

July 2001

MODIFICATION REPORT
MODIFICATION PROPOSAL P5 -
EXTENSION OF INDEMNITY UNDER
SECTION B2.9

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

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1 SUMMARY AND RECOMMENDATIONS

1.1 Recommendation

Modification Proposal P5 seeks to extend the scope of the indemnity and waiver of claims provided under section B2.9 of the BSC, such that those persons that are intended to be protected by the provision will benefit from its protection where they are found to have been acting 'in good faith', i.e. where they demonstrably and reasonably believed that the actions they took were permitted under the terms of the BSC.

On the basis of the analysis, consultation and assessment undertaken in respect of this Modification Proposal during the Assessment Phase, and the resultant findings of this report, the BSC Panel recommends that:

The Proposed Modification as set out in Section 6 of this report be approved and implemented immediately upon such approval.

1.2 Background

Prior to this Modification Proposal P5 being raised, a number of BSC Panel Members were uncomfortable with the current indemnity arrangements as a result of their pre NETA Go Live experience, and concluded that some action was required to meet their concerns. The Panel Members sought independent legal advice on the issue of the scope of the indemnity. That advice recommended an extension of the type proposed. However, as the scope of the indemnity was clearly prescribed by the terms of the BSC, it was identified that such a change would require a modification to the BSC.

Modification Proposal P5 was raised by London Electricity on 05 April 2001 and subsequently referred to the Governance Modification Group (GMG) by the BSC Panel under the Assessment Procedure. The Modification Group considered whether the Proposed Modification would better facilitate the achievement of the Applicable BSC Objectives, and concluded that it would. In reaching this conclusion, the group took due account of the views of the proposer, all representations received from interested parties and the views of the group itself.

The BSC Panel considered the GMG's report at its meeting on 31 May 2001 and agreed that the proposal should proceed to the Report Phase, and that the draft Modification Report to be consulted upon should contain a recommendation to the Authority that the modification should be approved and implemented with immediate effect. All representations received in response to the consultation on the draft report supported the proposal. The Panel therefore confirmed its recommendation at its meeting on 28 June 2001.

1.3 Rationale for Recommendations

The Panel endorses the Modification Group's conclusions that an alternatively worded version of the Proposed Modification would better facilitate the Applicable BSC Objectives as set out in the Transmission Licence. In particular, it would meet objective 7A(3)(d) – 'promoting efficiency in the implementation and administration of the balancing and settlement arrangements'. The Proposed Modification has no impact on the remaining Applicable BSC Objectives set out in Condition 7A(3)(a - c). In reaching this conclusion, the Panel took due account of the views of the proposer, all representations received from interested parties and the views of the Modification Group, which are detailed in section 5 below. This Modification Report should be read in conjunction with the Modification Group's Assessment Report, which forms Attachment 1 to this report.

2 INTRODUCTION

This Report has been prepared by ELEXON Ltd., on behalf of the Balancing and Settlement Code Panel ('the Panel'), in accordance with the terms of the Balancing and Settlement Code ('BSC'). The BSC 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 BSC.

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 can be found on the BSC website, at www.elexon.co.uk

3 PURPOSE AND SCOPE OF THE REPORT

BSC Section F sets out the procedures for progressing proposals to amend the BSC (known as 'Modification Proposals'). These include procedures for proposing, consulting on, developing, evaluating and reporting to the Authority on potential modifications.

The BSC Panel is charged with supervising and implementing the modification procedures. ELEXON provides the secretariat and other advice, support and resource required by the Panel for this purpose. In addition, if a modification to the Code is approved or directed by the Authority, ELEXON is responsible for overseeing the implementation of that amendment (including any consequential changes to systems, procedures and documentation).

A Modification Report must be prepared and submitted to the Authority in respect of each proposed modification and must contain:

- (a) The recommendation of the Panel as to whether or not the Proposed Modification or any Alternative Modification should be made;
- (b) The proposed Implementation Date for implementation of the Proposed Modification or any Alternative Modification;
- (c) The matters set out in Annex F-1 of the BSC. This will usually be in the form of the relevant Assessment Report where the Proposal has been submitted to a Modification Group prior to the Report Phase;
- (d) An explanation of the Panel's rationale should the Panel form a different view of any matters contained in the Modification Group Report; and
- (e) A summary of the representations made by Parties and interested third parties during the consultation undertaken in respect of the Proposed Modification and any Alternative Modification.

4 DESCRIPTION OF PROPOSED MODIFICATION

Under the terms of the BSC, ELEXON must indemnify certain persons ('indemnity beneficiaries') against any loss resulting from the proper exercise of their duties as prescribed by the BSC. In addition, each BSC Party irrevocably and unconditionally waives any liability of any indemnity beneficiary, and any rights, remedies and claims against any indemnity beneficiary where that person is found to be acting properly.

BSC section B2.9.1 currently obliges ELEXON (as BSCCo) to indemnify the above persons in respect of:

'...all costs (including legal costs), expenses, damages and other liabilities properly incurred or suffered by such person when acting in or in connection with his office under the Code, or in the proper exercise and discharge of the powers, duties, functions and discretions of that office in accordance with the Code, and all claims, demands and proceedings in connection therewith, other than:

- (a) any such costs or expenses in respect of which such person is reimbursed pursuant to paragraph 2.11;*
- (b) any such costs, expenses, damages or other liabilities incurred or suffered as a result of the wilful default or bad faith of such person.'*

BSC section B2.9.4 states:

'The Parties agree that no indemnity beneficiary shall be liable for anything done when acting properly in or in connection with his office under the Code, or anything done in the proper exercise and discharge of the powers, duties, functions and discretions of that office in accordance with the Code; and each Party hereby irrevocably and unconditionally waives any such liability of any indemnity beneficiary, and any rights, remedies and claims against any indemnity beneficiary in respect thereof.'

The indemnity beneficiaries are:

- each BSC Panel Member;
- the Panel Secretary;
- any member of any Panel Committee;
- the secretary of any Panel Committee;
- the Modification Secretary;
- each member of a Modification Group; and
- alternates of any of the above.

Modification Proposal P5 seeks to explicitly extend the scope of the indemnity and waiver of claims described above, such that these persons will benefit from its protection where they are found to have been acting 'in good faith', i.e. where they demonstrably and reasonably believed that the actions they took were permitted under the terms of the BSC. The relevant legal text to give effect to this proposal is included at Section 6 below.

5 RATIONALE FOR PANEL RECOMMENDATIONS

On the basis of the analysis, consultation and assessment undertaken in respect of this Modification Proposal, the BSC Panel recommends to the Authority that the Proposed Modification be approved, with an immediate implementation date.

The Panel endorses the views set out in the GMG's Assessment Report that:

- it would be unreasonable for indemnity beneficiaries to be exposed to personal liability where they genuinely and reasonably considered that they were properly fulfilling their duties and acting within their powers under the BSC.
- failure to make the modification would lead to delay and expense in the operation of the Panel, Panel Committees and Modification Groups, as there would be a frequent need to seek legal advice on the precise powers of those groups in particular circumstances.
- in the absence of the extended indemnity, these bodies may choose to act in an over-cautious manner, leading to inefficiencies in decision-making under the BSC. Pending the outcome of this modification, the BSC Panel had already adopted a cautious approach to establishing its vires.
- if it was necessary to seek an ad-hoc modification to the BSC in every case where the scope of an indemnity beneficiary's powers was not clear, this would also lead to significant inefficiencies in decision-making under the BSC and in its operation and implementation. It would be difficult and time consuming, if not impossible, to always ensure that any modified wording was sufficiently broad and precise that it not only appeared clear to those involved at the time of drafting, but would also be seen as similarly clear in the future when considered under potentially different circumstances. In the absence of the Proposed Modification P5 this would still potentially leave the Panel exposed to risk which the Proposed Modification seeks to address, as well as causing additional costs and inefficiencies.

In light of the above considerations, the Panel has concluded that the Proposed Modification would better facilitate the Applicable BSC Objective 7A(3)(d) - promoting efficiency in the implementation and administration of balancing and settlement arrangements. The Proposed Modification has no impact on the Applicable BSC Objectives set out in Condition 7A(3) (a - c).

The Panel recommends an immediate implementation date for this modification in order to allow the resulting benefits to be realised at the earliest opportunity.

6 LEGAL TEXT TO GIVE EFFECT TO THE PROPOSED MODIFICATION

BSC Sections B2.9.1 and B2.9.4 to read:

6.1 Conformed Version

- 2.9.1 BSCCo shall indemnify and keep indemnified each of the persons referred to in paragraph 2.9.2 (each such person an "indemnity beneficiary") in respect of all costs (including legal costs), expenses, damages and other liabilities properly incurred or suffered by such person when acting in or in connection with his office under the Code, or in [what he in good faith believes to be](#) the proper exercise and discharge of the powers, duties, functions and discretions of that office in accordance with the Code, and all claims, demands and proceedings in connection therewith, other than:
- (a) any such costs or expenses in respect of which such person is reimbursed pursuant to paragraph 2.11;
 - (b) any such costs, expenses, damages or other liabilities incurred or suffered as a result of the wilful default or bad faith of such person.
- 2.9.4 The Parties agree that no indemnity beneficiary shall be liable for anything done when acting properly in or in connection with his office under the Code, or anything done in [what he in good faith believes to be](#) the proper exercise and discharge of the powers, duties, functions and discretions of that office in accordance with the Code; and each Party hereby irrevocably and unconditionally waives any such liability of any indemnity beneficiary, and any rights, remedies and claims against any indemnity beneficiary in respect thereof.

6.2 Clean Version

- 2.9.1 BSCCo shall indemnify and keep indemnified each of the persons referred to in paragraph 2.9.2 (each such person an "indemnity beneficiary") in respect of all costs (including legal costs), expenses, damages and other liabilities properly incurred or suffered by such person when acting in or in connection with his office under the Code, or in what he in good faith believes to be the proper exercise and discharge of the powers, duties, functions and discretions of that office in accordance with the Code, and all claims, demands and proceedings in connection therewith, other than:
- (a) any such costs or expenses in respect of which such person is reimbursed pursuant to paragraph 2.11;
 - (b) any such costs, expenses, damages or other liabilities incurred or suffered as a result of the wilful default or bad faith of such person.
- 2.9.4 The Parties agree that no indemnity beneficiary shall be liable for anything done when acting properly in or in connection with his office under the Code, or anything done in what he in good faith believes to be the proper exercise and discharge of the powers, duties, functions and discretions of that office in accordance with the Code; and each Party hereby irrevocably and unconditionally waives any such liability of any indemnity beneficiary, and any rights, remedies and claims against any indemnity beneficiary in respect thereof.

7 ASSESSMENT

The following is a summary of the impacts identified in the Assessment Report produced by the Governance Modification Group, which forms Attachment 1 to this report.

The Proposed Modification will have the following impacts:

- Amendment of sections B2.9.1 and B2.9.4 of the BSC. The relevant legal drafting can be found at Section 6 of this report.
- No impact on BSC Systems;
- No increase or decrease in the payments due under BSC Agent Contracts;
- No impact on the Core Industry Documents;
- Likely savings in BSC Costs, as it would not be necessary for ELEXON to procure additional legal advice or other analysis to support all decisions. Savings would also result from the avoidance of ad-hoc modification procedures to correct every instance of ambiguity in the BSC.
- No impact on the systems and processes of BSCCo;
- De minimis costs attributable to the implementation of the Proposed Modification;
- No impact on Parties in general (or classes of Parties in general) and Party Agents in general;
- No impact on the statutory, regulatory and contractual framework within which the Code sits;
- No impact on the Code Subsidiary Documents.

8 SUMMARY OF REPRESENTATIONS

8.1 Initial Consultation

Copies of the original representations received and considered by the Governance Modification Group under the initial consultation on this proposal can be found in the Assessment Report on this proposal, included as Attachment 1 to this report.

In summary, while all except one respondent to the original consultation supported the Proposed Modification, only a small number of respondents commented explicitly on whether the Proposed Modification would better meet the Applicable BSC Objectives. One respondent commented that the change would allow the Panel to operate more efficiently. Another commented that the proposal would lead to more effective decision making. One party simply stated that the proposal would better meet the objectives, while another commented that the proposal was 'reasonable'.

Only one respondent argued against the Proposed Modification, stating that it would be better to resolve any uncertainty about an indemnity beneficiary's power to act in any given circumstance by seeking a clarificatory modification to the BSC, rather than potentially making ultra vires decisions and then seeking to rely on an extended indemnity provision after the event.

8.2 Consultation on Draft Modification Report

Four representations were received in response to the consultation on the Draft Modification Report, representing the views of nine parties. Copies of these responses are attached at Annex 1 to this report.

In summary, all respondents were supportive of the proposed modification and the Panel's rationale in recommending the adoption of the revision, stating that it would:

- help avoid increased cost or delay associated with frequently having to clarify or seek legal advice on precise powers;
- facilitate effective decision making, avoiding the adoption of a cautious approach by the Panel that may compromise the effective translation of the BSC; and
- better facilitate achievement of the applicable BSC Objective - promoting efficiency in the implementation and administration of balancing and settlement arrangements.

One respondent, while supportive of the change, suggested an alternative form of legal text to give effect to the proposed modification. However, the Panel has decided to recommend the original form of words proposed by the Modification Group and included in Section 6 above. This text was the subject of considerable debate by the group, has been widely consulted upon and is confirmed as acceptable to the original proposer of the modification.

ANNEX 1 – COPIES OF REPRESENTATIONS

The following submissions were received in response to the consultation on the Draft Modification Report.

P5_MR_001: Scottish and Southern Energy

Modification Proposal P5 - Extension of Indemnity Under Section B2.9

Response on behalf of Scottish and Southern Energy, Southern Electric, Keadby Generation Limited and SSE Energy Supply Limited.

This modification suggests section B2.9 of the BSC should be extended to cover actions undertaken in good faith.

SSE supports the modification on the grounds that it should help avoid increased cost or delay associated with frequently having to clarify or seek legal advice on precise powers. SSE recognises that timescales would not always permit this and it is unreasonable to expect such parties to be exposed to personal liability where they genuinely and reasonably consider they were properly fulfilling their duties. As such the modification would better facilitate achievement of the applicable BSC Objective - promoting efficiency in the implementation and administration of balancing and settlement arrangements.

SSE supports the move to introduce the principle of "good faith" but suggests that in order to avoid any further debate regarding the precise meaning of this expression, the wording used in page 7 of the Modification Report should be inserted in the Balancing and Settlement Code under Section 2.9.1 and 2.9.4 so that they read "... or anything done in what he demonstrably and reasonably believes to be the proper exercise and discharge".

Beverley Grubb

Market Development

Scottish and Southern Energy plc

P5_MR_002: Dynegy

Mr G Forrester

Elexon

Third Floor

1 Triton Square

London

NW1 3DX

13 June 2001

Dear Gareth,

Modification Proposal P005: Extension of indemnity under section B2.9.

Thank you for the opportunity to comment on this issue. Dynegy supports the extension of indemnity under section B2.9 of the BSC. By implementing this proposal and indemnify those persons against any losses resulting from the proper exercise of their duties as prescribed by the BSC, will facilitate effective decision making. A consequence of rejecting this modification proposal could be an adoption of a cautious approach by the Panel that may compromise the effective translation of the BSC. It is unnecessary to expose the Panel to risks that may sacrifice their ability to provide an efficient service. Dynegy believe that the proposal better fulfils the objective of running an efficient market, promoting efficiency in the implementation and administration of the balancing and settlement arrangements.

Yours sincerely,

Rekha Patel.

Power Regulatory Analyst.

P5_MR_003: London Electricity

From: Chesterman Paul[SMTP:Paul_Chesterman@sweb.co.uk]
Sent: 14 June 2001 16:57
To: 'Modifications'
Cc: Merriman Mark; Mott Paul
Subject: 'P5 Report Comments'

Dear Modifications,

Re: Proposal P5: Extension of Indemnity Under B2.9 should proceed to the Report Phase, as described in section F2.7 of the BSC.

London Electricity has followed the development of the drafting of this clarification to the indemnity provided for the BSC Panel since the original that we proposed. We are content with the development and support this proposal.

Paul Chesterman for

Liz Anderson

General Manager, Energy Strategy & Regulation

P5_MR_004: Scottish Power

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15th June 2001

Gareth Forrester

Modifications Manager

ELEXON Ltd

3rd Floor

1 Triton Square

London

NW1 3DX

P5 Draft Modification Report: ScottishPower Comments

Dear Mr Forrester,

ScottishPower has reviewed the Draft Modification Report for Modification Proposal P5: Extension of Indemnity under BSC Section B2.9. We support this modification and have no further comments to make on the Draft Report. Please take these comments as representing the views of ScottishPower plc, Manweb plc and Manweb Services Ltd.

I hope you find these comments helpful and please do not hesitate to contact me if you require any further clarification.

Steve Field

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