives, in particular, (c) and (d). Details of the Panel's views appear in the Final Modification Report (FMR).

The Authority's decision

The Authority has considered the issues raised by the modification proposal and the Final Modification Report (FMR) dated 13 April 2010. The Authority has considered and taken into account the responses to Elexon's⁹ consultation which are attached to the FMR¹⁰.

The Authority has concluded that:

1. implementation of the alternative modification will better facilitate the achievement of the relevant objectives of the BSC¹¹; and
2. directing that the alternative modification be made is consistent with the Authority's principal objective and statutory duties¹².

Reasons for the Authority's decision

In our view, there is a risk of timing out under the BSC. We do not agree with some respondents that there is no defect to address. The very fact that the Panel is obliged to recommend a proposed implementation date under the BSC gives rise to the risk that it may recommend a date which could time out.

⁸ The BSC Panel is established and constituted pursuant to and in accordance with Section B of the BSC.

⁹ The role and powers, functions and responsibilities of Elexon are set out in Section C of the BSC.

¹⁰ BSC modification proposals, modification reports and representations can be viewed on the Elexon website at www.elexon.co.uk

¹¹ As set out in Standard Condition C3(3) of NGET's Transmission Licence, see: http://epr.ofgem.gov.uk/document_fetch.php?documentid=4151

¹² The Authority's statutory duties are wider than matters which the Panel must take into consideration and are detailed mainly in the Electricity Act 1989.

The risk of timing out is likely to occur in very few cases. These cases will be where the issues to be addressed are complex, may have significant commercial impacts on all industry parties (either positive or negative) and, therefore, it is appropriate for the Authority to undertake the necessary steps and assessment before reaching a robust decision.

We note the views of a number of respondents that there is a risk of increased regulatory uncertainty for all parties if implementation dates for all modifications are left 'open ended'. We also note the concerns of these respondents that the longer that a decision is delayed, the greater the risk that the original analysis included in the FMR may become out of date and unreliable for a robust Authority decision.

It is necessary that the Authority has a reasonable period in which to take a decision. The need to reach a decision in a reasonable time must be considered against the need to undertake appropriate assessment of the issues raised by a code change, particularly if these issues emerge after the Panel submits the FMR. Following due process may involve the Authority undertaking a regulatory impact assessment of a code change for which there are clear criteria which the Authority must follow. An impact assessment would involve the Authority in assessing a code change against its wider statutory duties and not just the code objectives.

If the Authority did not undertake such assessment before it makes a decision on the relevant code change, it may be argued that it had failed to have undertaken appropriate due process. The Authority will use its best judgement to determine where the balance lies in terms of appropriate rigour and a reasonable period in which to make a decision.

We consider below the merits of the proposed and alternative modifications against the Applicable BSC Objectives.

Applicable BSC Objective (c) – promoting effective competition in the generation and supply of electricity

We note the unanimous views of the Panel and most respondents that the proposed modification does not better facilitate this objective. In particular, we note concerns about the potential increase in regulatory uncertainty for parties of 'open ended' implementation dates for modifications and the potential detriment to competition if they are unable to plan effectively for possible implementation of modifications.

While we recognise that there is a potential for increased regulatory uncertainty caused by this modification we note that the Panel's ability to recommend a suitable proposed implementation date would not be affected in the vast majority of cases.

In the cases that are affected, formal inclusion within the BSC of an existing working practice for the Panel to write to the Authority seeking its views on indicative dates for code change decisions and allowing the Panel to raise concerns about the validity of the original analysis in a FMR of a Pending Modification would limit the risk of regulatory uncertainty. This would allow the Panel to obtain greater clarity from the Authority about implementation dates to assist parties in planning for implementation. It would also allow the Authority to take into account any impact on the validity of the analysis in its final decision to ensure that the decision is robust.

At the same time, we consider that the proposed modification does introduce a process to avoid the risk that timing out of a modification leads to wasted resource and loss of potential benefits, including any competition benefits.

In our view, the proposed modification has a neutral impact on Applicable Objective (c).

We note the views expressed by the Panel and respondents about the alternative modification and whether it better facilitates this objective. In particular, we note that a majority of the Panel gave the same reasons why the alternative did not better meet this objective, namely, that there would also be regulatory uncertainty and an adverse impact on competition if the Authority sought revised implementation dates to avoid timing out. However, we also note that a minority of the Panel and of respondents did consider the alternative to provide a more pragmatic process for keeping the original modification active, preventing the waste of resource and loss of benefits resulting from timing out.

In our view, the approach set out in the alternative has merit over the modification proposal. It addresses the original defect of timing out, retains some degree of certainty to parties as to expected implementation timescales while additionally allowing the industry to provide views on the revision of implementation dates and the validity of the original analysis. The Authority would take this information into account in its final decision. We therefore consider that the alternative does better facilitate Applicable Objective (c).

Applicable BSC Objective (d) – promoting efficiency in the implementation and administration of the balancing and settlement arrangements

We note the arguments against both the proposed and the alternative modifications are that 'open ended' implementation dates invite the Authority to take an unreasonable period of time to decide on code changes, thereby increasing regulatory uncertainty and creating a more inefficient process. We also note the minority view that both the proposed and alternative modifications provide a process for addressing any potential delays to the Authority's decision. In the case of the alternative, this would involve the Authority directing the Panel to provide revised implementation dates.

In our view, both the proposed and alternative modifications better facilitate Applicable Objective (d). They create a formal code-based process to remove the risk of timing out and improve the efficiency of the current procedures. Although we consider that this risk may arise in only very few cases, addressing it would avoid both a waste of resources and the denial of benefits to consumers and industry.

Conclusion

The Panel and respondents generally considered the alternative to better facilitate Applicable Objectives (c) and (d) compared with the original. We agree that the alternative provides a trigger (the Authority's direction to the Panel for revised implementation dates) to ensure that industry views are taken into account both regarding implementation dates and the validity of the original analysis. In light of this and for the reasons set out above, we consider that the alternative modification better facilitates Objectives (c) and (d) compared with the original proposal or the baseline.

Decision notice

In accordance with Standard Condition C3 of NGET's Transmission Licence, the Authority, hereby directs that the **alternative** to modification proposal BSC P250: 'Prevention of "Timing Out" of Authority decisions on Modification Proposals' be made.

Mark Cox

Associate Partner, Transmission and Governance

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