

22 May 2001

ASSESSMENT REPORT

MODIFICATION PROPOSAL P5 – EXTENSION OF INDEMNITY UNDER SECTION B2.9

Prepared by the Governance Modification Group on
behalf of the Balancing and Settlement Code Panel

Document Reference	P5 AR
Version no.	1.0
Issue	1
Date of Issue	22 May 2001
Reason for Issue	Panel
Author	ELEXON

DOCUMENT CONTROL

Authorities

Version	Date	Author	Signature	Change Reference
0.1	08/05/01	Gareth Forrester		Initial draft for review
0.2	17/05/01	Gareth Forrester		Revised draft for review
1.0	22/05/01	Gareth Forrester		Final version for Panel

Version	Date	Reviewer	Signature	Responsibility
0.1	08/05/01	Linda Coe		Modification Group Chair
0.2	17/05/01	Linda Coe		Modification Group Chair
1.0	22/05/01	Linda Coe		Modification Group Chair

Distribution

Name	Organisation
BSC Panel	Various

Intellectual Property Rights and Copyright

This document contains materials the copyright and other intellectual property rights in which are vested in ELEXON Limited or which appear with the consent of the copyright owner. These materials are made available for you to review and to copy for the purposes of the establishment, operation or participation in electricity trading arrangements in Great Britain under the BSC. All other commercial use is prohibited. Unless you are a person having an interest in electricity trading in Great Britain under the BSC you are not permitted to view, download, modify, copy, distribute, transmit, store, reproduce or otherwise use, publish, licence, transfer, sell or create derivative works (in whatever format) from this document or any information obtained from this document otherwise than for personal academic or other non-commercial purposes. All copyright and other proprietary notices contained in the original material must be retained on any copy that you make. All other rights of the copyright owner not expressly dealt with above are reserved.

I CONTENTS TABLE

Document Control	2
Authorities	2
Distribution	2
Intellectual Property Rights and Copyright.....	2
I Contents Table	3
1 Executive Summary and Recommendations	4
2 Introduction	5
3 Purpose and Scope of the Report	5
4 Modification Group Details	9
5 Description and Assessment Against the Applicable BSC Objectives	10
5.1 The Proposed Modification.....	10
5.1.1 Description of Proposal.....	10
5.1.2 Background	11
5.1.3 Assessment Against Applicable BSC Objectives.....	11
6 Impact on BSC and BSCCo Documentation	14
6.1 BSC.....	14
6.2 Code Subsidiary Documents	14
6.3 BSCCo Memorandum and Articles of Association.....	14
7 Impact on BSC Systems	14
8 Impact on Core Industry Documents and Supporting Arrangements	14
9 Impact on BSCCo	14
10 Impact on Parties and Party Agents	14
11 Summary of Representations	15
Annex 1 – Modification Proposal	16
Annex 2 – Modification Group Membership	19
Annex 3 – Proposed Text to Modify BSC	20
Annex 4 – Copy of Representations Received	22

1 EXECUTIVE SUMMARY AND RECOMMENDATIONS

This report has been prepared by the Governance Modification Group on behalf of the BSC Panel.

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.

The Modification Group concluded 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 group noted that the Proposed Modification appeared to have no impact on the Applicable BSC Objectives set out in Condition 7A(3)(a - c). 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.

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 Modification Group recommends that:

- **The BSC Panel should recommend to the Authority that the Proposed Modification as set out in Annex 3 of this report be approved and implemented immediately upon such approval.**

2 INTRODUCTION

This Report has been prepared by the Governance Modification Group and 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.

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).

The Panel may decide to submit a Modification Proposal to an 'Assessment Procedure'¹. Under this procedure, a Modification Group is tasked with undertaking a detailed assessment of the proposal to evaluate whether it better facilitates achievement of the Applicable BSC Objectives². The group may also develop an alternative proposal if it believes that the alternative would better facilitate achievement of the objectives.

The Modification Group must prepare a report for the Panel, setting out the results of the assessment of the modification proposal and any alternative. The following matter should be included (to the extent applicable to the proposal in question)³:

- (a) an analysis of and the views and rationale of the Modification Group as to whether (and, if so, to what extent) the Proposed Modification would better facilitate achievement of the Applicable BSC Objective(s);
- (b) a description and analysis of any Alternative Modification developed by the Modification Group which, as compared with the Proposed Modification, would better facilitate achievement of the Applicable BSC Objective(s) and the views and rationale of the Group in respect thereof;
- (c) an assessment or estimate (as the case may be) of:
 - (i) the impact of the Proposed Modification and any Alternative Modification on BSC Systems;
 - (ii) any changes and/or developments which would be required to BSC Systems in order to give effect to the Proposed Modification and any Alternative Modification;

¹ See BSC F2.6

² As defined in the Transmission Licence

³ See BSC F2.6.4 and Annex F-1

- (iii) the total development and capital costs of making the changes and/or delivering the developments referred to in paragraph (ii);
 - (iv) the time period required for the design, build and delivery of the changes and/or developments referred to in paragraph (ii);
 - (v) the increase or decrease in the payments due under the BSC Agent Contracts in consequence of the Proposed Modification and any Alternative Modification;
 - (vi) the additional payments (if different from those referred to in paragraph (v)) due in connection with the operation and maintenance of the changes and/or developments to BSC Systems as a result of the Proposed Modification and any Alternative Modification;
 - (vii) any other costs or liabilities associated with BSC Systems attributable to the Proposed Modification and any Alternative Modification;
- (d) an assessment of:
- (i) the impact of the Proposed Modification and any Alternative Modification on the Core Industry Documents;
 - (ii) the changes which would be required to the Core Industry Documents in order to give effect to the Proposed Modification and any Alternative Modification;
 - (iii) the mechanism and likely timescale for the making of the changes referred to in paragraph (ii);
 - (iv) the changes and/or developments which would be required to central computer systems and processes used in connection with the operation of arrangements established under the Core Industry Documents;
 - (v) the mechanism and likely timescale for the making of the changes referred to in paragraph (iv);
 - (vi) an estimate of the costs associated with making and delivering the changes referred to in paragraphs (ii) and (iv),
- together with a summary of representations in relation to such matters;
- (e) an assessment of:
- (i) the likely increase or decrease in BSC Costs (to the extent not already taken into account in paragraph (c) above) in consequence of the Proposed Modification and any Alternative Modification;
 - (ii) the changes required to Systems and processes of BSCCo in order to give effect to the Proposed Modification and any Alternative Modification; and
 - (iii) the BSC Costs which are expected to be attributable to the implementation of the Proposed Modification and any Alternative Modification, to the extent not taken into account under any other provision above;
- (f) to the extent such information is available to the Modification Group, an assessment of the impact of the Proposed Modification and any Alternative Modification on Parties in general (or classes of

- Parties in general) and Party Agents in general, including the changes which are likely to be required to their internal systems and processes and an estimate of the development, capital and operating costs associated with implementing the changes to the Code and to Core Industry Documents;
- (g) an assessment of the Proposed Modification and any Alternative Modification in the context of the statutory, regulatory and contractual framework within which the Code sits (taking account of relevant utilities, competition and financial services legislation);
 - (h) 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 and the views and comments of the Modification Group in respect thereof;
 - (i) a summary of the analysis and impact assessment prepared by the Transmission Company and the views and comments of the Modification Group in respect thereof;
 - (j) a summary of the impact assessment prepared by relevant BSC Agents and the views and comments of the Modification Group in respect thereof;
 - (k) a summary of any impact assessment prepared by Core Industry Document Owners and the views and comments of the Modification Group in respect thereof;
 - (l) a copy of the terms of reference and any report or analysis of external consultants or advisers engaged in respect thereof;
 - (m) a list of the key assumptions which the Modification Group has made in formulating its views;
 - (n) any other matters required by the terms of reference of such Modification Group;
 - (o) any other matters which the Modification Group consider should properly be brought to the attention of the Panel to assist the Panel in forming a view as to whether the Proposed Modification and any Alternative Modification would better facilitate achievement of the Applicable BSC Objective(s);
 - (p) subject to paragraph 2.6.8 and 2.6.9 of Section F of the BSC, the proposed text to modify the Code in order to give effect to the Proposed Modification and any Alternative Modification, together with a commentary setting out the nature and effect of such text and of other areas of the Code which would be affected by the changes;
 - (q) the Modification Group's proposed Implementation Date(s) for implementation (subject to the consent of the Authority) of the Proposed Modification and any Alternative Modification;
 - (r) an executive summary of the project brief prepared by BSCCo;
 - (s) a recommendation (where applicable) as to whether, if the Proposed Modification or Alternative Modification is approved, Settlement Runs and Volume Allocation Runs carried out after the Implementation Date of such Approved Modification in respect of Settlement Days prior to that date should be carried out taking account of such Approved Modification or not;
 - (t) the proposed text (if any) to modify the Memorandum and Articles of Association of BSCCo and/or the BSC Clearer in order to give effect to the Proposed Modification and any Alternative Modification, together with a commentary setting out the nature and effect of such text and of

other areas of the Memorandum and Articles of Association and/or the Code which would be affected by the changes; and

- (u) a summary of any changes which would be required to Code Subsidiary Documents as a consequence of such Proposed Modification or Alternative Modification.

This Assessment Report therefore addresses all of the above items to the extent relevant to the Modification Proposal in question.

4 MODIFICATION GROUP DETAILS

This Assessment Report has been prepared by the Governance Modification Group. Details of the Membership of the group can be found at Annex 2. The Modification Group met to discuss this proposal on 30 April 2001.

5 DESCRIPTION AND ASSESSMENT AGAINST THE APPLICABLE BSC OBJECTIVES

5.1 The Proposed Modification

5.1.1 Description of Proposal

A copy of Modification Proposal P5 can be found at Annex 1 to this report.

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.

5.1.2 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 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 by the BSC Panel under the Assessment Procedure.

5.1.3 Assessment Against Applicable BSC Objectives

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. These views are reflected in the assessment below.

The Applicable BSC Objectives are set out in paragraph 3 of Condition 7A of the Transmission Licence, as follows:

- (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.

Proposer's Views

The proposer of Modification Proposal P5 put forward the view that the Proposed Modification better facilitates achievement of Applicable BSC Objective 7A(3)(d) - promoting efficiency in the implementation and administration of balancing and settlement arrangements. This was on the grounds that:

- the change would reduce the need for potentially costly and inefficient procedures to be developed to ensure that all decisions placed before indemnity beneficiaries are consistent with their vires under the Code.
- indemnity beneficiaries would be able to use their judgment in situations where ambiguities arise or where timescales are particularly tight and decisions are urgent, while relying on the advice of ELEXON

staff rather seeking formal legal advice from those trained in interpreting complex documents. This will reduce meeting times; reduce the burden on ELEXON in supporting the Panel and procuring legal advice; and improve the efficiency with which Panel business is managed, hence promoting efficiency in the implementation and administration of the balancing and settlement arrangements.

Respondent's Views

A summary of the representations received as part of the consultation on the Proposed Modification can be found in section 11 below. Copies of the representations can be found at Annex 4.

While all except one respondent 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.

Modification Group's Views

The Modification Group assessed both suggested models – i.e.:

- the Proposed Modification (extension of the scope of the indemnity); and
- the ad-hoc modification route (as suggested by one respondent).

The group concluded that the former of these (the Proposed Modification) would better facilitate achievement of the Applicable BSC Objectives, while the latter would not adequately address the perceived defect in the current arrangements.

The group was of the view 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 group 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 group noted that the Proposed Modification appeared to have no impact on the Applicable BSC Objectives set out in Condition 7A(3) (a - c).

6 IMPACT ON BSC AND BSCCO DOCUMENTATION

6.1 BSC

The Proposed Modification will require the amendment of sections B2.9.1 and B2.9.4 of the BSC. The relevant legal drafting can be found at Annex 3 to this report. It should be noted that the proposed text included in Annex 1 differs slightly from the text originally proposed in Modification Proposal P5. This is as a result of further discussion and legal advice. However, the proposer is content that the revised wording properly delivers the intent of the proposal and is a more robust form of words.

6.2 Code Subsidiary Documents

This Proposed Modification will have no impact on Code Subsidiary Documents.

6.3 BSCCo Memorandum and Articles of Association

This Proposed Modification will have no impact on the BSCCo Memorandum and Articles of Association.

7 IMPACT ON BSC SYSTEMS

This Proposed Modification will have no impact on BSC Systems.

8 IMPACT ON CORE INDUSTRY DOCUMENTS AND SUPPORTING ARRANGEMENTS

This Proposed Modification will have no impact on Core Industry Documents.

9 IMPACT ON BSCCO

The Modification Group considered the likely increase or decrease in BSC Costs in consequence of the Proposed Modification and concluded that the proposal would be likely to lead to 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.

The Proposed Modification does not require any changes to the systems and processes of BSCCo.

The BSC Costs that are expected to be attributable to the implementation of the Proposed Modification are minimal.

10 IMPACT ON PARTIES AND PARTY AGENTS

This Proposed Modification will have no impact on the systems and processes of BSC Parties and Party Agents.

11 SUMMARY OF REPRESENTATIONS

A complete set of the representations received from interested parties as a result of the consultation on Modification Proposal P5 can be found at Annex 4 to this report. Representations were received from the following parties:

	COMPANY NAME	REF	SUPPORTS PROPOSAL (Y/N)	MODIFICATION GROUP COMMENTS
1.	Innogy Group	P5 Ass_001	Yes	This submission suggests that acts in good faith may already be covered by implication under the current wording of B2.9.1/2.9.4. The Modification Group was of the view that this was insufficient and that it was necessary to be explicit to provide certainty and to meet the concerns of Panel Members.
2.	Lakeland Power	P5 Ass_002	Yes	Noted.
3.	EdF	P5 Ass_003	Yes	Noted.
4.	GPU Power	P5 Ass_004	No comment	Noted.
5.	Seeboard	P5 Ass_005	Yes	Noted.
6.	Scottish & Southern	P5 Ass_006	Yes	Noted.
7.	Northern Electric	P5 Ass_007	No	This submission suggests that it would be better to seek an ad-hoc modification to the BSC in every case where the scope of an indemnity beneficiary's powers is not clear. See the Modification Group's discussion of this issue at paragraph 5.1.3 above.
8.	ScottishPower	P5 Ass_008	Yes	Noted.

ANNEX 1 – MODIFICATION PROPOSAL

Modification Proposal – F76/01	MP No: P5 <i>(mandatory by ELEXON)</i>
Title of Modification Proposal <i>(mandatory by originator):</i> Extension Of Indemnity Under Section B2.9	
Submission Date <i>(mandatory by originator):</i> 28 March 2001	
Description of Proposed Modification <i>(mandatory by originator):</i> Modification to Section B 2.9.1 to extend the indemnity to cover actions undertaken in good faith. The words "or in the proper exercise of the powers.." in Section B 2.9.1 should be replaced with "or in the proper or good faith purported exercise of the powers.."	
Description of Issue or Defect that Modification Proposal Seeks to Address <i>(mandatory by originator):</i> There are a number of reasons why the provisions of Clause 2 (A) of the indemnity should be cast in the way proposed above; a selection of which are captured below. The new governance model under the BSC is untested and untried. Consequently, there are no precedents and no case history available to Panel Members to test the interpretation of the role. Therefore, it is unreasonable for Panel Members to be exposed to personal risk for accidental failure to correctly interpret the precise boundaries of a role that is imprecisely defined (there are over 1300 references to Panel in the Code and Panel members do not have legal training). In addition, it has become apparent that ELEXON is also unable to ensure that the Panel is not presented with decisions outside the Panel's vires. This should not be taken to indicate that ELEXON is not undertaking an appropriate role, but rather to highlight the potential difficulties. This concern is exacerbated by the prospect that Panel decisions could be subject to Judicial Review. In the event that the wider form of the indemnity is not granted, and given the difficulties ELEXON has had in ensuring that matters presented to the Panel are within its vires, the Panel will need to draw on legal advice on a regular basis. This may lead to a need to have a legal advisor present at some, or all Panel meetings, and/or seek written confirmation from a legal advisor on whether papers and recommendations presented to the Panel are consistent with the Panel's vires under the Code. This is a bureaucratic, costly, and inefficient solution that would not be necessary if the indemnity is cast in the way proposed. The form of the indemnity that is being sought has been accepted by the industry as it mirrors that granted to members of the litigation committee whose remit was much narrower than that of Panel Members and, arguably, much more clearly defined. The BSC was finalised before Panel Members were appointed and none of those involved in the drafting were acting on behalf of Panel Members. Therefore, the views of Panel members (and their legal advisor) were not	

Modification Proposal – F76/01	MP No: P5 <i>(mandatory by ELEXON)</i>
<p>available to be taken into account when the indemnity was drafted. It is the view of Panel members, and their advisor, that this extension of the indemnity is essential for the efficient conduct of Panel business and the appropriate protection of those undertaking this role.</p>	
<p>Impact on Code <i>(optional by Originator):</i></p> <p>The words "or in the proper exercise of the powers.." in Section B 2.9.1 should be replaced with "or in the proper or good faith purported exercise of the powers.."</p>	
<p>Impact on Core Industry Documents <i>(optional by Originator):</i></p> <p>None</p>	
<p>Impact on BSC Systems and Other Relevant Systems and Processes Used by Parties <i>(optional by originator):</i></p> <p>None</p>	
<p>Impact on other Configurable Items <i>(optional by originator):</i></p> <p>None</p>	
<p>Justification for Proposed Modification with Reference to Applicable BSC Objectives <i>(mandatory by originator):</i></p> <p>The Modification better facilitates achievement of the Applicable BSC Objective set out in Transmission Licence Condition 7A(3)(d) - promoting efficiency in the implementation and administration of balancing and settlement arrangements.</p> <p>It will reduce the need for potentially costly and inefficient procedures to be developed to ENSURE that ALL decisions placed before Panel members are consistent with their vires under the Code (Panel members will still wish this to be the case but will be able to use their judgement in situations where ambiguities arise or where timescales are particularly tight and decisions are urgent, they will also be able to rely on the advice of ELEXON staff rather seeking formal legal advice from those trained in interpreting complex documents). This will reduce meeting times; reduce the burden on ELEXON in supporting the Panel and procuring legal advice; and improve the efficiency with which Panel business is managed and hence promote efficiency in the operation of the implementation and administration of balancing and settlement arrangements.</p> <p>There appears to be no impact on the Applicable BSC Objectives set out in Condition 7A(3) (a - c).</p>	

Modification Proposal – F76/01	MP No: P5 <i>(mandatory by ELEXON)</i>
Details of Proposer <i>(mandatory by originator):</i>	
Name: Paul Chesterman	
Organisation: London Electricity plc	
Telephone Number: 01454 452128	
Email Address: paul_chesterman@sweb.co.uk	
Details of Proposer's Representative <i>(mandatory by originator):</i>	
Name: Martyn Hunter	
Organisation: St Clements Services Ltd	
Telephone Number: 01327 310184	
Email Address: martyn.hunter@st-clements.co.uk	
Details of Representative's Alternate <i>(mandatory by originator):</i>	
Name: Paul Chesterman	
Organisation: London Electricity plc	
Telephone Number: 01454 452128	
Email Address: paul_chesterman@sweb.co.uk	
Attachments <i>(mandatory by originator):</i> NO	
If Yes, Title and No. of Pages of Each Attachment:	

ANNEX 2 – MODIFICATION GROUP MEMBERSHIP

Membership of Governance Modification Group (GMG)

Member	Organisation
Linda Coe	Chairman ELEXON
Gareth Forrester	ELEXON
Paul Chesterman	London Electricity
Lisa Waters	Dynegy
Abid Sheikh	ScottishPower
Martyn Hunter	St Clements
Louise Elder	Transmission Company
Joojse Hamilton	Ofgem

ANNEX 3 – PROPOSED TEXT TO MODIFY BSC

Conformed Version:

BSC Sections B2.9.1 and B2.9.4 to be amended as follows:

- 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.

Clean Version:

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

- 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.

ANNEX 4 – COPY OF REPRESENTATIONS RECEIVED

Representations were received from the following parties:

COMPANY NAME	REF
Innogy Group	P5 Ass_001
Lakeland Power	P5 Ass_002
EdF	P5 Ass_003
GPU Power	P5 Ass_004
Seeboard	P5 Ass_005
Scottish & Southern	P5 Ass_006
Northern Electric	P5 Ass_007
ScottishPower	P5 Ass_008

P5_ASS_001 INNOGY GROUP

From: Ballard, Terry[SMTP:terry.ballard@npower.com]
Sent: 17 April 2001 13:46
To: 'Modifications@elexon.co.uk'
Subject: Modification Proposal P5 -Extension of Indemnity Under Section B2 .9

This response is sent on behalf of the Innogy Group of Companies.

We believe that the proposed modification P5 can be accepted on the basis that from previous experience of the Pool the chances of legal action requiring the indemnity to be relied upon are relatively minimal and the provisions of clause B2.9.4. Three key issues arise.

The drafting of the current wording in the BSC is such that by virtue of the fact that acts of bad faith are expressly excluded from the indemnity by definition acts of good faith must benefit from it.

In addition B2.9.4 provides that there is a waiver of claims, rights, remedies and claims by all Parties to the BSC against indemnity beneficiaries (persons benefiting from the indemnity) when they are acting properly in or in connection with their office or where they act within their powers. The chances of a legal action provided the beneficiary is acting correctly are therefore de minimis. This was included in the drafting to prevent the proliferation of litigation which was indirectly funded by trading parties via the indemnity contributions.

As a matter of drafting if the amendment proceeds B2.9.4 will also need amending to reflect the wider indemnity other wise there is a potential liability opened up as a result.

Terry Ballard
01905-720943
07989-493038

=====
This email and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you have received this email in error please notify gpupower.co.uk or postmaster@npower.com

This outgoing e-mail (and any attachments) has been checked (using Sophos Sweep 3.44 + patches) before leaving us (UK 08457 353637), and has been found to be clean from any virus infection.

=====

P5_ASS_002 LAKELAND POWER

From: Jackie Arnold[SMTP:jarnold@EdisonMission.Com]
Sent: 19 April 2001 12:24
To: Modifications@elexon.co.uk
Subject: P5 Assessments Comments

With reference to the above proposed modification, Lakeland Power Limited is in support of the proposal on the basis that it considers that it would better facilitate the efficient achievement of the Applicable BSC objectives with minimal impact on the other areas of the BSC and other Core Industry documents.

Jackie Arnold
General Manager
Lakeland Power Limited
01229 845630

P5_ASS_003 EDF

P5 - Increasing the Indemnity for Panel Members and the sub groups is considered reasonable.

Steve Drummond
Consultant to EDF Trading

S.Drummond@btinternet.com

P5_ASS_004 GPU POWER

From: Deregulation Control Group[SMTP:dcg@gpupower.co.uk]
Sent: 20 April 2001 12:48
To: 'modifications@elexon.co.uk'
Subject: GPU POWER UK's Response to 'P5 Assessment Comments'

Hello,

Please find that GPU POWER UK response to P5 Assessment Comments is 'No Comment'.

thanks
Rachael Gardener

Deregulation Control Group &
Disribution Support Office
GPU POWER.CO.UK

* 08457 353637 Ext: 09 - 3802
Fax: 01384 405177
Email: rachael.gardener@gpupower.co.uk &
dcg@gpupower.co.uk

=====
This email and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you have received this email in error please notify gpupower.co.uk or postmaster@npower.com

This outgoing e-mail (and any attachments) has been checked (using Sophos Sweep 3.44 + patches) before leaving us (UK 08457 353637), and has been found to be clean from any virus infection.

=====

P5_ASS_005 SEEBOARD

From: Fraser, Sue[SMTP:SFraser@seeboard.com]
Sent: 20 April 2001 13:27
To: 'modifications@elexon.co.uk'
Subject: P5 Assessment Comments - Seeboard Response

Seeboard's comments on Modification Proposal P5 are as follows:

Whilst this is essentially a legal question, from a pragmatic point of view we would support the change to allow the Panel to operate more efficiently.

In the long term we would judge this to be of greater benefit than the theoretical increase in risk that the change would represent.

There are no system impacts.

Sue Fraser
for Dave Morton SEEBOARD
0190 328 3465

P5_ASS_006 SCOTTISH & SOUTHERN

BSC Modification Proposal P5: Extension of Indemnity Under Section B2.9

Assessment Comments From Scottish and Southern Energy (SSE)

Summary

SSE supports P5.

Presentation of Comments

According to the consultation notice, comments are provided which focus on the following areas on which the Mods Group is to report to the Panel:

- whether the Proposed Modification or any Alternative Modification would better facilitate achievement of the Applicable BSC Objectives;
- the impact of the Proposed Modification and any Alternative Modification on BSC Systems, processes and costs;
- the impact on Core Industry Documents;
- the impact on participants including the changes which are likely to be required to their internal systems and processes and an estimate of the development, capital and operating costs associated with implementing the changes to the Code and to Core Industry Documents;
- the impact on the statutory, regulatory and contractual framework within which the Code sits (taking account of relevant utilities, competition and financial services legislation);
- view on the implementation date.

Is P5 an Improvement?

SSE believes that Mod P5 will be an improvement in that it should lead to more effective decision making.

Impact on BSC Systems, Processes and Costs

We think it will have a limited impact on systems and processes and any costs would be outweighed by the benefits.

Impact on Core Industry Documentation

Minimal/none.

Impact on Participants

Generally beneficial.

Impact on Regulatory Framework

Minimal/none.

Implementation Date

As soon as possible.

iam

20/4/01

P5_ASS_007 NORTHERN ELECTRIC

20th April 2001

Modifications

ELEXON

3rd Floor

1 Triton Square

London

NW1 3DX

Dear Sir

Modification Proposal P5:

Extension of Indemnity Under Section B2.9

Northern Electric welcomes the opportunity to comment on the modification for the Extension of Indemnity Under Section B2.9

Having reviewed this proposed modification it appears that the original wording of this provision has been misquoted, as it should read "or in the proper exercise and discharge of the powers...". We must therefore assume the wording of the modification being proposed is " or in the proper exercise and discharge or good faith purported exercise and discharge of the powers".

We believe that the proposed wording introduces the concept that the Panel can "purport" to exercise and discharge its powers. This seems redundant, in that if the BSC confers a power on the Panel then it may chose whether or not to exercise this power and this discretion is already covered by the existing wording namely "or in the proper exercise and discharge of the powers, duties, functions and discretion's of that office...".

If the BSC confers a power that may only be exercised in specified circumstances and the circumstances as set out are unclear, then the Panel in our opinion would surely be better advised to seek modifications to the BSC. This would help to ensure that clarification is made, rather than potentially make decisions outside of the scope of its authority and then seek to rely on this indemnity.

As a general point, where ambiguity exists it is surely in the interest of all market participants to seek to have proper clarification made, rather than the uncertainty that may arise as a result of the Panel potentially

taking different positions in respect of the same or similar circumstances on different occasions.

Yours faithfully

Lesley Mulley
Industry Communications Manager

P5_ASS_008 SCOTTISH POWER

From: NETA_SPOC[SMTP:NETA_SPOC@Scottishpower.plc.uk]
Sent: 20 April 2001 16:16
To: 'Modifications@elexon.co.uk'
Subject: RE: CONSULTATION ON MODIFICATION PROPOSALS P1, P2, P4 and P5

ScottishPower has reviewed Modification Proposals P1, P2, P4 and P5, and supports all of these proposed changes.

Regards,

Steve Field
Calanais for ScottishPower
Design Authority, Deregulation Services
Int - 700 2313 Ext - 0141 568 2313
<http://asg.scottishpower.plc.uk> (Intranet)