

Final MODIFICATION REPORT for Modification Proposal P145

Cost reflective mechanism to allocate any deficit arising from the application of the PNE claims fee

Prepared by: Governance Standing Modification Group (GSMG)

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This document has been distributed in accordance with Section F2.1.10¹ of the Balancing and Settlement Code.

RECOMMENDATIONS

The Balancing and Settlement Code Panel recommends that:

- **the Proposed Modification P145 should not be made; and**
- **In the event the Authority determine that Proposed Modification P145 should be made, AGREE the P145 Implementation Date of 5 Working Days from an Authority decision.**

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¹ The current version of the Balancing and Settlement Code (the 'Code') can be found at www.elexon.co.uk/ta/bscrel_docs/bsc_code.html

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SUMMARY OF IMPACTED PARTIES AND DOCUMENTS

The following parties/documents have been identified as being potentially impacted by Modification Proposal P145.

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"/>
Non Physical Traders <input checked="" type="checkbox"/>	F <input type="checkbox"/>	Communication Requirements Documents <input type="checkbox"/>
Party Agents		
Data Aggregators <input type="checkbox"/>	G <input type="checkbox"/>	Reporting Catalogue <input type="checkbox"/>
Data Collectors <input type="checkbox"/>	H <input type="checkbox"/>	MIDS <input type="checkbox"/>
Meter Operator Agents <input type="checkbox"/>	J <input type="checkbox"/>	Core Industry Documents
ECVNA <input type="checkbox"/>	K <input type="checkbox"/>	Grid Code <input type="checkbox"/>
MVRNA <input type="checkbox"/>	L <input type="checkbox"/>	Supplemental Agreements <input type="checkbox"/>
BSC Agents		
SAA <input type="checkbox"/>	M <input type="checkbox"/>	Ancillary Services Agreements <input type="checkbox"/>
FAA <input type="checkbox"/>	N <input type="checkbox"/>	Master Registration Agreement <input type="checkbox"/>
BMRA <input type="checkbox"/>	O <input type="checkbox"/>	Data Transfer Services Agreement <input type="checkbox"/>
ECVAA <input type="checkbox"/>	P <input checked="" type="checkbox"/>	British Grid Systems Agreement <input type="checkbox"/>
CDCA <input type="checkbox"/>	Q <input type="checkbox"/>	Use of Interconnector Agreement <input type="checkbox"/>
TAA <input type="checkbox"/>	R <input type="checkbox"/>	Settlement Agreement for Scotland <input type="checkbox"/>
CRA <input type="checkbox"/>	S <input type="checkbox"/>	Distribution Codes <input type="checkbox"/>
Teleswitch Agent <input type="checkbox"/>	T <input type="checkbox"/>	Distribution Use of System Agreements <input type="checkbox"/>
SVAA <input type="checkbox"/>	U <input type="checkbox"/>	Distribution Connection Agreements <input type="checkbox"/>
BSC Auditor <input type="checkbox"/>	V <input type="checkbox"/>	BSCCo
Profile Administrator <input type="checkbox"/>	W <input type="checkbox"/>	Internal Working Procedures <input type="checkbox"/>
Certification Agent <input type="checkbox"/>	X <input checked="" type="checkbox"/>	Other Documents
MIDP <input type="checkbox"/>		Transmission Licence <input type="checkbox"/>
TFLA <input type="checkbox"/>		
Other Agents		
SMRA <input type="checkbox"/>		
Data Transmission Provider <input type="checkbox"/>		

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

Cost of implementing Proposed Modification:	5 ELEXON man days
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1 DESCRIPTION OF PROPOSED MODIFICATION AND ASSESSMENT AGAINST THE APPLICABLE BSC OBJECTIVES

1.1 Modification Proposal

Modification Proposal P145, "Cost reflective mechanism to allocate any deficit arising from the application of the PNE claims fee" (P145) (Reference 1) was submitted by Powergen UK plc on 17 October 2003. P145 seeks to ensure that any deficit that arises between the monies to be collected from the Past Notification Error² (PNE) claim fees and the actual costs of the PNE process is recovered from PNE Claimants.

It is the Proposer's belief that it is unreasonable to expect parties that have not made a PNE claim to fund a proportion of the costs of administering the PNE claims process. The Proposer believes that placing an unreasonable cost burden on non-claimants or a disproportionate cost burden on claimants with relatively small value claims, will undermine those Parties' ability to compete in the market and therefore not better facilitate the achievement of Applicable BSC Objective (c). In contrast the Proposer believes that targeting costs at those that to a greater or lesser extent contribute to those costs will thus help promote competition in the generation and supply of electricity. Central to the Proposer's arguments in favour of P145 is an assertion that the larger value of the PNE claim, the larger the resultant proportion of the cost that will have been incurred in dealing with the claim.

1.2 Urgent Status

The Proposer requested that P145 be treated as urgent on the grounds that failure to expedite resolving the issue could create uncertainty in the market and Parties who have not made a PNE claim could incur disproportionate costs. ELEXON supported this request and made a recommendation to the Panel Chairman that P145 be treated as urgent.

The Balancing and Settlement Code Panel (the Panel) agreed with ELEXON's recommendation that P145 be treated as urgent, and requested that the Authority grant urgent status. The Authority granted urgency on 21 October 2003 and agreed that P145 should be progressed to the following timetable by the Governance Standing Modification Group (GSMG):

Date	Activity
23 October 2003	Modification Group Meeting
28 October 2003	Industry consultation issued
5 November 2003	Modification Group Meeting to discuss consultation responses and draft Urgent Modification Report
12 November 2003	Urgent Modification Report issued
13 November 2003	Panel Meeting – Consideration of Urgent Modification Report
14 November 2003	P145 Urgent Modification Report provided to the Authority for decision

² The concept of Past Notification Errors was introduced following approval of Modification Proposal P37 "To provide for the remedy of past errors in Energy Contract Volume Notifications and in Metered Volume Reallocation Notifications" (P37) (Reference 2) and is incorporated in paragraph P6 of the Code.

1.3 Proposed Modification

P145 identifies that there is a possibility of there being a difference between the monies to be collected from the application of the PNE claim fee and the total cost of the PNE process. P145 therefore seeks to ensure that any deficit arising from the application of the PNE claim fee is allocated in such a way as to ensure the costs of the PNE process are both allocated amongst PNE claimants only and that Parties that have not made any PNE claims or have decided not to pursue their claims are not required to fund such costs.

The proposal sets out a formula by which the allocation of costs will be calculated as follows:

$$C_{PNE} = D \times V_c / V_{TOT}^3$$

Where:

C_{PNE} = Cash payment to be paid by a particular claimant in respect of a single claim⁴

D = Deficit, i.e. the cost of the PNE process less the income generated from the PNE claim fee

V_c = Net value of each individual claim obtained by adding together the Energy Imbalance values of all the Parties associated with a particular claim. Such Energy Imbalance values have already been published by ELEXON under the title of "Past Notification Error Materiality".

V_{TOT} = Total net value of all PNE claims (i.e. a sum total of individual claim net Energy Imbalance values using data from ELEXON's document entitled "Past Notification Error Materiality").

The effect of this is to apportion the PNE process costs to claimants on a pro rata basis according to the size of their claim.

The proposal noted that claims having a negative net Energy Imbalance value should be excluded for the purpose of calculating V_c and V_{TOT} .

The Proposer believes that placing an unreasonable cost burden on non-claimants or a disproportionate cost burden on claimants with relatively small value claims (i.e. claims that the Proposer suggests have tended to generate lower PNE claims process costs), will tend to undermine those Parties' ability to compete in the market. The Proposer asserts that targeting costs at those that to a greater or lesser extent have contributed to the costs will thus help promote competition in the generation and supply of electricity.

Therefore, the Proposer believes implementation of P145 would better facilitate achievement of Applicable BSC Objective (c).

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.

1.4 Issues raised by the Proposed Modification

During the initial discussion of P145 by the GSMG, a number of issues were raised by the members of the group: These are described below

- **Retrospection:** Whether P145 was a retrospective Modification Proposal and whether it passed the tests set out by the Authority in their previous decision letters with respect to retrospection.

³ It should be noted that in drafting the legal text for P145 it was necessary to amend the actual variables used to make them consistent with the conventions for algebraic formulae used within the Code.

⁴ This subject to the establishment of single cause claims by the PNE Committee under P6.2.6

- **Cost Recovery:** Whether there should be a general principle of targeting a particular group of Parties for the recovery of costs associated with a particular Modification Proposal such as P37 where the costs could be said to benefit a subset of Parties.
- **New Entrants** – It was noted that entrants to the market after the introduction of P37, would be required to pay a share of the costs of administering a process that those Parties were unable to take part in.
- **Role of Interested Parties** – What part interested Parties may have played in contributing to the level of the costs incurred by the PNE process.
- **Role of Claims not pursued** – It was recognised by the GSMG that P145 does not include materiality values for claims that have not been pursued by the claimant, and hence such claimants would not be allocated additional costs under this proposal.
- **Relationship with Claim Fee** – It was noted that P145 does not itself propose a change to the claim fee but seeks to introduce a new fee to recoup any deficit between the income from the claim fees and the total cost of the PNE claims process. The GSMG confirmed that P145 did not need to be constrained by the timing of the invoicing of the PNE claim fee.
- **Apportionment of Costs** – It was noted that it was not clear that the statement by the Proposer that “the larger the value of claims, the larger the costs likely to be incurred in respect of such claims” was actually the case.
- **Appeals Process** – It was noted that it was not intended that P145 seek to recover any deficit in cost arising out of the appeals process.
- **Mechanism for Redistribution of Costs** – The GSMG noted that majority of the costs of the PNE process had already been recovered from all BSC Parties as part of the normal BSCCo cost recovery process through the Main Funding Share. This could mean that implementation of P145 would require money to be offset against the 2003/2004 BSCCo costs and paid back to Parties affected in 2002/2003.

These issues were outlined within the P145 Consultation document (Reference 3) issued to Parties on 28 October 2003. The views of respondents were considered by the GSMG at their meeting on 5 November 2003. A summary of the respondents views, together with the conclusions of the GSMG in respect of those views are contained within Section 5 of this report.

It should be noted that the P145 Consultation contained an estimate of the total PNE project costs. The estimate distributed as part of the P145 consultation is contained within Annex 8 which includes a breakdown of costs and an example of how these costs would be recovered under the current rules and under P145).

1.5 Assessment of how the Proposed Modification will better facilitate the Applicable BSC Objectives

The GSMG were unable to agree whether or not the Proposed Modification P145 would better facilitate the achievement of the Applicable BSC Objectives. Therefore in accordance with F2.4.14(c) this report contains a summary of the views of the GSMG. The Panel discussed the contents of the draft Urgent Modification Report and concluded by majority⁵ that the case was not proven for P145 better facilitating the achievement of the Applicable BSC Objectives. The rationale for the Panel decision is captured within Section 2 of this report.

⁵ Using the casting vote of the Panel Chairman.

1.6 Governance and regulatory framework assessment

The GSMG considered the wider implications of P145 in the context of the statutory, regulatory and contractual framework within which the Code sits, as is required by the Code (Annex F-1, paragraph 1(g)). The GSMG was of the opinion that, were P145 to be implemented, there would be no such wider implications.

2 RATIONALE FOR PANEL'S RECOMMENDATIONS

The Panel considered the P145 draft Urgent Modification Report at its meeting on 13 November 2003. Immediately prior to considering the P145 draft Urgent Modification Report, the Panel had considered whether or not it was appropriate to change the level of the PNE claim fee. The discussion on whether or not it was appropriate to change the level of the fee raised many issues that were relevant to consideration of P145 and as such allowed for a swift conclusion of the discussion on P145. It should be noted that in considering the level of the PNE claim fee the Panel was aware of the Panel objectives set out in B1.2 of the Code which should form the basis for decisions on such matters; and the Panel was mindful of this when it concluded that P145 the case for an improvement in the facilitation of the achievement of the Applicable BSC Objectives had not been made. The decision made in respect of P145 however would need to be made against the Applicable BSC Objectives. In order to allow full consideration of the issues associated with P145, the issues raised during the discussion on the level of the claim fee are included within this report and outlined below.

One Panel Member stated that at the time the decision was taken by the Panel to make a recommendation in respect of P37, both the overall cost of PNE process and the number of claims were unknown, the latter being altered further by the implementation of Approved Modification P84. In addition the Panel Member commented that the Panel had already considered other Modification Proposals that benefited individual Parties or groups of Parties. At that time, the Panel had asked the Proposers of those particular Modification Proposals, whether or not they would be prepared to fund the cost of those proposals. This Panel Member observed that a number of Modification Proposals had been recommended for rejection by the Panel on the grounds that the Proposer, or the set of beneficiaries of any particular Modification Proposal would not fully pay the costs of implementation. The Panel Member also indicated that at the time the decision with respect to Modification Proposal P37 was reached, there was no clear idea of the costs of the process and that the Panel had determined to set a fee at an initial value of £5,000 on the basis that it could be revisited. The Panel Member stated that this was the basis that paragraph P6 included the provisions to amend the fee. The Panel Member also expressed concern that the legal drafting for P37 may have fettered the Panel's ability to revise the fee, in particular on a claim specific basis, and it was on this basis that P145 had been raised.

The Panel Member also stated that it was incumbent on both Parties and prospective Parties to read the obligations within the Code. During the discussion of P145, this Panel Member drew particular attention to section 5.1 of the P145 draft Urgent Modification Report. In particular he observed that whilst some Parties had responded to the P145 consultation indicating that they had not expected a change to the PNE claim fee, their attention should be drawn to paragraph P6.2.2 of the Code. This Panel Member also asked that this report specifically highlight the part of the paragraph that referred to changes to the fee level and confirmed, in his opinion that, he believed that the Code allowed for a variable menu of fees to be applied to claimants.

P6.2.2 of the Code follows with emphasis added

“Subject to paragraph 6.2.6, where a relevant Contract Trading Party makes a claim of Past Notification Error, such Party shall pay a fee to BSCCo for each such claim, the amount of which (for each such claim, provided that, for the purposes of this paragraph 6.2.2 and subject to paragraph 6.2.4, claims of Past Notification Error made by a Party in respect of the same Volume Notification shall be treated as a single claim) shall be £5,000, or such other amount as the Panel may from time to time after consultation with Parties

and the approval of the Authority, determine upon not less than 30 days notice to Parties, and which shall not be reimbursed in any circumstances.” [emphasis added]

A Panel Member suggested that the incremental costs of Interested Parties' contribution to the PNE processes were possibly no more than 25% of the cost of those processes. ELEXON could not provide information to support or refute this suggestion as a breakdown of costs between Interested Parties and claimants had not been undertaken. Some aspects of the PNE process (for example, formulating determinations) were not visible to ELEXON, so such a breakdown would be difficult to complete.

One Panel Member observed that it was unfair to expect Parties acceding to the Code to expect to pay for a process which was not available to them. Another Panel Member suggested that the cost of the robust PNE process may decrease the risk of a procedural challenge that all Parties would be required to pay for.

One Panel Member suggested that Parties who traded at Go-Live did so in the knowledge of the challenges that lay ahead. He suggested that some Parties had chosen to invest in more robust systems and processes than others and as a consequence, some Parties had been more prepared to trade within the new arrangements than others. In his opinion it was difficult to justify asking all Parties to share the costs of the PNE process.

One Panel Member observed that in his opinion, it was the intent to ensure that the costs of the PNE processes were recovered from PNE claimants. At the time P37 was introduced there may have been an anticipation that there would be a small number of large claims, when in reality a large number of small claims emerged. The decisions to raise small claims had probably been based on the level of the fee set at £5,000 and in this Panel Member's opinion it was appropriate to ensure that those benefiting to a greater extent from the process, pay more as a share of the costs of that process.

The Authority representative drew the Panel's attention to the need, at the time the claim fee was set, to ensure that the fee was not set at a level too high to prevent smaller Parties making a claim whilst at the same time preventing vexatious claims from being lodged.

After careful consideration of the views of the GSMG, and the respondents to the P145 consultation, the Panel voted on whether or not P145 better facilitated the achievement of the Applicable BSC Objectives. The Panel was evenly balanced in its views and as such, in order to make a decision on P145, the Panel Chairman was required to exercise a casting vote. The Panel Chairman's casting vote is usually exercised in a manner that reflects that the case for change was unproven and retains the status quo. This was the case with P145. The Panel therefore voted by a majority⁵ that the case for P145 improving competition within the supply and generation of electricity or introducing efficiencies to the balancing and settlement arrangements had not been proven. In so doing, it therefore concluded that the recommendation to be made to the Authority in respect of P145 should be that the Proposed Modification should not be made.

3 IMPACT ON BSC SYSTEMS AND PARTIES

3.1 BSCCo

Were P145 to be approved, there would be a new reduction in overall BSC Costs for the financial years 2002/3 and 2003/4. The total reduction in these costs would equate to the difference between the revenue generated from the application of the PNE claim fee and the total cost of the PNE process.

Any monies already paid by Parties to fund the PNE Process for the previous BSC Year (ie 2002/3) financial years would be refunded when the PNE Deficit is paid by PNE claimants. The deficit paid for the current financial year will be offset against the funding shares.

In addition to BSCCo invoicing the £5000 fee to claimants as part of the PNE process, BSCCo will also need to calculate any deficit arising, invoice claimants for the deficit and repay any overpayment of BSC Costs. It is estimated that this will take no more than 5 ELEXON man days effort.

3.2 BSC Systems

No impact as been identified on any BSC System as a result of the introduction of P145.

3.3 Parties and Party Agents

The GSMG recognised that any impacts arising following the implementation of P145 would be financial in nature and the materiality would depend on the single claim decisions made by the PNE Committee in respect of claims within the PNE claims process. These outcomes could not be fully considered by the GSMG prior to their final meeting and it was therefore concluded that, given the urgent timetable being followed, Parties could make any material points via the consultation process and that there would be no requirement to undertake a separate Party Impact Assessment.

4 IMPACT ON CODE AND DOCUMENTATION

4.1 Balancing and Settlement Code

The impacts to the Code fall within two Sections, Section P and Annex X-1 and Annex X-2.

Section P of the Code will be modified to include:

- a definition of the Parties responsible for funding any deficit, including as appropriate the definition of any cut-off dates for Parties who did not pursue their claims and therefore may not have incurred any significant costs over and above their claim fee;
- a description of the mechanism by which the PNE funding deficit is calculated and recovered;
- a description of the mechanism by which Parties who have already funded the PNE claims process will be repaid;

Annex X-1 of the Code will be changed to accommodate any definitions introduced by P145; and

Annex X-2 of the Code will be changed to define any formulae introduced by P145.

4.2 Code Subsidiary Documents

No changes are proposed to any Code Subsidiary Documents;

4.3 BSCCo Memorandum and Articles of Association

No changes are proposed to BSCCo's Memorandum and Articles of Association

4.4 Impact on Core Industry Documents and supporting arrangements

No impacts have been identified on any of the following Core Industry Documents:

Grid Code, Master Connection and Use of System Agreement (MCUSA), Supplemental Agreements, Ancillary Services Agreements (ASAs), Master Registration Agreement (MRA), Data Transfer Services Agreement (DTSA), British Grid Systems Agreement (BGSA), Use of Interconnector Agreement, Pooling and Settlement Agreement (PSA), Settlement Agreement for Scotland (SAS), Distribution Codes, and Distribution Use of System Agreements (DuoSAs).

5 SUMMARY OF CONSULTATIONS & VIEWS OF THE MODIFICATION GROUP

The P145 Urgent Modification Consultation (Reference 3) sought respondents views in respect of the issues identified within section 1.4 of this report and a number of issues identified by the GSMG at their initial meeting on 23 October 2003.

This section of the document provides a summary of the consultation respondents views in respect of each of these issues and provides further commentary, where appropriate, from the GSMG in respect of these views.

A total of 16 responses (61 Parties and 1 Non Party) were received to the P145 consultation.

Question	Respondent Agrees	Respondent Disagrees	No opinion Expressed
Do you believe P145 is a retrospective modification?	13	3	-
If you do believe P145 is a retrospective modification, do you believe the retrospective rule change is appropriate?	7	7	2
Do you believe that it is appropriate for the total cost of the PNE process to be recovered from PNE claimants alone?	8	8	-
If costs are to be apportioned amongst PNE claimants alone, do you believe that the methodology in P145 reasonably reflects the costs incurred by individual PNE claimants?	7	7	2
If P145 is approved, do you believe the 2002/2003 costs should be paid back to Parties based on their funding share for 2002/2003 or based on this years funding share?	2002/2003	2003/2004	
	11	2	3
Do you believe Proposed Modification P145 better facilitates the achievement of the Applicable BSC Objectives?	8	8	-
Do you believe that there is an Alternative Modification that addresses the perceived defect and better facilitates the achievement of the Applicable BSC Objectives?	2 ⁶	13	1
Does P145 raise any issues that you believe have not been identified so far and that should be progressed?	A number of respondents identified matters to be brought to the attention of the GSMG. These are summarised below.		
Are there any further comments on P145 that you wish to make?			

⁶ Includes one respondent that responded "maybe". The remaining respondent suggested a change to the Error Correction Payment mechanism.

5.1 Summary of the consultation responses

This section of the Urgent Modification Report provides a summary, as provided by the GSMG, of the rationale used by the respondents to justify the views expressed above. The detailed consultation responses are included within Annex 3 of this document. This section also provides the opportunity to record the views of the GSMG in respect of those consultation responses and has been split by consultation question.

5.1.1 Retrospection

The majority of respondents believed that P145 was retrospective in nature. Other arguments expressed in support of this view included:

- the Code does not currently allow for a variation in the methodology for recovering Past Notification Error process costs from claimants;
- decisions by Parties as to whether they wished to make a PNE claim were made on the basis that there was a £5,000 claim fee; and
- the possibility of retrospective action of this nature had not been clearly flagged.

The minority view, that P145 was not retrospective in nature, was backed up by the arguments that claimants were aware that the value of the fee could be changed as it had been flagged within the legal drafting.

The GSMG agreed that as Section P6 of the Code included a uniform level of the PNE claim fee, a mechanism for a non uniform charge would have a retrospective effect.

5.1.2 Appropriateness of the Proposed Rule Changes on a Retrospective Basis

Those respondents that believed that P145 was retrospective were asked whether the proposed change was an appropriate change to make retrospectively⁷ in light of the criteria previously set out by the Authority, for example that which was included within the P19 decision letter.

The respondents' views in support of P145 being an appropriate change to make retrospectively were that:

- the costs of the PNE process were unknown at the time the claim fee was set and as such it was clear that there might exist a deficit that may give rise to a change of the level of the claim fee;
- the costs are now materially above that which might have been envisaged at the time;
- the possibility of a change in the level of costs was recognised and clearly flagged in paragraph P6.2.2;
- the intention that the claim fee should broadly cover the cost of the process was reflected in the comments of P37 respondents;
- the intention of the Panel to revisit the level of the fee was clearly flagged throughout the progression of the PNE process;
- Modification Proposal P84 'Amendment to Process for Past Notification Errors (2)' (P84) (Reference 4) had changed the definition of a Past Notification Error claim for the purposes of calculating the fee and as such the basis on which the claim fee had been agreed at £5000 had also changed – it was only after this change in definition had occurred that the likelihood of any deficit had arisen; and

⁷ A copy of the criteria set out by the Authority is included within the legal advice provided to ELEXON and is attached as Annex 7 of this report.

- There was an expectation that non claimants would not have to pay a significant proportion of the PNE process costs.

The respondents' arguments expressed against this retrospective rule change being appropriate were:

- claimants had depended on the level of the fee remaining at £5,000 as the basis for submitting a claim and such a change would be unfair;
- the non uniform basis for the change in fee had clearly not been flagged in advance;
- the costs were not as a result of an irrecoverable central loss but merely as a result of a central cost;
- substantial change to the amount of the claim fee was not foreseeable at the time PNE claims were submitted; and
- it is unreasonable to change the basis of the fee at this late stage in the process as this would be procedurally unfair.

During discussion of the issue of retrospectivity, the GSMG received a view from ELEXON's legal advisors on this issue. A member of the GSMG disagreed with the view expressed by the legal advice, that P145 does not satisfy the Authority's test for retrospectivity, as set out in the previous decision letters. The member of the GSMG suggested that contrary legal opinions might also exist. A copy of the advice prepared by ELEXON's legal advisors is set out in Annex 7.

The GSMG expressed similar polarised views to that of the consultation respondents and did not agree on whether the retrospective change was appropriate.

5.1.3 PNE Costs Recoverable from Claimants Alone?

Respondents were asked whether it was appropriate that the total cost of the PNE process should be recoverable from claimants alone.

Respondents' views were divided and arguments in favour of allocating costs to the claimants alone were:

- it was the intent from the PNE claim fee that the PNE claimants should pay for the administration of the PNE process;
- it is unfair that those Parties that had not submitted a claim should be expected to pay for the PNE process;
- the PNE process is a 'one-off' process which benefits PNE claimants and should not be compared with the disputes process which covers errors within BSC Systems and therefore benefits all Parties;
- it is consistent with the achievement of the Applicable BSC Objectives that the costs of administering the process should be borne by those that initiated the claims; and
- participants that had not made a claim may have invested heavily in the time period approaching Go-Live to ensure that they had robust systems and processes in place in order to minimise the possibility of a notification error occurring.

The counter view expressed by respondents was that:

- the PNE process was carried out on behalf of all market participants in a robust manner to ensure that only valid claims would be upheld and the interests of all Parties protected;
- P145 may be anti-competitive;

- costs have not only been caused by the Parties making a claim but also Interested Parties who have contributed to the costs of the PNE processes;
- the size of the costs for the PNE processes related to the desire to have an independent, robust and transparent process;
- each Party is a potential beneficiary of the PNE process;
- it would have been reasonable to agree the level of any costs for administering the process prior to the submission of any claims in the procedure;
- the effect of the Error Correction Payment shared across all BSC Parties (with the exception of the relevant benefiting Party(s)), further supports the proposition that the shortfall in costs should be met collectively by all BSC parties; and
- this mechanism would be unfair to the Parties involved in the process.

The GSMG expressed similar polarised views to that of the consultation respondents and did not agree on whether the costs of the PNE processes should be recovered from claimants alone. One member of the GSMG observed that the points relating to Error Correction Payments would only be relevant if claims are upheld.

5.1.4 Cost Reflectivity

Respondents were asked whether they believed the methodology suggested by P145 reflected the costs caused by individual PNE claimants as a result of the claims they had made. The views of the respondents were split. The views of those that believed it was an accurate reflection of the costs caused by individual PNE claimants were:

- a pro-rating of costs in proportion to the benefits was the most appropriate mechanism;
- it is fairer than the current flat fee approach;
- costs should not be borne by Parties who have not made use of the process;
- claimants with larger claims have submitted the majority of evidence to the PNE Committee; and
- the methodology is pragmatic and fair.

The arguments of the respondents with the counter view were:

- the size of the claim is not connected to the costs incurred in administering the process;
- the costs of the PNE process are related to the complexity of each claim and not to the size of that claim;
- the only fair methodology is for all Parties to pay;
- interested Parties also contribute to the costs of the process;
- the robustness of the process which has an impact on costs will protect non claimants; and
- larger Parties with larger claims may have put more effort into making the supporting information clearer and less costly to administer.

The GSMG expressed similar polarised views to that of the consultation respondents and did not agree on whether the methodology expressed within P145 was cost reflective. However, it should be noted that a number of responses that expressed an opinion believed that there is no evidence or link that large value claims mean higher administrative costs.

5.1.5 Refund for Financial Year 2002/3

Respondents were asked the basis on which the repayments for costs incurred during the 2002/3 BSC Year should be refunded. The majority of respondents agreed that this should be on the basis of Parties' funding shares during that BSC Year.

The main arguments in support of this view were that it was the most pragmatic solution and could be calculated immediately.

The GSMG agreed with the majority view of respondents and had no further comments to make.

5.1.6 Achievement of the Applicable BSC Objectives

Respondents were asked whether they believed P145 better fulfilled the Applicable BSC Objectives. Respondents were evenly split with those in support of the Modification Proposal and those against providing arguments and counter arguments for most of the points made.

The main arguments in support of P145 better facilitating the achievement of the Applicable BSC Objectives being:

- it was fair to ensure that those contributing to the cause of high PNE process costs should pay for those costs;
- targeting costs introduced efficiency;
- there are currently unreasonable or disproportionate costs being incurred by Parties who did not claim;
- the existing process is anti-competitive with an inherent cross subsidy from those who did not make a PNE claim to those that did make a PNE claim;
- there is an anti-competitive impact on new entrants, i.e. those that entered the market following the commencement of the claims submission window are expected to pay for a process they could not participate in;
- this mechanism is more flexible than that suggested by paragraph P6.2.2 and is therefore better than the existing legal baseline; and
- P145 assists the Panel to discharge their obligations in a fair and non discriminatory manner in accordance to B1.2.2(c) of the Code.

The main arguments expressed against P145 better fulfilling the Applicable BSC Objectives were:

- P145 is anti-competitive;
- P145 is discriminatory;
- there is an increase in regulatory risk of retrospective changes;
- P145 does not promote the efficient administration of the balancing and settlement arrangements and therefore it does not facilitate the achievement of Applicable BSC Objective (d);
- it is reasonable for all Parties to pay for a process that benefits all Parties; and
- there is a general presumption against retrospection which is related to fairness.

The GSMG agreed that the arguments for and against P145 centred on whether or not P145 increased or decreased competition within the supply and generation of electricity (i.e. Applicable BSC Objective (c)). The GSMG expressed similar polarised views to those expressed by respondents and could not reach agreement on whether or not the Applicable BSC Objectives were better facilitated.

Some members of the GSMG noted that P37 was itself a retrospective Modification Proposal and to be opposed to P145 on the grounds of retrospection seemed unjust to them.

5.1.7 Alternative Modification

Respondents were asked whether they believed there existed an Alternative Modification that when compared with the Proposed Modification would better facilitate the achievement of the Applicable BSC Objectives.

One respondent indicated that they were open minded to the possibility of there being an Alternative Modification. Another respondent suggest that a change to the Error Correction Payment may form an appropriate Alternative Modification. A member of the Modification Group expressed the view that this would only be useful if any claims were upheld.

The GSMG were in agreement that they could not identify an Alternative Modification that better facilitated the achievement of the Applicable BSC Objectives when compared to the Proposed Modification.

5.1.8 Other views/comments

A number of other views / comments were expressed by the consultation respondents. These are presented below along with other views that were expressed by the GSMG.

One respondent suggested that a retrospective change of this nature would breach the EC Directives on Competition.

Another respondent suggested that a change in the basis of the fee at this point in time may lead to legal challenge and that the costs associated with such a challenge will fall on the general demand led funds.

One respondent suggested that had it been made clear that the PNE claim fee would not cover the costs of the PNE process, a different set of responses would have been received to the P37 consultation.

One respondent suggested that approval of P145 would lead to a large number of similar Modification Proposals being raised in the future to attempt to allow certain Parties to opt out of particular parts of the Code.

One respondent indicated that any Parties wishing to exit the market continue to face regulatory risk and costs associated with a market within which they no longer trade.

One respondent stated that non claimants will not be disadvantaged by any deficit as they will be compensated through the error correction payment. One member of the Modification Group commented that this would only be the case were any PNE claims to be upheld.

One respondent indicated the responses to the P145 consultation would be biased to whether the Parties were net receivers or payers of monies within the PNE claims process and suggested that the results of the consultation are unlikely to add any real clarity to the issue. This view was also supported by another respondent. One member of the GSMG also expressed an opinion that this may be true of all consultation responses.

One respondent commented on the legal opinion accompanying a consultation being undertaken in respect of changing the level of the claim fee, outside the P145 process. They considered that the view expressed that "a change [to the claims fee] would not be advisable", did not concur with the P37 documentary evidence and in particular the views of the Panel and P37 respondents, and that this view was relevant to the assessment of P145.

One respondent requested further clarity on what would happen should anyone wish to withdraw their claim at this late stage in order to avoid an increased claim fee. The GSMG discussed this and concluded that the Proposed Modification should only exclude those claims that had not been pursued prior to the date of the commencement of the PNE Committee hearings (July 2003).

There was a discussion within the group about the best mechanism for describing those claimants that would be expected to pay the costs of the PNE Process and those that did not. The GSMG noted that some claimants had determined not to pursue their claims following the commencement of the 2003/4 BSC Year and hence would have contributed to the costs of the PNE processes during the BSC Year of 2002/3.

The GSMG also discussed the method by which the Past Notification Error Deficit (PNED) in the funds would be calculated. The GSMG agreed that the PNED would be calculated based on the claim fees invoiced rather than those paid. Any further deficit arising from the non payment of fees pursuant to paragraph P6.2.2 would be recovered using the current mechanisms within the Code.

In commenting on the anti-competitive nature of P145, one member of the GSMG suggested that P145 creates a risk of undermining the integrity, fairness and justice of the very difficult PNE Process which all BSC Parties have a joint responsibility to discharge.

5.2 Comments and views of the Panel

A Panel Member commented that the summary of the consultation respondents' views had not corrected the respondents where they had made an incorrect statement. The Panel Member requested that paragraph P6.2.2 be highlighted within the Urgent Modification Report. This paragraph has been included within section 2 of this report.

6 SUMMARY OF ADVICE PROVIDED TO THE GSMG

During the progression of P145, legal advice was requested by the GSMG with respect to whether P145 was retrospective and whether it passed the criteria set by the Authority in their decision letter on Modification Proposal P19 "To provide for the remedy of errors in Energy Contract Volume Notifications and in Metered Volume Reallocation Notifications." (Reference 4) and other decision letters.

This advice provided by ELEXON concluded that P145 was retrospective and that it does not satisfy the criteria for retrospective Modifications set out by the Authority in their previous decision letters.

It should be noted that one member of the GSMG believed that the ELEXON legal opinion went beyond that which had been requested by the GSMG and had expressed an ELEXON viewpoint regarding the intention behind the PNE claim fee rather than one based on legal precedent. In particular this member expressed the view that the ELEXON legal opinion was flawed because:

- the assertion that "the claim fee was only ever intended to reflect an estimate of the administrative costs that BSCCo might incur" (paragraph 2.2), was not supported by the documentary evidence set out in Panel minutes and the P37 Final Modification Report.
- it failed to consider the interests of non-claimants or new entrants who might have been expected to rely on P6.2.2 to protect them from PNE process costs (paragraph 2.3).

A copy of the Legal opinion provided by ELEXON is attached as Annex 7

7 DOCUMENT CONTROL

7.1 Authorities

Version	Date	Author	Reviewer	Change Reference
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0.1	06/11/03	Richard Clarke	Sarah Parsons	Peer Review
0.2	07/11/03	Richard Clarke	GSMG	Formal Review
0.3	11/11/03	Richard Clarke	GSMG	Final Review by GSMG
0.4	12/11/03	Richard Clarke	Sarah Parsons	For decision by Panel
1.0	13/11/03	Richard Clarke	ELEXON	For Authority Decision

7.2 References

Unless otherwise stated, all the referenced documents are available from the BSC Website at www.elexon.co.uk.

Ref	Document	Owner	Issue date	Version
1	Modification Proposal P145		-	-
2	Modification Proposal P37		-	-
3	Modification Proposal P145 – Consultation Document	ELEXON	28 October 2003	1.0
4	P19 Authority Decision Letter	ELEXON	1 August 2003	-

ANNEX 1 DRAFT LEGAL TEXT

- Text for Proposed Modification is included within a separate document.

ANNEX 2 MODIFICATION GROUP DETAILS

The table below indicates the membership of the GSMG that has considered P145.

MEMBER	ORGANISATION
Gareth Forrester	ELEXON (Chairman)
Richard Clarke	ELEXON (Lead Analyst)
Sarah Parsons	ELEXON
Richard Humphreys	ELEXON
Peter Bolitho	Powergen (Proposer)
Terry Ballard	Innogy
Rachel Lockley	British Energy
Mark Manley	British Gas Trading
Man Kwong Liu	Scottish Power
Andrew Colley	Scottish and Southern
Paul Mott	London Electricity
Rob Barnett	Campbell Carr

ANNEX 3 CONSULTATION RESPONSES

Responses from P145 Urgent Consultation

Consultation issued 28 October 203

Representations were received from the following parties:

No	Company	File Number	No. BSC Parties Represented	No. Non-Parties Represented
1.	CECL	P145_ASS_001	4	1
2.	Powergen UK Plc	P145_ASS_002	14	0
3.	British Gas Trading	P145_ASS_003	1	0
4.	BizzEnergy Ltd	P145_ASS_004	1	0
5.	Innogy Plc	P145_ASS_005	9	0
6.	British Energy	P145_ASS_006	3	0
7.	Connoco Phillips Limited	P145_ASS_007	2	0
8.	EDF Energy Plc	P145_ASS_008	9	0
9.	Derwent Cogeneration Limited	P145_ASS_009	1	0
10.	Edison Mission Energy	P145_ASS_010	2	0
11.	Dynegy UK Ltd	P145_ASS_011	1	0

12.	Scottish and Southern Energy	P145_ASS_012	4	0
13.	Scottish Power UK Plc	P145_ASS_013	6	0
14.	Total Gas & Power Ltd	P145_ASS_014	1	0
15.	EDF Trading	P145_ASS_015	2	0
16.	Gaz de France Marketing (late response)	P145_ASS_016	1	0

P145_ASS_001 – CECL

Respondent:	<i>Chris Ridgway</i>
No. of BSC Parties Represented	4
BSC Parties Represented	<i>CECL, IETS, RPCL, SPAL</i>
No. of Non BSC Parties Represented	1
Non BSC Parties represented	<i>InterGen (UK) Ltd</i>
Role of Respondent	<i>Generator</i>

Q	Question	Response	Rationale
1.	Do you believe P145 is a retrospective modification?	Yes	The BSC does not currently allow for a variation in the fee charged to parties and the deadline for the submission of PNE claims has now passed.
2.	If you do believe P145 is a retrospective modification, do you believe the retrospective rule change is appropriate?	YES	Costs should be allocated to those that Parties that cause them to be incurred. The current flat fee does not achieve this.
3.	Do you believe that it is appropriate for the total cost of the PNE process to be recovered from PNE claimants alone?	YES	See Q2.
4.	If costs are to be apportioned amongst PNE claimants alone, do you believe that the methodology in P145 reasonably reflects the costs incurred by individual PNE claimants?	YES	A pro-rating of cost according to benefit is the most reasonable methodology of cost recovery.
5.	If P145 is approved, do you believe the 2002/2003 costs should be paid back to Parties based on their funding share for 2002/2003 or based on this years funding share?		2002/3 funding share as per original contribution.
6.	Do you believe Proposed Modification P145 better facilitates the achievement of the Applicable BSC Objectives? Please state which objective(s)	YES	P145 allocates costs to those that have caused them to be incurred in a fair and proportionate manner and hence better facilitates Applicable BSC Objective (c).

Q	Question	Response	Rationale
7.	Do you believe that there is an alternative modification that addresses the perceived defect and better facilitates the achievement of the Applicable BSC Objectives?	NO	
8.	Does P145 raise any issues that you believe have not been identified so far and that should be progressed?	NO	
9.	Are there any further comments on P145 that you wish to make?	NO	

P145_ASS_002 Powergen UK Plc

Respondent:	Powergen UK plc
No. of BSC Parties Represented	14
BSC Parties Represented	Powergen UK plc, Powergen Retail Limited, Cottam Development Centre Limited, TXU Europe Drakelow Limited, TXU Europe Ironbridge Limited, TXU Europe High Marnham Limited, Midlands Gas Limited, Western Gas Limited, TXU Europe (AHG) Limited, TXU Europe (AH Online) Limited, Citigen (London) Limited, Severn Trent Energy Limited (known as TXU Europe (AHST) Limited), TXU Europe (AHGD) Limited and Ownlabel Energy
No. of Non BSC Parties Represented	0
Non BSC Parties represented	0
Role of Respondent	Supplier, Generator, Trader and Exemptable Generator

Q	Question	Response	Rationale
1.	Do you believe P145 is a retrospective modification?	YES	P145 is retrospective in that it proposes that any deficit arising from the application of the PNE claims fee should be borne by PNE claimants rather than recovered via general BSCCo charges.
2.	If you do believe P145 is a retrospective modification, do you believe the retrospective rule change is appropriate?	YES	<p>In setting out its rationale for approving P37 and rejecting P19 Ofgem described the circumstances in which it considered retrospective changes may be justified. This included:</p> <p>combinations of circumstances that could not have reasonably be foreseen [PNE claims process costs as large as £1.6m were always possible but not expected], where the possibility of retrospective action had been clearly flagged to participants in advance and only details and process were decided retrospectively, [P6.2.2 drafting] and in any event the loss sustained would need to be material [large costs could be faced by non-claimants should fee income significantly fall short of costs].</p> <p>It is also inconsistent to argue against such a change to the fee on the grounds of retrospectivity, when P37 was in itself a retrospective modification proposal!</p>

Q	Question	Response	Rationale
3.	Do you believe that it is appropriate for the total cost of the PNE process to be recovered from PNE claimants alone?	YES	<p>There can be no doubt that the original claim fee under P6.2.2 sought to spread the cost of the claims process amongst those who wished to make a claim. Furthermore the Code specifically reserves the right of the Panel (with approval of the Authority) to amend this fee where appropriate. This provision could only have been included for a circumstance of over or under recovery. This confirms the assertion that those responsible for PNE process costs must pay for the process. To expose non-claimants or indeed new entrants to such cost represents a perverse shift from the original intent of P37.</p> <p>Claimants should pay for the PNE process</p> <p>It is clear from the deliberations of the Panel, discussions within the Error Notification Modification Group and in particular the responses of consultees that the intent of P6.2.2. was to facilitate adjustment of the claims fee to broadly recover the cost of the P6 claims process. Rather than the Panel recommending a crude increase in the fees, to recover the cost of the PNE process, P145 allows the Panel to recommend a fairer allocation of the PNE process costs amongst claimants. In referring to the Panel P37 deliberations the Final Report states;</p> <p>“Panel Members also noted that inevitably there would be administrative costs arising from the process defined in the proposal, and, taken in isolation, this increase in costs would not better facilitate achievement of the BSC Applicable Objective 7A.3 (d), relating to efficiency. It was recognised that it was intended that central costs would be recovered from the claimant through the administration fee.</p> <p>On this particular aspect of the proposal, the £5,000 administrative fee for making a claim and lodging an appeal, Panel Members considered the possible impact on smaller Parties. Panel Members accepted the position of the Modifications Group that this fee should be related to administrative costs.”</p> <p>Please also see Attachment 1 below for a full list of supporting evidence.</p>

Q	Question	Response	Rationale
4.	If costs are to be apportioned amongst PNE claimants alone, do you believe that the methodology in P145 reasonably reflects the costs incurred by individual PNE claimants?	YES	<p>No costs should be borne by non claimants as such parties have not made use of the process.</p> <p>P145 provides together with the review of the claims fee (which is being consulted on separately) with a mechanism to fairly allocate the PNE costs amongst claimants. No cost allocation mechanism can ever be described as fully cost reflective. What needs to be considered is what combination of claims fee and allocation of the deficit (arising from the fee income e less costs) best targets costs at those that have 'caused' those costs.</p> <p>P145 suggests allocating the deficit (arising from the fee income less costs) amongst claimants in proportion to the net value of claims. This may not be perfect but at least ensures that the majority of the PNE costs are borne by large claimants, who have by the way in which they have prosecuted their claims inflated the overall cost of the PNE claims process.</p>
5.	If P145 is approved, do you believe the 2002/2003 costs should be paid back to Parties based on their funding share for 2002/2003 or based on this years funding share?	YES	The costs were originally allocated amongst BSC Parties according to the year in which such costs were incurred. It is therefore right and proper that such costs should be repaid using the same funding shares.
6.	Do you believe Proposed Modification P145 better facilitates the achievement of the Applicable BSC Objectives? Please state which objectives (s)	YES	Placing an unreasonable cost burden on new entrants and non-claimants or a disproportionate cost burden on claimants with relatively small value claims (i.e. claims that have tended to generate lower PNE claims process costs), will tend to undermine those parties ability to compete in the market. Targeting costs at those that to a greater or lesser extent contribute to those costs will thus help promote competition in the generation and supply of electricity.
7.	Do you believe that there is an alternative modification that addresses the perceived defect and better facilitates the achievement of the Applicable BSC Objectives?	Maybe	<p>As the proposer of P145 we are open minded about possible alternatives. Nevertheless, the mechanism for allocating any deficit amongst claimants outlined in P145 is relatively straight forward and therefore cost effective.</p> <p>Alternatives are likely to be more complex and it would be necessary for the Modification Group to consider whether more 'accurate' methods for allocating PNE costs outweigh the additional costs of administration.</p>
8.	Does P145 raise any issues that you believe have not been identified so far and that should be progressed?	NO	

Q	Question	Response	Rationale
9.	Are there any further comments on P145 that you wish to make?	YES	<p>Elexon Legal view on change to claims fee</p> <p>In Panel Paper 68/020, Elexon conclude that “that such a change [to the claims fee] would not be advisable”. On the face of it this may seem to lend some support to those that advocate no change to the claims fee/PNE cost recovery mechanism. The facts of the matter however, indicate change(s) designed to ensure cost recovery are necessary to both satisfy the intent of P37 and to avoid undue discrimination against non claimants.</p> <p>If the claims fee was intended to be £5,000 and only ever £5,000 then P6.2.2. would have said that. It is clear from the evidence outlined in Attachment 1 below that the general expectation amongst BSC Parties was that the claims fee should broadly cover the cost of the process and that the drafting under P6.2.2 was established to allow the Panel to recommend a adjustment of the claims fee (up or down) to cover the cost of the process.</p> <p>Although the legal advice considers the possible impact on claimants it fails to consider the potential impact on non-claimants and new entrants who would otherwise have to pay for any shortfall arising from the failure of the fee income to fully cover the cost of the PNE claims process. There is also the possibility that any decision made that fails to increase fees to recover costs would be open to challenge.</p> <p>In our view the Panel should not place undue emphasis on the legal view expressed by Elexon on this subject thus far, which in Powergen’s view is unnecessarily ‘conservative’ in tone and is certainly at odds with the views of the Panel, the Modification Group and consultees at the time P37 was considered. It is possible (or perhaps inevitable) that that some parties may change their opinions since then, but views expressed now are of course not relevant to determining the intent at that time.</p>

Q	Question	Response	Rationale
1.	Are there any further comments on P145 that you wish to make? (continued):		<p>Matters for consideration by the Panel in making its recommendation</p> <p>Should a surplus (fees income less costs) arise we would support a Panel recommendation to reduce fees to recover the costs of the PNE claims process under P6.2.2. If however a deficit were to arise from the application of a £5,000 claims fee, the Panel face some very difficult choices. Simply raising the 'flat' claims fee may not be an appropriate means of recovering a deficit.</p> <p>Under B1.2.1(c) the "Panel shall conduct its business under the Code" so "that the Code is given effect without undue discrimination between Parties or classes of Party. In the absence of an complementary cost recovery mechanism (P145) the Panel will have difficulty fulfilling this objective with respect to any review of the claims fees set out in P6.2.2. In our view the Panel should recommend the raising of the claims fee to a level sufficient to cover the cost of the PNE claims process, to ensure there is not undue discrimination between classes of party (namely claimants who should pay and non-claimants who should not). In doing this however, the Panel may unduly discriminate against parties that have submitted small claims by setting a disproportionately high claims fee. P145 in conjunction with the review of the PNE claim fee will allow the Panel to consider how best to apportion the cost of the PNE claims process.</p> <p>P145 is designed to assist the Panel in its deliberations and in particular place them in a better position to satisfy B1.2.1 (c). This modification together with any adjustment to the claims fee under P6.2.2 will ensure the PNE process which was established for the benefit of parties seeking to rectify their past notification errors will be borne by such parties.</p> <p>It is also important to note that P145 together with the review of fees, seeks to determine who should pay for a unique, 'one-off' process, which are not reflective of the typical day to day-to-day costs incurred by Elexon. P145 does not seek to challenge the basis on which 'normal' BSCCo costs are recovered, or establish particular general principles with respect to cost reflectivity or the 'fair' allocation of such costs. General principles of cost reflectivity and in particular the targeting of costs at those parties that to a greater or lesser extent cause those costs are indeed laudable objectives which can be construed as better facilitating the Applicable BSC Objectives, but each individual modification proposal must be considered on its own merits.</p>

Attachment 1**Claimants should pay for the PNE Claims Process – the evidence**

Of the 13 respondents to the original P37 consultation who commented on the claims fee 7 clearly indicate the importance of cost recovery, 5 simply indicated that the £5,000 fee seems reasonable and 1 party thought the fee should be not be below £2,500 and not above £5,000. Significantly London Electricity (the proposer of P37) considers fees should be adjusted should the average cost of administering claims be significantly more or less than the £5,000 fee.

Responses to original P37 consultation question with regard to the administration fee.

Q5: Do you agree that the administration fee for making a claim should be £5,000? If not, what should it be and why?

Scottish power

"ScottishPower believes that the fee for processing a claim of erroneous notification should be cost reflective and that £5000 may reflect the cost of processing a single notification error claim or each of a series of unrelated claims."

(Mike Harrison, Commercial Manager, Scottish Power – File No P37_UMR_001)

Seeboard

"If this modification were progressed we would agree to a fee of £5,000, provided this covers all costs accrued by Elexon and others in processing such a claim.

No other BSC Party should pick up any costs of such claims."

(Dave Morton, Seeboard – File No P37_UMR_003)

London Electricity

"The fee should be broadly related to the average cost of administering a claim of notification error. If Elexon has grounds for believing that this figure will be significantly more or less than £5,000, that would provide prima facie grounds for changing the level of the administration fee. Under P37, the Authority will have the power to veto changes to the fee (for example, if it believes that a different amount would prejudice smaller market players)."

(Roger Barnard, Regulatory Lawyer, London Electricity Group – File No P37_UMR_005)

Edison Mission Energy

"If this represents the cost of administering the claim, then it is appropriate."

(Libby Glazebrook, Edison Mission Energy – File No P37_UMR_007)

APX

"The administration fee should reflect the Elexon costs in processing any claim. Views should be sought from Elexon on the likely cost."

(Ian Moss, Automated Power Exchange – File No P37_UMR_009)

Innogy

"The administrative fee should be set at a level that covers the cost of investigating and correcting the consequences of a notification error. It may be appropriate to have a minimum charge in order to dissuade frivolous claims."

(Innogy - File No P37_UMR_015)

Derwent Cogeneration Ltd

"A fee of £5000 with the protections suggested within the proposal does not seem unreasonable if it is a true reflection of the cost of administering the claim."

(Derwent Cogeneration Ltd – File No P37_UMR_016)

Other relevant quotations

P37 Final Modification Report – 5 November 2001

"On more detailed issues, one respondent commented unfavourably on the £5,000 administration fee for lodging an appeal (and also on the similar fee for making a claim), the argument being that a fee of such size would be

disadvantageous to small Parties. The argument of the Modification Group was that this fee should be related to administrative costs, rather than the size of claim or the claiming Party."

Pg 42

"(a) Authority's paragraph 25(i): an appropriate and material charge for any party seeking to correct a notification error

This would initially be set at £5,000, being an estimate of the average administrative cost that the BSCCo would incur in investigating a claim of notification error (it is also the fee charged for investigating claims of manifest error under Section Q of the Code). The Panel would have the discretion to vary this charge, following consultation with the parties and with the approval of the Authority. The need to obtain the Authority's approval would guard against the charge being set at a level that could be prohibitive to smaller players."

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INEOS Chlor Ltd

"The proposed non reimbursable fee of £5,000 to be levied on a party for each and every claim regarding a "post notification error" is highly discriminatory against existing small players whilst serving to deter direct involvement of potential new entrants. The situation is compounded by the proposal an additional non reimbursable £5,000 be paid prior to acceptance of an appeal. NETA has failed miserably to encourage participation of the demand side & such rules will add unnecessary economic hurdles, thereby further discouraging competition from this market sector."

Pg 162 P37_UMR_CON - INEOS Chlor Ltd & INEOS Chlor Energy Ltd

London Electricity response legal drafting consultation

Paragraph 6.2.2

"The legal drafting no longer provides for the modification by the Panel of the £5,000 fee for making a claim of notification error. While London recognises the practical difficulties involved in modifying the fee within the five-day window in which claims of notification error may be made under P37, nevertheless we are keen to provide the Panel with opportunity to modify the fee if it believes that £5,000 will be inadequate to cover the average cost of processing a claim. Since P37 may well form the basis for a modification dealing with future (rather than past) notification errors, the inclusion of this power has some relevance looking forward. Moreover, London is keen to ensure that P37 conforms as closely as possible with Ofgem's decision letter in respect of P19. One possibility in respect of P37 would be to retain the power of the Panel to modify the fee subject only to the Authority's approval (ie, remove the requirement to consult with the BSC Parties). In this way, any change to the fee could be implemented at the same time that the modification became effective. The duty to consult with BSC Parties could (and should) be reinstated in any forward looking modification."

Pg 167/168.

Peter Bolitho
Trading Arrangements Manager
Powergen UK plc
3 November 2003

P145_ASS_003 British Gas Trading

Respondent:	Mark Manley
No. of BSC Parties Represented	
BSC Parties Represented	British Gas Trading (BGT)
No. of Non BSC Parties Represented	
Non BSC Parties represented	
Role of Respondent	

Q	Question	Response	Rationale
1.	Do you believe P145 is a retrospective modification?	YES	BGT agree with the proposer of the modification and concur this is a retrospective modification.
2.	If you do believe P145 is a retrospective modification, do you believe the retrospective rule change is appropriate?	YES	BGT note the historical guidance in the modification report provided by the Authority in relation to modifications with retrospective effect. BGT believes this modification pass the criterion, which states a "combination of circumstances that could not have been reasonably foreseen." The expectation based upon the discussions of the P37 modification group and the Panel when considering P37 appears to suggest that the costs of the process were to be recovered via the administration fee. In view of this assumption and the potential for a significant deficit to exist BGT believe the rule change to be appropriate.
3.	Do you believe that it is appropriate for the total cost of the PNE process to be recovered from PNE claimants alone?	YES	BGT recognise that Parties other than the PNE claimants have impacted upon the cost of the process. However BGT believe those costs to be negligible in the overall budget of £1.61 million. Furthermore it would be difficult if not impossible to quantify those costs. Therefore BGT believe it is appropriate to target the costs of the process at the primary users of the service, the claimants.
4.	If costs are to be apportioned amongst PNE claimants alone, do you believe that the methodology in P145 reasonably reflects the costs incurred by individual PNE claimants?	YES	BGT note the difficulties of apportioning the cost of the process amongst claimants, however BGT believes the mechanism outlined in the proposal provides a pragmatic and fair methodology for allocating costs.
5.	If P145 is approved, do you believe the 2002/2003 costs should be paid back to Parties based on their funding share for 2002/2003 or based on this years funding share?	YES	BGT believe as the costs for 2002/03 were based on Parties funding shares for 2002/03 it should be reallocated on a similar basis. If it is not practical to undertake the re-distribution based on last year's costs this year's funding share would be the next best alternative.

Q	Question	Response	Rationale
6.	<p>Do you believe Proposed Modification P145 better facilitates the achievement of the Applicable BSC Objectives?</p> <p>Please state which objective(s)</p>	YES	<p>BGT believes this modification better facilitates Applicable BSC Objective (c) as it promotes effective competition in the generation and supply of electricity. BGT believes the administration fee levied on claimants was intended to cover all or certainly the vast majority of the cost of the process. This view seems to be borne out by a number of the consultation responses from participants to the original P37 consultation exercise. Therefore BGT concur that the costs should be targeted at the principal users of the service and to not do so is detrimental to competition as it introduces cross subsidies into the market place.</p>
7.	<p>Do you believe that there is an alternative modification that addresses the perceived defect and better facilitates the achievement of the Applicable BSC Objectives?</p>	NO	
8.	<p>Does P145 raise any issues that you believe have not been identified so far and that should be progressed?</p>	NO	
9.	<p>Are there any further comments on P145 that you wish to make?</p>	YES	<p>It is BGT's understanding that the deficit will be recovered, only from BSC Parties awaiting a determination by the PNEC committee on their claim, ie if a Party has withdrawn their claim they will not be liable for any of the £1.4 million shortfall. On the assumption P145 is approved, BGT would like some clarity on what would happen if a Party was to withdraw its claim prior to the PNEC determination. Would this Party still be liable for its share of the deficit or did the claim have to be withdrawn prior to this modification being raised to remove the liability?</p>

P145_ASS_004 BizzEnergy Ltd

Respondent:	<i>Name Keith Munday</i>
No. of BSC Parties Represented	<i>BizzEnergy Ltd</i>
BSC Parties Represented	<i>BizzEnergy Limited</i>
No. of Non BSC Parties Represented	<i>1</i>
Non BSC Parties represented	<i>Please list all non BSC Parties responding on behalf of (including the respondent company if relevant).</i>
Role of Respondent	<i>Supplier</i>

Q	Question	Response	Rationale
1.	Do you believe P145 is a retrospective modification?	YES	Definitely – the decisions to claim have long been made on the assumption of a flat fee that many considered should be the £5,000 set out initially in the Code.
2.	If you do believe P145 is a retrospective modification, do you believe the retrospective rule change is appropriate?	YES	Nobody knew the costs of PNE at the time and the fee was intended to cover costs. Therefore, the bill on non-claimants through the general fund was not foreseen. The overall cost of £1.4m is material. Therefore this satisfies at least some of the Ofgem criteria for retrospective treatment.
3.	Do you believe that it is appropriate for the total cost of the PNE process to be recovered from PNE claimants alone?	YES	Given the natural bias in a claim system (people don't usually claim when it would cost them money if the claim is successful) then non-claimants already face a potential retrospective charge from beer fund and do not expect to have to pay for the administration of this as well. It was the clear intent at the time of P37 that the administration fee was meant to cover the cost of the process. However, it should be noted that the procedure for adjudicating claims was onerous in order to protect non-claimants so maybe some of the bill is due on the general fund.
4.	If costs are to be apportioned amongst PNE claimants alone, do you believe that the methodology in P145 reasonably reflects the costs incurred by individual PNE claimants?	YES / NO	The methodology cannot be considered cost-reflective, as size of claim and complexity (and therefore cost) will not necessarily be correlated. However, some of the fixed costs can be considered to be covered from the claim fee. There is a degree of correlation between size of claim and ability to pay because errors made by larger parties will reflect greater MWh throughput. The methodology reflects this rather than costs. This may be considered fair even if it is not cost - reflective.
5.	If P145 is approved, do you believe the 2002/2003 costs should be paid back to Parties based on their funding share for 2002/2003 or based on this years funding share?	YES	A major identified principle on which the proposal is made is that those who made no claim should not bear the cost of the process. Therefore, those who effectively paid out in 2002/3 should be reimbursed on the same basis.

Q	Question	Response	Rationale
6.	Do you believe Proposed Modification P145 better facilitates the achievement of the Applicable BSC Objectives? Please state which objective(s)	YES	It sets a fairer way of sharing out costs if all the costs are attributable to claimants. However, it should be noted that the general principle of central administration costs being recovered from funding shares is being distorted by this. For example, the considerable cost of P98 (dual notification) is not being charged out to those availing themselves of the service because it facilitates competition, which Ofgem decided was the case with regard to P37.
7.	Do you believe that there is an alternative modification that addresses the perceived defect and better facilitates the achievement of the Applicable BSC Objectives?	NO	
8.	Does P145 raise any issues that you believe have not been identified so far and that should be progressed?	NO	
9.	Are there any further comments on P145 that you wish to make?	YES	It was understood from P37 that the costs would be recovered from the claimants. Had it been made clear at the time that this was not the case a different set of responses would have been received in relation to P37. These may or may not have led to its approval.

P145_ASS_005 Innogy

Respondent:	<i>Terry Ballard</i>
No. of BSC Parties Represented	9
BSC Parties Represented	Innogy plc, Innogy Cogen Limited, Innogy Cogen Trading Limited, Npower Limited, Npower Direct Limited, Npower Northern Limited, Npower Northern Supply Limited, Npower Yorkshire Limited, Npower Yorkshire Supply Limited.
No. of Non BSC Parties Represented	
Non BSC Parties represented	<i>Please list all non BSC Parties responding on behalf of (including the respondent company if relevant).</i>
Role of Respondent	<i>(Supplier/Generator/ Trader / Consolidator / Exemptable Generator / BSC Agent / Party Agent / other – please state ⁸)</i>

⁸ Delete as appropriate

Q	Question	Response	Rationale
1.	Do you believe P145 is a retrospective modification?	YES	The possibility of retrospective action was not clearly flagged in advance. This modification goes beyond issues of detail and process.
2.	If you do believe P145 is a retrospective modification, do you believe the retrospective rule change is appropriate?	YES / NO	N/A
3.	Do you believe that it is appropriate for the total cost of the PNE process to be recovered from PNE claimants alone?	NO	The size of the costs are directly related to the need for an independent, robust and transparent process. All BSC Parties have been beneficiaries irrespective of whether they have made claims or not.
4.	If costs are to be apportioned amongst PNE claimants alone, do you believe that the methodology in P145 reasonably reflects the costs incurred by individual PNE claimants?	YES / NO	It is not clear that costs are correlated to claims value.
5.	If P145 is approved, do you believe the 2002/2003 costs should be paid back to Parties based on their funding share for 2002/2003 or based on this years funding share?	YES	This seems a pragmatic solution avoiding excessive administrative effort.
6.	Do you believe Proposed Modification P145 better facilitates the achievement of the Applicable BSC Objectives? Please state which objective(s)	NO	
7.	Do you believe that there is an alternative modification that addresses the perceived defect and better facilitates the achievement of the Applicable BSC Objectives?	NO	

Q	Question	Response	Rationale
8.	Does P145 raise any issues that you believe have not been identified so far and that should be progressed?	NO	
9.	Are there any further comments on P145 that you wish to make?	NO	

P145_ASS_006 British Energy

Respondent:	<i>Rachel Lockley</i>
No. of BSC Parties Represented	3
BSC Parties Represented	<i>British Energy Generation, British Energy Power and Energy Trading; Eggborough Power Ltd</i>
No. of Non BSC Parties Represented	0
Non BSC Parties represented	
Role of Respondent	<i>(Supplier/Generator/ Trader / Consolidator / Exemptable Generator / BSC Agent / Party Agent / other – please state ⁹)</i>

Q	Question	Response	Rationale
1.	Do you believe P145 is a retrospective modification?	YES	British Energy does not normally support retrospection, however, the BSC Section P6 claim process was itself introduced retrospectively and this moderates our view in this particular case. The P6 process allows those parties which made notification errors an opportunity, if certain conditions are met, to have those errors corrected, and it seems reasonable that claimants should bear the costs of this opportunity.
2.	If you do believe P145 is a retrospective modification, do you believe the retrospective rule change is appropriate?	YES	See above.
3.	Do you believe that it is appropriate for the total cost of the PNE process to be recovered from PNE claimants alone?	YES	Given that the entire PNE claim process is one which was created after the event to give those parties which made notification errors an opportunity, if certain conditions are met, to have errors corrected, we consider it reasonable that claimants should pay the costs of the claim process.
4.	If costs are to be apportioned amongst PNE claimants alone, do you believe that the methodology in P145 reasonably reflects the costs incurred by individual PNE claimants?	YES	We believe that the process described in P145 is a reasonable methodology, as it apportions the PNE process costs to claimants on a pro rata basis according to the size of their claim and therefore does not penalise smaller players.

⁹ Delete as appropriate

Q	Question	Response	Rationale
5.	If P145 is approved, do you believe the 2002/2003 costs should be paid back to Parties based on their funding share for 2002/2003 or based on this years funding share?	YES	It would seem appropriate to refund Parties on the basis of their funding share in the year in question.
6.	Do you believe Proposed Modification P145 better facilitates the achievement of the Applicable BSC Objectives? Please state which objective(s)	YES	Yes BE believe that P145 better facilitates BSC objective c) promoting effective competition in the generation and supply of electricity, and (so far as consistent therewith) promoting such competition in the sale and purchase of electricity. We believe that placing unreasonable cost burden on non-claimants or disproportionate cost burden on claimants with relatively small value claims will tend to undermine those Parties ability to compete in the market. Targeting costs at those that to a greater or lesser extent have contributed to the costs will thus help promote competition in the generation and supply of electricity.
7.	Do you believe that there is an alternative modification that addresses the perceived defect and better facilitates the achievement of the Applicable BSC Objectives?	NO	
8.	Does P145 raise any issues that you believe have not been identified so far and that should be progressed?	NO	
9.	Are there any further comments on P145 that you wish to make?	NO	

P145_ASS_007 Conocco Phillips Ltd

Respondent:	<i>Andrew Murray</i>
No. of BSC Parties Represented	2
BSC Parties Represented	<i>ConocoPhillips (U.K.) Limited and Immingham CHP</i>
No. of Non BSC Parties Represented	
Non BSC Parties represented	<i>Please list all non BSC Parties responding on behalf of (including the respondent company if relevant).</i>
Role of Respondent	<i>Trader and Generator</i>

Q	Question	Response	Rationale
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Q	Question	Response	Rationale
1.	Do you believe P145 is a retrospective modification?	NO	Claimants were made fully aware that the fee could be amended at the time that they submitted their claims.
2.	If you do believe P145 is a retrospective modification, do you believe the retrospective rule change is appropriate?	YES / NO	
3.	Do you believe that it is appropriate for the total cost of the PNE process to be recovered from PNE claimants alone?	YES	It would be unfair for parties who did not submit claims to pay for a process they did not utilise or benefit from. It would be especially unfair to levy charges against parties (especially new entrants) who will be totally unaffected by this process and the resultant re-runs (if any) of the settlement calculations.
4.	If costs are to be apportioned amongst PNE claimants alone, do you believe that the methodology in P145 reasonably reflects the costs incurred by individual PNE claimants?	YES	Although 'the larger the claim, the larger the cost' is not strictly true, we do believe that it is fairer than a flat fee approach. We would however, be open to any alternative approaches target the costs more effectively.
5.	If P145 is approved, do you believe the 2002/2003 costs should be paid back to Parties based on their funding share for 2002/2003 or based on this years funding share?	This years	Most of the costs have been borne this year.
6.	Do you believe Proposed Modification P145 better facilitates the achievement of the Applicable BSC Objectives? Please state which objective(s)	YES	Promotes effective competition in the generation and supply of electricity by targeting costs against those who caused them.
7.	Do you believe that there is an alternative modification that addresses the perceived defect and better facilitates the achievement of the Applicable BSC Objectives?	NO	

Q	Question	Response	Rationale
8.	Does P145 raise any issues that you believe have not been identified so far and that should be progressed?	NO	
9.	Are there any further comments on P145 that you wish to make?	NO	

P145_ASS_008 EDF Energy Plc

Respondent:	EDF Energy plc
Number of BSC Parties Represented	9 (nine)
BSC Parties Represented	EDF Energy Networks (EPN) plc; EDF Energy Networks (LPN) plc; EDF Energy Networks (SPN) plc; EDF Energy (Sutton Bridge Power); EDF Energy (Cottam Power) Ltd; EDF Energy (West Burton Power) Ltd; EDF Energy plc; London Energy plc; Seeboard Energy Ltd
Number of Non BSC Parties Represented	none
Non BSC Parties represented	none
Role of Respondent	Supplier/Generator/Trader

Q	Question	Response	Rationale
1.	Do you believe that P145 is a retrospective modification?	YES	<p>P145 is clearly a retrospective modification since, if implemented, it would have the practical effect of increasing the claim fee payable by PNE claimants on a basis that is not currently permissible under Section P6 of the BSC.</p> <p>The element of retrospection arises from the fact that the modification would directly and materially affect PNE claims that have already been made and cannot be with- drawn. PNE claimants would therefore have no opportunity to adjust their behaviour in the light of any rule change introduced by P145.</p>

Q	Question	Response	Rationale
2.	If you do believe that P145 is a retrospective modification, do you believe that the retrospective rule change is appropriate?	NO	<p>A retrospective rule change can only be justified in certain, narrowly defined circumstances. In its decision in relation to P19 (referred to in the P145 consultation document), Ofgem identified the following particular circumstances which could give rise to the need for a retrospective rule change:</p> <p>a situation where the fault or error occasioning the loss was directly attributable to central arrangements;</p> <p>combinations of circumstances that could not have been reasonably foreseen; or</p> <p>where the possibility of retrospective action had been clearly flagged to participants in advance and only the details and process were decided retrospectively.</p> <p>In our view, none of these particular sets of circumstances are applicable to the issues raised by P145.</p> <p>The Proposer of P145, relying on the third bullet above, argues that since Section P6 of the BSC envisages that the BSC Panel might adjust the claim fee following the submission of claims, this means that the possibility of retrospective action has been clearly flagged. It is debatable to what extent Section P6 permits the adjustment of the PNE claims fee at this late stage in proceedings, and this has been the subject of recent consultation by the BSC Panel. But in any event, Section P6 does not permit the recovery of the costs of the PNE claims process on a non-uniform basis as proposed by P145. Consequently, Section P6 cannot be used to justify retrospective action in the form envisaged by P145.</p>

Q	Question	Response	Rationale
3.	Do you believe that it is appropriate for the total cost of the PNE process to be recovered from PNE claimants alone?	NO	<p>Each and every BSC Party is a beneficiary of the PNE claims process since the determination of PNE claims is capable of impacting on the amounts payable by each Party under the terms of the BSC. BSC Parties have appointed the BSC Panel (and hence the PNE Committee) to uphold their interests through the proper application of the PNE claim thresholds and the appropriate use of discretionary powers in Section P6 of the BSC. All BSC Parties will have benefited from having a robust claims process which protected their interests regardless of whether they were a PNE claimant. There is therefore no justification for loading the total cost of the PNE claims process on a sub-set of the beneficiaries of that process: the PNE claimants alone. In this respect, Section P6 is no different from the Trading Dispute process under Section W of the BSC, where there is no targeted cost recovery.</p> <p>The point is further illustrated by the role of Interested Parties in the PNE claims process. The active participation of Interested Parties in the PNE claims process has increased considerably the overall costs of the process. No reason has been put forward as to why PNE claimants should fund the additional costs that resulted from that participation.</p>
4.	If costs are to be apportioned amongst PNE claimants alone, do you believe that the methodology in P145 reasonably reflects the costs incurred by individual PNE claimants?	NO	<p>There is no evidence whatever to support the assertion made by P145 that "the larger the value of claims, the larger the costs likely to be incurred in respect of such claims". Indeed, such a conclusion is counter-intuitive, as the PNE Committee will need to be as confident in its conclusions in relation to the smallest claim as it is in relation to the largest. Section P6 of the BSC permits of no lesser standard of proof in relation to claims of low value than in relation to claims of high value. Consequently, the work required to determine each claim is unlikely to bear any relation to the value of the claim.</p> <p>The cost of determining a particular claim is likely to depend for the most part on the factual circumstances on which that claim is founded. A low value claim is just as likely to give rise to complex factual circumstances as a high value claim.</p>
5.	If P145 is approved, do you believe that the 2002/2003 costs should be paid back to Parties based on their funding share for 2002/2003 or based on this years funding share?		In the light of our previous comments, this point should not arise.

Q	Question	Response	Rationale
6.	<p>Do you believe that Proposed Modification P145 better facilitates the achievement of the Applicable BSC Objectives?</p> <p>Please state which objective(s)</p>	NO	<p>On the contrary. The adoption of a retrospective rule change in these circumstances is likely:</p> <p>(a) to be unfair to parties who would have acted differently, if they had known that the new rules would apply; and</p> <p>(b) to increase the perception among present and future participants in the BSC trading arrangements that there will be other occasions where new rules are adopted and applied retrospectively to the detriment of parties, thereby causing them to regard participation in the arrangements as carrying additional risk, which will feed through into higher prices.</p> <p>As a consequence, in our submission, P145 is likely to have a detrimental effect on the following Applicable BSC Objectives:</p> <p>the promotion of effective competition in the generation and supply of electricity (Condition 7A.3(c)); and, even more certainly,</p> <p>the promotion of efficiency in the implementation of the balancing and settlement arrangements (Condition 7A3(d)) (see our first paragraph at Question 8 below).</p>
7.	<p>Do you believe that there is an alternative modification that addresses the perceived defect and better facilitates the achievement of the Applicable BSC Objectives?</p>	N/A	<p>We do not agree that there is a defect to be addressed.</p>
8.	<p>Does P145 raise any issues that you believe have not been identified so far and that should be progressed?</p>	NO	<p>On the contrary. It is relevant in this regard that, in its decision in relation to P84, Ofgem expressed concern that issues relating to PNE claim fees raised by that modification had not been resolved during the consideration of P37. Ofgem expressed disappointment that P84 had not been put forward until after the implementation date of P37 and said that, in future, Ofgem would expect parties to adopt a more constructive approach so as to facilitate the efficient administration of the BSC.</p> <p>For similar but even more convincing reasons, Ofgem should not now be willing to countenance P145, given that it raises issues that should have been addressed, if at all, during consideration of P37 and has been proposed almost 30 months after P37 was implemented.</p>

Q	Question	Response	Rationale
9.	Are there any further comments on P145 that you wish to make?	NO	

P145_ASS_009 Derwent Cogeneration Limited

Respondent:	<i>Derwent Cogeneration Limited</i>
No. of BSC Parties Represented	1
BSC Parties Represented	<i>Derwent Cogeneration Limited</i>
No. of Non BSC Parties Represented	0
Non BSC Parties represented	<i>n/a</i>
Role of Respondent	<i>Generator</i>

Q	Question	Response	Rationale
1.	Do you believe P145 is a retrospective modification?	YES / NO	YES. It has been known since the inception of the P6 process (PNE Correction) ("the Process") that the £5,000 administration fee applied to claimants only was unlikely to recover the cost of the Process. That cost under-recovery was likely was foreseen. Additionally, as the costs attributed to the Process for the year 2002/03 have already been charged to all BSC Parties, it was actually known and accepted by all parties that there was going to be an under-recovery. The code does not envision a change to the mechanism for the administration charge nor does it make any mention, reference or requirement that the administration fee recover the cost of the Process, nor does it provide direction as to how any excess in the administration fees over the cost should be allocated. These are matters dealt within the general framework of the code.
2.	If you do believe P145 is a retrospective modification, do you believe the retrospective rule change is appropriate?	YES / NO	NO. As noted above, it does not meet the guidance criteria set out by the Regulator as it is not an irrecoverable central loss, just an operational cost that will be recovered through the existing fee mechanism. Under-recovery of costs was foreseen and in fact was know. Participants were never flagged to the possibility that a retrospective decision was going to be made to recover all or any portion of the costs of the Process via the administration fee. Again, there is no loss to the BSC Co.
3.	Do you believe that it is appropriate for the total cost of the PNE process to be recovered from PNE claimants alone?	YES / NO	NO. This goes against the criteria of modifications and would not be code compliant. To require that any sub-group of BSC Parties should fund the cost of a modification is anti-competitive and will be challenged under EC competition rules. The code instead uses an apportionment mechanism already set out within the BSCCo annual costs.

Q	Question	Response	Rationale
4.	If costs are to be apportioned amongst PNE claimants alone, do you believe that the methodology in P145 reasonably reflects the costs incurred by individual PNE claimants?	YES / NO	We are opposed to P145 in its entirety and we are opposed to the suggestion that P6 costs should be recovered by claimants only.
5.	If P145 is approved, do you believe the 2002/2003 costs should be paid back to Parties based on their funding share for 2002/2003 or based on this years funding share?	YES / NO	We are opposed to P145 in its entirety and we are opposed to the suggestion that P6 costs already paid should be recovered. In some instances this will result in a recovery of a paid credit. This would clearly be anti-competitive as it would negatively impact the smallest participants.
6.	Do you believe Proposed Modification P145 better facilitates the achievement of the Applicable BSC Objectives? Please state which objective(s)	YES / NO	NO. P145 goes against the general criteria of BSC Objectives as it is anti-competitive and retrospective in nature.
7.	Do you believe that there is an alternative modification that addresses the perceived defect and better facilitates the achievement of the Applicable BSC Objectives?	YES / NO	NO. There is no defect. The issue that has been brought forward is that some parties are still fighting Modification P37. It is time for the industry to put this issue behind itself and for the market to move forward.

Q	Question	Response	Rationale
8.	Does P145 raise any issues that you believe have not been identified so far and that should be progressed?	YES / NO	YES. P145 attempts to introduce the concept where only a certain group or class of BSC Parties would pay the costs associated with a modification. It suggests that only BSC parties who receive a perceived financial benefit should contribute to the funding of a modification. It attempts to do the above in a retrospective fashion. It is our view that this would breach the EC Directives on Competition and we would like to know what legal advice has been sought in this regard. In addition this process could significantly increase costs and we are wondering if the proposer who is also the biggest beneficiary of this proposed modification is prepared to fund the entire cost of the time required to investigate at European level the implications of these changes. Will review of this modification delay in the determinations of PNEC?
9.	Are there any further comments on P145 that you wish to make?	YES / NO	Approval of this modification will lead to a large number of similar and equally bogus modifications being put forward where parties would in effect attempt to opt out of some parts of their BSC obligations on the basis that they are paying more than they are receiving, or put forward modifications on the basis that the proposer will fund it and therefore in itself skirt the guidance criteria that exists to determine whether or not a modification furthers the objectives to the industry.

P145_ASS_010 Edison Mission Energy

Respondent:	Mark Edwards (Edison Mission Energy)
No. of BSC Parties Represented	2
BSC Parties Represented	First Hydro Company and Edison First Power
No. of Non BSC Parties Represented	None
Non BSC Parties represented	
Role of Respondent	Generator

Q	Question	Response	Rationale
1.	Do you believe P145 is a retrospective modification?	YES	The proposal seeks to change the costs associated with decisions already made (the decisions on whether or not to make certain PNE claims). Had the structure of the claims fee been different at the time of making claims, then BSC Parties may have made different decisions.
2.	If you do believe P145 is a retrospective modification, do you believe the retrospective rule change is appropriate?	NO	The shortfall in recovery of the costs, under the existing charging regime, was entirely foreseeable given the requirements to investigate claims thoroughly. The concept of a fixed claim fee was included in the original P6 and was intended to be material but not to be too onerous for small participants.

Q	Question	Response	Rationale
3.	Do you believe that it is appropriate for the total cost of the PNE process to be recovered from PNE claimants alone?	NO	<p>Costs have been caused by Parties other than PNE claimants. This is particularly true of 'Interested Parties' who have made much relevant input into the claims evidence which has been considered by the PNEC.</p> <p>There are other similar areas of the BSC, essentially concerned with ensuring 'fair play', where costs are recovered from all participants rather than just those who stand to make a financial gain – these include the consideration of trading disputes, manifest errors (for costs in excess of the £5000 fee), Q8 claims and the costs of processing Modification Proposals (which may not benefit all Parties). It is appropriate that the costs of such processes (including PNE claims) should be recovered from all participants.</p>
4.	If costs are to be apportioned amongst PNE claimants alone, do you believe that the methodology in P145 reasonably reflects the costs incurred by individual PNE claimants?	NO	<p>The costs associated with investigating claims are not associated with the materiality of the claim itself. For example a single PNE could result in an error in notified volumes of either 10 MWh or 1000 MWh – if the error was the same then the investigation should have addressed the same points in both cases. However the materiality of the claim itself will be very different for these two cases.</p> <p>If a cost-reflective charging mechanism were to be implemented, the P145 method would be inappropriate in that those claimants who have made claims of little or negative value would avoid paying significant costs, when they have taken a significant amount of the PNEC's time.</p>
5.	If P145 is approved, do you believe the 2002/2003 costs should be paid back to Parties based on their funding share for 2002/2003 or based on this years funding share?	2002/2003 shares	<p>If the costs were not paid back in the same proportions that they were originally paid, this would undermine the whole intent of P145 – that non-claimants should not contribute to the costs. The fact that redistribution of costs that have already been recovered would be necessary under P145 is a clear indication that this modification is indeed retrospective.</p>
6.	<p>Do you believe Proposed Modification P145 better facilitates the achievement of the Applicable BSC Objectives?</p> <p>Please state which objective(s)</p>	NO	

Q	Question	Response	Rationale
7.	Do you believe that there is an alternative modification that addresses the perceived defect and better facilitates the achievement of the Applicable BSC Objectives?	NO	At this stage it is too late to make any changes to the structure of PNE Claims fees without there being a retrospective change. Had a change been proposed earlier (before claims submission) then a fairer distribution of costs may have been possible – but it is not clear that this would have been achieved using the methodology of P145. A fairer method might have involved the PNEC deciding on a reasonable distribution of their costs amongst all BSC Parties (not just claimants) according to their views of the cause of costs – this might allocate some costs to Interested Parties.
8.	Does P145 raise any issues that you believe have not been identified so far and that should be progressed?	NO	The relevant issues have been identified through P145 and the recent consultation on modification of the Claims fee.
9.	Are there any further comments on P145 that you wish to make?	YES	In the form of the attachments to this consultation, Elexon have provided the information on the likely split of costs with or without approval of this modification. It is likely that BSC Parties will simply respond in accordance with their own financial interests – thus the results of the consultation are unlikely to add any real clarity to the issue.

P145_ASS_011 Dynegy UK Ltd

Respondent:	<i>Name</i> Dynegy UK Limited
No. of BSC Parties Represented	One
BSC Parties Represented	<i>Please list all BSC Parties responding on behalf of (including the respondent company if relevant).</i>
No. of Non BSC Parties Represented	
Non BSC Parties represented	<i>Please list all non BSC Parties responding on behalf of (including the respondent company if relevant).</i>
Role of Respondent	<i>(Supplier/Generator/ Trader / Consolidator / Exemptable Generator / BSC Agent / Party Agent / other – please state ¹⁰)</i> Trader at the time of NETA go-live

Q	Question	Response	Rationale
1.	Do you believe P145 is a retrospective modification?	NO	The modification is dealing with an issue that is arising today, though it has been caused by past events. At the time that the PNE process was put into the code there was a set fee for submitting a claim, but it was also clear that the size of the fee could be altered. Dynegy would therefore suggest that while this could be seen as a retrospective modification it is addressing the current funding problem. Where Ofgem to feel it was retrospective the modification still meets a number of Ofgem's criteria for retrospection: the costs could not have been clearly foreseen; changes were flagged in the BSC under P37 and the potential costs are material.

¹⁰ Delete as appropriate

Q	Question	Response	Rationale
2.	If you do believe P145 is a retrospective modification, do you believe the retrospective rule change is appropriate?	YES	<p>With the benefit of hindsight it is right to adjust the claim fee so that it covers the costs associated with pursuing a claim under the PNE process. It is important from an efficiency perspective to ensure that the costs associated with the PNE process are placed where they arise – ie from claimants. Were it to be the case that non-claimants are to pick up these costs some companies will face costs from a process they have not been party to, dealing with errors that they did not cause and from which they received no benefit. Not only is this inefficient, it is anti-competitive.</p>
3.	Do you believe that it is appropriate for the total cost of the PNE process to be recovered from PNE claimants alone?	YES	<p>There were many companies at the time of go-live which had system problems, for a variety of reasons. However, only some companies chose to undertake PNE claims, which they obviously felt would be to their advantage. It is therefore right that they should pay the costs associated with administering the claims process. While it is important that costs are borne by the whole industry when the work being undertaken is to the benefit of the whole industry, this is not the case with the PNE process. The process is not only being undertaken for the sole benefit of those with claims, but it is also an area of cost where those causing the costs can be clearly identified and the charges levied upon them.</p> <p>Dynegy notes the points raised that this process is to the benefit of all parties, but we would disagree with this. The PNE process has effectively allowed those with non-robust systems to pass their business costs on to other parties. Dynegy recognised that there were significant risks associated with the notification systems, and raised P4 to try and address these risks. However, we remain of the view that all parties knew that NETA was coming and were under an obligation to be ready. In fact we were present when the then Energy Minister reminded senior staff in all companies to be ready as NETA was happening. Insufficient systems testing or staff training should not be a cost borne by other parties. While other BSC costs are generally smeared these are costs which are related to changes that are generally good for the market as a whole. The same is not true with the PNE process.</p> <p>It therefore seems entirely consistent with the BSC objectives to place the costs of the PNE claims on those who are causing them and are the likely beneficiaries of the claims.</p>

Q	Question	Response	Rationale
4.	If costs are to be apportioned amongst PNE claimants alone, do you believe that the methodology in P145 reasonably reflects the costs incurred by individual PNE claimants?	YES	The process outlines seems a reasonable way forward. However, we do understand that there are a number of claims that while very large do not necessarily lead to an increase in cost compared to smaller more complicated claims. We would agree with the proposer that the methodology in P145 does look the most just if not completely robust way to allocate the deficit.
5.	If P145 is approved, do you believe the 2002/2003 costs should be paid back to Parties based on their funding share for 2002/2003 or based on this years funding share?		Dynergy is of the view that the 2002/3 funding figures represent the appropriate cost allocations in line with the size and type of claims for each of the parties. It is also more reasonable to give money back to those who have paid it, such as Dynergy, even though they are no longer active market participants.
6.	Do you believe Proposed Modification P145 better facilitates the achievement of the Applicable BSC Objectives? Please state which objective(s)	YES	By cost targeting to the parties both causing the costs and most likely to benefit from the PNE process P145 would improve the efficiency of the market and further enhance competition.
7.	Do you believe that there is an alternative modification that addresses the perceived defect and better facilitates the achievement of the Applicable BSC Objectives?	NO	
8.	Does P145 raise any issues that you believe have not been identified so far and that should be progressed?	NO	

Q	Question	Response	Rationale
9.	Are there any further comments on P145 that you wish to make?	YES	<p>Dynegy would wish to remind the market that there are a number of players who are in the process of withdrawing from the UK market. It is the sign of an efficient market that participants may both enter and leave without facing any significant or costly barriers. While this process continues to go on there are a number of parties who are facing regulatory risk and potential costs in a market in which they are no longer active participants. It is therefore in the interests of the UK market that the issues surrounding the PNE process are resolved in a timely manner and in a way that best allocates costs to those involved in the process.</p> <p>Dynegy would also note that for new entrants these costs are not cost reflective and should not be levied on them. We note that points made about the need for market entrants to do due diligence before entering a market, but as this process stands the risks are extremely high and are unmanageable by companies. It is therefore likely that these unforeseen costs will act as a barrier to market entry and as such are anti-competitive and cannot act in the long term interest of the customers.</p>

P145_ASS_012 Scottish and Southern Energy

Respondent:	John Sykes
No. of BSC Parties Represented	4
BSC Parties Represented	Scottish and Southern Energy, Southern Electric, Keadby Generation Ltd. and SSE Energy Supply Ltd.
No. of Non BSC Parties Represented	
Non BSC Parties represented	
Role of Respondent	Supplier/Generator

Q	Question	Response	Rationale
1.	Do you believe P145 is a retrospective modification?	YES	<p>The modification seeks to make a fundamental change to the method whereby parties who wished to make a claim would be charged for doing so. The change is from a straightforward prescribed universally applied flat rate fee to a fee calculated on an individual ad valorem post event basis. This change is fundamental because it alters the balance of risk that a party would have to consider in making a claim, a decision that it cannot reverse at this stage without incurring costs and forfeiting its right for a legitimate claim to be allowed.</p> <p>Once that decision to submit a claim has been taken, i.e. on the last day that claims could be filed, P145 must be retrospective if it seeks to change the basis on which such decisions were made. At that time it was not reasonably foreseeable that a modification would be made to change the basis of the fee calculation in such a fundamental way as proposed by P145.</p> <p>The whole basis on which claimants would be charged was well debated at the time of P37. The agreed fee was pitched at a level which parties considered to be high enough to prevent frivolous claims, not be a barrier to legitimate smaller claims and to contribute reasonably to the likely cost of financing the claims administration. The fee compares favourably with other similar charges under the BSC. An ad valorem basis was not considered appropriate at that time.</p>

Q	Question	Response	Rationale
2.	If you do believe P145 is a retrospective modification, do you believe the retrospective rule change is appropriate?	NO	<p>The only circumstance outlined in the P145 Consultation which could be considered to foresee a retrospective modification is where “the possibility of retrospective action had been clearly flagged....” However, the only occasion where this may have been the case is the incorporation in P6.2.2 of the provision allowing the Panel the discretion to vary the fee amount (and here the possibility of a retrospective change is merely implied in the wording of 6.2.2 and is certainly not “clearly flagged”). In any event this is quite different from changing the basis of the claim fee calculation as P145 seeks to do. It is unreasonable to expect claimants to have foreseen that the fee could be adjusted by a substantial amount, even through the powers given to the Panel. In the circumstances it was reasonable only to assume that the Panels discretion would be used to “fine tune” the fee, or to reduce it in the event that fees exceeded the costs.</p> <p>Making an ad valorem charge would, in fact, have meant that the exact fee to be charged would have been unknown at the time a decision to make a claim was being made, because the materiality of claims both individually and collectively, upon which the calculation depends, would be unknown at the time. We believe that this would have been a sufficient reason why P145 would have been rejected had it been introduced before the decision point was reached; and therefore it should be rejected now.</p>

Q	Question	Response	Rationale
3.	Do you believe that it is appropriate for the total cost of the PNE process to be recovered from PNE claimants alone?	NO	<p>It would have been reasonable to agree any level of cost/revenue balance before the point at which parties had to make the decision to submit a claim. However, once that point has been passed, and the deadline for the submission of claims has passed, the basis of the fee has to be upheld.</p> <p>The level of the fee was rightly declared before claims were made and was pitched at a level which parties considered to be high enough to prevent frivolous claims, not be a barrier to legitimate smaller claims and to contribute reasonably to the likely cost of financing the claims administration. The fee compares favourably with other similar charges under the BSC.</p> <p>The cost to any particular claimant should not depend on how many other people do (or do not) make a claim.</p> <p>If the basis of the fee were to be changed, then a "withdrawal at no fee" provision would, in equity, have to be offered to all claimants, with the risk that as claims are withdrawn, the costs will fall on a smaller number of claimants, through no action of their own.</p> <p>In addition, BSC parties as a whole do derive a benefit from the costs being incurred, as well as the claimants. Right from the outset, it was recognised that the PNE process would require exceptional measures to execute it properly. The very nature of the PNE Process is one that required a high level of independence, assurance and robustness if it were to withstand the scrutiny that it could be subjected to. It was recognised from the start that there were likely to be exceptional costs, and implied in this is the recognition that claim fees might not cover all such exceptional costs. The excess cost should be considered as an insurance premium in favour of BSC parties as a whole, mitigating against any action being taken against them alleging maladministration or some other irregularity in the process.</p>
4.	If costs are to be apportioned amongst PNE claimants alone, do you believe that the methodology in P145 reasonably reflects the costs incurred by individual PNE claimants?	NO	<p>It is quite wrong to conclude that the amount of effort to process a claim is directly proportional to its value, or that the total costs are a function of the sum of the individual fees. For one thing the value of each claim is dependent on the pertaining market prices, which is clearly a totally independent variable.</p> <p>To also imply that smaller valued claims were somehow afforded less diligence or scrutiny is a travesty to the integrity of those dealing with the claims, and would hardly be an indicator of a fair, robust and impartial process.</p>

Q	Question	Response	Rationale
5.	If P145 is approved, do you believe the 2002/2003 costs should be paid back to Parties based on their funding share for 2002/2003 or based on this years funding share?	BASED ON THE 2002/2003 FUNDING SHARE	Should P145 be agreed, the moneys should be returned on the basis on which they were paid. Whilst this might be argued to be less efficient because it involves more administration, the amount is so small that it is hardly worth calculating in the whole scheme of things.
6.	Do you believe Proposed Modification P145 better facilitates the achievement of the Applicable BSC Objectives? Please state which objective(s)	NO	<p>We do not believe that it is fair or equitable to change the basis of the fee at this stage in the proceedings. This is because claimants will have assessed the balance between the value of their claim, its likely success, and the fee, in deciding whether to enter a claim or not. To change the fee after this decision point, on whatever basis, is not defensible. Some claims would become uneconomic, and the PNE process becomes discriminatory against such claims. It does not therefore promote competition, nor does making a late change such as this make matters more efficient.</p> <p>Claiming Parties have also invested far more than just the claim fee. The preparation and presentation of evidence within the PNE process has been (rightly) exhaustive and thorough. Even if a "withdrawal at no cost" provision were to be made (which may itself require a Modification) those parties whose claims are no longer economic will have had a previous right taken away from them, having invested significantly more than just the fee. In itself this may lead to a challenge to the process.</p> <p>To change the basis of the fee at this late stage could be discriminatory, and would not be consistent with the BSC objectives of efficient operation, or promoting competition.</p> <p>To make such a change now would not be prudent, or act in the best interests of BSC Parties as a whole.</p> <p>We, therefore, do not believe that P145 furthers BSC Panel Objectives 1.2.1 (b), (c) or (d).</p>
7.	Do you believe that there is an alternative modification that addresses the perceived defect and better facilitates the achievement of the Applicable BSC Objectives?	NO	

Q	Question	Response	Rationale
8.	Does P145 raise any issues that you believe have not been identified so far and that should be progressed?	YES	<p>We believe that if the basis of the fee is changed at this stage in the PNE Claim process, either by Panel action under its existing powers, or by the introduction of a change through modification, there is a serious risk that there will be a challenge to the overall integrity and administration of the process, with the consequential delay to conclusion of the current process, and the incurring of still further substantial costs. This challenge could come not only from those parties who incur a substantial increase in their claim fee, but also from those whose opportunity to have a claim upheld has effectively been denied, as outlined above.</p> <p>The likely high costs associated with such a challenge would fall on general demand led funds. It is right that the premium to avoid such an event be also funded from such funds.</p>
9.	Are there any further comments on P145 that you wish to make?	NO	

P145_ASS_013 Scottish Power UK Plc

Respondent:	Man Kwong Liu (SAIC Ltd)
No. of BSC Parties Represented	6
BSC Parties Represented	<i>Please list all BSC Parties responding on behalf of (including the respondent company if relevant).</i> Scottish Power UK plc; ScottishPower Energy Management Ltd.; ScottishPower Generation Ltd; ScottishPower Energy Retail Ltd.; SP Transmission Ltd; SP Manweb plc.
No. of Non BSC Parties Represented	0
Non BSC Parties represented	<i>Please list all non BSC Parties responding on behalf of (including the respondent company if relevant).</i>
Role of Respondent	<i>(Supplier/Generator/ Trader / Consolidator / Exemptable Generator / BSC Agent / Party Agent / other – please state¹¹)</i> Supplier / Generator / Trader / Consolidator / Exemptable Generator / Party Agent

Q	Question	Response	Rationale
1.	Do you believe P145 is a retrospective modification?	YES	The modification is clearly retrospective in that it seeks to change the charges payable by claimants under the P6 process after the claims have been submitted.

¹¹ Delete as appropriate

Q	Question	Response s	Rationale
2.	If you do believe P145 is a retrospective modification, do you believe the retrospective rule change is appropriate?	NO	<p>ScottishPower considers that it would be wholly unreasonable and legally challengeable for the charges payable by claimants under the P6 process to be changed at this stage of the process.</p> <p>ScottishPower submits that however the costs of the P6 claims process are assessed, it is now too late to make a change to charges payable by claimants. An increase in the claim charges, at this stage in the process would be procedurally unfair and would be contrary to the principles of natural justice. Claimants have completed their submissions and have made decisions in relation to which Claims should be progressed. Some Claimants have chosen to withdraw claims. All of these decisions have been taken without any indication that the claim charges would be increased. Not only did the shortfall for 2002/2003 form part of the overall BSCCo costs collected from BSC Parties but Elexon circulars have made reference to the £5000 fee in such a way as to suggest that no such change was contemplated. It is self evident that Claimants have relied upon this and have in good faith taken certain decisions as to how to progress their claims. As stated by ScottishPower in oral submissions (and in evidence) to the PNEC decisions as to whether to submit claims in the initial stages of the process were partially dependent on the claim fee. Were the charges to be increased retrospectively to level greater than the stated fee there may be claims in respect of which the claim charge would exceed the amount recovered (bearing in mind the Error Correction Payment in respect of each erroneous notification) and consequently steps may have been taken to seek withdrawal of such claims.</p>

Q	Question	Response 8	Rationale
3.	Do you believe that it is appropriate for the total cost of the PNE process to be recovered from PNE claimants?	NO	<p>ScottishPower does not consider that it is appropriate for the total cost of the PNE process to be recovered from PNE claimants alone. In the first place, recovery of the total costs of the process from claimants would require a change to the magnitude and structure of the claim charges. As noted above, we believe this would be a retrospective change, which would be wholly unreasonable and legally challengeable.</p> <p>ScottishPower considers that to the extent that there is any shortfall between the costs of the process and the fees recovered under the existing claim fee arrangements, that shortfall should form part of the overall BSCCo costs collected from all BSC parties.</p> <p>Secondly, to do otherwise than to recover the costs from all BSC Parties would be without precedent. In the context of trading disputes and manifest errors, for the most part, the costs associated with the dispute/process are recovered from all BSC Parties, who derive benefit and reassurance from the effective management of these processes. In the same way, it is in the interests of all BSC Parties, including non-claimants, that the P6 process is conducted properly and effectively and the fact that the costs may exceed the amount recovered from the claim fees is, in part, a reflection of the extent of the measures put in place by the Panel to ensure that non-claimants' interests are protected.</p> <p>Thirdly, it should not be forgotten that to the extent that a Claimant is successful, the effect of the Error Correction Payment is such that 20% of the value of the claim will be shared across all BSC Parties (with the exception of the relevant Claimant). The likelihood of receipt of funds by virtue of the Error Correction Payment further supports the proposition that the shortfall in costs should be met collectively by all BSC parties.</p> <p>Finally, the involvement of Interested Parties has greatly increased the cost of the process. Whilst ScottishPower recognises that the costs incurred by the PNEC/Elexon have no doubt exceeded expectations, it submits that this is at least partly attributable to the excessive and repeated comments by Interested Parties particularly those made outwith the timescales set by the PNEC for commenting on Claimants' OMRs. Whilst Scottish Power recognises the desirability of ensuring that all issues have been fully considered and addressed by the PNEC it would be inappropriate for the PNEC's costs associated with Interested Parties to be borne solely by Claimants, particularly given Claimants must meet their own costs in responding to such comments.</p>

Q	Question	Response 8	Rationale
4.	If costs are to be apportioned amongst PNE claimants, do you believe that the methodology in P145 reasonably reflects the costs incurred by individual PNE claimants?	NO	ScottishPower does not believe that the methodology in P145 reasonable reflects the costs incurred by individual PNE claimants. As noted above, the costs of the process have been driven in part by the Panel's desire to protect the interests of non-claimants and in part by the activities of Interested Parties. No evidence has been offered to support the assumption which underlies P145 that the costs are related to the value of claims and should be shared between claimants.
5.	If P145 is approved, do you believe the 2002/2003 costs should be paid back to Parties based on their funding share for 2002/2003 or based on this years funding share?	YES / NO	In the unfortunate event that this misguided modification was approved, ScottishPower believes that the simplest and quickest implementation route should be used, i.e., the 2002/3 costs should be returned to Parties within this year's accounts using this year's funding shares.
6.	Do you believe Proposed Modification P145 better facilitates the achievement of the Applicable BSC Objectives? Please state which objective(s)	NO	ScottishPower does not believe that P145 better facilitates the achievement of the Applicable BSC Objectives. To introduce into the BSC the concept that a Party which initiates any action by Elexon under the provisions of the Code will be liable for the costs of that action, whatever they may turn out to be, neither promotes effective competition in the generation and supply of electricity nor promotes efficiency in the implementation of the balancing and settlement arrangements.
7.	Do you believe that there is an alternative modification that addresses the perceived defect and better facilitates the achievement of the Applicable BSC Objectives?	NO	ScottishPower does not believe that there presently exists a defect in the Code which requires to be addressed through this or any Alternative modification.
8.	Does P145 raise any issues that you believe have not been identified so far and that should be progressed? Please give rationale.	NO	

Q	Question	Response ⁸	Rationale
9.	Are there any further comments on P145 that you wish to make?	YES	It is self evident that Interested Parties in respect of the P6 process have a vested interest not only in seeking to ensure that claims are rejected but also in seeking to ensure that the costs of the process are met only by the Claimants. Interested Party activities and responses in respect of this modification should be considered in that light.

P145_ASS_014 Total Gas and Power

Respondent:	<i>Total Gas & Power Ltd</i>
No. of BSC Parties Represented	1
BSC Parties Represented	<i>Please list all BSC Parties responding on behalf of (including the respondent company if relevant).</i>
No. of Non BSC Parties Represented	
Non BSC Parties represented	<i>Please list all non BSC Parties responding on behalf of (including the respondent company if relevant).</i>
Role of Respondent	<i>(Supplier/ Trader)</i>

Q	Question	Response	Rationale
1.	Do you believe P145 is a retrospective modification?	YES	
2.	If you do believe P145 is a retrospective modification, do you believe the retrospective rule change is appropriate?	NO	<p>In the period following the introduction of NETA Go-Live, TG&P (then TotalFinaElf Gas and Power Limited) experienced a number of past notification errors. With the introduction of P37, TG&P made claims in relation to four of those past notification errors (Claims C039 to C042). A key consideration in TG&P's decisions (i) as to whether to bring PNE claims and (ii) in respect of which past notification errors, was the level of the claim fee in proportion to the amount of the prospective claim (allowing for the error correction payment (ECP)). TG&P appreciated the possibility that the claim fee might change but also anticipated that any such variation would have to have been both reasonable, timely and justified.</p> <p>TG&P has pursued its four claims. In doing so, TG&P has incurred not inconsiderable professional costs. These costs have been incurred in the preparation and submission of the claims and supporting evidence; in responding to particular issues and questions identified by the Committee; in meeting with the Committee; and in responding to comments made by interested parties (including by non-claimants). Throughout each stage, TG&P has been aware of the need to ensure that the costs of pursuing its claims are proportionate to the potential recoveries (again having regard to the ECP). Modifying the claim fees, as proposed by P145, substantially alters the basis of TG&P's decisions to raise and pursue these claims, hence we do not consider P145 to be appropriate.</p>

Q	Question	Response	Rationale
3.	Do you believe that it is appropriate for the total cost of the PNE process to be recovered from PNE claimants alone?	NO	<p>TG&P considers that such an approach would be flawed as a matter of principle and very difficult to implement if fairness is to be achieved among the claimants.</p> <p>As a matter of principle, TG&P considers that it would be unfair for the costs of the P6 exercise to be ring-fenced to be borne by claimants only. The process was conducted on an industry-wide basis. Provision was made (quite properly) for all BSC parties, including non-claimants, to take part. A number of non-claimants availed of that opportunity; indeed some non-claimants were very active in the process. TG&P does not suggest that this involvement was inappropriate; quite the contrary. Those non-claimants intervened because they were all interested parties, having a real and tangible financial interest in the outcome of the claims (whether successful or not).</p> <p>If the view is nevertheless taken that the P6 claim fee should serve to recoup as accurately as possible the costs of the P6 claims process from the claimants, TG&P believe that this should only be undertaken on a basis which involves each claimant being required to pay its fair share. TG&P believe there would be significant logistical difficulties in allocating those costs properly and fairly among the claimants.</p>
4.	If costs are to be apportioned amongst PNE claimants alone, do you believe that the methodology in P145 reasonably reflects the costs incurred by individual PNE claimants?	NO	<p>TG&P are aware Modification Proposal P145, proposes that the fee be calculated in proportion to the amount at stake in the individual claims. TG&P believes that this proposed approach would be fundamentally unfair. There is also no logical justification for it. The proposal asserts that "broadly speaking the larger in value in claims, the larger the costs likely to be incurred in respect of such claims". TG&P believes that there is no evidence at all to support that assertion. On the contrary, TG&P's own experience in the P6 claim process indicates otherwise. One of TG&P's claims (C039) is significantly higher in amount than any of the other three. However, it is inconceivable that it caused greater P6 costs than the others in similar proportion (or at all). Indeed, TG&P consider that the costs incurred by the Panel and the Special Advisers in respect of that claim may well have been lower than a number of TG&P's other claims.</p> <p>It appears to TG&P that, if all of the costs of the P6 claims process are to be recovered from the claimants, this could only be achieved fairly by properly determining to which claim(s) and/or issue(s) the costs are attributable and allocating the actual costs to each claim accordingly. TG&P does not underestimate the complexity of such an exercise.</p>

Q	Question	Response	Rationale
5.	If P145 is approved, do you believe the 2002/2003 costs should be paid back to Parties based on their funding share for 2002/2003 or based on this years funding share?	No comment	
6.	Do you believe Proposed Modification P145 better facilitates the achievement of the Applicable BSC Objectives? Please state which objective(s)	NO	
7.	Do you believe that there is an alternative modification that addresses the perceived defect and better facilitates the achievement of the Applicable BSC Objectives?	YES	TG&P believes that it is important to bear in mind in the context of this Consultation that all successful claims will give rise to an ECP of 20% of the sums adjusted. TG&P appreciates, of course, that the ECP to be paid by a successful claimant is of an entirely different nature to the claim fee. However, it is a cost being borne by successful claimants in circumstances where (in the hypothesis) those claimants have satisfied the Panel that they suffered an error notwithstanding that they had prudent systems and processes and that they took all steps to rectify, reverse or mitigate the effect of the error. Such ECPs will be for the benefit of all other BSC parties. It is important to acknowledge this fact where there may be a perception that it would be unfair for non-claimants to suffer as a result of the P6 claims process. In this context ECPs could be used to offset any potential difference between the level of claim fees we suggest this possibility be explored by the P145 process.
8.	Does P145 raise any issues that you believe have not been identified so far and that should be progressed?	YES	Please refer to Q7.
9.	Are there any further comments on P145 that you wish to make?	NO	

P145_ASS_015 EDF Trading

Respondent:	<i>Saeed Patel on behalf of EdF Trading Ltd</i>
No. of BSC Parties Represented	2
BSC Parties Represented	<i>EdF Trading Ltd and EdF (Generation)</i>
No. of Non BSC Parties Represented	<i>None</i>
Non BSC Parties represented	<i>N/A</i>
Role of Respondent	<i>Trader and Generator respectively</i>

Q	Question	Response	Rationale
1.	Do you believe P145 is a retrospective modification?	NO	The claims procedure and rationale had been agreed by the market participants and it was on this basis that parties claims were put forward. All parties whether they were potential claimants or not were consulted and it was agreed that a £5,000 fee would be charged along with a 20% reduction in any claim that was proved valid. To agree to P145 would in our view be unjustifiable. The proposal is clearly attempting to be retrospective, but in our view the criteria for retrospection has not been met; it was definitely not clearly flagged to participants that the level of fees in this instance could be changed to this extent or indeed in this manner.
2.	If you do believe P145 is a retrospective modification, do you believe the retrospective rule change is appropriate?	NO	As mentioned above the arrangements had been carefully agreed beforehand and it would be unduly discriminatory to the claimants if the rules were changed, especially when the 20% reduction of any claim is taken into account and, furthermore, when you consider that other Payment Disputes are not charged to a specific claimant. If it was approved it would be in our view unduly discriminatory.
3.	Do you believe that it is appropriate for the total cost of the PNE process to be recovered from PNE claimants alone?	NO	The PNE process was carried out on behalf of all market participants to ensure that only valid claims are allowed. This is clearly fair and appropriate when considered alongside other dispute procedures and their associated costs and indeed when considered in relation to all other BSC Modifications and Elexon costs. Such costs are recovered through the BSC Charges and this process should be allowed to continue in this instance as well.
4.	If costs are to be apportioned amongst PNE claimants alone, do you believe that the methodology in P145 reasonably reflects the costs incurred by individual PNE claimants?	NO	A very small error can cause a very large imbalance charge, as the proposer of P145 knows to his cost, and as such it would not be at all appropriate for PNE costs to be apportioned on the basis of the size of claim. The only fair methodology is for it to be paid for by all BSC parties in the same way as all the other BSC costs are allocated, no other method would be appropriate.

Q	Question	Response	Rationale
5.	If P145 is approved, do you believe the 2002/2003 costs should be paid back to Parties based on their funding share for 2002/2003 or based on this years funding share?	YES / NO	2002/2003 is a full year and allows a funding share to be calculated immediately, but would it not be more appropriate for the costs to be placed in the years to which they applied and then use the volumes accordingly ie if the imbalances were in 2001/2002 then shouldn't the shares be based on 2001/2002 volumes. This would be consistent with the Residual Cash Flow payments made to parties. If however this is too problematic, then the use of the 2002/2003 volumes would be reasonable.
6.	Do you believe Proposed Modification P145 better facilitates the achievement of the Applicable BSC Objectives? Please state which objective(s)	NO	None of the objectives will have been met, it will have a discriminatory effect to claimants and unduly benefit non-claimants who might be seeking to protect their windfall gains.
7.	Do you believe that there is an alternative modification that addresses the perceived defect and better facilitates the achievement of the Applicable BSC Objectives?	NO	The process should be allowed to finish.
8.	Does P145 raise any issues that you believe have not been identified so far and that should be progressed?	NO	
9.	Are there any further comments on P145 that you wish to make?	YES	If there is an under-recovery of the PNE costs then we believe that non-claimants will not be disadvantaged, as they will benefit from the ECPR ie 20% of each claim upheld, unlike the claimants.

P145_ASS_016 Gaz de France Marketing

Respondent:	<i>Gaz de France Marketing</i>
No. of BSC Parties Represented	1
BSC Parties Represented	<i>Gaz de France Marketing</i>

No. of Non BSC Parties Represented	0
Non BSC Parties represented	N/a
Role of Respondent	Supplier/Generator

Q	Question	Response	Rationale
1.	Do you believe P145 is a retrospective modification?	YES	The Balancing and Settlement Code clearly states in paragraph P6.2.2 that the fee of £5000 is subject to change. The Panel have frequently requested information regarding the cost of the process and have stated that it was their intention to revisit this issue at a point in time when the total costs of the process were available. As stated in the consultation documentation paragraph 4.2 the Panel are only able to agree a uniform change to the fee for all claimants that could lead to a fee of £38,300 per claim being applied. This modification enables application of a fairer allocation of costs in a pro rata basis according to the size of their claim and as such better achieves the applicable BSC (d) efficiency of the BSC arrangements
2.	If you do believe P145 is a retrospective modification, do you believe the retrospective rule change is appropriate?	YES	The guidelines issued by Ofgem on retrospective change identified that 'where the possibility of retrospective action had been clearly flagged to participants in advance and only the details and process were decided retrospectively'. The intention of the panel to revisit the PNE fees issue are clearly outlined in paragraph P6.2.2, this modification merely proposes an option for an alternative allocation of those fees rather than the 'flat fee' approach currently available to the panel..
3.	Do you believe that it is appropriate for the total cost of the PNE process to be recovered from PNE claimants alone?	YES	During the run up to NETA Go Live there were many potential market entrants who participated in a wide ranging programme of market trailing and testing. Many of those participants believed that to be their opportunity to eliminate settlement related errors. The process was costly, time consuming and resource intensive and for individual company participants it formed part of their risk management strategy in the run up to NETA Go Live. Many of those companies did not support initiation of the PNE process and therefore would not have expected to be subject to any costs associated with the administration of the process. The total costs of this project have escalated considerably due to the requirement to 'gold plate' the process. It is in our opinion inappropriate to levy any charge on those who have not taken part in the process.
4.	If costs are to be apportioned amongst PNE claimants alone, do you believe that the methodology in P145 reasonably reflects the costs incurred by individual PNE claimants?	YES	This approach is in our opinion much fairer than the process currently available to the Panel (the flat fee approach) and is therefore our preferred option.

Q	Question	Response	Rationale
5.	If P145 is approved, do you believe the 2002/2003 costs should be paid back to Parties based on their funding share for 2002/2003 or based on this years funding share?	YES	This years funding shares should be used.
6.	Do you believe Proposed Modification P145 better facilitates the achievement of the Applicable BSC Objectives? Please state which objective(s)	YES	As a participant who entered the market well after the date that this process began we had difficulty understanding why we should be subject to any PNE associated costs and believe that this modification proposal better facilitates BSC Objective C.
7.	Do you believe that there is an alternative modification that addresses the perceived defect and better facilitates the achievement of the Applicable BSC Objectives?	NO	
8.	Does P145 raise any issues that you believe have not been identified so far and that should be progressed?	NO	
9.	Are there any further comments on P145 that you wish to make?	NO	

ANNEX 4 TRANSMISSION COMPANY ANALYSIS

None commissioned

ANNEX 5 BSC AGENT IMPACT ASSESSMENTS

None commissioned

ANNEX 6 PARTY IMPACT ASSESSMENTS

None commissioned

ANNEX 7 LEGAL ADVICE PROVIDED BY ELEXON

ANNEX 8 ATTACHMENTS FROM P145 CONSULTATION

Attached as 3 separate Microsoft Excel Spreadsheets.

This information is based on actual costs invoiced up to August 2003 with estimated costs for September onwards. This represents a saving of approximately £800,000 against the budget. The budget of £1.55m for demand led costs was presented to the Panel in December 2002 and circulated to BSC Parties within the draft Business Strategy. ELEXON operational costs were not separately identified.