

Modification proposal:	<b>Balancing and Settlement Code (BSC) P271: NETSO Consultation in relation to any potential changes to the BSC which takes place in forums other than the BSC Panel</b>		
Decision:	The Authority <sup>1</sup> has decided to reject this proposal		
Target audience:	National Grid Electricity Transmission Plc (NGET), Parties to the BSC and other interested parties		
Date of publication:	13 October 2011	Implementation Date:	n/a

## Background to the modification proposal

In July 2009, the Third Package<sup>2</sup> was adopted by the European Union (EU) and aspects of the Third Package came into force on 3 March 2011. The Third Package seeks to achieve consistency in the rules and regulations that apply to the EU internal market for energy (gas and electricity) across the EU by the establishment and adoption of a number of European Network Codes (ENCs).

The process by which the ENCs (for the internal market for electricity) will be adopted is as follows:

- a set of high-level principles, known as Framework Guidelines (FGs) are to be developed by the Agency for the Cooperation of Energy Regulators (ACER) consisting of all the national energy regulatory bodies across the EU. Ofgem is the national regulatory authority for Great Britain (GB) and is a member of ACER. ACER was established when the Third Package came into force;
- the detailed ENCs are to be drafted, based on the high-level principles set out in the FGs, by the European Network of Transmission System Operators for electricity (ENTSO-e) consisting of all the Transmission System Operators (TSOs) across the European Union and several non-EU Countries (34 countries in total). ENTSO-e was also established when the Third Package came into force; and
- the drafted ENCs are to go through an approval process by EU member states known as comitology, used by the European Commission (EC) to make the ENCs legally binding on each Member State.

The proposed ENCs are focused on issues relating to cross border trade and development of the internal energy market. They could potentially have a significant impact on GB industry codes and, once approved, take precedence over the rules in GB codes. NGET is the National Electricity Transmission System Operator (NETSO) for GB and is actively involved in developing the ENCs through the ENTSO-e.

There are consultation and stakeholder engagement processes at a European level for interested stakeholders across the EU to provide views to ACER and ENTSO-e at each stage of the development of the ENCs. National stakeholder forums are not mandated at EU level, leaving Member States to make their own arrangements for stakeholder

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

<sup>2</sup> Details of the Third Package proposals relevant to this modification are set out in EC Regulation 714/2009 and are available on the Eur-lex website:

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0015:0035:EN:PDF>.

engagement on this topic. A number of GB stakeholders are keen that their views on the development of the ENC's are provided at an early stage in the drafting process and that this would complement European level engagement. In the view of these stakeholders, NGET, in its role as NETSO, would be the lead GB TSO involved in the development of the ENC's through ENTSO-e and, as such, should be under an obligation to engage with GB stakeholders.

## **The modification proposal**

P271 was raised by Scottish and Southern Energy (SSE) Generation Limited in February 2011. The proposer raised a similarly worded CUSC modification and Grid Code user request at the same time<sup>3</sup>. The proposer considered that there is a risk that NGET will not engage with GB stakeholders at a national level and that this would adversely impact GB stakeholders' ability to provide views to NGET, as the NETSO, during the drafting development phase of the ENC's. In the proposer's view, the potentially significant impact of the ENC's as legally binding rules which take precedence over GB codes means that GB stakeholder engagement should be a requirement on NGET to take effect as early as possible in the drafting process.

P271 would create a code obligation on NGET, as the NETSO, to consult with BSC signatories and consider their views regarding any potential changes to the BSC which arise from forums other than the BSC Panel. The scope of the proposed solution would include any forum on any topic where NGET is attending as the NETSO. In doing so, NGET would be obliged to:

- provide details of any draft proposals, in particular those concerning the ENC's, before they are submitted to the relevant body, e.g. ENTSO-e, including draft text and impact assessments as appropriate,
- seek and take into consideration the views of the BSC Panel on such proposals before they are submitted to the relevant body, and
- provide prior notification of, and subsequent feedback from, meetings and workshops at which NGET attends as NETSO, particularly regarding the development of the ENC's.

In addition, NGET would be obliged to report any potential or likely BSC impacts resulting from the development of the ENC's to the BSC Panel.

During the assessment of P271 and the related modifications, the joint Workgroup developed an alternative to P271. P271 Alternative is the same as the original except that it would limit the scope of the obligation on NGET as set out in the original proposal to work undertaken as part of the Third Package only.

During the assessment of the modifications, a Joint European Standing Group<sup>4</sup> (JESG) open to all interested GB stakeholders was established on the recommendation of the joint Workgroup and with the approval of the relevant code panels (BSC Panel, CUSC Panel and Grid Code Review Panel). The proposed solutions for P271 original and alternative both provide for the discharge of NGET's obligation to engage with GB

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<sup>3</sup> Details regarding CUSC modification CMP191 and the Grid Code user request are available on NGET's website: <http://www.nationalgrid.com/uk/Electricity/Codes/>.

<sup>4</sup> JESG met for the first time on 10 August 2011. Papers from the JESG meetings can be found here: <http://www.nationalgrid.com/uk/Electricity/Codes/systemcode/workingstandinggroups/JointEuroSG/>.

stakeholders through the JESG. The proposer accepted that NGET would take views expressed at the JESG into account but would not be obliged to adhere to them when participating in the development of the ENC's at ENTSO-e.

A majority of the joint Workgroup considered that both the original and alternative proposals better facilitate Applicable BSC Objectives (a), (c) and (d), while a minority considered that the proposals were neutral against Applicable Objective (a) and detrimental to Objective (d). A majority of the Workgroup supported the alternative over the original against Objective (d).

### **BSC Panel<sup>5</sup> recommendation**

On 8 September 2011, the BSC Panel considered the draft Final Modification Report (FMR) for P271 and the responses to it. The Panel recommended by a majority that the alternative modification be made. The Panel considered that the Alternative better facilitates Applicable BSC Objectives (a), (c) and (d). A minority of the Panel considered that the alternative modification is neutral against Applicable BSC Objectives (a) and (c) and does not better facilitate Applicable BSC Objective (d). The Panel unanimously rejected the original modification. The Panel's views can be found in full in the FMR.

### **The Authority's decision**

The Authority has considered the issues raised by the modification proposal and the Final Modification Report (FMR) dated 8 September 2011. The Authority has considered and taken into account the responses to Elexon's<sup>6</sup> consultation on the modification proposal which are attached to the FMR<sup>7</sup>.

**The Authority has concluded that implementation of the modification proposal will not better facilitate the achievement of the applicable objectives of the BSC<sup>8</sup>.**

### **Reasons for the Authority's decision**

We note the views of the joint Workgroup, NGET and the Panel in reaching our decision. We also note the strong support for national forums for stakeholder engagement on the development of the ENC's. We are also keen for such forums to understand stakeholders' views. One such forum (the JESG) is now established and operating under existing code governance. It is open to all interested GB stakeholders to exchange views with NGET on the development of the ENC's. We have taken this development into account when setting out the reasons for our decision against each of the Applicable BSC Objectives.

*Applicable BSC Objective (a) 'the efficient discharge by the licensee of the obligation imposed upon it by this licence'*

We note the views expressed by some consultation respondents, Workgroup and Panel members that the introduction of a code obligation on NGET to engage with GB

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<sup>5</sup> The BSC Panel is established and constituted pursuant and in accordance with Section B of the BSC.

<sup>6</sup> The role and powers, functions and responsibilities of Elexon are set out in Section C of the BSC.

<sup>7</sup> BSC modification proposals, modification reports and representations can be viewed on the Elexon website at [www.elexon.co.uk](http://www.elexon.co.uk).

<sup>8</sup> As set out in Standard Condition C3(3) of NGET's Transmission Licence, see: [http://epr.ofgem.gov.uk/document\\_fetch.php?documentid=4151](http://epr.ofgem.gov.uk/document_fetch.php?documentid=4151)

stakeholders on the development of the ENCs would ensure that NGET better meets its licence obligations.

NGET's current licence obligation to bring code changes to the attention of code parties and others with an interest in them is set out, in the case of the BSC, in Standard Licence Condition C3.4 (b)(i). This obligation currently arises once a code change has been raised. As it is not yet clear, in the case of the ENCs, what consequential changes, if any, will be made to the BSC, it would be inconsistent and outside the scope of the current licence obligation for NGET to bring potential code changes to the attention of BSC parties when neither the extent, nor the impact, of these changes is clear. However, we do recognise that there is a case for NGET to undertake appropriate and effective engagement with GB stakeholders on the development of the ENCs without the need for a code obligation.

We do not agree that either the original or the alternative proposals better facilitate objective (a).

*Applicable BSC Objective (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'*

We note the views expressed in consultation responses and through the Workgroup and the Panel on whether the proposals better facilitate this objective. We note that these views highlight the need for GB stakeholders to have 'greater certainty' from NGET through the code obligation that it will engage with GB stakeholders regarding development of the ENCs though not to adhere to stakeholder views. The responses suggested that:

- NGET could not be aware of GB stakeholders' views without engaging with them;
- having effective stakeholder engagement would improve awareness for both NGET and stakeholders of the issues as development of the ENCs took place; and
- the establishment of the JESG, to which not only NGET and stakeholders but also Ofgem and DECC would be invited, would form a suitable forum for the exchange of views which could form NGET's input to ENTSO-e discussion on the ENCs.

We consider that 'greater certainty' refers to a transparent and open process for GB stakeholder engagement and, so long as there is a suitable forum established for the exchange of views between NGET and stakeholders, the expectations of stakeholders can be met. In this context, 'greater certainty' does not mean that stakeholders will have their views accepted and adhered to when NGET participates at ENTSO-e in the development of the ENCs.

The establishment of the JESG under the existing governance arrangements of the BSC, CUSC and Grid Code provides such a forum and, importantly, the JESG cannot be disbanded without the relevant code panels' agreement. A long-term commitment by NGET to participate in the JESG in order to engage with stakeholders and exchange views is a more proportionate approach to the lack of engagement identified by the proposal and we would encourage NGET to provide such a commitment.

We therefore do not agree that either the original or the alternative proposals better facilitate objective (c).

*Applicable BSC Objective (d) 'Promoting efficiency in the implementation and administration of the balancing and settlement arrangements'*

We note the views expressed in developing the proposals that a change to the code would represent a more efficient means for NGET to deliver information about its participation in the development of the ENC's and for stakeholders to engage with NGET. We also note that, since the proposal was raised, the JESG has been established under existing code governance and cannot be disbanded without panel approval.

In our view, as reflected in the views of a minority of the Panel, existing code governance processes allow for the creation of suitable Standing Groups, whose terms of reference are set by code panels, to undertake appropriate enquiry into specific areas of work that are relevant to the code(s) in an open and transparent manner. The JESG is a welcome development for which the proposal has acted as a catalyst and, importantly, has been established under the oversight of code panels each of which include a number of industry members.

We do not consider that a code obligation on NGET to engage with GB stakeholders through JESG is appropriate or proportionate. It would be difficult to assess whether NGET had complied with the obligation and it is not clear who would lead on this. There would also be a risk that NGET does not apply its resources in the most effective way to engage with stakeholders because it is not clear when it could potentially be in breach.

We consider the establishment of the JESG to be an opportunity for all parties (NGET and stakeholders) to engage positively and effectively to understand the implications of the ENC's which may, in due course, pass into GB codes. We particularly expect NGET to maintain high levels of commitment to participate in, and administer, the JESG in recognition of the strong demand for engagement from GB stakeholders on ENC development. Ultimately, all code signatories will be responsible for adhering to any changes made to GB codes by the ENC's and so all parties should make their best efforts to engage. Ofgem intends to monitor the progress of JESG by attending the group.

We note that there is already a mechanism for any EU stakeholder to engage with the development of the ENC's at European level. The JESG has been identified as a complement to this engagement process. We note the concerns expressed about the EU stakeholder engagement process but would encourage those stakeholders who are able to engage through that process in addition to any participation through JESG.

### **Other stakeholder engagement**

We note that DECC has recently begun its own GB stakeholder engagement process with the participation of Ofgem<sup>9</sup>. As stated above, Ofgem intends to participate and monitor progress at JESG. We consider that these developments recognise the importance of canvassing the views of GB stakeholders, that these views are valuable, and that appropriate, transparent processes for engagement should be available at national level. We look forward to working with GB stakeholders to assist them in understanding the implications of the ENC's and provide us with their views on how the ENC's should develop.

**Declan Tomany**

**Associate Partner Legal**

Signed on behalf of the Authority and authorised for that purpose

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<sup>9</sup> The first meeting of the DECC/Ofgem stakeholder forum took place on 6 October 2011.