
Meeting name BSC Panel
Date of meeting 14 October 2004
Paper Title GSMG ISSUE 10: 'IMPLEMENTATION DATES'
Purpose of Paper For Information

Synopsis Issue 10 suggests that there may be an inconsistency between the Transmission Licence and the Balancing and Settlement Code regarding the formulation of Implementation Dates. The Governance Standing Modification Group met on 22 September 2004 to consider Issue 10, and this paper summarises the Group's discussions and conclusions. The GSMG agreed that there is no obvious inconsistency between the Transmission Licence and the Code in this area. However, the Group noted that the working practice of proposing two 'time-bound' Implementation Dates could potentially lead to the Authority being 'timed out' from making a decision. The GSMG remained unconvinced that a change to this practice was required, but agreed that (if a change was to be made) its preferred route would be the addition of a third generic 'backstop' date to be used only in the event of judicial review or appeal.

1. DESCRIPTION OF ISSUE

- 1.1 Issue 10 'Implementation Dates' (Reference 1) was raised by National Grid Transco ('the Proposer') on 24 August 2004. Issue 10 suggests that, under the current method of proposing two 'time-bound' Implementation Dates for Modification Proposals (i.e. two fixed calendar Implementation Dates with corresponding decision deadlines), there is the potential for the Authority to be 'timed out' from making a decision if the second cut-off point is passed. The Proposer of Issue 10 therefore requested that the Governance Standing Modification Group (GSMG) consider whether the Code requirements and/or the BSC Panel's working practice regarding the construction of Implementation Dates are inconsistent with the intention of the Transmission Licence, which appears to imply that a Modification Proposal must always have a viable Implementation Date.
- 1.2 The GSMG met to discuss Issue 10 on 22 September 2004, and this paper provides a summary of the Group's discussions and conclusions.

2. GSMG'S CONSIDERATION OF TRANSMISSION LICENCE AND CODE PROVISIONS

- 2.1 The GSMG considered the relevant provisions of the Transmission Licence and the Code. The Group noted that these provisions require a Modification Report to set out:
- (i) 'the timetable for implementation of the modification and any alternative, including the date with effect from which such modification (if made) is to take effect' (Transmission Licence, Condition C3.4(b)(v));
 - (ii) 'the proposed Implementation Date for implementation of any Proposed Modification or Alternative Modification' (the Code, paragraph F2.7.7(b)).

The GSMG agreed that there appears to be no obvious inconsistency between the Transmission Licence and the Code, since neither prescribes the format of Implementation Dates. The Proposer concurred with this view.

- 2.2 The GSMG noted that this issue had also recently been discussed in the context of the Connection and Use of System Code (CUSC), which contains similar provisions to the Code. The Group noted that a report by the CUSC Governance Standing Group (GSG) had also concluded that there was no obvious inconsistency between the CUSC requirements and those of the Transmission Licence (Reference 2).

3. GSMG'S CONSIDERATION OF PANEL WORKING PRACTICE

- 3.1 The GSMG agreed that, if there is an issue relating to 'timing out' of Authority decisions, this originates in the working practices of ELEXON, Modification Groups and the Panel of proposing two 'time-bound' Implementation Dates.

– Risks and benefits of current process

- 3.2 The GSMG noted that the current process contains the risk that, if the second decision cut-off date for approving a Modification Proposal is passed, the Authority may feel that it is unable to make a decision to approve – resulting in it rejecting the Proposal on procedural grounds rather than on its merits against the Applicable BSC Objectives.

- 3.3 The GSMG considered that historically this had been a very rare event, occurring in respect of three Modification Proposals since NETA Go-Live (P80, P82 and P87) either as a result of decision-making timescales or judicial review.¹ However, the Group noted the planned introduction by the DTI of a mechanism for appeals to the Competition Commission (currently scheduled for implementation in April 2005) – and that, whilst not finalised, one proposed outcome of this appeals process is the ability for the Competition Commission to quash a decision and refer a Modification Proposal back to the Authority. The GSMG noted that it was possible that the second cut-off date provided in the original Modification Report would have lapsed by the time the appeals cycle was completed, and that a Modification referred back to the Authority for re-decision might therefore be 'timed out'. The Group considered that, if this situation arose, the Authority's ability under the Code to direct a change to an Implementation Date for an Approved Modification could not be used since the Modification would revert to being a Pending Modification.

- 3.4 The GSMG also agreed that addressing the issue of 'timing out' via a working practice change would have the advantage of retaining an element of flexibility, and the ability for this practice to be reviewed as circumstances required. However, the Group noted that the BSC Panel had previously rejected a proposal by BSCCo to revise its current practice in order to incorporate a third 'generic' rolling back-stop date aligned with the BSC release strategy (References 3 and 4).² The Group also noted that concerns had been expressed by the Issue 9 Group regarding such an

¹ Modification Proposals P80 'Deemed Bid/Offer Acceptance for Transmission System Faults', P82 'Introduction of Zonal Transmission Losses on an Average Basis', and P87 'Removal of market risk associated with the operation of a Generator Inter-Trip Scheme'.

² The proposed generic formulation was "the release date for the relevant BSC Systems release which first occurs no less than Y months after the date of an Authority decision", where Y represents the lead time necessary for the particular Modification. Code-only Modifications would retain their existing formulation of "X Working Days following an Authority decision".

approach (Reference 5), and that the CUSC GSG had recently concluded that no change to the current construction of CUSC Implementation Dates was required.

- 3.5 An attendee at the GSMG commented that a move to a third generic 'back-stop' date seemed to represent a pragmatic solution to the issue of 'timing out'. This attendee considered that it would not be good regulatory practice for the Authority to use this third proposed date to prolong its decision-making process, and that the Panel could question the Authority regarding any decisions which it believed to be unduly delayed.
- 3.6 However, other members of the GSMG believed that use of a third 'back-stop' date would reduce market certainty as to when Modifications would be implemented, since it would reduce the pressure on the Authority to deliver timely decisions. BSCCo suggested that it could publish release dates in advance for a rolling year period, in order that Parties could view the potential Implementation Dates for Modifications. However, one member argued that the ability for a proposed Implementation Date to extend indefinitely into the future would make it difficult for Parties to plan for future changes as part of their annual budgets. This member also believed that the prospect of a significant Modification being approved in the near future (particularly in the area of pricing) affects the commercial decisions made by Parties prior to an Authority determination – and that increasing the Authority's decision-making timescales would therefore increase commercial uncertainty.
- 3.7 The GSMG also considered the risk of 'timing out' to be low, and noted that the mechanism and frequency of appeals were not yet certain since these were subject to the outcome of a forthcoming DTI consultation.³ The Group considered that a route already existed whereby a 'timed out' Modification Proposal could be resubmitted by a Party, with its progression potentially expedited by the Panel. The Group noted that the CUSC GSG had concluded that this route remained appropriate for 'timed out' CUSC Amendment Proposals since, although there was an element of inefficiency in this process, introduction of a third 'back-stop' date would reduce market certainty.
- 3.8 One member of the GSMG considered that the circumstances under which an Authority decision could be quashed (either via an appeal or through judicial review) were a procedural failure, new information being presented, or a failure to consider existing information.⁴ This member strongly believed that under such circumstances it was appropriate for a decision to be 'timed out' and resubmitted as a new Proposal, in order for it to be properly reconsidered by the industry. However, an attendee at the meeting considered that in cases where the new or existing information related purely to the Authority's wider statutory duties, there would not appear to be any benefit in resubmission (since this would not fall within the Panel's vires for consideration).
- 3.9 The Group also noted that a Modification Group's and/or the Panel's assessment of a Proposal against the Applicable BSC Objectives was only valid against the Code baseline in existence at the time of the Modification Report, and that there was the risk that this assessment could

³ The DTI consultation on appeals against Ofgem code modification decisions was subsequently issued on 4 October 2004, and can be found at http://www.dti.gov.uk/energy/consultations/appeals_secondary_order.pdf.

⁴ Under sections 173-177 of the Energy Act 2004, the determination of an appeal will assess whether Ofgem:

- Failed to have proper regard to the Applicable BSC Objectives or its wider statutory obligations;
- Failed to give the appropriate weight to one or more of these objectives and obligations;
- Based its decision on a error of fact; and/or
- Made a decision which was wrong in law.

become out of date if there was a substantial time-lag between submission of the Report and an Authority decision.

- 3.10 The GSMG remained unconvinced that a move to a third generic 'back-stop date' was desirable, but noted that the Authority had expressed its view that the present arrangements were untenable due to the potential for 'timing out' and the perceived risk posed by appeals. The Group also noted that if a change was not made to current working practices, it was possible that a non-'time-bound' Implementation Date formulation could be mandated via a Modification to the Code or a change to the Transmission Licence. The GSMG agreed that this would not be desirable, and therefore considered whether there were any other means by which the perceived risk could be reduced.

– **Other methods for reducing risk**

- 3.11 One member of the GSMG questioned whether the issue was being considered from the wrong angle. This member suggested that what was needed might not be a change to the Implementation Date formulation but either the introduction of a process for such dates to be amended for Pending Modifications following submission of a Modification Report to the Authority, or for 'timed out' Modification Proposals to be sent back into the Modification Process without the need to raise a new Proposal. In both cases, the member considered that such an ability should only be exercised following an appropriate level of industry consultation. The Group noted that previous Modification Proposal P93 had sought to introduce a process for the Panel to amend an Implementation Date for a Pending Modification.⁵ However, the Group noted that P93 had been rejected by the Authority on the grounds that such a process would introduce unnecessary regulatory uncertainty to the market.

- 3.12 An attendee at the meeting queried how far the Authority was constrained by the Implementation Dates proposed in a Modification Report, since they believed the Transmission Licence implied that the Authority could direct a change to the proposed timetable (following consultation) without making a distinction between Approved and Pending Modifications. The Group noted that the Transmission Licence contains the provision for the implementation timetable:

'to be extended or shortened with the consent of or as directed by the Authority after those persons likely to be affected by the revision of the timetable have been consulted' (C3.4(c)).

However, the Group considered that it would not be good regulatory practice for the Authority to be able to approve a Modification with a different Implementation Date from that proposed by the Panel, since the Group was of the view that this could be said to represent an inherent part of a Proposed or Alternative Modification.

– **Potential compromise solution**

- 3.13 One member of the GSMG suggested a potential compromise solution, whereby current working practice be altered to add a third generic date with the caveat that this be used by the Authority *only* in the event of an appeal or judicial review. The Group agreed that, if a change was to be made, this would be its preferred approach since it would address the majority of situations whereby an Authority decision could be 'timed out'. The Proposer agreed that this solution

⁵ Modification Proposal P93 'Introduction of a Process for Amendment of Proposed Implementation Dates'.

would provide a good compromise by retaining the current benefits of market certainty and timely decisions for the majority of Proposals, whilst addressing the risk posed by appeals.

- 3.14 However, the Proposer noted that this solution would not always deliver a viable Implementation Date – since there might still be other unforeseen events which could result in a Proposal being ‘timed out’. The GSMG recognised this risk, but the majority of the Group considered that it would not be desirable to reduce market certainty for the sake of such exceptional circumstances. One member also stated their view that there should be no reason for the Authority to be ‘timed out’ simply as a result of decision-making timescales, since it could provide feedback during the Modification Process as to whether it felt the proposed timescales to be achievable or whether they needed to take account of factors like Regulatory Impact Assessments.
- 3.15 One member of the GSMG requested that any change to current working practice be subject to an industry consultation prior to its implementation. However, the Group noted that all proposed Implementation Dates are subject to consultation during the Report Phase – and that any third ‘back-stop’ date would therefore be consulted on as a matter of course.

4. GSMG CONCLUSIONS REGARDING ISSUE 10

4.1 In summary, the GSMG:

- a) Agreed that there is no obvious inconsistency between the Code and the Transmission Licence regarding the construction of Implementation Dates;**
- b) Agreed that it would not be desirable to mandate the formulation of Implementation Dates via a change to the Code or Transmission Licence, and that a working practice change would allow greater flexibility and the ability for future review;**
- c) Remained unconvinced that a change to current working practice was required, but agreed that (if a change was to be made) its preferred route would be the addition of a third generic ‘back-stop’ date to be used by the Authority only in the event of a judicial review or an appeal.**

5. NOTE REGARDING SUBSEQUENT CUSC PANEL DISCUSSIONS

- 5.1 Following its meeting on 22 September 2004, the GSMG noted that further discussions had taken place at the CUSC Panel Meeting on 24 September regarding the issue of Implementation Dates (Reference 6).
- 5.2 The GSMG noted that the CUSC Panel had endorsed the view of the GSG that no change to its current formulation of Implementation Dates was required. However, Ofgem had expressed concerns at this meeting regarding a further potential inconsistency between industry Codes and the Transmission Licence, regarding a process for the Authority to direct a change to an Implementation Date for a Pending Modification. The GSMG noted that NGT had agreed to provide a legal view on this issue to the November meeting of the CUSC Panel, but agreed that this appeared to be a separate issue to that raised under Issue 10. The Proposer confirmed that they were satisfied that there were no outstanding matters to be addressed by the GSMG under

Issue 10, and the Group therefore agreed that these legal discussions should not delay production of its report to the Panel.

6. GSMG'S CONSIDERATION OF ADDITIONAL ISSUE (DEFERRED FROM ISSUE 9)

6.1 At the GSMG's meeting to discuss Issue 9 on 5 August 2004, an attendee at the meeting requested that BSCCo provide advice as to whether the Panel's existing ability to request a change to an Approved Modification's Implementation Date under Section F could be used on grounds of cost-efficiency. Specifically, the attendee queried whether the Panel could request that an Implementation Date be altered where it became apparent that a particular Modification would be the only BSC Systems change within a release – and where it would therefore incur full 'stand-alone' rather than 'incremental' release costs.

– BSCCo legal advice

6.2 BSCCo undertook to provide legal advice on this issue, which was subsequently circulated to the GSMG and provided in the Issue 9 report. BSCCo's legal view is that, under the current provisions of the Code, the Panel may only apply to the Authority to alter an Implementation Date for an Approved Modification where (on the basis of a report by BSCCo) it has identified a potential delay to its implementation timetable in accordance with F2.11. The Panel therefore has no ability to request a change to an Implementation Date due to a change in the expected content of a release. However, F2.11 recognises that the Authority has the ability (as outlined in the Transmission Licence) to independently direct that an Implementation Date for an Approved Modification be brought forward or extended. The Authority may therefore be able to exercise this ability on grounds of cost-efficiency, depending on the nature of its own obligations.

6.3 The GSMG agreed to defer this issue for further discussion under Issue 10. On 22 September 2004 the Group therefore considered BSCCo's legal advice and whether it believed that a Modification Proposal in this area would be desirable.

– Consideration of issue

6.4 The GSMG agreed that if a particular Modification represented the only significant piece of work within a release, there was the potential for cost-savings to be achieved by moving its Implementation Date to another release containing more changes. An attendee at the meeting, who had originally raised the issue for consideration under Issue 9, argued that the perceived benefit of a particular Modification can depend on its Implementation Date. This attendee argued that if a process was introduced into the Code for the Panel to request a change to an Implementation Date on cost-efficiency grounds – following industry consultation – this would enable the most cost-efficient implementation approach to be delivered for each individual Modification.

6.5 One member of the GSMG queried whether a change in release content would constitute 'new information' to the Authority, since the 'worst case' stand-alone costs for each Modification Proposal would have been considered by the Authority as part of its original decision. However, an attendee argued that the rationale for aligning Implementation Dates to the BSC release strategy was to deliver cost-efficiency benefits and that they believed changes on these grounds would be supported by the industry.

- 6.6 One member of the Group noted that there would remain a risk that, even if an Implementation Date was moved to a subsequent release, the Modification might still turn out to be the only major change in that release. The GSMG noted the reduction in the numbers of Modification Proposals being raised over the period since NETA Go-Live, and queried how any further decrease would impact the current strategy of three BSC System releases per year. BSCCo clarified that it would propose a revision of this strategy if it considered that this was required.
- 6.7 The GSMG asked BSCCo to provide a high-level view of the potential cost-savings which could be achieved by the ability to realign an Implementation Date to a more substantial release. BSCCo advised that such an approach could deliver short-term savings although, if it led to a pattern of non-contiguous releases over the longer term, this might result in an overall increase in release overhead costs (as staffing levels would need to be continually varied).
- **Conclusions**
- 6.8 The GSMG reserved its judgement on whether an ability for the Panel to request a change to Implementation Dates on cost-efficiency grounds would better facilitate the achievement of the Applicable BSC Objectives. However, the Group supported the raising of a Modification Proposal in this area, to investigate the issue in detail, since it agreed that there were potential cost-benefits to be achieved from such a process.

Kathryn Coffin

ELEXON Change Delivery

References

Reference 1 – Issue 10

[ELEXON - Implementation Dates](#)

Reference 2 – CUSC Panel Paper: 'Consideration of Implementation Dates within the CUSC: A paper by the Governance Standing Group'

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Reference 3 – BSC Panel Paper 80/004: 'Implementation Dates for Modification Proposals'

[ELEXON - BSC Panel Paper Meeting number 080 - 12/08/04](#)

Reference 4 – BSC Panel Minutes, Meeting 80

[ELEXON - BSC Panel Meetings 2004](#)

Reference 5 – BSC Panel Paper 82/001(f): 'GSMG Issue 9: Review of Aspects of the Modifications Process'

[ELEXON - BSC Panel Paper Meeting number 082 - 09/09/04](#)

Reference 6 – CUSC Panel Headline Report, Meeting 36

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ANNEX 1 GSMG MEMBERSHIP: ISSUE 10

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