Having had an opportunity to give further consideration to the Legal Advice provided by Elexon on 2nd December 2004 concerning "The Balancing and Settlement Code and Human Rights issues" I have the following comments to make.

1 Public Authority

1.1 I disagree with the sentiment in Section 3.2 of the Legal Advice (and summarised in Section 7.2) which implies that Generators, acting in a free market situation, may themselves, in some way, be regarded as a 'public authority' and thus cannot be a 'victim' of a human right infringement. This seems to be somewhat of a 'red herring'.

In this respect I note:-

a) that Generators, such as Damhead Creek (which as at the 19th May 2004 had still to be purchased by Scottish Power), Teesside Power etc., cannot be considered to be one of the 'privatised utilities' (that is to say they were not one of the 12 RECs, 3 Generators, 2 Scottish companies or NGT etc., that were sold off circa 14-15 years ago);

b) as to those Generators 'associated' with 'privatised utilities' (as well as other Generators noted in 1.1 (a) above) it seems clear in the Joint [Parliamentary] Committee on Human Rights report published in March this year ("The meaning of Public Authority under the Human Rights Act") that the reference to 'public authority' has two broad meanings; namely "pure" public authorities and "functional" (or "hybrid" as some legal documents refer to them) public authorities, which refers to the act being undertaken. It this 'functional' or 'hybrid' public authority that concerns us.

The report notes:-

(i) "19. Statements by the then Home Secretary and the then Lord Chancellor in the parliamentary debates in both Houses made it clear that privatised or contracted-out public services were intended to be brought within the scope of the Act by the "public function" provision. It was also made clear that the Government intended the provisions of the Act to be adaptable to the changing structures of public realm, and to changes in the distribution of power and responsibility for factors affecting individual rights—

(ii) "The Government have a direct responsibility for core bodies, such as central Government and the police, but they also have a responsibility for other public authorities, in so far as the actions of such authorities impinge on private individuals. The Bill had to have a definition …. that went at least as wide and took account of the fact that, over the past 20 years, an increasingly large number of private bodies, such as companies and charities, have come to exercise public functions that were previously exercised by public authorities."

(iii)"Railtrack acts privately in its functions as a commercial property developer. We were anxious that we should not catch the commercial activities of Railtrack or, for example, of the water companies. which were nothing whatever to do with its exercise of public functions. Private security firms contract to run prisons: what Group 4, for example, does as a plc contracting with other bodies is nothing whatever to do with the state, but, plainly where it runs a prison, it may be acting in the shoes of the state."

(iv) "A private security company would be exercising public functions in relation to the management of a contracted-out prison but would be acting privately when, for example, guarding commercial premises. Doctors in general practice would be public authorities in

relation to their National Health Service functions, but not in relation to their private patients."

The report goes on to say that:-

(v) "20. It was left to the courts to interpret the legislation to determine exactly where the lines between public and private functions should be drawn. It is quite clear that Parliament envisaged that the scope of section 6(3)(b) should be based primarily on the nature of the function being performed by a private body, rather than the intrinsic nature of the body itself. In a key statement the Home Secretary explained—

As we are dealing with public functions and with an evolving situation, we believe that the test must relate to the substance and nature of the act, not to the form and legal personality."

The report goes onto note that:-

(vi) "25. However, the House of Lords stressed that it was the nature of the function being performed that should determine whether a body was a functional public authority. Lord Nicholls of Birkenhead considered that there should be a "generously wide" interpretation of "public function" so as to further the statutory aim of promoting human rights protection, whilst still allowing functional bodies to rely on the Convention rights themselves where they acted privately. In determining what was a "public function", there could be "no single test of universal application … given the diverse nature of governmental functions and the variety of means by which these functions are discharged today". .....

(vii) "26. The House of Lords, therefore, favoured a relatively narrow test for "pure" public authority status [it being my contention, in this respect, that NGT as GBSO is a "functional" or "hybrid", rather than a "pure" public authority], but balanced this against a correspondingly wide and flexible category of "functional" public authority. In contrast to this decision, as well as to the tenor of the debates in Parliament and the clearly expressed expectation of Ministers, the broad, functional approach to public authority responsibility under the Human Rights Act has not so far found favour in the lower courts. In the relatively few decided cases, the courts have, in their application of section 6, taken as their starting point the amenability to judicial review of a body discharging a function, and have looked to the identity of the body, and its links with the State, as well as to the nature of the function performed."

(viii) "27. This is particularly the case as regards application of the definition to private sector providers of public services. The fully privatised public utilities such as the water companies are established in the case law as "functional" public authorities, performing public functions in their delivery of services. By contrast, the application of section 6(3)(b) to smaller private or charitable organisations, often providing services under contract from local authorities, has been less clear-cut. The case law has considered the public authority status of organisations including housing associations, care homes, mental health care facilities and organisations managing public markets."

The report then proceeds to summaries a number of relevant court cases that have considered the issue of 'functionality' and notes:-

(ix) "29. [Poplar Housing and Regeneration Community Association v Donoghue]….[The Court] found a number of other factors to be relevant to reaching the conclusion that the Human Rights Act applied, including:

statutory authority;

control by the State; and

proximity of the relationship between the private body and the delegating public authority."

(x) "35. [R (A) v Partnership in Care Ltd.] In this case the court emphasised the public nature of the function being performed, noting that Health Authorities had statutory power to contract out their health service provision functions to private bodies. ….The court attached particular significance to the element of compulsion involved in the detention powers, and the importance of the statutory function which had devolved on the defendants, in reaching a determination of the meaning of "public function". Neither the absence of "enmeshing" with a State body, nor the absence of direct statutory authority, prevented the hospital from being considered a functional public authority when it was performing these important public functions."

The report concludes the 'Summary of the current state of the law' [concerning public authorities within the context of the Human Rights Act] by noting:-

(xi) "40. The consequence is that, as the law presently stands, a private body is likely to be held to be a public authority performing public functions (a "functional" public authority) under section 6(3)(b) if:

its structures and work are closely linked with the delegating or contracting out State body; or

it is exercising powers of a public nature directly assigned to it by statute; or

it is exercising coercive powers devolved from the State.

Beyond these categories, whether the courts will find that a body falls within section 6(3)(b) remains extremely uncertain. Factors such as:

the fact of delegation from a State body,

the fact of supervision by a State regulatory body,

public funding,

the public interest in the functions being performed, or

motivation of serving the public interest, rather than profit,

are not in themselves likely to establish public authority status, though they may have some cumulative effect, indicating that the function performed has a "public flavour". But the courts are reluctant to rely on a vague notion of public-ness alone. Where there are no direct statutory powers, therefore, or where the functions exercised are not within a narrow range of incontrovertibly governmental powers (such as powers of detention), institutional connection with government will be likely to be the indication of section 6(3)(b) status found to be most significant."; and

c) as noted in the case of Ashton Cantlow, the Court stated:-

"12. What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service."

1.2 In the light of the above, it seems clear to me that a Generator (even if part of a 'privatised utility') in operating its power station in the marketplace cannot be considered to meet the requirements attributed to a 'functional' or 'hybrid' public authority.

1.3 In addition, for the avoidance of doubt, given the statutory nature of the Grid Code (with its designation by the Secretary of State) along with the fact that all changes to it are subject to approval by the Authority, as well as the process followed by the Secretary of State (also involving the Authority) in the appointment of the GBSO, coupled with the Regulatory approval, for example, of the System Operator Incentive Scheme (as well as other NGT charges) and not overlooking the ability to compel Generators to conform with the Grid Code requirements, it seems clear to me that the taking of any action under the Grid Code by the GBSO (such as, but not limited to, the issuing of Emergency Instructions) can be clearly said to be the action of a 'functional' or 'hybrid' public authority.

2 Public Interest

2.1 In regard to Section 5.1 of the Legal Advice, whilst the particular event that gave rise to P173 (the Damhead Creek incident) was safety related, P173 has to take account of all types of Emergency Instruction some of which are far more likely to be related to the integrity of the system than to safety per se (such as the direct risk to life indicated in the Damhead Creek incident).

2.2 I am not denying that NGT (acting as GBSO) has a legitimate right to issue an Emergency Instruction in accordance with the Grid Code and, as a result, legitimately interfere in the use of property (the power station in the case of Damhead Creek) and I have ensured that this is reflected in our Report to the Panel. The issue at hand is is that interference disproportionate. In this respect the Courts look to whether the interference strikes a 'fair balance' between the 'general interest' and the rights of the property owner, and therefore the issue of compensation arises.

2.3 In regard to the notion of 'public interest' clearly, for all intense and purposes, the actions taken by the State or a public authority (such as GBSO) can generally be characterised as being 'in the interest of the public'. However, the Courts, it would seem, have sought to qualify what, for the purposes of Article 1 of the First Protocol, "public interest" means. In this respect its worth noting the comments of the European Court of Human Rights in James and Others v United Kingdom (at paragraph 54):-

"54. The Court further accepts the Commission's conclusion as to the standard of compensation: the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1 [of the First Protocol]. Article 1 [of the First Protocol] does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value."

2.4 In light of the above and given that Emergency Instructions, even on the most generous interpretation, cannot be considered to be " measures of economic reform or measures designed to achieve greater social justice", it therefore follows that it cannot be deduced that when a court looks "first at the existence of any public interest justification" (as noted in Section 5.1 of the Legal Advice) that it will necessarily find that a "public interest" justification is valid where the Emergency Instructions impacts on the use of property (vis Article 1 of the First Protocol).

3. Compensation

3.1 In regard to Sections 6.4 and 6.5 of the Legal Advice (and also as summarised in Sections 7.6 and 7.7), in addition to my comments noted in 2 above ('public interest') the comments in the Legal Advice concerning the right to compensation and the level of such compensation would merit further clarification.

In this respect I note:-

a) the comments of the European Court of Human Rights in the Holy Monasteries v Greece (at paragraphs 70 and 71) that:-

(i) "70. An interference with peaceful enjoyment of possessions must strike a "fair balance" between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights [refers to Sporrong and Lonnroth v Sweden at paragraph 69]. The concern to achieve this balance is reflected in the structure of Article 1[of the First Protocol] as a whole.... In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions [refers to James v United Kingdom at paragraph 50]."

(ii) "71. Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden on the applicants. In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 [of the First Protocol] only in exceptional circumstances. Article 1 [of the First Protocol] does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest" may call for less than reimbursement of the full market value [refers to Lithgow and Others v United Kingdom at paragraph 121]."; and

b) the comments of the European Court of Human Rights in Lithgow and Others v United Kingdom (at paragraph 121) that:-

"121. The Court further accepts the Commission's conclusion as to the standard of compensation: the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1 [of the First Protocol]. Article 1 [of the First Protocol] does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value [refers to James and Others v United Kingdom at paragraph 54 – see 2.4 above]."

3.2 In light of my comments in 2 and 3 above (and in reference to Section 7.6 of the Legal Advice) it seems clear to me that "A right to compensation does…always arise in circumstances of state control" (given that "public interest" is not justified in the case of Emergency Instructions as they are not " measures of economic reform or measures designed to achieve greater social justice").

3.3 Furthermore, taking account of my comments in 2 and 3 above (and in reference to Section 7.7 of the Legal Advice) it seems clear to me also, in the absence of any 'exceptional circumstances' associated with the action being in the 'public interest', that "'Full' compensation is …always required".

3.4 For the avoidance of doubt; and referring to the last sentence of both the Holy Monasteries and also the Lithgow cases noted above (see 3.1 (a) (ii) and 3.1 (b)); it seems to me that "Full compensation" is directly linked to the "reimbursement of the full market value", that being, for the purposes of the Balancing and Settlement Code, the Bid/Offer Price, e.g. the BOA methodology that P173 seeks to specifically remove in the case of Emergency Instructions being issued.

3.5 For clarification, it seems to me that the market rate for a product or service, let alone the "full market value", is not generally considered to be limited to just the costs directly associated with the item. Rather, as with some fruit that you buy from a market stall, there is an element of 'market value' over and above the costs per se, that takes account of a number of factors including risk, and that this can be classified as "full market value". If only *all* you costs are recompensed might you then consider yourself to be held 'cost neutral'.

4 Compensation (continued)

4.1 In regard to Section 6.6 of the Legal Advice (for the reasons already outlined in 2 and 3 above) the key issue is that compensation should be made by the public authority (NGT acting as GBSO) to the Party whose property has been disproportionately interfered with. In this respect I note:-

a) the comments of the Court of Appeal in Marcic v Thames Water Utilities Ltd (at paragraphs 117 and 118) that:-

(i) [Quoting from a European Court of Human Rights judgement in S. v France] "117..... When a State is authorised to restrict rights or freedoms guaranteed by the Convention, the proportionality rule may well require it to ensure that these restrictions do not oblige the person concerned to bear an unreasonable burden."

(ii) [The Court of Appeal stated that] "118. This suggests that where an authority carries on an undertaking in the interest of the community as a whole it may have to pay compensation to individuals whose rights are infringed by that undertaking in order to achieve a fair balance between the interests of the individual and the community. "

and

b) the comments of the European Court of Human Rights in Guillemin v France (at paragraph 54) that:-

"Compensation for the loss sustained by the applicant can only constitute adequate reparation where it also takes into account the damage arising from the length of the deprivation. It must moreover be paid within a reasonable time."

4.2 In the light of the fact that the P173 'compensation' methodology:-

i) restricts the items of costs that a Lead Party may claim compensation for to a limited set, i.e. the Section G 2.1.4 claims process (this being further compounded by the fact that the Panel and the Authority have the ability to further restrict, but not expand, the costs items to be recompensed); and

ii) restricts the period for which a Lead Party can claim costs to one acceptance term; particularly as the length of deprivation (in conforming with the public authority requirement) could, in the case for example of a nuclear power station tripped off, be circa 48 hours (not taking account of any plant damage).

I do not believe that it can be considered to provide a fair balance between the Lead Party and the general interest, nor can it be said to be a "genuine attempt to recompense the generator" as not all the totality of costs, or the duration that they were incurred, have been taken into account in striking such a 'fair balance'.

5 Cost Neutral

5.1 I do not support the assertion in Section 6.7 of the Legal Advice that the "aim of the proposed rules [associated with P173] put the generator in a neutral position as respect his costs".

5.2 The use of the term 'cost neutral' is somewhat misleading and subjective in its use in P173 as *all* the Lead Party costs (or there duration) will not be included in the P173 cost calculation methodology (see 4.2 above), so the Lead Party cannot be said to be in a 'cost neutral' position following the application of P173 unless and until the totality of *all* costs are taken into account.

5.3 Given the clear caveat that all costs are demonstrably, reasonably and prudently incurred (see G 2.1.4 (c) (ii)) as a result of acting upon the Emergency Instruction, I see no reason why *all* costs cannot, at the very least, be put forward by the Lead Party for consideration by the Panel and the Authority.

5.4 Only is this way can the totality of the costs be established and, upon payment of those cost, can it be said that the Lead Party has been held 'cost neutral'.

5.5 For the avoidance of doubt (for the reasons I have outlined in 2, 3 and 4 above) I do not believe that being held 'cost neutral' (in the context of P173) is the same as being compensated.

6 BSC Parties

6.1 In regard to Section 7.1 of the Legal Advice, the aim should be to ensure that there is no infringement of the human rights of any BSC Party who may be subject to an Emergency Instruction (under Article 1 of the First Protocol) by the proposed Modification (P173) to the BSC, not just Generators per se.

7 State Actions

7.1 In regard to 7.3, this too has somewhat of the appearance of a 'red herring'. All actions by a State, be they regulation or licences, or indeed Acts of Parliament (as well as a BSC Modification approved by the Authority) are subject, simplistically, to a test to see if they disproportionately interfere with someone's rights, hence the legal cases referred to in the Legal Advice and my comments above.

Anecdotally, its worth considering the comments in the 'Times' on 19th November 2004, when referring to the ban on hunting passed by Parliament a few days before, which noted that in addition to challenging this ruling in terms of the use of the Parliament Act that:-

"The second challenge will be under the Human Rights Act. This issue, first raised in the Burns Report of 2000 and then by the Joint Committee on Human Rights, covers the property rights [Article 1 of the First Protocol] of hunters, and, in particular, the absence of any compensation scheme from the legislation."

8 'Fair balance' and 'disproportionate interference'

8.1 Taking account of my comments in 2, 3 and 4 above, the assertion in Section 7.4 of the Legal Advice appears over ambitious if due consideration is not also given to the matters of 'fair balance' and 'disproportionate interference'.

8.2 For the avoidance of doubt, whilst it is true that a "State is allowed a wide scope of control of the use of possessions in the public interest and the Courts are not likely to interfere" the "wide scope" afforded to the State is not unfettered (see, for example my comments in 2 above) and, certainly for the purposes of Article 1 of the First Protocol, the notion of 'public interest' is not necessarily the same as what is 'in the interest of the public'. In addition this "wide scope" is also constrained (except in exceptional cases of "public interest") by the notion of striking a fair balance between the general interest of the community and the rights of the property owner.

9 Equality

9.1 As per my comments in 8 above; Section 7.5 of the Legal Advice seems over ambitious if not qualified by the principles of 'fair balance' and 'disproportionate interference' (see, for example, my comments in 3 and 4 above), particularly as the interference (the Emergency Instruction) may not (and did not in the case of Damhead Creek) "appl[y] to all equally" as this paragraph states.

9.2 Who can say how long the GBSO might; in order "to maintain adequate frequency sensitive Generating Units" (an example of an Emergency Instruction listed at BC2.9.1.2 (c) of the Grid Code) that might arise in the sought of extreme situation that may require the issuing of an Emergency Instruction; keep a Generator subject to 'emergency instructions'.

9.3 Indeed one might even read 7.5 to suggest that as the interference is not 'temporary' (the effect of compliance with the Emergency Instruction could interference with the use of the property for some time) and is not applied equally to all that it therefore "can[not] be argued to be within the State's scope"(!).

9.4 A scenario may arise, for example, where the GBSO, faced with the option of two power stations who could equally meet the "need to maintain adequate System and Localised NRAPM" (an example of an Emergency Instruction listed at BC2.9.1.2 (b) of the Grid Code) might chose station A over station B because of an understandable desire to have the (blackstart) station A 'warmed' (akin to a 'warming contract') in case the circumstances (that warrant the issuing of the Emergency Instruction) deteriorate. I would suggest that if such a situation where to arise it could not credible be claimed that the Emergency Instruction "applies to all equally".

9.5 Accordingly, and in light of the comments in the case before the High Court of London and Continental Stations and Property v Rail Regulator [2003] (a case related to the approval, by a regulatory body, of a compensation regime applicable to Parties subject to the oversight of that regulatory body) (at paragraph 41 and 42):-

(i) " 41. Further, the terms under which compensation is received in return for the use or expropriation of land are material to the assessment of whether a fair balance is struck between the public interest and the protection of property rights. In particular, compensation terms are relevant to the question of whether a disproportionate burden has been imposed upon a property owner [refers to Jokela v Finland]."; and

(ii) “42…..It is implicit in the concept of proportionality that an excessive burden must not be imposed [refers to International Transport Roth GmbH v The Home Secretary, which in turn is citing James v United Kingdom (at paragraph 50)]:-

> "The requisite balance will not be found if the person concerned has had to bear "an individual and excessive burden".

I believe that an Emergency Instruction (where the matter of compensation is not also given due consideration) cannot be considered proportionate and it would, therefore, impose an excessive burden on the Lead Party.

9.6 As an aside, how can an Emergency Instruction “appl[y] to all equally” (Section 7.5) and yet also be “an individual instruction [which] will apply to a specific operator” (3rd bullet point Section 5.1)?

10 Conclusion

10.1 The notion combined in Sections 7.6, 7.7 and 7.8 of the Legal Advice is that the concept of ‘cost neutrality’, in and of itself, equates to ‘compensation’ and is thus a ‘fair balance’ between the ‘disproportionate interference’ of the Lead Party and the general interest. I note the definition of ‘compensation’ in the Concise Oxford [English] Dictionary (9th Edition):-

“compensation.... 1 [a] the act of compensating. [b] the process of being compensated. 2 something, especially money, given as a recompense....”

10.2 I fail to see (even if one accepts – which I do not - the notion that using the curtailed list of ‘cost’ items (in G 2.1.4) equates to ‘cost neutrality’) how a Lead Party who ends up, at the end of the process, receiving £0 (‘cost neutral’) for the interference with the use of his property can be considered (a) to have been compensated or (b) that a fair and proportionate balance has been struck between that interference and the general interest.

10.3 Furthermore, taking account of the particular facts associated with the Damhead Creek incident (that is the technical failure of the assets of the public authority) I am not 100% certain that a Court would consider it appropriate or suitable that the affect Lead Party should suffer such a manifestly disproportionate burden (of not having its costs fully, and fairly, recovered).

10.4 I conclude my thoughts by saying, for the reasons detailed in this note, that I am not confident that if P173 were to be implemented that it would necessarily meet the requirements of Article 1 of the First Protocol of the European Convention of Human Rights. This concludes my thoughts on this matter at this time.

[5th December 2004]