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The National Grid Company, BSC Signatories and  
Other Interested Parties

31 March 2005

Our Ref: MP No 180

Dear Colleague,

**Modification to the Balancing and Settlement Code (“BSC”) - Decision and notice in relation to Modification Proposal P180 “Revision to BSC Modification Implementation Dates, where an Authority determination is referred to appeal or judicial review”**

The Gas and Electricity Markets Authority (the “Authority”)<sup>1</sup> has carefully considered the issues raised in the Modification Report<sup>2</sup> in respect of Modification Proposal P180, “Revision to BSC Modification Implementation Dates, where an Authority determination is referred to appeal or judicial review”.

The BSC Panel (the “Panel”) recommended to the Authority that Proposed Modification P180 should be made and in the event P180 is approved that the Implementation Date should be 5 Working Days after an Authority decision.

Having carefully considered the Modification Report and the Panel’s recommendation and having regard to the Applicable BSC Objectives<sup>3</sup> and the Authority’s wider statutory duties,<sup>4</sup> the

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<sup>1</sup> Ofgem is the office of the Authority. The terms “Ofgem” and “the Authority” are used interchangeably in this letter.

<sup>2</sup> ELEXON document reference P180MR, Version No. 1.0, dated 10/02/05

<sup>3</sup> The Applicable BSC Objectives, as contained in Standard Condition C3 (3) of NGC’s Transmission Licence, are:

- a) the efficient discharge by the Licencee of the obligations imposed upon it by this licence;
- b) the efficient, economic and co-ordinated operation by the Licencee of the Licencee’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.

<sup>4</sup> Ofgem’s statutory duties are wider than the matters that the Panel must take into consideration and include amongst other things a duty to have regard to social and environmental guidance provided to Ofgem by the government.

Authority has decided to direct a Modification to the BSC in line with Modification Proposal P180.

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

This letter constitutes notice by the Authority under section 49A Electricity Act 1989 in relation to the direction.

## **Background**

The proposed Implementation Date is an integral part of the final report for proposed Code Modifications submitted to Ofgem for decision. NGC's Transmission Licence (the Licence) sets out the requirements for the submission of Implementation Dates. In summary, the Licence requires Implementation Dates be set which allow an Approved Modification to take effect as soon as practicable after Ofgem has directed the amendment to be made, and which allows for the timetable for implementation to be extended if Ofgem so directs.

Legal challenge can potentially result in the Authority having to revisit its previous decisions on a proposed Modification. Depending on timescales, a consequence of this may be that the Authority is not capable of re-considering a Proposed Modification because the Implementation Date contained in the original Modification Report has expired. The practical effect of such a situation could be that the Modification Proposal would "time out" and be incapable of implementation.

In order to rectify this situation, National Grid Transco submitted Modification Proposal P180, "Revision to BSC Modification Implementation Dates, where an Authority determination is referred to appeal or Judicial Review" on 1 November 2004.

The Panel agreed by majority decision at its meeting on 11 November 2004 that P180 should be submitted to a three month Assessment Procedure by the Governance Standing Modification Group (the Group). The Group met for the first time on 17 November 2004. 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. The Group modified its assessment timetable accordingly. The Group convened once more and produced an assessment report for consideration by the Panel at its meeting on 13 January 2005.

## **The Modification Proposal**

Modification Proposal P180 seeks to modify the BSC so as to allow the BSC Panel to provide an additional proposed Implementation Date(s) to the Authority where an Authority direction has been legally challenged. It was the unanimous view of the Group that P180 would better facilitate achievement of Applicable BSC Objectives (a), (b), (c) and (d). The Group considered whether it would facilitate the achievement of Applicable BSC Objectives (a), (b) and (c) and concluded that the case was marginal, but agreed that the inclusion in the BSC of the legal text pertaining to P180 would better facilitate the achievement of Applicable BSC Objective (d).

P180 proposes that upon receiving notice that a Party has been granted leave to challenge a decision on a Proposed Modification, BSCCo would issue a request that Parties, affected BSC

Agents and affected Party Agents indicate the impact which the Modification would have on them. This would be done with a view to identifying the lead time required for implementation should the status of the Modification change following the conclusion of the legal challenge. The results of this process would then be put before the Panel, which would reach a provisional recommendation on the additional proposed Implementation Date(s). The Panel would consult with Parties and affected Party Agents on this provisional recommendation. The legal text pertaining to P180 contains provisions the spirit of which is to ensure that after consideration of the responses a viable Implementation Date is submitted to the Authority.

Implementation of an Approved Modification would in all events continue while the legal challenge was being heard unless a direction was received from the appellate body that such work should cease. Any additional date put forward to the Authority would therefore be 'additional'. It would not be a replacement of the proposed date already provided but be available if the proposed date was no longer viable. This process to submit additional dates could be repeated if additional dates themselves looked like they too would not be viable. The Panel retains a discretion over submitting additional Implementation Date(s), in the Implementation Date report to the Authority. They may decide that any proposed dates are still viable and consequently confirm this in their report.

The Group considered that it would be prudent to include within the process under P180 an obligation on the appellant to notify the BSC Modifications Secretary that it had applied for leave to challenge a decision and then if it had been granted leave to challenge.

The Group considered P180 would better facilitate the achievement of Applicable Objective (a) on the grounds that the Transmission Company has an obligation under its Licence to ensure suggested amendments to the Code have viable Implementation Dates. The Proposer believes the Proposed Modification would clarify this obligation. The Group considered P180 would marginally benefit this Objective.

The Group also considered the Proposed modification only marginally facilitated the achievement of objectives (b) and (c) on the grounds that in the absence of P180, the benefits of an affected modification that better facilitated achievement of either (b) and/ or (c) could be lost owing to a lack of a viable Implementation Date. The Proposer considered the benefits would be more than marginal.

The Group considered that although P180 would introduce additional processes in the event of an affected modification being challenged, the alternative expedient of allowing the Implementation Date to expire and then commencing new Modification Procedures in respect of the proposal was far more onerous.

The Group considered any re-assessment under P180 would be restricted to determine an additional proposed Implementation Date only and would not include a full re-assessment of all aspects of the Modification Proposal. In addition, any spent implementation costs would not be lost on procedural grounds.

On these grounds the Group and the Proposer considered there would be significant benefits towards the facilitation of Objective (d)

ELEXON published a draft Modification Report on 18 January 2005, which invited respondents' views by 28 January 2005.

### **Responses to ELEXON Consultation**

Eight responses were received in response to the draft Modification Report. All eight responses (representing 48 Parties and 0 non-Parties) expressed support for the Proposed Modification.

Those responses that referenced specific BSC Objectives considered that Objective (d) would be better facilitated by providing a procedure to ensure a Modification Proposal could not lack a viable implementation date.

One respondent considered it vitally important that the Modification included a procedure to allow for industry consultation of any additional proposed Implementation Date.

Another respondent, whilst agreeing that introducing a process to develop Conditional Implementation date(s) may be more efficient than requiring a Modification Proposal to be raised, considered that there may be circumstances where raising a Modification Proposal may be more appropriate to allow re-consideration of the issues raised in the Modification Proposal.

The same respondent asked for clarification on the process put forward in P180, querying if the requirement to inform the BSCCo of the appeal fulfilled the obligation placed upon an appealing party or parties by the Competition Commission Rules requiring the appellant(s) to notify affected parties.

The respondent also asked what the impact on BSCCo would be in the event that the Competition Commission exercised its power to suspend the implementation of an Approved Modification that is subject to an appeal.

The respondents' views are summarised in the Modification Report for Modification Proposal P180, which also includes the complete text of all respondents' replies.

### **Panel's recommendation**

The Panel met on 10 February 2005 and considered the Modification Proposal, the draft Modification Report, the views of the Modification Group and the consultation responses received.

The Panel agreed that one result of the application of the current Code rules was that following legal challenge Proposed Modifications remitted the Authority for decision could be timed out. The Panel considered this circumstance was restricted to instances where an appeal or Judicial Review is sought against an Authority decision. It was noted by the Panel that the consultation responses received during the Report Phase were fully supportive of its previously provisional recommendation that P180 should be approved, and made no specific reference to any comments made by respondents to the consultation.

The Panel recommended that the Authority should approve the Proposed Modification and that, if approved, the Proposed Modification should be implemented 5 Working Days after an Authority decision.

## Ofgem's view

Having carefully considered the Modification Report and the Panel's recommendation, Ofgem considers, having regard to the Applicable BSC Objectives and its statutory duties, that Proposed Modification P180 will better facilitate the achievement of Objectives (a) and (d). In addition Ofgem considers that the modification will also better facilitate the achievement of Applicable BSC Objectives (b) and (c).

Ofgem notes the arguments of the Proposer and the Group for the facilitation of Objectives (b) and (c) and considers that once implemented, the processes introduced by P180 will ensure Modification Proposals that are legally challenged always have a viable Implementation Date. Ofgem considers that P180 offers increased regulatory certainty to the market by ensuring the Authority can make a decision in respect of modifications remitted for decision following legal challenge, and that this increase in regulatory certainty promotes Applicable Objectives (b) and (c).

Licence Condition C3 1 (c) requires that NGC shall at all times have in force a BSC including, amongst other things, the Modification Procedures required by Condition C3 (4). This Condition requires, amongst other things, the Modification Procedures to allow for the implementation timetable to be extended or shortened with the consent of the Authority after those persons likely to be affected by the revision of the timetable have been consulted. Ofgem considers Modification Proposal P180 will better facilitate achievement of Applicable BSC Objective (a) by enabling the Licensee to more efficiently discharge the obligations imposed upon it by Licence condition C3 4 (c) in relation to instances where Ofgem decisions on Code Modifications are referred to appeal or Judicial Review and where Ofgem consents to the variation of the implementation timetable. Ofgem further considers, in those circumstances, that the form of consultation suggested is appropriate and this also contributes to the more efficient discharge of Licence condition C3 4 (c).

Further to the above, Licence Condition C3 4 (c) also requires, amongst other things, that the implementation timetable be capable of being extended or shortened as directed by the Authority after those persons likely to be affected by the revision of the timetable have been consulted. However neither the proposal nor the current text of the BSC provides for this. Nevertheless Ofgem considers P180 better facilitates the achievement of Applicable BSC Objectives relative to the current code baseline.

Ofgem considers that if P180 were not approved the only way in which issues could be reconsidered in the event that an Implementation Date for a Modification Proposal passes due to an Authority direction being legally challenged would be for a new Modification Proposal to be raised and for this to pass through the Modification Procedures of the BSC. Ofgem does not consider this desirable and is of the view that the changes proposed by P180 will provide a more efficient process than those provided by the current baseline, thus better facilitating the achievement Applicable BSC Objective (d).

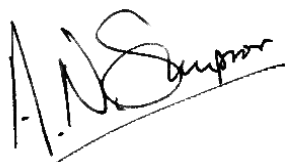
The P180 process is triggered when an appellant is granted leave to proceed with a legal challenge. The outcome of the process is for the Panel to always provide an Implementation Date Report to the Authority. Ofgem considers it is appropriate for the Panel to retain a

discretion to put forward in this report either an additional Implementation Date(s) or confirm the existing proposed Implementation Date, if it is still viable.

One respondent to the consultation commented that it may be more efficient in general for an additional step to be introduced in the Modification Procedures rather than for a new Modification Proposal to be raised. This comment also had a statement that in some circumstances, (for example where there is a material change to the subject matter of or surrounding a Modification Proposal) that it may be more appropriate for a Modification Proposal to time out and for the issues concerned to be reconsidered under a new proposal. It is Ofgem's view that there is considerable risk in leaving in place arrangements whereby a party with a commercial interest in preventing a modification from being implemented could frustrate the appropriate governance of the BSC by raising a legal challenge to an Authority direction. Nevertheless Ofgem recognises the possibility raised by the respondent is a valid one. Accordingly Ofgem wishes to assure market participants that, should it be made aware such circumstances may have arisen, that it will take appropriate steps to ensure that those matters can be taken into account in the event that the Authority comes to reconsider a Proposed Modification.

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

Yours sincerely,

A handwritten signature in black ink, appearing to read 'N. Simpson', written over a horizontal line.

**Nick Simpson**

**Director, Modifications**

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