

MODIFICATION REPORT for Modification Proposal P180**Revision to BSC Modification Implementation Dates,
where an Authority determination is referred to appeal
or judicial review**

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RECOMMENDATIONS

Having considered and taken into due account the contents of the draft P180 Modification Report, the Balancing and Settlement Code Panel recommends:

- **that Proposed Modification P180 should be made;**
- **the P180 Implementation Date of 5 Working Days after an Authority decision; and**
- **the proposed text for modifying the Code, as set out in the Modification Report.**

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¹ The current version of the Balancing and Settlement Code (the 'Code') can be found at <http://www.elexon.co.uk/bscrelateddocs/BSC/default.aspx>

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SUMMARY OF IMPACTED PARTIES AND DOCUMENTS

The following parties/documents have been identified as being potentially impacted by Modification Proposal P180.

Parties *	Sections of the BSC	Code Subsidiary Documents
Suppliers <input checked="" type="checkbox"/>	A <input type="checkbox"/>	BSC Procedures <input type="checkbox"/>
Generators <input checked="" type="checkbox"/>	B <input type="checkbox"/>	Codes of Practice <input type="checkbox"/>
Licence Exemptable Generators <input checked="" type="checkbox"/>	C <input type="checkbox"/>	BSC Service Descriptions <input type="checkbox"/>
Transmission Company <input checked="" type="checkbox"/>	D <input type="checkbox"/>	Service Lines <input type="checkbox"/>
Interconnector <input checked="" type="checkbox"/>	E <input type="checkbox"/>	Data Catalogues <input type="checkbox"/>
Distribution System Operators <input checked="" type="checkbox"/>	F <input checked="" type="checkbox"/>	Communication Requirements Documents <input type="checkbox"/>
Non-Physical Traders <input checked="" type="checkbox"/>	G <input type="checkbox"/>	Reporting Catalogue <input type="checkbox"/>
Party Agents *	H <input type="checkbox"/>	MIDS <input type="checkbox"/>
Data Aggregators <input checked="" type="checkbox"/>	I <input type="checkbox"/>	Core Industry Documents
Data Collectors <input checked="" type="checkbox"/>	J <input type="checkbox"/>	Grid Code <input type="checkbox"/>
Meter Operator Agents <input checked="" type="checkbox"/>	K <input type="checkbox"/>	Supplemental Agreements <input type="checkbox"/>
ECVNA <input checked="" type="checkbox"/>	L <input type="checkbox"/>	Ancillary Services Agreements <input type="checkbox"/>
MVRNA <input checked="" type="checkbox"/>	M <input type="checkbox"/>	Master Registration Agreement <input type="checkbox"/>
BSC Agents *	N <input type="checkbox"/>	Data Transfer Services Agreement <input type="checkbox"/>
SAA <input checked="" type="checkbox"/>	O <input type="checkbox"/>	British Grid Systems Agreement <input type="checkbox"/>
FAA <input checked="" type="checkbox"/>	P <input type="checkbox"/>	Use of Interconnector Agreement <input type="checkbox"/>
BMRA <input checked="" type="checkbox"/>	Q <input type="checkbox"/>	Settlement Agreement for Scotland <input type="checkbox"/>
ECVAA <input checked="" type="checkbox"/>	R <input type="checkbox"/>	Distribution Codes <input type="checkbox"/>
CDCA <input checked="" type="checkbox"/>	S <input type="checkbox"/>	Distribution Use of System Agreements <input type="checkbox"/>
TAA <input checked="" type="checkbox"/>	T <input type="checkbox"/>	Distribution Connection Agreements <input type="checkbox"/>
CRA <input checked="" type="checkbox"/>	U <input type="checkbox"/>	BSCCo
Teleswitch Agent <input checked="" type="checkbox"/>	V <input type="checkbox"/>	Internal Working Procedures <input checked="" type="checkbox"/>
SVAA <input checked="" type="checkbox"/>	W <input type="checkbox"/>	Other Documents
BSC Auditor <input checked="" type="checkbox"/>	X <input checked="" type="checkbox"/>	Transmission Licence <input type="checkbox"/>
Profile Administrator <input checked="" type="checkbox"/>		System Operator-Transmission Owner Code <input type="checkbox"/>
Certification Agent <input checked="" type="checkbox"/>		
MIDP <input checked="" type="checkbox"/>		
Other Agents		
SMRA <input checked="" type="checkbox"/>		
Data Transmission Provider <input checked="" type="checkbox"/>		

X = Identified in Report for last Procedure
 N = Newly identified in this Report

* P180 has no direct impact on Parties, Party Agents or BSC Agents. P180 may indirectly impact these parties to the extent that a change to an Implementation Date for a Modification Proposal (resulting as a consequence of an appeal or judicial review) could affect organisations' processes for the planning, budgeting and delivery of the changes necessary for its implementation. Parties, Party Agents and BSC Agents will have the opportunity to provide impact assessments or consultation responses as part of the P180 solution developed.

1 DESCRIPTION OF PROPOSED MODIFICATION AND ASSESSMENT AGAINST THE APPLICABLE BSC OBJECTIVES

1.1 Modification Proposal

Modification Proposal P180 'Revision to BSC Modification Implementation Dates, where an Authority decision is referred to appeal or judicial review' ('P180', reference 1) was raised by National Grid Transco ('the Proposer') on 1 November 2004.

P180 suggests that a defect exists within the Code whereby in limited specified circumstances a Modification Proposal may lack a viable Implementation Date. This circumstance would arise where the following criteria were all met:

- The Authority issues a direction resulting in a Pending Modification Proposal becoming either an Approved Modification or a Rejected Modification Proposal;
- This direction is contested, either by judicial review to the High Court or by appeal to the Competition Commission (under powers to be introduced on or after 1 April 2005, pursuant to provisions of the Energy Act (reference 3) that are outlined later in this document);
- The outcome of the judicial review or appeal is such that the Authority direction is invalidated and it once again becomes a Modification Proposal on which an Authority decision should be reached; and
- At the time that it reverts to this status, the implementation timetable put forward in the Modification Report to the Authority cannot be met.

The Proposer contends that in such a circumstance the Authority will not be able to make a determination on the Pending Modification Proposal, as the Implementation Dates put forward within the Modification Report are no longer viable.

The Proposer considers this a defect within the Code, and suggests that it could be removed through a mechanism obliging the Panel to provide an additional proposed Implementation Date(s) to the Authority where a direction has been submitted to judicial review or appeal. This additional Implementation Date(s) would take into account the perceived length of the judicial review or appeal process, and the amount of time that would be required following its outcome to implement the Modification Proposal.

The Proposer contends that P180 would better facilitate Applicable BSC Objectives:

- (a) *'The efficient discharge by the licensee of the obligations imposed upon it by this licence and, during the transition period, shall include the efficient discharge by the licensee of those obligations which it is known (or reasonably anticipated) during the transition period are to be imposed on the licensee by this licence after the expiry of the transition period';* and
- (d) *'promoting efficiency in the implementation and administration of the balancing and settlement arrangements'*

1.2 Process followed

The P180 Initial Written Assessment ('IWA', Reference 2) was presented at the Panel Meeting held on 11 November 2004, where the Panel determined by a majority decision that P180 should be submitted to a three-month Assessment Procedure by the Governance Standing Modification Group ('the Group') as its subject matter fell within the Group's general Terms of Reference. The specific Terms of Reference agreed for P180 are contained within Annex 2 of this document.

The Group convened for the first time on 17 November 2004 and agreed the content of a consultation document to be issued for industry feedback, pursuant to the requirements of section F2.2.6 of the Code.

On 19 November 2004 the Authority issued a notice under section F1.4.3(d) of the Code instructing the Modification Secretary to compress the Assessment Procedure to two months (reference 7). The Group modified its assessment timetable accordingly, in order that an Assessment Report might be brought before the 13 January 2005 meeting of the Panel.

An analysis and impact assessment from the Transmission Company was requested, pursuant to the requirements of F2.6.6(a) of the Code, and its contents were taken into account by the Group.

The Group reconvened on 8 December 2004 to consider the results of the consultation, the Transmission Company analysis, and to come to conclusions in its assessment of the Proposed Modification against the Applicable BSC Objectives.

An attendance list for both meetings, reflecting both members of the Modification Group and additional attendees, is contained within Annex 2 of this document.

The Panel considered the Assessment Report at its meeting on 13 January 2005, agreeing with the recommendations put forward to it by the Group that: P180 should proceed to the Report Phase; it should be approved; and an Implementation Date of 5 Working Days after an Authority decision should be stipulated.

The draft Modification Report for P180 was issued for industry consultation on 18 January 2005, with a deadline for responses of 28 January 2005.

The Panel considered the responses to the industry consultation on the draft Modification Report; re-considered its provisional recommendations with regard to the Proposed Modification; and directed the correction of an error in the draft legal text identified by ELEXON at its meeting on 10 February 2005.

1.3 Related issues and amendments

1.3.1 Issue 10

The Group noted that consideration of the issue of Modification Proposals lacking viable Implementation Dates has previously been considered by both the BSC and Connection and Use of System (CUSC) Panels and their respective governance groups, who had concluded that no change was required at the current time since this was a rare event and prima facie a Modification Proposal lacking a viable Implementation Date through the passage of time could be resubmitted as a new Proposal (see BSC Issue 10 report, Reference 5).

These previous discussions had focused on potential ways of removing the risk of a Modification Proposal lacking a viable Implementation Date through a working practice change to add a back-stop, non-time-bound, third proposed Implementation Date to all Modification Reports and were not restricted to the specific circumstances of an appeal or judicial review of an Authority decision.

The solution proposed by P180 is different to that proposed under Issue 10 in that it suggests including within the Code a process for changing the Implementation Date at the time an appeal or judicial review is granted leave to proceed.

When the Group considered Issue 10 (prior to the raising of P180) it concluded that:

- there was no obvious inconsistency between the Code and the Transmission Licence regarding the construction of Implementation Dates;

- that it would not be desirable to mandate the formulation of Implementation Dates via a change to the Code or Transmission Licence, and that a working practice change would allow greater flexibility and the ability for future review; and
- whilst remaining unconvinced that a change to current working practice was required, agreed that (if a change was to be made) its preferred route would be the addition of a third generic 'back-stop' date to be used by the Authority only in the event of a judicial review or an appeal.

The findings of the Group in regard of Issue 10 were reported to the Panel at its 14 October 2004 meeting. The Panel noted its findings and Issue 10 was closed. The Panel has not adopted any changes to working practices relating to Implementation Dates as a consequence of Issue 10.

1.3.2 CAP077

National Grid Transco has also raised a separate Amendment Proposal to the CUSC that seeks to address a similar perceived defect in that document (CUSC Amendment Proposal 077, 'Revision to CUSC Amendment Implementation Dates where an Authority decision is referred to appeal or judicial review' ('CAP077'), Reference 6).

There was significant cross-group collaboration in the consideration of P180 and CAP077. The groups had significant overlap in membership and attendees, and the Lead Analyst of P180 and the Chairman and Technical Secretary of CAP077 attended both. The first meetings of both groups were convened back-to-back on the 17 November 2004. Differences in the subsequent timetables for the respective Groups that were necessitated by the differing requirements of Code and CUSC Assessment Procedures prevented subsequent meetings being held back-to-back, but updates on respective progress were relayed to each group.

The Group remained mindful of the considerations of the CAP077 working group in order to ensure that all issues and potential solutions to the common perceived defect were fully explored, whilst assessing P180 purely against the Code baseline.

1.4 Proposed Modification

This section aims to provide a plain English overview of the solution developed by the Group. It does not seek to detail all the thought processes that led to the development of this model. The reader should refer to the Assessment Report to understand why the Group's discussions led to this model.

A process flow model schematically representing this solution is shown in 'Diagram: P180 process'.

P180 would require a Party to notify the BSCCo:

- when it applies for permission to appeal to the Competition Commission or the courts for a judicial review against an Authority decision to approve or reject a Modification Proposal; and
- if this application is subsequently granted leave to proceed by the appellate body.

The purpose of the former notification is to ensure that BSCCo has reasonable visibility that a P180 process trigger may be forthcoming. The latter would be the key trigger for P180 processes. Vexatious, trivial or otherwise invalid legal challenges that are not judged eligible for consideration by the appellate body will not trigger a subsequent notification and the process shall go no further.

When BSCCo becomes aware that an appeal or judicial review has been judged as eligible for consideration by the appellate body, whether through a direct notification from a Party or through any other means, it shall notify BSC Agents, Parties and Party Agents that the relevant provisions of the Code have been triggered.

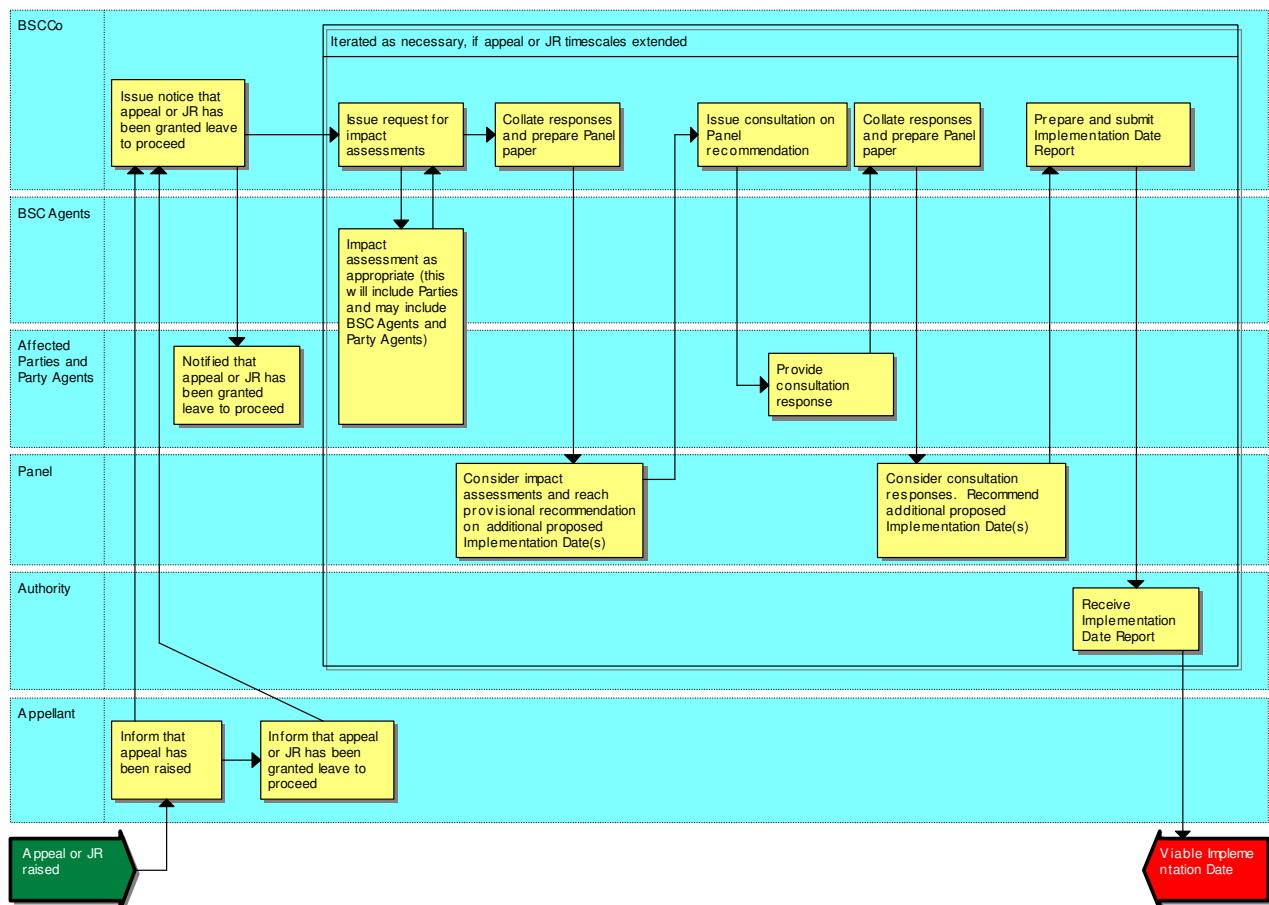
BSCCo shall then seek impact assessments from Parties (in all cases) and BSC Agents and Party Agents (if they are affected by the content of the Modification Proposal). These impact assessments shall purely be seeking a re-estimation of required lead time for implementation should the status of the Modification Proposal be changed as the result of the legal challenge². These impact assessments shall not be seeking a re-evaluation of the benefits or dis-benefits of the Modification Proposal.

The results of the impact assessment shall be brought before the Panel. The Panel will then be invited to reach a provisional recommendation on whether an additional proposed Implementation Date(s) should be recommended to the Authority in relation to the Modification Proposal.

It is expected that the Panel decision may require the consideration of whether existing Implementation Date(s) were viable. This could be achieved by considering:

- a) the expected duration of the appeal or judicial review;
- b) the expected decision making time required by the Authority, were its decision to be quashed and a new decision to be required; and
- c) the time required to implement the Modification Proposal, were a subsequent approval decision to be reached, taking into consideration the progress made towards implementation prior to the outcome of the legal challenge.

Diagram: P180 process



A composite of (a), (b) and (c) would be compared with the latest Implementation Date (d) put before the Authority in the Modification Report. If (a) + (b) + (c) fell before date (d) then one or more of the

² The possible outcomes of an appeal or judicial review, and how these may impact on the status of an Authority decision, are outlined in the Assessment Report.

existing Implementation Date(s) would remain viable. If however (a) + (b) + (c) fell after date (d) then an additional Implementation Date would be put forward to cater for the eventuality that the Authority direction was rendered invalid and a subsequent approval decision reached.

If the Panel believes the existing Implementation Date(s) remains viable it may confirm the original recommended Implementation Date(s).

It should be noted that the additional proposed Implementation Date(s) put forward would be an additive rather than an alternative to those put forward in the Modification Report. The additional Implementation Date(s) functions to provide a fallback implementation timetable that could be used were the outcome of the legal challenge to render the initial Authority decision invalid, resulting in the need for a further Authority decision to approve or reject the Modification Proposal.

In the event that the legal challenge is unsuccessful, implementation efforts for an Approved Modification would continue to progress to the initial agreed timetable. Implementation of an Approved Modification will in all events continue while the legal challenge is heard unless a direction is received from the appellate body that means that such work must cease.

A consultation process would then take place, wherein Parties and interested third Parties would be invited to provide feedback on the provisional Panel recommendation. This process would take place even where the Panel considers that existing Implementation Date(s) remain viable.

The Panel will then reconsider its provisional recommendation in the context of the consultation responses, providing a final recommendation to the Authority in the form of an Implementation Date Report.

The process from impact assessment through to provision of an Implementation Date Report may be iterated as required, should the timescales for progression of the legal challenge take longer than anticipated, thereby itself calling into question the validity of any additional proposed Implementation Date(s) already put before the Authority. This is only expected to be exercised in the case of judicial reviews, as the timescales for progression of appeals are considerably more prescriptive.

1.5 Issues raised by the Proposed Modification

The Group considered the following issues:

- When the defect arises;
- Process and outcomes of judicial reviews and appeals;
- Consideration of how these outcomes affect P180;
- The mechanism by which an additional Implementation Date(s) would be determined;
- Treatment of judicial review versus appeal in the proposed solution; and
- A potential Alternative Modification.

These issues are addressed in the Assessment Report (Annex 3) and are not discussed further in this document.

1.6 Assessment of the Proposed Modification against the Applicable BSC Objectives

The Group considered the arguments made for and against P180 in terms of it either:

- better facilitating Applicable BSC Objectives (a), (b), (c) and (d); or
- impeding Applicable BSC Objectives (c) and (d)

and considered the validity and the strength of the argument put forward in relation to each objective. No case has been put forward for P180 either better facilitating or impeding (e). The Panel has ratified the assessment conducted by the Group.

The case for (a) is that the Transmission Company has an obligation under the Transmission Licence to ensure that suggested amendments to the Code have viable Implementation Dates. Whilst the Proposer does not believe that the Code is inconsistent with the Transmission Licence, it suggests that the presence of industry debate on this issue may indicate that there is a perception of ambiguity on this matter. It is suggested that removing this ambiguity would result in the more efficient discharge of obligations on the Transmission Company resulting from its licence.

It was felt on balance that the realisation of clarificatory benefits suggested marginal rather than significant facilitation of (a). The Proposer continues to believe it would result in more than marginal improvement.

The case put forward for the better facilitation of (b) and (c) was dependent on the nature of the Modification Proposal(s) affected by the risk of lacking a viable Implementation Date (i.e. that in the absence of P180 the benefits of an impacted Modification Proposal that better facilitated either (b) and/or (c) could be lost through the lack of a viable Implementation Date). The Group acknowledged the logic of this argument but again felt that it suggested marginal rather than significant better facilitation, as the nature of the benefits associated with any Modification Proposal(s) that may be subject to a future appeal or judicial review cannot be accurately predicted. As with (a), the Proposer continues to believe it would result in more than marginal improvement.

The Group considered that there is a strong argument that suggests that P180 would better facilitate (d). Whilst it is acknowledged that additional processes would be required under P180, these processes would be a subset of those required under the normal Modification Procedures. P180 would restrict re-assessment to that required to determine an additional proposed Implementation Date(s), rather than requiring a full re-assessment of all aspects of the Modification Proposal. The Group believes this would manifestly be more efficient. In addition, any sunk implementation costs would not be lost on procedural grounds.

It is also acknowledged that raising a new Modification Proposal does not alleviate the perceived defect that a valid decision could not be reached on the original Modification Proposal. It would also result in delays in gaining a determination on the basis of the merits of the suggested change whilst the new Modification Proposal is assessed. This may reduce market certainty, and would also delay the crystallisation of benefits associated with implementation, were a subsequent decision to approve to be reached.

A counter argument suggesting that P180 would impede (c), and also have a detrimental impact on (d), was that the absence of a viable Implementation Date for a Modification Proposal that is subject to a legal challenge may actually be appropriate. It was contended that this would particularly be the case in circumstances where significant time has elapsed since the Modification Report had been put to the Authority. In such cases, it is argued that the assessment of the Modification Proposal may have become outdated, thereby increasing the risk that a sub-optimal decision may be reached. This may make necessitating the raising of a new Modification Proposal to re-assess the business case more appropriate than extending the implementation window.

It was also argued that the facilitation of (d) would be impeded by the requirement to introduce processes to determine an additional proposed Implementation Date.

Under the current baseline a Modification Proposal that is timed out could be raised again as a new Modification Proposal. The Group therefore considered that a reasonable threshold for determining whether efficiency is better served by P180 is whether operating its provisions would be more or less onerous than commencing the Modification Procedures from scratch with a new Modification Proposal.

P180 provides for a subset of the existing Modification Procedures – the establishment of a viable implementation timetable through a process of impact assessment and consultation – to be iterated, but does not require a full re-assessment of the Modification Proposal.

As the level of process required is less than that for a new Modification Proposal, the Group believes it is demonstrably more efficient than allowing the status quo, with its commensurate risk that a Modification Proposal may lack a viable Implementation Date, to continue.

Overall, the Group unanimously believed that P180 would better facilitate Applicable BSC Objectives (a), (b), (c) and (d). The cases for (a), (b) and (c) are considered to be marginal. The case for (d) is considered to be significant. The provisional Panel view is in agreement with these conclusions.

2 COSTS³

PROGRESSING MODIFICATION PROPOSAL

Meeting Cost	£ 1,000 ⁴
Legal/expert Cost	£ 0 ⁵
Impact Assessment Cost	£ 0
ELEXON Resource	35 Man days £ 9,060

IMPLEMENTATION COSTS

		Stand Alone Cost	P180 Incremental Cost	Tolerance
Total Demand Led Implementation Cost		£ 0	£ 0	+/- 0%
ELEXON Implementation Resource Cost		6 Man days £ 1,320	6 Man days £ 1,320	+/- 0%
Total Implementation Cost		£ 1,320	£ 1,320	+/- 0%

³ Clarification of the meanings of the cost terms in this section can be found in annex 7 of this report

⁴ Represents BSCCo costs to host two meetings for P180. The first meeting to consider P180 under the BSC was held back-to-back with the first meeting to consider CAP077 under the CUSC. The hosting costs for this CAP077 meeting have been absorbed into the sunk costs for the P180 meeting and no charge was made for convening the CAP077 meeting.

⁵ Legal costs are only reflected within this box where external legal advice is sought. Internal legal advice is contained within the 'ELEXON Resource' estimate.

ONGOING SUPPORT AND MAINTENANCE COSTS

	Stand Alone Cost	P180 Incremental Cost	Tolerance
Service Provider Operation Cost	£ 0 per annum	£ 0 per annum	+/- 0%
Service Provider Maintenance Cost	£ 0 per annum	£ 0 per annum	+/- 0%
ELEXON Operational Cost	£ 1,320 per occurrence	£ 1,320 per occurrence	+/- 10%

3 RATIONALE FOR PANEL'S RECOMMENDATIONS

The Panel agrees with the recommendations of the Modification Group, which reached a unanimous opinion that P180 should be approved. The Panel agrees that the current application of the Code can result in a circumstance whereby the Authority cannot make a decision on a Modification Proposal as the implementation timetable contained within the Modification Report has been timed out. This circumstance is restricted to instances where an appeal or judicial review is sought against an Authority decision; the outcome of this legal challenge is such that the Authority decision is no longer valid; and it is no longer possible to meet any of the implementation timetables contained within the Modification Report.

The Panel believes that the weight of the case for P180 rests in the better facilitation of Applicable BSC Objective (d) for the reasons given in 1.6 of this document. The cases for the better facilitation of (a), (b) and (c) are considered to be more marginal.

- **It is therefore recommended that P180 be approved.**

The processes required for impact assessment, consultation and Panel decision would represent extensions of existing Modification Procedure processes and do not require the introduction of new mechanisms for BSC Agents, Parties or Party Agents to follow. P180 is therefore perceived to be a Code only change that would have a minimal implementation lead time.

- **It is recommended that P180 be implemented 5 Working Days after an Authority decision.**

The Panel believes that the proposed text for modifying the Code appended to this document correctly addresses the perceived defect

- **It is recommended that the proposed text for modifying the Code is given effect.**

4 IMPACT ON BSC SYSTEMS AND PARTIES

An assessment has been undertaken in respect of BSC Systems and Parties and the following have been identified as potentially being impacted by the Proposed Modification.

4.1 BSCCo

If an appeal is raised or a judicial review requested for an Approved Modification, the delivery programme will continue with the planned implementation timetable but will need to consider a design that will support:

- Switchable functionality such that the deployment can carry on to current schedule, but without any part of it becoming effective; or
- Delaying the deployment date without affecting any other changes in the same release; and/or
- Backing out the changes prior/post implementation should this be required.

If an appeal or judicial review proceeds against a Rejected Modification Proposal, then the delivery programme will not start work unless this decision is quashed and a subsequent Authority decision to approve is received.

For both Approved Modifications and Rejected Modification Proposals that are subject to legal challenge, fresh impact assessments would be required to determine the correct approach for any subsequent or continuing implementation.

BSCCo Change Delivery will be also be impacted by the need to conduct the industry impact assessment and consultation processes required.

BSCCo Stakeholder Assurance will be impacted by the need to manage Panel processes where the Panel needs to make a determination on an additional Implementation Date(s), in accordance with the processes set out in section 1.4 of this document.

4.2 BSC Systems

The BSC Systems are not directly affected by P180.

The activities of the BSC Agents may be indirectly affected by the requirement to re-evaluate the lead time needed to implement a Modification Proposal in circumstances where an Authority decision is subject to either appeal or judicial review and the content of the Modification Proposal necessitates changes to BSC Systems and Processes.

The cost of NETA Central Service Agent impact assessments is currently met through a fixed monthly fee rather than being charged on a per event basis. The cost of this re-evaluation of lead time would therefore be subsumed within this fee.

4.3 Parties and Party Agents

Parties and Party Agents will be impacted by the mechanism put forward in the proposed solution whereby impact assessments and consultation responses will be sought from market participants as part of the process by which the Panel makes a determination on a proposed Implementation Date(s).

The frequency of such requests will be driven by the volume of Authority decisions that are subject to appeal or judicial review, but are expected to be comparatively rare.

The existing Modification Procedures contain frequently used processes for conducting impact assessments and consulting on the basis of Panel recommendations and the P180 mechanisms represent an extension of these processes rather than a new paradigm. No new Party or Party Agent processes have therefore been identified as resulting from the proposed solution.

5 IMPACT ON CODE AND DOCUMENTATION

5.1 Balancing and Settlement Code

Legal text setting out the changes required to the Code is appended to this document as Annex 1.

It should be noted that one change has been made to the legal text following the Report Phase consultation. Previously, draft clause F2.11.14(b) contained an erroneous reference to the Panel that

should have instead referred to the Authority. This error was identified by ELEXON after the Report Phase consultation closed.

The Panel has powers under F2.7.5(c) *[...] to instruct the Modification Secretary to make such changes to the [legal] text as may be specified by the Panel* during the Report Phase. ELEXON requested that the Panel exercise this power to make the following change to the legal text (amendment shown in redline):

2.11.14 Where the Panel considers that:

- (a) a Conditional Implementation Date (whether or not subject to any condition precedent concerning its effectiveness) imposed in accordance with this paragraph 2.11 is or may no longer be appropriate or may expire prior to a determination being made in relation to the Relevant Challenge; or
- (b) where the Authority has previously rejected a recommendation from the Panel made pursuant to paragraph 2.11.11 but, as a result of the progress of the appeal or judicial review or some other relevant circumstance, the Panel considers that it may be appropriate to make or consider making a new recommendation to the ~~Panel~~ Authority concerning a Conditional Implementation Date;

paragraphs 2.11.10, 2.11.11, 2.11.12 and 2.11.13 shall apply mutatis mutandis.

The Panel concurred with this recommendation at its meeting on 10 February 2005, directing that the legal text should be modified accordingly.

5.2 Code Subsidiary Documents

No Code Subsidiary Documents would be impacted by P180.

5.3 BSCCo Memorandum and Articles of Association

Neither the BSCCo Memorandum nor its Articles of Association would be impacted by P180.

5.4 Impact on Core Industry Documents and supporting arrangements

No other Core Industry Documents and/or supporting arrangements would be impacted by P180.

6 SUMMARY OF CONSULTATIONS

The draft Modification Report was issued for industry consultation on 18 January 2005, with a deadline for responses of 28 January 2005. 8 responses were received, representing 48 Parties and 0 non-Parties.

Consultation question	Respondent agrees	Respondent disagrees	Opinion unexpressed
Do you agree with the Panel's views on P180 and the provisional recommendation to the Authority contained in the draft Modification Report that P180 should be made?	8 (48)	0	0
Do you agree with the Panel's view that the legal text provided in the draft Modification Report correctly addresses the defect or issue identified in the Modification Proposal?	7 (47)	0	0 (1)

Do you agree with the Panel's provisional recommendation concerning the Implementation Date for P180?	8 (48)	0	0
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6.1 Panel's Provisional Recommendation

There was unanimous agreement with the Panel's provisional recommendation that P180 should be made. Those respondents who referenced specific BSC Objectives highlighted that (d), 'Promoting efficiency in the implementation and administration of the balancing and settlement arrangements', would be better facilitated by providing a procedural means to ensure that a Modification Proposal cannot lack a viable Implementation Date.

Two respondents caveated their support. One of these highlighted the processes for industry consultation contained within the solution developed by the Group as being vitally important to the case for the Proposed Modification, suggesting that it would be unlikely that they could support it without such consultation. The other respondent, whilst agreeing that P180 processes for developing Conditional Implementation Date(s) in instances where an Authority decision is subject to a legal challenge may be more efficient than requiring a new Modification Proposal to be raised, nonetheless believes that there may be circumstances where this latter route is more appropriate in order to allow the re-consideration of issues raised in the Modification Proposal.

6.2 Draft Legal Text

All respondents who expressed a firm opinion considered that the draft legal text correctly addresses the perceived defect, although few gave any rationale for this opinion. One respondent considered that the solution embodied in the legal text represents the least change to governance that is required to address the perceived defect.

It should be noted that a change to the legal text was directed by the Panel at its meeting on 10 February 2005. Please see section 5.1 of this document for further details.

6.3 Recommended Implementation Date

There was unanimous support for the Panel's provisional recommendation that P180 should be implemented 5 Working Days after an Authority decision, were it to be approved.

One respondent, also the Proposer, considers it necessary that P180 should be implemented as soon as possible – preferably before the expected introduction of the appeals process in late Spring/Summer 2005. It is suggested that this wish is facilitated by the provisionally recommended Implementation Date.

Several respondents suggested that the relatively limited amount of implementation effort required by BSCCo, Parties, and Party Agents was consistent with this Implementation Date format.

6.4 Further Comments

One respondent made requests for clarification on two issues:

- the status of a Party's notifications to the BSCCo that it is proceeding with an appeal, and, where relevant, that this has been given leave to proceed (pursuant to F2.11.16 of the draft legal text for P180);
- and the impact on BSCCo should the Competition Commission exercise powers to suspend the implementation of an Approved Modification that is subject to an appeal.

6.4.1 Notifications to the BSCCo

With regard to the former, the respondent is seeking clarification on whether these obligations are in addition to, or would be discharged by the exercise of, obligations contained in the Energy Act 2004 (the Act) that obligated an appellant to inform persons or organisations affected by an appeal. This issue was discussed in some depth in the Modification Group and ELEXON can provide the following clarification.

Schedule 22, paragraph 1(7) of the Act sets out a requirement for the applicant for an appeal to notify 'such persons (apart from GEMA⁶) *as appear to him to be affected* by the decision appealed against; and such other persons as GEMA may require him to keep informed about his appeal' (italics added for emphasis).

Schedule 22, paragraph 1(12) goes on to provide that when the Competition Commission makes its subsequent decision to either allow or refuse the appeal permission to proceed, it will notify the applicant, the Authority and all those people whom the appellant notified of its application for permission to proceed pursuant to paragraph 1(7). This may or may not include the BSCCo, depending on whether the appellant notified the BSCCo when requesting permission to proceed.

The onus under the Act is therefore on the appellant to identify and notify those persons who are affected by an appeal, plus any additional persons that the Authority specifically requires they keep informed. The Group considered that whilst it was highly unlikely that an appellant to a Code modification would not consider that the BSCCo was affected by the decision appealed against and therefore notify it, this was not guaranteed under the Act. The Group further noted that the Authority could not be obligated to exercise its right to direct appellants to notify the BSCCo of appeals under the Code, as the Authority is not a signatory to the Code. It was therefore considered prudent that the P180 legal text should contain relevant obligations on Parties to tell the BSCCo both: when an application for permission to bring a legal challenge is made; and again when this legal challenge is granted leave to proceed⁷. These notifications would need to be issued to the Modification Secretary.

The respondent questions whether this is either a parallel process to the Energy Act obligation, or is already covered by the Party discharging its Act obligation. In practice, either route may be followed depending on how the Party chose to exercise its Act and Code obligations.

The Act does not stipulate to whom at each affected organisation the appellant should notify of the appeal. The Competition Commission is currently consulting on how it will practically apply the principles set down in the Act, but its draft 'Rules for the conduct and disposal of appeals in energy code modification cases' (reference 9) are also silent on to whom such notification should be sent⁸.

In summary:

- A Party may notify BSCCo under the Energy Act. This is discretionary, dependent on whether the appellant subjectively considers that BSCCo is affected by the decision appealed against;
- Neither the Energy Act nor the draft 'Rules for the conduct and disposal of appeals in energy code modification cases' stipulate whom at BSCCo would be told; and
- Were P180 to be approved, a Party would have a Code obligation to notify the Modification Secretary at the BSCCo that it had applied for permission to appeal or that it had been granted leave to proceed with this appeal.

⁶ GEMA is the Gas and Electricity Markets Authority. This role is held by the Authority (Ofgem).

⁷ Noting that P180 is applicable to judicial review as well as appeals to Competition Commission and that there was need for a mechanism to notify the BSCCo where permission to bring a judicial review has been granted.

⁸ See paragraph 4.4 of the 'Rules for conduct and disposal of appeals in energy code modification cases'. This document is draft and subject to a currently ongoing consultation that will close on 28 February 2005.

Therefore, if a Party issued the relevant notifications to the Modification Secretary it would definitely discharge its P180 Code obligations, and may simultaneously discharge its Act obligations (depending on whether it considers that BSCCo was affected by the appeal, pursuant to Schedule 22, paragraph 1(7) of the Act). Were it to notify someone other than the Modification Secretary at the BSCCo it may only discharge Act obligations (depending on whether it considers that BSCCo was affected by the appeal, pursuant to Schedule 22, paragraph 1(7) of the Act). There would not however be any impediment to the Party subsequently notifying the Modification Secretary in order to discharge P180 Code obligations. P180 would not fetter appellant discretion in how a Party chose to discharge obligations under the Energy Act and the Code – this could be achieved either simultaneously or in parallel dependent on whom at the BSCCo the appellant directed the relevant notices to.

6.4.2 Suspension of implementation

The respondent requests clarification of the impact on the BSCCo were the Competition Commission to suspend the implementation of an Approved Modification pursuant to powers it has under paragraph 3 of Schedule 22 of the Act. These powers give the Competition Commission the right to suspend implementation pending the determination of an appeal in defined circumstances.

In practice, any direction to suspend implementation received from the Competition Commission may influence the required lead time for implementation put forward under the P180 process, were the Proposed Modification to be approved. Despite this, on balance this scenario does not appear to be directly relevant to either Panel or Authority consideration of P180. This is because regardless of whether the Proposed Modification were to be approved or rejected, the Competition Commission already has these powers pursuant to the Act. The BSCCo would be obligated to act in accordance with any suspension directed by the Competition Commission, and any impact on BSCCo resulting from this direction is not linked to the existence (or not) of P180 provisions within the Code.

6.5 Comments and views of the Panel

The Panel noted that the consultation responses received during the Report Phase were fully supportive of its previously provisional recommendations, and made no specific comment with regard to any comments made by respondents.

A Panel member noted that neither the Modification Group nor the consultation respondents had seen legal advice procured by the Authority in relation to the issue of Implementation Date viability, and questioned whether the public release of such advice could be mandated in accordance with the Freedom of Information Act. The Authority representative noted that its policy was not to publicly release the legal advice it procures, but that it had summarised its advice on this matter in public session before.

7 SUMMARY OF TRANSMISSION COMPANY ANALYSIS

7.1 Analysis

The Transmission Company believes that P180 will improve its ability to discharge its obligations efficiently under the Transmission Licence and its ability to operate an efficient, economical and co-ordinated Transmission System.

It believes this will be achieved by enabling it to ensure that Modification Proposals are not timed out as a result of legal challenge, by enabling the amendment of proposed Implementation Dates in these circumstances. It is contended that this better facilitates Applicable BSC Objectives (a) and (d). In addition, by ensuring that a viable Implementation Date always exists where a Modification Proposal is

subject to a legal challenge, it is argued that (b) and (c) may be better facilitated, depending on the nature of the affected Modification Proposal(s).

No impact on Transmission Company computer systems has been identified. Internal processes for monitoring the progression of appeals and judicial reviews will be needed.

Without P180, the Transmission Company considers that there is a risk, albeit of low probability, that a Modification Proposal with a security of supply element could be timed out. It does not believe that this risk should be ignored and believes that this factor strengthens the case for P180.

No capital or development costs and nugatory operational costs would be incurred by the Transmission Company were P180 to be approved.

No consequential changes to Core Industry Documents or the System Operator Transmission Owner Code have been identified, although it is noted that CAP077 is seeking similar changes to the CUSC.

The full text of the Transmission Company response, and the views of the Modification Group in relation to it, may be found in the Assessment Report (Annex 3).

7.2 Comments and views of the Panel

The Panel noted the Transmission Company analysis, but made no comment with regard to any aspect of its content.

8 SUMMARY OF EXTERNAL ADVICE

No external advice or consultancy was sought during the progression of P180.

9 IMPLEMENTATION APPROACH

P180 is a 'Code-only' Modification Proposal, and the implementation approach would be limited to taking steps to modify the legal baseline should a decision to approve be received. P180 would be implemented 5 Working Days after an Authority decision.

It should be noted that were P180 to be approved, then any Relevant Challenge⁹ would trigger its processes. This would include any Relevant Challenge(s) that was ongoing at the time of the Authority decision in addition to any Relevant Challenge(s) raised subsequent to the Authority decision.

10 DOCUMENT CONTROL

10.1 Authorities

Version	Date	Author	Reviewer	Change Reference
0.1	17/01/05	Change Delivery	Sarah Parsons	BSCCo technical/QA review
0.2	18/01/05	Change Delivery	Industry	Consultation
0.3	02/02/05	Change Delivery	Change Delivery	Internal technical review
0.4	04/02/05	Change Delivery	Panel	Panel decision
1.0	10/02/05	Change Delivery	Authority	Authority decision

⁹ Within the context of the definition contained in F2.11.15 of the appended draft legal text.

10.2 References

Ref.	Document Title	Owner	Issue Date	Version
1	Modification Proposal P180: http://www.elexon.co.uk/documents/modifications/180/P180.pdf	BSCCo	01/11/04	N/A
2	Initial Written Assessment for Modification Proposal P180: http://www.elexon.co.uk/documents/BSC_Panel_and_Panel_Committees/BSC_Panel_Meetings_2004_-_085_-_Papers/85_011a.pdf	BSCCo	05/11/04	1.0
3	Energy Act 2004: http://www.legislation.hmso.gov.uk/acts/acts2004/20040020.htm	Crown Copyright	2004	N/A
4	Appeals against Ofgem Code Modification decisions: consultation on draft order http://www.dti.gov.uk/energy/consultations/appeals_secondary_order.pdf	DTI	04/10/04	N/A
5	GSMG Issue 10: 'Implementation Dates': http://www.elexon.co.uk/documents/BSC_Panel_and_Panel_Committees/BSC_Panel_Meetings_2004_-_084_-_Papers/84_001f.pdf	BSCCo	14/10/04	N/A
6	CAP077 'Revision to CUSC Amendment implementation dates where an Authority decision is referred to appeal or judicial review': http://www.nationalgridinfo.co.uk/cusc/amendments.asp	NGT	10/04	1.0
7	Notice to amend the timetable for the assessment and evaluation of P180: http://www.elexon.co.uk/documents/modifications/180/P180_Timetable.pdf	Ofgem	19/11/04	N/A
8	Proposed Modification P82, 'Introduction of Zonal Transmission Losses on an Average basis' http://www.elexon.co.uk/changeimplementation/Modification_Process/modificationdocumentation/modProposalView.aspx?propID=87	BSCCo	2002-2004	N/A
9	Draft 'Rules for the conduct and disposal of appeals in energy code modification cases' http://www.competition-commission.org.uk/rep_pub/consultations/current/html/energy_code_modification_cases.htm	Competition Commission	December 2004	N/A

ANNEX 1 LEGAL TEXT

Attachment 1 contains the legal text for Proposed Modification P180.

ANNEX 2 MODIFICATION GROUP DETAILS

The Group met twice to discuss P180: on 17 November 2004; and on 8 December 2004. The following tables identify the Modification Group members and the other attendees for these meetings.

Member	Organisation	17/11/2004	08/12/2004
Roger Salomone	ELEXON (Chairman)	√	√
Richard Hall	ELEXON (Lead Analyst)	√	√
Ben Graff	National Grid Transco (Proposer)	√	X
Mark Manley	BG Centrica	√	√
James Nixon	SAIC	X	√
Neil Smith	E.ON UK	√	X
John Sykes	Scottish & Southern	√	√
Terry Ballard	RWE npower	√	X
Steven Eyre	British Energy	√	√
Steve Drummond	EDF Trading	√	X
Stephen Moore	EDF Energy	√	√

Attendee	Organisation	17/11/2004	08/12/2004
Barbara Vest	Gaz de France Energy Supply Solutions	√	X
Paul Jones	E.ON UK	X	√
David Edward	Ofgem	√	√
Steve Mackay	Ofgem	√	X
Richard Dunn	National Grid	√	√
Bob Brown	Cornwall Consulting	√	X
David Lane	Clear Energy	X	√
Melanie Henry	ELEXON (Lawyer)	√	√
Chris Rowell	ELEXON (Change Delivery)	√	X
Gareth Forrester	ELEXON (Governance & Regulatory Affairs)	√	√

The Group's Terms of Reference were that:

1. The Modification Group will carry out an Assessment Procedure in respect of Modification Proposal P180 pursuant to section F2.6 of the Balancing and Settlement Code.

2. The Modification Group will produce an Assessment Report for consideration at the BSC Panel Meeting on 13 January 2005.
3. The Modification Group shall consider and/or include in the Assessment Report as appropriate:
 - Background of Issue 10;
 - Consideration of CUSC amendment proposal CAP077;
 - Circumstances in which the defect occurs;
 - Identifying which outcomes of judicial review/appeal will impact implementation dates, including whether certain judicial review/appeal outcomes can themselves interact with suggested revised implementation dates;
 - Current status of the defect;
 - Results of the Department of Trade and Industry (DTI) consultation on the draft order to put in place a process for appeals against authority modification decisions¹⁰;
 - Confirm whether any other areas of the Energy Act will interact with P180;
 - The criteria that Panel would apply in suggesting revised implementation dates; and
 - Consideration of precise mechanisms of the P180 process.

ANNEX 3 ASSESSMENT REPORT

The Assessment Report for P170 is appended to this document as a separate attachment.

Annex 3 to the Assessment Report, which contains responses to the industry consultation during the Assessment Procedure, is also appended.

Please note that Annex 1 to the Assessment Report, which contains the draft legal text produced during the Assessment Procedure, has not been appended to this document. This is in order to avoid any potential for confusion on what legal text is being put forward for Authority decision.

ANNEX 4 CLARIFICATION OF COSTS

There are several different types of costs relating to the implementation of Modification Proposals. ELEXON implements the majority of Approved Modifications under its CVA or SVA Release Programmes. These Programmes incur a base overhead which is broadly stable whatever the content of the Release. On top of this each Approved Modification incurs an incremental implementation cost. The table of estimated costs of implementing the Proposed/Alternative Modification given in section 2 of this report has three columns:

- **Stand Alone Cost** – the cost of delivering the Modification as a stand alone project outside of a CVA or SVA Release, or the cost of a CVA or SVA Release with no other changes included in the Release scope. This is the estimated maximum cost that could be attributed to any one Modification implementation.

¹⁰ It should be noted that the final results of this consultation may not be available during the Assessment Procedure. Should this prove to be the case, the Group will need to ensure its Assessment Report highlights any issues it considered to be left outstanding at the time that the Assessment Procedure window closed.

- **Incremental Cost** - the cost of adding that Modification Proposal to the scope of an existing release. This cost would also represent the potential saving if the Modification Proposal was to be removed from the scope of a release before development had started.
- **Tolerance** – the predicted limits of how certain the cost estimates included in the template are. The tolerance will be dependent on the complexity and certainty of the solution and the time allowed for the provision of an impact assessment by the Service Provider(s).

The cost breakdowns are shown below:

PROGRESSING MODIFICATION PROPOSAL	
Meeting Cost	This is the cost associated with holding Modification Group meetings and is based on an estimate of the travel expenses claimed by Modification Group members.
Legal/expert Cost	This is the cost associated with obtaining external expert advice, usually legal advice.
Impact Assessment Cost	Service Provider Impact Assessments are covered by a pre-determined monthly contractual charge. Therefore the cost included in this report is an estimate based on the level of impact assessment that the modification is expected to require and may not reflect the actual cost attributed to the modification, which will be based on a percentage of the contractual impact assessment costs for each month that it is assessed.
ELEXON Resource	This is the ELEXON Resource requirement to progress the Modification Proposal through the Modification Procedures. This is estimated using a standard formula based on the length of the Modification Procedure.

TOTAL DEMAND LED IMPLEMENTATION COSTS
This is calculated as the sum of the total Service Provider(s) Cost and the total Implementation Cost. The tolerance associated with the Total Demand Led Implementation Cost is calculated as the weighted average of the individual Service Provider(s) Costs and Implementation Costs tolerances. This tolerance will be rounded to the nearest 5%.

ELEXON IMPLEMENTATION RESOURCE COSTS
Cost quoted in man days multiplied by project average daily rate, which represents the resources utilised by ELEXON in supporting the implementation of the release. This cost is typically funded from the "ELEXON Operational" budget using existing staff, but there may be instances where the total resources required to deliver a release exceeds the level of available ELEXON resources, in which case additional Demand Led Resources will be required.
The ELEXON Implementation Resource Cost will typically have a tolerance of +/- 5% associated with it.

ONGOING SUPPORT AND MAINTENANCE COSTS	
ELEXON Operational Cost	Cost, in man days per annum multiplied by project average daily rate, of operating the revised systems and processes post implementation.
Service Provider Operation Cost	Cost in £ per annum payable to the Service Provider(s) to cover staffing requirements, software or hardware licensing fees, communications charges or any hardware storage fees associated with the ongoing operation of the revised systems and processes.
Service Provider Maintenance Cost	Cost quoted in £ per annum payable to the Service Provider(s) to cover the maintenance of the amended BSC Systems.

ANNEX 5 CONSULTATION REPONSES

Attachment 2 contains the consultation responses received during the Report Phase.

ANNEX 6 GUIDANCE NOTE PREPARED IN RESPONSE TO PANEL ACTION

Attachment 3 contains a briefing note prepared by ELEXON's legal department with regard to whether any outcome of a judicial review negates the need for the Authority to revisit its original decision is appended to this document as a separate attachment.