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DRAFT MODIFICATION REPORT
MODIFICATION PROPOSAL P111 - Procedure to
allow the BSC Panel to refuse to accept
Contingent Modification Proposals

Prepared by ELEXON on behalf of the Balancing and
Settlement Code Panel

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d Related Documents

Ref.	Document	Owner	Issue Date	Version
1	P111 – Modification Proposal		27 November 2002	-
2	P111 Initial Written Assessment	ELEXON	10 December 2002	1.0
3	P111 – GSMG Report to the Panel Paper 58/014	ELEXON	7 February 2003	-

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1 SUMMARY AND RECOMMENDATIONS

1.1 Recommendation

On the basis of the analysis and assessment undertaken in respect of this Modification Proposal during the Assessment Procedure, and the resultant findings of this report, the Balancing and Settlement Code Panel (the Panel) recommends that:

Proposed Modification P111 should not be made.

In the event that the Authority determines that the Proposed Modification P111 should be made, AGREE an Implementation Date of 20 Working Days after an Authority determination.

Note that no legal text has been prepared during the progression of P111 through the Modification Procedures as agreed by the Authority.

1.2 Background

Modification Proposal P111 'Procedure to allow the BSC Panel to refuse to accept Contingent Modification Proposals' (P111) (Reference 1), was raised by Powergen UK plc and sought to extend the powers of the Panel to refuse to accept Modification Proposals.

P111 sought to introduce a "contingency test" to identify proposals to modify the Balancing and Settlement Code (the Code) that are contingent on the acceptance, by the Authority, of a Pending Modification Proposal or another as yet undefined Modification Proposal. This contingency test would then be applied at the time the Panel first considered any proposal to modify the Code. If a proposal to modify the Code failed the contingency test, i.e. it was contingent on approval of another Pending Modification Proposal or yet to be developed Modification Proposal, the Panel must refuse to accept its submission.

P111 also sought to apply the contingency test to all Modification Proposals currently within the Assessment Procedure or the Definition Procedure. If a proposal to modify the Code, failed such a test, the Panel would be obliged to direct that the Modification Proposal be submitted to the Report Phase.

P111 had been raised against a background of the submission of Modification Proposal P109, which sought to hedge against the risk of a future change to the Code being introduced to change the values of Transmission Loss Factors to any value other than zero.

1.3 Rationale for Recommendations

At the Panel meeting on 13 February 2003 the Panel was presented with paper 58/014 (Reference 3) describing the views of the Governance Standing Modification Group (GSMG) and included a legal opinion from ELEXON (Annex 2). The legal opinion explained that the powers proposed under P111 were already included in the Code. The Panel agreed with the view of the GSMG that, in light of the legal opinion, none of the Applicable BSC Objectives were better facilitated by P111. Furthermore the Panel agreed that further assessment of P111 should be curtailed in accordance with paragraph F2.2.11 of the Code and that P111 should be submitted to the Report Phase with a recommendation that the Proposed Modification should not be made.

2 INTRODUCTION

This Report has been prepared by ELEXON Ltd., on behalf of the Panel, in accordance with the terms of the Code. The Code is the legal document containing the rules of the balancing mechanism and imbalance settlement process and related governance provisions. ELEXON is the company that performs the role and functions of the BSCCo, as defined in the Code.

This Modification Report is addressed and furnished to the Gas and Electricity Markets Authority ('the Authority') and none of the facts, opinions or statements contained herein may be relied upon by any other person.

An electronic copy of this document and all referenced documents can be found on the BSC Website, at www.elexon.co.uk

3 HISTORY OF PROPOSED MODIFICATION

P111 was submitted on 27 November 2002 by Powergen UK plc, in accordance with Section F 2.1.1 of the Code. The Initial Written Assessment (IWA) for P111 (Reference 2) was presented to the Panel meeting of 12 December 2002. The IWA proposed that P111 be submitted to a two-month Assessment Procedure to be undertaken by the P109 Modification Group. However, the Panel determined that P111 should instead be submitted to a 3-month Assessment Procedure to be undertaken by the GSMG. ELEXON indicated that if it was possible to report back to the Panel at an earlier stage, the GSMG would attempt to do this.

During the Assessment Procedure for P111, the GSMG met twice, initially on 9 January 2003 and again on 30 January 2003. The initial meeting of the GSMG discussed the issues identified within the IWA and attempted to develop an understanding of the characteristics of a contingency test.

During the discussion, the GSMG had significant difficulty in defining the characteristics that a contingent Modification Proposal may be said to exhibit and requested that ELEXON provide some legal advice in respect of P111. The GSMG also discussed the basis for a consultation to be undertaken in respect of P111 and requested that ELEXON prepare an initial draft of a consultation document for review by the group.

The draft consultation document and legal opinion were circulated to the GSMG on 24 January 2003 and 27 January 2003 respectively and subsequently discussed at the GSMG meeting on 30 January 2003.

In light of the legal opinion provided by ELEXON, the GSMG unanimously concluded that the Assessment Procedure should be stopped in accordance with paragraph F2.2.11 and agreed that a paper should be presented to the Panel requesting the cessation of the P111 Assessment Procedure. The GSMG also concluded that it was not appropriate to undertake a consultation until the Panel had formed an opinion on whether or not to stop the assessment of P111.

The Panel meeting on 13 February 2003 discussed the GSMG paper (Reference 3). Based on the views of the GSMG, and in particular the legal opinion prepared for the GSMG, the Panel agreed with the recommendation of the GSMG and agreed P111 should proceed to the Report Phase with a recommendation that P111 should not be made.

The GSMG paper to the Panel (Reference 3) stated that no legal text had been prepared for P111. The Panel asked the Authority representative at the Panel meeting whether the Modification Report for P111 should contain legal text. The Authority representative confirmed that no legal text was required.

A draft Modification Report was issued for consultation on 19 February 2003, and six working days were allowed for responses to the consultation to be submitted.

4 DESCRIPTION OF PROPOSED MODIFICATION

Paragraph F2.1.4 of the Code states that the Panel “may refuse to accept the submission” of a Modification Proposal. These are where, in the opinion of the Panel, the Modification Proposal has substantially the same effect as:

- a Pending Modification Proposal; or
- a Rejected Modification Proposal, where such Modification Proposal is made within 2 months of the decision of the Authority not to direct the Transmission Company to modify the Code in the manner set out in the Modification Proposal.

P111 seeks to place a new obligation on the Panel to perform a “contingency test” prior to accepting the submission of a Modification Proposal. The contingency test, would prevent the Panel accepting the submission of a Modification Proposal where the Proposer has failed to demonstrate “beyond reasonable doubt”, in the opinion of the Panel, that such a Modification Proposal is not contingent on the outcome of any other Pending Modification Proposal, or a “yet to be developed” future Modification Proposal.

P111 also seeks to place a further obligation on the Panel to assess all Pending Modification Proposals that are currently subject to either a Definition Procedure or Assessment Procedure against the proposed “contingency test”. Where the Panel determined that any such Pending Modification Proposal failed the proposed “contingency test” the Panel would be required to submit that Pending Modification Proposal to the Report Phase with a recommendation that the Proposed Modification should not be made.

It is the view of the Proposer that the perceived defect that P111 is attempting to resolve has arisen following the submission of Modification Proposal P109 ‘A Hedging Scheme for changes to TLF in Section T of the code’ (P109). Although P109 was intended to be a stand alone Modification Proposal at the time of its submission, the Proposer of P111 argues that an additional Modification Proposal is required to effect the substance of P109. The Proposer also argues that similar Modification Proposals of an anticipatory nature could be raised in the future which would “waste the BSC Panel’s, ELEXON’s and BSC Parties’ time”.

5 RATIONALE FOR PANEL RECOMMENDATIONS

The Panel considered the legal opinion presented to the GSMG (Annex 2) that the powers proposed under P111 were already included in the Code. The Panel agreed that in view of the legal opinion provided by ELEXON, that none of the Applicable BSC Objectives would be better facilitated by implementing P111. The Panel also agreed with the view of the GSMG that further assessment of P111 should be curtailed in accordance with F2.2.11 and that P111 should be submitted to the Report Phase with a recommendation that the Proposed Modification should not be made.

6 LEGAL TEXT TO GIVE EFFECT TO THE PROPOSED MODIFICATION

No legal text was prepared for P111. The Authority have confirmed that no legal text was required.

7 ASSESSMENT

The GSMG met twice on 9 January 2003 and 30 January 2003.

7.1 GSMG Meeting 1 - 9 January 2003

The initial meeting of the GSMG discussed the three issues identified in the IWA for P111 (Reference 2):

- the definition an appropriate contingency test;

- the issues relating to retrospection in the Implementation of P111; and
- an assessment against the Applicable BSC Objectives of whether it is appropriate to “refuse to accept” contingent Modification Proposals.

The GSMG had encountered difficulties in defining what a “contingent” Modification Proposal might be. The GSMG also requested that BSCCo provide a legal opinion on whether a Code Modification was necessary in order to achieve the aims of P111.

7.1.1 Appropriate Contingency Test

The GSMG discussed some of the characteristics that “contingent” Modification Proposals *may* be said to exhibit and considered three possible characteristics. These are described below:

Characteristic 1: Trigger

A Modification Proposal that does not result in a change to a Parties’ rights and obligations until “triggered into action” by approval of a subsequent Modification Proposal.

The GSMG discussed whether this characteristic was an appropriate test of “contingency”. Some members of the GSMG were concerned that at Go-Live, the Code had set certain parameters to have a null effect until triggered by the approval of a subsequent Modification Proposal. Such parameters included the Information Imbalance Price¹ and any deviation from zero of the value of Transmission Loss Factors².

Characteristic 2: Insurance

A Modification Proposal that seeks to insure against some form of regulatory risk in that, if implemented, the proposal would be likely to fetter the Authority’s discretion in making a decision on subsequent Modification Proposals.

Concern was expressed at the GSMG that this characteristic attempted to legislate against a future rule change, although the GSMG recognised that this was impossible under the Code.

The GSMG agreed that even if a Modification Proposal sought to introduce a restriction, that restriction could simply be overwritten as the result of future Modification Proposals being implemented. The GSMG were not convinced, therefore, that this characteristic was appropriate but agreed that views could be sought during the P111 consultation.

Characteristic 3: Mitigation

It seeks to mitigate against the perceived risk of a particular future change without itself defining the exact details of that change. This definition of “contingent” would, for example, allow a phasing algorithm to be introduced to alter the value of Transmission Loss Factors from zero, provided it was accompanied by the mechanism for defining what those Transmission Loss Factors might be.

The GSMG were concerned that they might not be able to adequately define “contingent” Modification Proposals and felt that of all the characteristics identified, Characteristic 3 might be the most appropriate option for further consideration. The GSMG agreed that the P111 consultation should seek views on what characteristics should be used to define a “contingent” Modification Proposal.

¹ As defined within paragraph T4.3.5

² As defined in paragraph T2.2

Subsequent to the meeting, one of the members of the GSMG circulated a refinement to characteristic 3 that suggested that a “contingent” Modification Proposal might be defined as a Modification Proposal that would seek to reduce the perceived risk to one or more BSC Parties resulting from a particular hypothetical change to the Code.

7.1.2 Decision Making

The GSMG discussed the difference between the existing provisions within the Code and the change proposed within P111. Unless the Panel refuses to accept a Modification Proposal under F2.1.4, it will proceed to the Report Phase. The Panel can also decide that a Modification Proposal should proceed directly to the Report Phase where its decision would be self evident. During the Report Phase, the Panel will make its final recommendation to the Authority. The ultimate decision whether to accept or reject the Modification Proposal then rests with the Authority.

P111 would extend the Panel's power to refuse to accept a Modification Proposal without proceeding to the Report Phase and allowing a Modification Proposal to be submitted to the Authority for decision.

7.1.3 Potential for Retrospection

The GSMG discussed the issue that P111 would seek to apply a contingency test to all Pending Modification Proposals that were in either the Definition Procedure or the Assessment Procedure. The GSMG was concerned that P111 sought to introduce a test that would be applied to all such Pending Modification Proposals that was not present when the relevant Modification Proposals were submitted to the Definition Procedure or Assessment Procedure. The GSMG considered that this introduced retrospection into the Modification Procedures and suggested that if this was to be avoided, there was scope for an Alternative Modification that excluded this retrospective element.

7.1.4 Panel Discretion

P111 requires “the BSC Panel to refuse to accept any new proposal where the Proposer (or his/her representative/alternate) has failed to demonstrate beyond reasonable doubt that such a proposal is not contingent on one or more future or pending modification proposals being approved by the Authority.”

The GSMG recognised that this was an inherent part of P111, and considered whether this should be a mandatory requirement on the Panel or whether the Panel should have any discretion in applying such a “contingency” test. The GSMG agreed at that time to seek consultation views on whether an Alternative Modification was appropriate to deal with this issue.

During the discussion, the GSMG had encountered difficulties in defining the characteristics that a contingent Modification Proposal may be said to exhibit and requested that ELEXON provide some legal advice in respect of P111. The GSMG also discussed the basis for a consultation to be undertaken in respect of P111 and requested that ELEXON prepare an initial draft of a consultation document for review by the group.

7.2 Draft Consultation Document

The draft consultation document prepared by ELEXON, was circulated to the GSMG on 24 January 2003 in order that it could be reviewed during the second meeting of the GSMG on

30 January 2003. A summary of the issues identified within this draft consultation document is contained above within paragraph 7.1.

7.3 Legal Opinion

The BSCCo legal opinion was issued to the GSMG on 27 January 2003 and discussed at the GSMG meeting on 30 January 2003.

ELEXON considered whether it was necessary to make a Code Modification in order to extend the powers of the Panel in relation to "contingent" Modification Proposals. The provisions of Section F of the Code that dealt with the refusal to accept the submission of Modification Proposals and concluded that a Code Modification was not necessary to achieve the aims of P111 as the provisions were already there.

Specifically, paragraph F2.1.3 of the Code provides that where a Modification Proposal "fails in any material respect to comply with the requirements of paragraph 2.1.2 the Modification Secretary may refuse to accept such submission..."

Paragraph F2.1.2 relevantly provides that **(Emphasis added)**:

F2.1.2 A proposal made pursuant to paragraph 2.1.1 shall be submitted in writing in accordance with BSCP 76, and shall contain the following information in relation to the proposal:

...

*(c) a description (in reasonable but not excessive detail) of the **issue or defect** which the proposed modification seeks to address;*

...

*(f) the reasons why the Proposer believes that the proposed modification would better facilitate the achievement of the applicable BSC Objective(s) as compared with the **then current version of the Code**.*

The legal opinion stated that a contingent Modification Proposal would fail to comply with paragraph F2.1.2 as:

- a) There is no issue or defect relating to the 'then current version of the Code'; and
- b) There can be no assessment of whether the proposal better facilitates the achievement of the Applicable BSC Objectives as compared with the 'then current version of the Code'.

BSCCo proposed that the GSMG to take is to recommend to the Panel that the assessment of P111 be stopped in accordance with paragraph F2.2.11 as it did not better facilitate the achievement of any of the Applicable BSC Objectives. Furthermore P111 should be sent to the Report Phase with a recommendation that the Proposed Modification should not be made.

7.4 GSMG Meeting 2 – 30 January 2003

On the basis of the legal opinion, the GSMG unanimously concluded that it would be appropriate to request that the Panel agree to stop the Assessment Procedure of P111 in accordance with paragraph F2.2.11. The GSMG further recommended that P111 be submitted to the Report Phase with a recommendation that the Proposed Modification should not be made.

The recommendation was based on the fact that providing powers to the Panel that already existed within the Code was inefficient and therefore did not better facilitate the achievement of Applicable BSC Objective (d).

The GSMG concluded that in fact, none of the Applicable BSC Objectives would be better facilitated by the introduction of P111.

7.5 Costs of P111

P111 seeks to introduce powers that currently exist under the Code. Although no impact assessments were undertaken due to the curtailment of the assessment of P111, it is envisaged that the costs of implementing P111 would be insignificant.

Any costs associated to the implementation of P111 would relate to the physical changes to the Code and the issuing of this documentation along with the application of a contingency test to all Pending Modification Proposals as well as the documentation changes required as a result of a Code Modification.

8 SUMMARY OF REPRESENTATIONS

[A summary of responses to consultation on draft Modification Report will be inserted here. Copies of the actual responses will be inserted at Annex 1.]

ANNEX 1 – REPRESENTATIONS

[Attached as separate document (following consultation).]

ANNEX 2 – LEGAL OPINION IN RESPECT OF P111

Attached as separate document.