

Consultation for Modification Proposal P129: Changes to Panel Determination Process and Panel Election Procedures

A consultation document issued on behalf of the Governance Standing Modification Group.

For Attention of: **BSC Parties and all other interested parties**

Date of Issue: **11 July 2003**

Responses Due: **17:00 on Thursday 31 July 2003 (To: Modifications@exxon.co.uk)**

1. INTRODUCTION

Modification Proposal P129 "Changes to Panel Determination Process and Panel Election Procedures" ("P129") was raised on 7 May 2003 by Powergen UK.

P129 seeks to revise the election procedures for those Panel Members elected by Trading Parties (Industry Panel Members), pursuant to Section B2.2 of the Balancing and Settlement Code (the 'Code'), and to introduce new powers to allow the Balancing and Settlement Code Panel (the 'Panel') to make determinations on Modification Proposals, where there is agreement by a "substantial majority" of voting Panel Members.

1.1 Proposed Modification

The changes to the Panel's composition that P129 seeks to introduce are changes to the way in which Industry Panel Members are elected by Trading Parties. Specifically, P129 seeks to replace the current system of biennial preference voting with a constituency-based annual election process that employs a "first past the post" approach.

The Proposer suggests that each trading party group (Annex B-2, paragraph 3.1.5) would be permitted to cast two votes in its designated constituencies, and the criteria by which Parties are categorised are found in annex 1 of this document.

P129 proposes to introduce 5 constituency classes with each trading party group having 2 votes; one vote in each of two self-declared constituencies within which that trading party group belongs. In the case of pure Trading Parties, 2 votes would be allocated in a single constituency. The Proposer believes that the proposed revised process for electing industry Panel Members would, together with the proposal to make the Panel elections annual rather than biennial, make the Panel more representative of the industry.

Presently, the Panel makes *recommendations* on each Modification Proposal in a Modification Report, which is sent to the Authority for determination. P129 proposes that, where there is a "substantial majority" of Panel Members in agreement, the Panel could make determinations in respect of Modification Proposals. Where there is no "substantial majority" agreement the Modification Report would be sent to the Authority for determination.

The Proposer quantifies a "substantial majority" as 7 votes out of 9 from voting Panel Members (or 7 votes out of 10, if the Panel Chairman has appointed a sixth industry Panel Member, pursuant to Section B2.6.1).

P129 recognises that the Panel has no jurisdiction over other industry documents, such as the Grid Code for example, and that some Modification Proposals may require amendments to such documents. P129 proposes that in such cases, the Panel could "conditionally approve" a Modification Proposal. Such conditional approval would be time-limited, so that if the corresponding change were not made, the modification to the Code would fail.

The Proposer believes that Panel recommendations and Authority decisions do not always reflect the views of a cross section of the industry, and that they should do so. If the Panel were to make determinations instead of recommendations, as proposed in P129, then the constitution of the Panel is of primary concern to the Proposer. The Proposer believes that if P129 were made, the Authority would be able to refocus its resources on more complicated or controversial Modification Proposals that would be passed to it due to a lack of a majority decision by the Panel.

P129 does not seek to:

- alter the requirement of impartiality on Panel Members, pursuant to Section B2.8.1(a); or
- change the process whereby the Panel apply to the Authority to change the Implementation Date of Approved Modification Proposals, pursuant to Section F2.11.9.

The P129 Initial Written Assessment (IWA) was presented to the Panel at its meeting on 12 June 2003. The Panel recommended that P129 should be submitted to a 3 month Assessment Procedure, to be undertaken by the Governance Standing Modification Group (GSMG). The Panel requested that an interim report be presented to them at its meeting on 14 August 2003. The GSMG has met twice so far to assess P129. This consultation document represents the conclusions to date of the GSMG.

2. MODIFICATION GROUP DISCUSSION

During its two meetings, on 18 June and 9 July 2003, the GSMG discussed the issues raised in the P129 IWA and the Terms of Reference agreed by the Panel at its meeting on 12 June 2003. Although the GSMG recognised the need to consider the Modification Proposal as a "single package", the group initially considered the implications of the revised Panel election procedures, followed by the issues related to the proposed remit for the Panel to make determinations when there is "substantial majority" agreement. Respondents to this consultation should consider whether or not the Modification Proposal as a whole better facilitates the achievement of the Applicable BSC Objectives.

Respondents' views are sought on whether or not the Proposed Modification better facilitates the Applicable BSC Objectives.

2.1 Revised Panel election procedures

The following sections outline the GSMG's initial thoughts on the issues raised by the proposal in P129 to amend the process for electing Industry Panel Members.

2.1.1 Comparison of the preference voting system with the first past the post system

The GSMG agreed that replacing the current preference voting system with a first past the post system could mean that the voting procedure would be clearer to participants. The GSMG observed that the revised election procedures proposed in P129 may increase Parties' perception of their ability to influence Panel Member selection, as they would be fully aware of which Panel Members' election they directly participated in.

2.1.2 Optimum number of constituencies to achieve the desired balance within the Panel

The Proposer clarified that the constituency class of each trading party group would be determined by the characteristics of each trading party group's whole portfolio. Trading party groups would declare which constituencies they believed they belonged to, but this would be open to challenge by other Parties. BSCCo would investigate any challenge, and if necessary refer to annual metered energy offtake or delivery to establish constituency class. The Proposer explained that there were two reasons he had suggested five constituency classes. Firstly, Parties are currently entitled to elect 5 industry Panel Members, and secondly, the Proposer felt that the constituency classes defined in the Modification Proposal were a logical grouping.

The GSMG discussed the balance of the industry Panel Members to non voting Panel Members and agreed that this was an important consideration. It was recognised that any variance from the 5 industry Panel Members would need to form part of any Alternative Modification. The GSMG believe that there is an appropriate balance between the number of voting and non-voting Panel Members.

Respondents' views are sought on the appropriateness of the proposed 5 constituency classes and on whether or not the balance of the Panel is correct for voting Panel Members versus non-voting Panel Members.

2.1.3 Criteria for constituency classes

The GSMG discussed the thresholds (defined in TWh – see annex 1 of this document) by which a trading party group would declare its constituency class. The GSMG had no particular objections to the limits suggested by the Proposer.

Two votes would be allocated to each trading party group, as described in section 1.1 above. A GSMG member pointed out that, while non-physical traders would have two votes, these votes would be within one constituency and therefore non-physical traders would only be involved in electing one Panel Member. They would, however, have greater influence over the election of the Panel Member for that constituency. A GSMG member noted that as non-physical traders have no metered delivery or offtake, they are likely to have less interest in the Code and therefore was not unfair. The result of the discussion was that the GSMG were happy with the constituency structure proposed in P129.

A GSMG member indicated that the cut-off threshold for constituency classes would have an influence on their size. The GSMG held mixed opinions as to whether or not the threshold levels for constituency class, as defined in the Modification Proposal, should be reviewed and changed and who should be responsible for this process. The GSMG considered the fact that, if the threshold levels for constituency class were written into the Code, a Modification Proposal would be required to amend them. If the Panel was the body making the determination on the Modification Proposal, it would effectively be involved in setting the parameters for its own re-election. The wider implications of this issue are outlined in section 2.2.4. An alternative would be for the Authority to authorise the thresholds.

Respondents' views are sought on whether or not the thresholds for constituency class should be open to review, and who should be responsible for this process.

The GSMG noted that P129 did not propose a change to the number of candidates allowed within the industry Panel Member election process, however the group did agree that a candidate should only stand for election within a single constituency.

The GSMG briefly discussed which constituency class Interconnector Users would fall into. The group determined that Interconnector Users should fall into the Trading constituency and it was decided that an additional constituency class for Interconnector Users would not be included as a refinement to the Modification Proposal.

Respondents' views are sought on whether or not Interconnector Users should have their own constituency class.

2.1.4 Panel Chairman's right to appoint an additional industry Panel Member

The GSMG discussed whether or not the Panel Chairman should retain the right to elect a further Panel Member, pursuant to Section B2.6. The Panel Chairman would appoint an additional industry Panel Member if he believed that there was an industry sector not represented by the 5 elected industry Panel Members. The Modification Proposal is silent on the matter, however, the GSMG believe that there is still benefit in the Panel Chairman retaining the ability to appoint an additional Industry Panel Member.

2.1.5 Changes to the current non-voting appointments on the Panel

The GSMG decided that changing the non-voting status of some Panel Members was not necessary to address the defect documented in P129 and would, therefore, not be considered further in the discussion of options for inclusion in any Alternative Modification.

2.1.6 Distribution System Operators and the Transmission Company

P129 is silent on the appointment of the Distribution System Operator and Transmission Company Panel representatives. The GSMG indicated it did not intend to change the status quo for the Panel Members appointed by the Transmission Company and Distribution System Operators.

2.1.7 Publication of number of votes for each candidate in the Panel Election

The Modification Proposal was raised with the intention that only the *number* of votes for each candidate be published, as opposed to who voted for which candidate. This differs from the existing election rules, under which no voting information is made available. The GSMG believed that the publication of the number of votes for each candidate would make the process more transparent without compromising the Panel's independence.

2.1.8 Annual elections

The GSMG discussed the impact of elections being annual, rather than biennial, as they currently are. The group noted the importance of preserving Panel Member continuity and this might be compromised by annual elections. The group discussed the possibility that the industry Panel Members should be elected for two years, but that the voting for different Panel Members be staggered. This suggestion was, however, discounted by the GSMG as overly complex and impractical.

The GSMG discussed whether the entire Panel should be reappointed on an annual basis or just the elected industry members. The group observed that the Proposed Modification implied that only the elected members would be appointed annually; however, the GSMG favoured biennial elections.

Respondents' views are sought on whether or not annual Panel elections, rather than biennial elections, would better facilitate the achievement of the Applicable BSC Objectives.

2.1.9 Constitution of the Panel and impact on Panel Committees

The GSMG agreed that since the processes for choosing Panel Members and Panel Committee Members are different, a change to the industry Panel Member election procedure would have no immediate impact on the Panel Committee appointment processes. Moreover, the GSMG concluded that it would not be practical to introduce any such changes, as Panel Committees are based largely on industry experts appointed by the Panel, as opposed to being elected by Parties.

2.2 Principle of Panel making determinations on Modification Proposals rather than recommendations to the Authority

At its meetings on 18 June and 9 July 2003, the GSMG discussed the principle that the Panel could, where there is "substantial majority" agreement between Panel Members, make determinations on Modification Proposals.

A view was put forward that allowing the Panel to make decisions on Modification Proposals could result in a more efficient decision-making process regarding whether or not Modification Proposals are made or not, as the time taken for the Authority to make a decision would be eliminated in many instances.

However, it was also observed that it would be the more controversial Modification Proposals that would be referred to the Authority and these are the Modification Proposals that take time for the Authority to decide upon. The GSMG concluded that they were undecided as to whether or not the Proposal to allow the Panel

decision making powers for Modification Proposals would in practice significantly cut down the time it takes for determinations to be made.

Respondents' views are sought on the principle that the Panel could make determinations on Modification Proposals where there is "substantial majority" agreement.

2.2.1 Wider statutory obligations

Currently, the Authority is able to consider the implications of Modification Proposals in the context of the regulatory and statutory frameworks, within which it operates. If the responsibility for determining whether or not Modification Proposals are made were to fall to the Panel, it would not, as compared with the Authority, be able to fully consider the wider context of its determinations (for example, environmental issues or consumer protection objectives), since the Panel is currently confined to considering whether a Modification Proposal would better facilitate the achievement of the Applicable BSC Objectives (which can be found in the Transmission Licence in section C3).

The GSMG felt that industry views should be sought on whether or not Parties believe that the Applicable BSC Objectives should be revised to allow the Panel to take into account a wider statutory view, in addition to the current Applicable BSC Objectives. One member of the GSMG pointed out that the Authority had never cited as a reason for rejecting a Modification Proposal that the proposal would be contrary to a wider statutory obligation. However, the Authority representative observed that the Authority always take their wider statutory obligations into account when making determinations on whether Modification Proposals should be made or not.

Respondents' views are sought on whether or not they believe it would be inappropriate for the Panel to make determinations on Modification Proposals only against the Applicable BSC Objectives, whilst determinations made by the Authority would be made against its wider statutory obligations, as well as the Applicable BSC Objectives.

2.2.2 Conditional approval

The GSMG discussed the issue of approval of Modification Proposals which are conditional on the modification of industry documents not under the vires of the Panel. The group felt that if a deadline for the non-BSC documentation to be changed were to be included in the conditional determination, then configuration management of the Code could be successfully managed.

Respondents' views are sought on whether or not they believe it appropriate for the Panel to make conditional determinations.

2.2.3 Panel's ability to raise and make determinations on Modification Proposals

The GSMG considered whether it would still be appropriate for the Panel to raise Modification Proposals as, additionally, it would hold powers to make determinations on Modification Proposals. The GSMG agreed that, as the Panel are only able to raise Modification Proposals in limited circumstances, e.g. for housekeeping or efficiency, the group did not believe this would be an issue.

2.2.4 Code Sections not determinable by "substantial majority"

The GSMG noted that, currently, there are certain matters enshrined within the Code that require Authority approval to make any change. These matters range from, parameters set within the Code, to the timetable set for Modification Proposals etc. The GSMG also noted that under the current proposal, were a Modification Proposal to be raised, and a "substantial majority" of the Panel so minded, the Authority's role in such decisions could be eliminated from the process. Certain members of the GSMG believed that it may be apt for certain paragraphs of the Code to be reserved, such that Authority approval would be required to vary those provisions.

Respondents' views are sought on whether or not it is appropriate for certain parts of the Code to only have changes made to their provisions with Authority approval.

2.2.5 Competing Modification Proposals

The Panel is obliged to consider each Modification Proposal, with which it is presented, in terms of whether it better facilitates the Applicable BSC Objectives. The GSMG considered what would happen in the event that two Modification Proposals, which addressed the same defect but proposed different solutions, were presented to the Panel for determination at the same Panel meeting. P129 proposes that the Panel should consider which Modification Proposal *best* facilitated the Applicable BSC Objectives.

A question was asked about what would happen where competing Modification Proposals both achieve a "substantial majority" in relation to whether they better facilitate the Applicable BSC Objectives. In the event that a "substantial majority" could not be reached on which *best* facilitates the Applicable BSC Objectives overall, the GSMG agreed that both the Modification Proposals should be sent to the Authority for a decision.

2.2.6 Appeals mechanism

The process by which an Approved Modification is currently appealed is by way of an application for judicial review. The GSMG considered whether or not Parties should be able to appeal a decision regarding a Modification Proposal, when the decision has been made by the Panel, as opposed to the Authority.

The GSMG requested legal advice from BSCCo on whether to adopt an appeals process in relation to the revised Modification Procedures proposed under P129. The legal advice stated that establishment of an appeals process may render any revised modification procedure better able to withstand any potential challenge than perhaps if the Panel decision was final. For this reason, the legal opinion is that it would be advisable for the GSMG to consider formulating an appeals mechanism, in relation to revision of the Modification Procedures to grant the Panel the power to determine Modification Proposals under P129.

Respondents' views are sought on whether or not a process should be put in place to allow Parties to appeal a decision by the Panel on whether a Modification Proposal is approved or not and, if so, what the process should be.

The GSMG discussed what the grounds for appeal of a decision by the Panel should be. The group were mindful of the fact that the grounds needed to be stringently defined, such that Parties didn't routinely appeal Modification Proposal decisions that they disagreed with.

The GSMG felt that the grounds for appeal could be that:

- new evidence could be presented that the appealing Party felt had not been sufficiently explored during the Modification Procedures;
- the Code Modification will, or is likely to, unfairly prejudice the interests of the appealing Party; or
- the Code Modification will cause that appealing Party to be in breach of the Code or its licence.

Respondents' views are sought on whether the above grounds for appeal are appropriate.

The GSMG came to the conclusion that anyone who can raise a Modification Proposal should be able to appeal a Panel determination on Modification Proposals.

The GSMG decided that there should be a time limit on when an appeal against the decision could be made. The group decided that this timeframe should be 10 working days after the Panel meeting at which the decision was made.

Respondents' views are sought on whether or not 10 days after the Panel meeting at which the decision was made is the most appropriate time limit for Parties to appeal against Panel determinations regarding Modification Proposals.

2.2.7 Increased indemnification for the Panel

The GSMG requested that BSCCo provide it with legal advice on whether the revision of the Modification Procedures to allow the Panel to decide whether to approve or reject Modification Proposals, requires a strengthening of the terms of the indemnity granted to Panel Members by BSCCo.

The legal view is that Section B2.9.1, together with the current terms of the indemnity, will be sufficient to protect Panel Members in the event that the Code is amended to require the Panel to make determinations on Modification Proposals, as outlined in P129.

The GSMG believed that the Panel would be appropriately indemnified to cover any new powers of determination for Modification Proposals.

2.2.8 Urgent Modification Proposals

The GSMG discussed whether or not the Panel should be able to make determinations on Modification Proposals that had been granted urgent status. The GSMG noted that P129 is silent on Urgent Modification Proposals. The GSMG decided that any Urgent Modification Proposals should be approved or rejected by the Authority, and also that the Authority should continue to determine whether Modification Proposals should be granted urgent status.

3. CONSULTATION

The GSMG are still considering these points and would like to seek participant views in order to complete its assessment of P129. Views are sought on what market participants believe should be the solution for the points raised above and the rationale for this.

This consultation seeks views, in particular, on whether the Proposed Modification better facilitates achievement of the Applicable BSC Objectives.

For information the Applicable BSC objectives are;

- (a) The efficient discharge by the Transmission Company of the obligations imposed under the Transmission Licence;
- (b) The efficient, economic and co-ordinated operation by the Transmission Company of the Transmission System;
- (c) Promoting effective competition in the generation and supply of electricity, and (so far as consistent therewith) promoting such competition in the sale and purchase of electricity;
- (d) Promoting efficiency in the implementation and administration of the balancing and settlement arrangements.
- (e) without prejudice to the foregoing objectives and subject to paragraph 3A, the undertaking of work by BSCCo (as defined in the BSC) which is:
 - (i) necessary for the timely and effective implementation of the proposed British Electricity Trading and Transmission Arrangements (BETTA); and
 - (ii) relevant to the proposed GB wide balancing and settlement code;

and does not prevent BSCCo performing its other functions under the BSC in accordance with its objectives.

You are invited to provide a response in respect of the questions on the attached pro-forma.

Please send your responses entitled 'P129 Assessment Consultation 1' by 17:00 on Thursday 31 July 2003 to the following email address: Modifications@elexon.co.uk

Any queries on the content of the consultation pro-forma should be addressed to Rachel Lindstrom-Thomas (020 7380 4020) email address rachel.lindstrom@elexon.co.uk.

ANNEX 1:Small Supplier constituency

One vote would be allocated if the annual metered energy offtake by a trading party group is "greater than zero TWh and less than [25] TWh" [sic], except where the trading party group is allocated a vote in the Trading Constituency since its annual energy metered offtake is less than or equal to 50% of the annual metered energy delivered by that trading party group.

Small generator constituency

One vote would be allocated if annual metered energy delivered by a trading party group is "greater than zero TWh and less than [10] TWh" [sic], except where the trading party group is allocated a vote in the Trading constituency since its annual metered energy delivered is less than or equal to 50% of the annual metered energy offtake by that trading party group.

Large Supplier constituency

One vote would be allocated if annual metered energy offtake by a trading party group is "more than [25] TWh"¹, except where the trading party group is allocated a vote in the Trading constituency since its annual metered energy offtake is less than or equal to 50% of the annual metered energy delivered by that trading party group.

Large generator constituency

One vote would be allocated if annual metered energy delivered by a trading party group is "more than [10] TWh"² except where the trading party group is allocated a vote in the Trading constituency since its annual metered energy delivered is less than or equal to 50% of the annual metered energy offtake by that trading party group.

Trading constituency (Representing 'pure' traders (two votes) and net purchasers or sellers of electricity (one vote))

- One vote allocated if a trading party group's annual metered energy offtake is less than or equal to 50% of the annual metered energy delivered by that trading party group (the 'Electricity Seller Vote').
- One vote allocated if a trading party group's annual metered energy delivered is less than or equal to 50% of the annual metered energy offtake by that trading party group (the 'Electricity Buyer vote').

¹ The Proposer has, subsequently to submitting the Modification Proposal, clarified the definition of a Large Supplier constituency to be as written in this section.

² The Proposer has, subsequently to submitting the Modification Proposal, clarified the definition of a Large Generator constituency to be as written in this section.